IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

HERMINIA M. FUSCO, JULIA B. MATSUMOTO, AND JAE YEOL LIM,
Plaintiff-Appellants/Cross-Appellees,

v.

ROMAN B. MATSUMOTO,
Defendant-Appellee/Cross-Appellant.

SUPREME COURT NO. 2009-SCC-0030-CIV
SUPERIOR COURT NO. 06-0080

Cite as: 2011 MP 17

Decided December 30, 2011

Colin M. Thompson, Saipan, MP, for Plaintiff-Appellants.
Ramon K. Quichocho, Saipan, MP, for Defendant-Appellee.

BEFORE: MIGUEL S. DEMAPAN, Chief Justice (Ret.);[1] ALEXANDRO C. CASTRO, Acting Chief Justice; EDWARD MANIBUSAN, Justice Pro Tem.

CASTRO, J.:

¶ 1 Plaintiff-Appellants Herminia M. Fusco ("Herminia"), Julia B. Matsumoto ("Julia"), and Jae Yeol Lim ("Lim") (collectively, "Plaintiffs") appeal the trial court's decision denying their claims of fraud and quiet title against Defendant-Appellee Roman B. Matsumoto ("Roman"). On appeal, Plaintiffs argue that the trial court erred by: (1) concluding that Plaintiffs failed to state a cause of action for fraudulent misrepresentation; (2) failing to consider their claims for quiet title; (3) concluding that Herminia's quitclaim deed transferred Herminia's property to Roman; and (4) failing to award Lim $248,320.14 in damages under his lease agreement. Roman filed a cross appeal, asserting that: (1) Herminia and Julia never acquired title to the disputed property; (2) Lim's leasehold did not encompass the disputed property; and (3) Lim was not entitled to recover $12,245.36 in attorney fees and costs from Roman under the terms of Lim's lease agreement.

¶ 2 For the reasons stated herein, we reverse the trial court's determinations that: (1) Plaintiffs failed to state a cause of action for fraudulent misrepresentation; (2) Lim was entitled to recover attorney fees and costs from Roman; and (3) Lim was not entitled to any damages based on the lease agreement. In all other respects, the trial court's decision is affirmed. We remand to the trial court for proceedings consistent with this opinion.

I

¶ 3 Jose Y. Matsumoto ("Jose") and his wife Augusta B. Matsumoto ("Augusta") jointly owned a large tract of property in As Lito, Saipan. Portions of this tract became encumbered by several rights-of-way ("ROWs") during World War II because United States Armed Forces improved and incorporated part of the As Lito property into a public roadway. The Commonwealth assumed responsibility for maintaining the public roadway after 1978. The ROWs were eventually surveyed and subdivided sometime in the early 1990s, and three of them, Lots E.A. 825NEW-4-R/W, E.A. 825NEW-R/W-1, and E.A. 825NEW-1-R/W ("Disputed ROWS"), are at issue in this appeal.

¶ 4 In June 1990, Augusta and Jose entered into a Ground Lease Agreement ("Ground Lease") with Lim which granted Lim a leasehold interest in a portion of the As Lito property. The Ground Lease encompassed "Lot C & D of E.A. 825 and 826 containing an area of 20,000 square meters." Excerpts of Record ("ER") at 88. In December 1990, Augusta and Jose decided to pursue a land exchange with the Commonwealth in order to obtain unencumbered land elsewhere on Saipan. Ultimately, the land exchange did not take place. Sometime in 1991, Jose died, leaving Augusta as the sole fee simple owner

[1] Former Chief Justice Miguel S. Demapan heard oral argument. He retired from the Commonwealth Judiciary prior to the issuance of this opinion.

of the As Lito property. In 1994, Augusta became ill. Although she recovered, she decided to distribute the As Lito property to her children. She held a family meeting at her home in Garapan and explained the manner in which she intended to distribute the As Lito property. Five of her six children were present at the meeting: Herminia, John, Lydia, Margaret, and Roman.

¶ 5 Shortly after the family meeting, attorney Juan T. Lizama ("Attorney Lizama") visited Augusta to discuss distribution of the As Lito property. Herminia was present at the meeting. About a week later, Attorney Lizama returned to Augusta's house with a document entitled Grand Deed Reserving Life Estate ("First Grand Deed"). Herminia, who was again present, reviewed the First Grand Deed and witnessed her mother sign the deed on each page. The gifts in the First Grand Deed corresponded to the plan outlined by Augusta at the family meeting. According to the Deed, Julia was to receive 5,000 square meters of Lot C.[2] The trial court found that Lot C contained two of the Disputed ROWs: E.A. 825NEW-R/W-1, and E.A. 825NEW-1-R/W. *Fusco v. Matsumoto*, No. 06-0080 (NMI Super. Ct. December 9, 2008) (Order: Findings of Fact and Conclusions of Law) ("Findings of Fact and Conclusions of Law") at 4. Herminia was to receive 10,000 square meters comprising Lot D. The trial court found that Lot D contained the remaining Disputed ROW: E.A. 825NEW-4-R/W. *Id.* Attorney Lizama notarized the First Grand Deed, took the deed with him when he left Augusta's, but did not record it. The trial court concluded that the First Grand Deed was a valid transfer of property and that it transferred fee title of the Disputed ROWs to Herminia and Julia.

¶ 6 The next day, Herminia visited Attorney Lizama's office and picked up a copy of the First Grand Deed for Augusta's records. Thereafter, at Roman's direction, Attorney Lizama prepared a Second Grand Deed less than twenty-four hours later, which purported to convey the Disputed ROWs to Roman. The trial court made no finding of fact as to whether Augusta signed the Second Grand Deed.[3] The trial court concluded that since the First Grand Deed was a valid transfer of property, this Second Grand Deed was ineffective and did not transfer any property interests. During the next several years, Augusta executed two amendments to the Second Grand Deed.

¶ 7 In August 1997, Roman contacted Lim. Roman asked Lim to execute an amendment to the Ground Lease ("Ground Lease Amendment" or "Amendment"). Roman represented to Lim that he was the owner of the Disputed ROWs and that these ROWs were part of Lim's leasehold. Roman also represented that he intended to enter into a land exchange for the ROWs with the Commonwealth. As determined by the trial court, Roman did not own the ROWs at the time he made these representations to

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[2] The First Grand Deed granted the remaining 5,000 square meters of Lot C to Lydia Fejeran Matsumoto, who is not a party to this action.

[3] Neither the record nor the parties' briefs explain why the First and Second Grand Deeds, which the parties claim were separately executed instruments, contain identical signatures for both Augusta and the notary, dated April 21, 1994.

Lim. According to the trial court, Roman made these representations for the purpose of inducing Lim to sign the Amendment. At trial, Lim testified that the Disputed ROWs were worthless to him because they were part of the existing roadway. Lim further testified that, in part, he signed the Amendment because Roman agreed to a payment schedule for money that Roman owed Lim.

¶ 8 In September 1998, Roman separately contacted Herminia and Julia. Roman represented to each sister that he was the owner of the Disputed ROWs. Roman promised that he would pursue their now-deceased mother's longstanding wish for a land exchange for the benefit of Roman's children if Julia and Herminia would quitclaim their respective interests in the Disputed ROWs to him. Roman was not the owner of the ROWs at the time he made these promises to his sisters. The trial court found that Julia and Herminia quitclaimed their interests in the Disputed ROWs to Roman. Both quitclaim deeds stated that the purpose of the transfer was to avoid difficulties in recordation. Neither Herminia nor Julia received any monetary compensation for the transfer.

¶ 9 In 2004, Roman entered into a Warranty Deed and Land Compensation Agreement with the Commonwealth. Roman conveyed his interest in the Disputed ROWs to the Commonwealth in exchange for $248,320.14. During the summer of 2005, Herminia heard rumors that Roman had received a large cash settlement from the Commonwealth. Herminia later confirmed that Roman had obtained monetary compensation for the Disputed ROWs and that he had not pursued a land exchange with the Commonwealth as previously promised.

¶ 10 Plaintiffs sued Roman in March 2006. In their amended complaint, Plaintiffs advanced two theories of recovery: fraudulent misrepresentation and quiet title. Herminia and Julia sought rescission of the quitclaim deeds and reconveyance of the Disputed ROWs. Lim requested a declaration from the court that he was the rightful leaseholder of the Disputed ROWs at the time Roman conveyed the ROWs to the Commonwealth. In the alternative, Plaintiffs sought recovery of the $248,320.14 that Roman received in exchange for the Disputed ROWs.

¶ 11 In December 2008, the trial court issued its Findings of Fact and Conclusions of Law. The trial court ruled against Plaintiffs on their claims of fraudulent misrepresentation, holding that the Commonwealth did not recognize a cause of action for fraudulent misrepresentation based on future intent. As part of its factual findings, the trial court found that under the First Grand Deed, Herminia and Julia acquired ownership of the Disputed ROWs. As to Lim, the trial court made factual findings that the Disputed ROWs were part of the property that Augusta leased to Lim in 1990. Although Roman was not a signatory to the Ground Lease signed by Augusta, Jose, and Lim, the trial court concluded that Roman had bound himself to the terms of the Ground Lease by inducing Lim to sign the Ground Lease Amendment. The trial court ordered Lim to submit evidence showing the amount of damages, attorney fees, and costs owed to Lim pursuant to the Ground Lease. The trial court ultimately did not award

damages to Lim but did award him $12,245.36 in attorney fees and costs. Plaintiffs and Roman timely appealed the trial court's final judgment.

II

¶ 12 We have jurisdiction over this appeal pursuant to 1 CMC § 3102(a).

III

A. Validity of the First Grand Deed

¶ 13 Roman argues that the trial court erred in finding that the First Grand Deed was a valid donative transfer and that the Second Grand Deed transferred nothing to Roman. A valid *inter vivos* donative transfer requires: 1) donative intent; 2) delivery; and 3) acceptance.[4] *Cabrera v. Cabrera*, 3 NMI 1, 5 (1991); *see also* Restatement (Second) of Property: Donative Transfers § 32.1 (1992). The overall validity of a gift of real property is a mixed question of law and fact which we review de novo. *Id.* at 4. We review factual findings under the clearly erroneous standard. *Commonwealth Ports Auth. v. Tinian Shipping Co.*, 2007 MP 22 ¶ 14. The grantor's donative intent is a question of fact, which depends on all the circumstances surrounding the transaction. *Hill v. Donnelly*, 110 P.2d 135, 136 (Cal. Ct. App. 1941); *Evans v. Waddell*, 689 So. 2d 23, 29 (Ala. 1997).

¶ 14 Roman argues that Augusta lacked donative intent at the time she signed the First Grand Deed because she reserved a life estate for herself. The well-recognized modern rule is that a grantor may make a present conveyance of real property reserving a life estate in the grantor and conveying the remainder interest to the grantee. Restatement (Second) of Property: Donative Transfers § 32.1 cmt. f (1992); *see, e.g.*, *Million v. Botefur*, 9 P.2d 284, 284 (Colo. 1932); *Keeter v. Bank of Ellijay*, 9 S.E.2d 761, 763 (Ga. 1940); *Stoutenburg v. Stoutenburg*, 27 N.Y.S.2d 734, 736-38 (N.Y. Sup. Ct. 1941). In our only published opinion substantially related to this issue, we upheld the validity of a donative transfer via a deed of gift which reserved a life estate in the grantor. *Pangelinan v. Itaman*, 1996 MP 16 ¶ 14. Thus, Augusta's reservation of a life estate for herself in the First Grand Deed does not negate Augusta's donative intent.

¶ 15 Roman also argues that there was no delivery of the First Grand Deed. Delivery is "that point in time at which the parties manifest their intention to make the instrument . . . operative and effective . . . ." *Paine v. Paine*, 458 A.2d 420, 421 (Me. 1983). Delivery of the deed may be actual or constructive. *See Cabrera*, 3 NMI at 5. Actual delivery occurs when the grantor gives physical control of the original deed instrument to the grantee. *See Beaumont v. Beaumont*, 152 F. 55, 61 (3d Cir. 1907).

[4] Roman makes a token argument that there was no acceptance of the First Grand Deed. Acceptance is presumed absent contrary facts. Restatement (Second) of Property: Donative Transfers § 32.3(2) (1992); *Jennings v. Jennings*, 37 P. 794, 796 (Cal. 1894).

Constructive delivery occurs any time there is a delivery where the instrument itself is not transferred to the grantee. To effectuate constructive delivery, a deed

> may be delivered to a third person with intention that the grantee shall have the benefit of the deed or it may be retained by the grantor and delivery be consummated if the grantor expresses an intention that the title shall pass and indicates by acts or words that he is holding the instrument for the benefit of the grantee. The controlling factor is the intention to make delivery, and this intention may be inferred from the grantor's acts and words and from the circumstances surrounding the execution of the instrument.

Noffsinger v. Noffsinger, 197 S.W.2d 785, 786-87 (Ky. 1946); *Howell v. Herald*, 197 S.W.3d 505, 510 (Ky. 2006); *see also Moore v. Trott*, 122 P. 462, 465 (Cal. 1912) ("A deed may be good by constructive delivery as well as by actual delivery. Any words or acts showing an intention on the part of the grantor that the deed shall be considered as completely executed, and the title conveyed, are sufficient." (citation omitted)). Constructive delivery may be accomplished without a physical transfer of the deed, or even a copy of the deed, to the grantee. Restatement (Second) of Property: Donative Transfers § 32.1 cmt. g (1992) ("A manifestation that the document is to be presently operative may be made without any delivery thereof to anyone."); *Lape v. Oberman*, 284 S.W.2d 538, 540 (Mo. 1955) ("[M]anual delivery is not essential to effectuate a legal delivery, if the grantor's conduct indicates an intention on his part to relinquish all dominion or control over the deed and to have it become presently effective as a conveyance of title.").

¶ 16 In the instant case, the trial court made factual findings that delivery of the First Grand Deed was completed based on the circumstances surrounding the execution of the instrument: Augusta explained the manner in which she intended to distribute her real property at a family meeting; the provisions of the First Grand Deed accorded with the plan discussed at the family meeting; Augusta signed the deed on each page in the presence of one of the grantees (Herminia); Attorney Lizama notarized the deed; and Augusta voluntarily relinquished the deed to Attorney Lizama after signing it. Moreover, the trial court made credibility determinations and resolved conflicts in the facts surrounding execution of the First Grand Deed in favor of Herminia and Julia. We have reviewed the record, and the trial court's findings of fact are not clearly erroneous.

¶ 17 Roman asserts that delivery was incomplete because Augusta retained possession of the First Grand Deed through her agent, Attorney Lizama.[5] He reasons that when Attorney Lizama left Augusta's residence with the First Grand Deed, it showed that Augusta lacked intent to make a present irrevocable transfer. Roman directs us to *Chapman v. Chapman*, 473 So. 2d 467 (Miss. 1985), in which the defendant husband signed a deed in favor of his plaintiff-wife, but left the original deed with his attorney with instructions that the deed should not be recorded until the defendant instructed the attorney to do so.

[5] In her trial testimony, Herminia acknowledged that Attorney Lizama worked for her mother.

Id. at 468. Roman argues that the operative fact in *Chapman* is that the attorney was acting as an agent for the defendant, and that there was no delivery because the defendant's agent retained control of the deed.

¶ 18 We reject Roman's argument because even if Augusta technically retained control of the First Grand Deed through Attorney Lizama, "if surrounding and attendant facts and circumstances are sufficient to clearly show an irrevocable intent to transfer the title, and there are some physical acts supporting such intention and fixing with definiteness symbolical or constructive delivery, the requirements for the transfer of the title have been complied with." *Johnson v. Brown*, 144 P.2d 198, 201 (Idaho 1943). We reiterate what we stated above: the grantor's intent is essential. *Howell*, 197 S.W.3d at 510. Put another way, "[i]f both parties be present, and the usual formalities of execution take place, and the contract is to all appearances consummated without any conditions or qualifications annexed, it is a complete and valid deed, notwithstanding it be left in the custody of the grantor." *Stone v. Daily*, 185 P. 665, 669 (Cal. 1919) (quoting 4 James Kent, Commentaries on American Law 455-56 (John M. Gould ed., 1896)).

¶ 19 We also reject Roman's argument because this case is distinguishable from *Chapman*. In *Chapman*, the appellate court noted that the trial court believed that "[the defendant] did not intend to deliver the original deed to himself nor to accept such delivery as a co-grantee." 473 So. 2d at 469. The trial court's belief was premised on the fact that the defendant instructed his attorney *not* to record the deed until he told the attorney to do so. *Chapman* upheld the trial court, holding that the defendant's special instructions to his attorney indicated that the defendant lacked intent to create a binding delivery of the deed. We would have no trouble reaching the same conclusion as the *Chapman* court had the facts of this case been more similar to *Chapman* and there was circumstantial evidence showing that Augusta did not intend the first deed to be legally operative. *See* Restatement (Second) of Property: Donative Transfers § 32.1 cmt. g (1981) ("A delivery of the document by the donor to someone other than the donee is a manifestation that the document is presently operative, unless the circumstances indicate otherwise."). Here, the facts and circumstances surrounding execution of the First Grand Deed place this case within the purview of the *Brown* and *Daily* rules cited above. The First Grand Deed contained words of a present conveyance despite carving out a life estate for Augusta. Moreover, Herminia acquired a signed, notarized copy of the First Grand Deed *before* the Second Grand Deed appeared. That Attorney Lizama retained possession of the First Grand Deed does not negate the trial court's finding that delivery occurred absent additional facts.

¶ 20 Finally, Roman argues that the subsequent execution of the Second Grand Deed plus two later amendments to the Second Grand Deed indicate that Augusta did not intend the First Grand Deed to be operative. As we previously stated, donative intent is a factual determination. *Evans*, 689 So. 2d at 29.

As it was obligated to do, the trial court examined the circumstances surrounding execution of the First Grand Deed and concluded that Augusta intended the First Grand Deed be operative when she signed it. The mere existence of the Second Grand Deed and two subsequent amendments does not convince us that the trial court erred when it found that Augusta possessed the requisite intent to make an inter vivos gift. We affirm the trial court's determination that the First Grand Deed transferred the Disputed ROWs to Julia and Herminia.

B. Quiet Title

¶ 21 Herminia's and Lim's attempt to reassert their quiet title claim on appeal appears to be borne of a misunderstanding as to the nature of quiet title actions. In order to succeed on a quiet title action, the petitioning party must assert a *present* interest in the subject property. *Har v. Boreiko*, 986 A.2d 1072, 1078 (Conn. App. Ct. 2010) ("An action to quiet title is one quasi in rem, and it lies against those who, at the time it is instituted, are the present claimants to the land under the instrument which creates the cloud." (citation and internal quotations omitted)); *Haynes Land & Livestock Co. v. Jacob Family Chalk Creek, LLC*, 233 P.3d 529, 535 (Utah Ct. App. 2010) ("A quiet title action is a suit brought to quiet an existing title against an adverse or hostile claim of another . . . ." (internal quotations omitted)).

¶ 22 Plaintiffs Herminia and Lim argue that the trial court erred by failing to consider their claims for quiet title. Because Herminia and Lim abandoned their quiet title claims in the trial court, we disagree. In a memorandum to the trial court, Plaintiffs stated:

> Plaintiffs wish to make clear that they do not claim to have a *present* interest in the subject right-of-ways now in the title of the CNMI government. Plaintiffs concede that even if the purported transfers of their respective interests to Defendant were defective and null and void, the Commonwealth government probably has title as a bona fide purchaser for value. . . . The Plaintiffs no longer seek rescission and reconveyance of the property. Any allegation to that affect [sic] is abandoned.

Fusco v. Matsumoto, No. 06-0080 (NMI Super. Ct. Apr. 22, 2008) (Plaintiff's Reply in Support of Motion for Summary Judgment; Opposition to Defendant's Cross-motion for Summary Judgment; Opposition to Defendant's Motion to Strike at 15-16) (emphasis added).

¶ 23 In their appellate brief, Herminia and Lim do not assert that they have a present or existing interest in E.A. 825NEW-4-R/W; rather, they assert quiet title claims based upon their *past* interests in the disputed property. Specifically, Plaintiffs argue that they are "entitled to a declaration that [they] had title to E.A. 825NEW-4-R/W at the time that the Warranty Deed and settlement agreement was executed in favor of MPLA [in 1997]." Appellant's Brief at 24. Plaintiffs cannot sustain claims of quiet title in the absence of a present claim to the disputed property. While it is possible that Herminia and Lim may have had legal or equitable rights to Lot E.A. 825NEW-4-R/W at the time Roman deeded the property to the

Commonwealth, a quiet title claim is an inappropriate way to vindicate that interest.[6] We affirm the trial court's tacit refusal to consider Plaintiffs' claims of quiet title.

C. Herminia's Quitclaim Deed

¶ 24 Herminia argues that her quitclaim deed did not convey her interest in one of the Disputed ROWs to Roman. Specifically, she alleges that the ROW encumbering her property, E.A. 825NEW-4-R/W, and the ROW referred to in the quitclaim deed, E.A. 825NEW-4 R/W (no dash), are distinct property interests. She contends that her quitclaim deed transferred E.A. 825NEW-4 R/W to Roman instead of E.A. 825NEW-4-R/W. The trial court concluded that Herminia's quitclaim deed transferred E.A. 825NEW-4-R/W to Roman.[7] Interpretation of deeds is a question of law, which we review de novo. *Del Rosario v. Camacho*, 2001 MP 3 ¶ 38; *Pangelinan v. Itaman*, 1996 MP 16, ¶2.

¶ 25 Here, the reference to E.A. 825NEW-4 R/W in Herminia's quitclaim deed undoubtedly referred to E.A. 825NEW-4-R/W. Though Herminia claims that E.A. 825NEW-4 R/W was a separately existing lot, the only document apart from Herminia's quitclaim deed that mentions E.A. 825NEW-4 R/W is the Second Grand Deed, an attempted transfer of property which we affirm was invalid. It is undisputed that no lot designated E.A. 825NEW-4 R/W ever encumbered Herminia's property. Thus, we affirm the trial court's judgment that Herminia's quitclaim deed transferred E.A. 825NEW-4-R/W to Roman.

D. Plaintiff Lim's Leasehold Interest in the Disputed ROWs

¶ 26 Roman argues that circumstantial and extrinsic evidence admitted at trial proved that Augusta and Jose did not intend the Disputed ROWs to be part of the 20,000 square meters leased to Lim through the Ground Lease. In the Commonwealth, "a written lease is a contract, subject to the same rules of construction as contracts." *Camacho v. L & T Int'l Corp.*, 4 NMI 323, 325-26 (1996). Interpretation of contract terms is a question of law that we review de novo. *Malite v. Superior Court*, 2007 MP 3 ¶ 23.

¶ 27 Under established Commonwealth precedent, "the language in a contract is to be given its plain grammatical meaning unless doing so would defeat the parties' intent." *Commonwealth Ports Auth. v. Tinian Shipping Co.*, 2007 MP 22 ¶ 17 (citing *DeWitt County Elec. Coop., Inc. v. Parks*, 1 S.W.3d 96,

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[6] To the degree that the Plaintiffs request purely declaratory relief, they are still without remedy. As we stated in *Rayphand v. Tenorio*, 2003 MP 12:

> A declaratory judgment or decree is one which simply declares the rights of the parties or expresses the opinion of the court on a question of law, without ordering anything to be done; its distinctive characteristic being that the declaration stands by itself, and no executory process follows as of course; and the action is therefore distinguished from other actions in that it does not seek execution or performance from the defendant or opposing party.

Id. ¶ 25 (quoting *Burgess v. Burgess*, 80 S.E.2d 280, 282 (Ga. 1954). Thus, even if the Court were to declare, as Plaintiffs request, that they had legal title to the Disputed ROWs at the relevant times in 1997 and 1998, that declaration would not entitle Plaintiffs to relief without an accompanying theory of recovery.

[7] Herminia treated this issue as a question of fact.

101 (Tex. 1999). When we analyze the intent of the parties to a contract, we look only to see "what is actually stated, and not at what was allegedly meant." *Tinian Shipping Co.*, 2007 MP 22 ¶ 17 (citing *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 131 (Tex. App. 2000). We will consider the manner in which a reasonable person would have used the relevant language in the contract "by pondering the circumstances surrounding the contract's negotiation, and by considering the purposes which the parties intended to accomplish by entering into the contract." *Cook Composites*, 15 S.W.3d at 132. In the absence of any ambiguity, we will find intent in the plain meaning of the contractual language. *Dynasty Hous., Inc. v. McCollum*, 832 So. 2d 73, 75 (Ala. Civ. App. 2001).

¶ 28 Roman asserts that Augusta and Jose could not have intended to lease the Disputed ROWs to Lim because at the time Jose and Augusta leased their property to Lim, they were also intending to use the Disputed ROWs to enter into a land exchange with the Commonwealth. This argument is unavailing because the plain language of the Ground Lease controls. If Augusta and Jose did not intend the Ground Lease to include land comprising the Disputed ROWs, it was incumbent upon them to specify differently in the Ground Lease. The mere fact that Augusta and Jose might have acted against their own future interests does not obviate the plain language of the Ground Lease.

¶ 29 Roman also argues that extrinsic documentary evidence admitted during trial proves that the 20,000 square meters leased to Lim does not encompass the Disputed ROWs. Roman cannot prevail on this argument either because Roman's evidence, which consists entirely of documents created several years after the Ground Lease, is wholly irrelevant to the parties' intent at the time they entered into the Ground Lease. Though "[w]e are free to examine prior negotiations and all other relevant incidents bearing on the intent of the parties[,]" we need not consider extrinsic evidence which has no bearing on the parties' intent. *Cook Composites, Inc.*, 15 S.W.3d at 132. Moreover, the record is replete with contrary evidence. According to the survey plats introduced at trial, including the rough plat *attached to the original Ground Lease*, the 20,000 square meters comprising Lot C and D included the Disputed ROWs. Indeed, nearly every piece of documentary evidence in the record indicates that Lim's leasehold encompassed the Disputed ROWs. We affirm the trial court on this point.

E. Roman's Liability Under the Ground Lease Amendment

¶ 30 The original Ground Lease between Jose, Herminia and Lim contained an attorney fees clause,[8] as well as an eminent domain clause with a damages provision. [9] The trial court concluded that Roman

[8] Paragraph thirteen provides that: "In the event either Lessee or Lessors shall bring any proceeding for an alleged violation of any of the provisions of this Ground Lease the prevailing party shall be entitled to recover as part of such proceeding attorney's fees and costs as determined in the proceeding." ER at 96-96 (two consecutive pages in the ER are labeled "000096").

[9] Paragraph ten of the Ground Lease provides, in relevant part, that: "[A]ll compensation and damages for or on account of any land and improvements taken payable to Lessor for Lessor's interests as owners as well as that

bound himself to the Ground Lease by signing the Ground Lease Amendment, and that Roman was consequently liable for both attorney fees and damages under the relevant clauses of the Ground Lease.[10] The court held that Roman's severance of "portions of Lim's lease without compensat[ion] . . . entitled [Lim] to damages as dictated by [the eminent domain clause]" of the Ground Lease. *Id.* The court also awarded Lim attorney fees and costs pursuant to the attorney fees clause of the Ground Lease since Lim was the prevailing party in his challenge to Roman's sale of the Disputed ROWs to the Commonwealth. *Id.* The trial court stated:

> Defendant Roman clearly consented to the Lease Agreement with Plaintiff Lim when Defendant amended the lease. The Lease Amendment states that all previous agreements remained in effect. Defendant, acting as the party to the lease, entered into the Lease Amendment. In so doing, Defendant Roman bound himself to the terms of the Lease Agreement. Defendant Roman is not a "nonparty" to the Lease Amendment and therefore, is not a "nonparty" to the Lease Agreement incorporated therein. Therefore, Defendant Roman is bound to the provisions of the Lease Agreement.

Fusco v. Matsumoto, No. 06-0080 (NMI Super Ct. Apr. 14, 2009) (Order Awarding Plaintiff's Damages and Attorney's Fees at 2) ("Order Awarding Damages").

¶ 31 On appeal, Roman argues that he is not liable for attorney fees or damages, because he did not bind himself to the Ground Lease by signing the Ground Lease Amendment. We apply principles of contract construction to our interpretation of the scope and meaning of a lease. *Manglona v. Commonwealth*, 2005 MP 15 ¶ 34; *Bill Signs Trucking, LLC v. Signs Family Ltd. P'ship*, 69 Cal. Rptr. 3d 589, 593 (Cal. Ct. App. 2007). The issue of whether Roman was bound to the Ground Lease by virtue of the Ground Lease Amendment is an issue of contract interpretation that we review de novo. *Island Leisure Corp. v. Rasa*, 2004 MP 4 ¶ 2.

¶ 32 The trial court made no findings of fact or conclusions of law regarding whether the Ground Lease Amendment had any independent legal validity as a contract. However, even assuming that the Ground Lease Amendment was a valid contract with some independent legal validity, Lim may not rely

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payable to Lessee for Lessee's leasehold interest, shall be payable to and become the sole property of Lessee . . . ." ER at 93.

[10] Although both parties briefed the issue of whether the trial court's award of no damages was in error, they simply assume Lim's entitlement to damages without discussing the basis for such entitlement. The trial court concluded that Roman was bound by the Ground Lease by virtue of entering into the Ground Lease Amendment with Lim, a conclusion we review in this section. However, Roman could also be bound by provisions of the Ground Lease through obtaining fee title to the Disputed ROWs from Herminia and Julia. Since the issue of entitlement to damages is squarely before the Court and a determination of a successor-in-interest lessor's duties under a lease between the predecessor-in-interest lessor and a lessee is an issue of first impression in this Court, we will exercise our discretion in this unique circumstance and analyze whether Roman's status as the successor in interest bound him to provisions of the Ground Lease in the next section even though the parties failed to address this theory of entitlement. *See Reyes v. Reyes*, 2001 MP 13 ¶ 12 (addressing issue of whether trial court could modify an order pursuant to 8 CMC § 1311 despite failure of party to raise issue because "it is one of first impression and a discussion is useful for future lower court application and interpretation" of the statute).

on the Ground Lease Amendment to enforce the provisions of the Ground Lease against Roman. The text of the Ground Lease Amendment contains no statement acknowledging the existence of the Ground Lease or incorporating any of its terms by reference. The trial court recognized as much by stating that the Ground Lease Amendment "included an integration clause stating that the Amendment was *the entire agreement of the parties*." Findings of Fact and Conclusions of Law at 5 (emphasis added). Therefore, the Ground Lease Amendment did not bind Roman to the provisions of the Ground Lease.

Roman argues that he did not bind himself to the Ground Lease by signing the Ground Lease Amendment because "nonparties are not bound to agreements to which they did not consent." Resp. Br. at 34 (quoting *Bank of Saipan v. Superior Court*, 2001 MP 5 ¶ 32). We agree with Roman. The trial court correctly concluded that, since Roman did not own the Disputed ROWs when he signed the Ground Lease Amendment, "Roman had no authority to negotiate or alter Lim's lease." Findings of Fact and Conclusions of Law at 12. Despite having no authority to alter Lim's lease, the trial court then held that Roman "severed portions of Lim's lease without compensating Lim or otherwise adjusting rents owed" by signing the Ground Lease Amendment. *Id.* This does not follow. Since Roman had no authority to alter Lim's lease, the Ground Lease Amendment could not alter Lim's property interest in the Disputed ROWs and the trial court erred in so holding.

F. Roman's Liability Under the Ground Lease

¶ 33 Having determined that the Ground Lease Amendment did not bind Roman to the provisions of the Ground Lease, we must now determine whether Roman became liable under either the eminent domain clause or the attorney fees clause of the Ground Lease when he obtained fee title to the Disputed ROWs through entering into the quitclaim deeds with Herminia and Julia.

1. Roman's Legal Relation to Lim

¶ 34 To determine which, if any, clauses from the Ground Lease are applicable against Roman, we must determine the legal relationship between Roman and Lim that arose when Roman acquired fee title to the Disputed ROWs via the quitclaim deeds he entered with Herminia and Julia. As this Court noted earlier this term:

> "Liability between an owner of real property and parties with a leasehold interest is predicated on privity. The common law recognizes three types of privity - privity of contract, privity of estate, and a combination of privity of contract and estate." *Sarete, Inc. v. 1344 U St. Ltd. P'ship*, 871 A.2d 480, 495 (D.C. 2005) (quoting 1 Milton R. Friedman, *Friedman on Leases* § 7:5.1[A] (5th ed. 2004)). Privity of contract is premised on the existence of a contractual relationship between two parties, typically in the form of a lease agreement. *Columbia Club, Inc. v. Am. Fletcher Realty Corp.*, 720 N.E.2d 411, 417 (Ind. Ct. App. 1999). In contrast, privity of estate is a "[a] mutual or successive relationship to the same right in property, as between grantor and grantee or landlord and tenant." *Hodge v. McGowan*, 50 V.I. 296, 310 (2008) (quoting Black's Law Dictionary 1238 (8th ed. 2004)).

Estate of Ogumoro v. Han Yoon Ko, 2011 MP 11 ¶ 36. By entering into quitclaim deeds with Herminia and Julia, Roman obtained fee title to the Disputed ROWs and stepped into the shoes of the lessor of the Disputed ROWs to Lim. This created privity of estate between Roman and Lim. *See id.* ("[A]cquisition of the leasehold interest creates privity of estate . . . ." (quoting *Sarete, Inc.*, 871 A.2d at 495)). While there was privity of estate between Roman and Lim at the time of Roman's alleged breach of the eminent domain clause, Roman would be bound by all of the terms of the Ground Lease only if Roman promised to perform the express promises contained in the Ground Lease. *See* Restatement (Second) of Property: Landlord and Tenant § 16.1(4) (1977). Such a promise by Roman would bring him into privity of contract with Lim and would make Roman liable for all of the terms of the Ground Lease. *Id.* Absent such a promise, Roman would not be bound by the terms of the Ground Lease simply by acquiring the Disputed ROWs subject to Lim's tenancy. *See Latses v. Nick Floor, Inc.*, 104 P.2d 619, 624 (Utah 1940) (purchase of property subject to lease does not automatically make purchaser subject to lease terms absent express agreement to abide by lease terms); *cf. Estate of Ogumoro*, 2011 MP 11 ¶ 40 ("An assignee who acquires a leasehold interest without expressly agreeing to assume any contractual provisions of the original lease acquires privity of estate with the lessor but not privity of contract.").

¶ 35 There is no evidence in the record that Roman made any promise to be bound by the terms of the Ground Lease and the trial court made no findings to that effect. The only legal document signed by both Roman and Lim was the ineffective Ground Lease Amendment. As noted above, the Ground Lease Amendment contains no language incorporating the terms of the Ground Lease by reference. Thus, the Ground Lease is unenforceable against Roman based on privity of contract because Roman made no promise to be bound by the express terms of the Ground Lease.

2. Roman's Liability for Specific Clauses in the Ground Lease

¶ 36 While the lack of privity of contract between Roman and Lim precludes enforcement of the Ground Lease *as a whole* against Roman, we next must analyze whether the eminent domain or attorney fees clauses are individually binding on Roman solely based on the privity of estate between the parties. Whether these clauses are binding on Roman turns on whether the clauses at issue are real, as opposed to personal, covenants. *Estate of Ogumoro*, 2011 MP 11 ¶ 43. Real covenants run with the land and pass by operation of law to successors in interest of land, meaning that they are enforceable against parties who are in privity of estate with one another regardless of whether privity of contract exists. *Id.* Personal covenants, on the other hand, bind only the parties to the agreement giving rise to the covenants and are not enforceable against a successor in interest when there is only privity of estate between the parties. *Latses*, 104 P.2d at 624; *Estate of Ogumoro*, 2011 MP 11 ¶ 43. To determine whether the clauses at issue are real covenants that are enforceable against Roman (as the successor in interest to Augusta's interest

in the Disputed ROWs), we must apply the common law test from section 16.1(2) of the Restatement (Second) of Property: Landlord and Tenant (1977):

> A transferee of an interest in leased property is obligated to perform an express promise contained in the lease if:
>
> (a) the promise creates a burden that touches and concerns the transferred interest;
> (b) the promisor and promisee intend that the burden is to run with the transferred interest;
> (c) the transferee is not relieved of the obligation by the person entitled to enforce it; and
> (d) the transfer brings the transferee into privity of estate with the person entitled to enforce the promise.

¶ 37 Analysis of elements (b) through (d) of the Restatement test is the same for both the eminent domain and attorney fees clauses of the Ground Lease. Paragraph sixteen of the Ground Lease states that "[t]he covenants and provisions herein contained shall run with the land and shall apply to and bind the heirs, successors, executors, administrators, and assigns of all of the parties hereto." ER at 97. This statement of intent satisfies element (b) of the test. *Estate of Ogumoro*, 2011 MP 11 ¶ 46 (citing *In re Petition of Turners Crossroad Dev. Co.*, 277 N.W.2d 364, 369 (Minn. 1979)). Element (c) is satisfied because Lim, as the person entitled to enforce these clauses, never relieved Roman of the obligations and has affirmatively attempted to enforce these obligations through this litigation. Element (d) is satisfied because, as noted previously, Roman's acquisition of the Disputed ROWs via the quitclaim deeds with Herminia and Julia gave him fee title over the Disputed ROWs and placed him in privity of estate with Lim. Thus, the only element left undecided is whether the eminent domain and attorney fees clauses create burdens that touch and concern Roman's interest in the Disputed ROWs. A promise by a lessor touches and concerns the lessor's "interest in the leased property to the extent its performance is not related to other property and affects the use and enjoyment of the leased property by the tenant." Restatement (Second) of Property: Landlord and Tenant § 16.1 cmt. b (1977).

a. The Eminent Domain Clause

¶ 38 Few cases have dealt with whether an eminent domain clause touches and concerns land. In *Caulk v. Orange County*, 661 So. 2d 932 (Fla. Dist. Ct. App. 1995), the court faced the question of whether a reservation in a deed between the original owner ("Caulk") and the purchaser of certain property, which called for payment of the proceeds from any condemnation of the property to Caulk, touched and concerned the land such that it could be enforced against a subsequent purchaser of the property. *Id.* at 933. Although the court ultimately decided that Caulk could not enforce the reservation because there was insufficient evidence of any intent to bind subsequent purchasers, the court briefly discussed whether the reservation touched and concerned the land. The court noted that "[a]lthough the covenant 'concerns' the land, it does so only tangentially." *Id.* at 934. The court continued that "[t]he

only thing the covenant in the instant case really 'touches' and 'concerns' is the intangible personal property, namely cash, that may be paid by a condemnor." *Id.*

¶ 39 Because the court in *Caulk* ultimately rested its decision on a different element of the test to refuse to enforce the eminent domain reservation, these statements are technically dicta. However, a later decision distinguished *Caulk* and held that a similar reservation was a real covenant that was enforceable by the original owner. *J.H. Williams Oil Co., Inc. v. Harvey*, 872 So. 2d 287, 289 (Fla. Dist. Ct. App. 2004). Unlike the reservation at issue in *Caulk*, in *J.H. Williams* the reservation agreement unambiguously bound both the parties *and* all successors and assigns. *Id.* at 288. In distinguishing *Caulk* and holding that the original owner could enforce the reservation, the court in *J.H. Williams* implicitly concluded that the eminent domain reservation touched and concerned the land. *Id.* at 289.

¶ 40 In light of these authorities, we hold that the eminent domain clause of the Ground Lease does touch and concern the leasehold property. If the Commonwealth exercised its eminent domain power to acquire part of Lim's leasehold and severed Lim's lease over the condemned portion of the leasehold, Lim's use and enjoyment of the leased property would be affected. Even if the Commonwealth allowed Lim's lease of the condemned property to remain, Lim's use and enjoyment would be affected because the Commonwealth could use the condemned portion of the leasehold for whatever government purpose necessitated the condemnation in the first place. Also, since the performance of the promise to pay the proceeds from any condemnation to Lim is not related to any other property, it satisfies the second part of the Restatement's "touch and concern" test. Restatement (Second) of Property: Landlord and Tenant § 16.1 cmt. b (1977) (requiring the promise to "not [be] related to other property"). Because the eminent domain clause touches and concerns Roman's interest in the Disputed ROWs, element (a) of the Restatement test is satisfied and the eminent domain clause is a real covenant that runs with the land.

¶ 41 Having concluded that the eminent domain clause runs with the land, we still must review the trial court's conclusion that Roman failed to comply with the eminent domain clause, thereby entitling Lim to damages. The trial court found that Roman entered into a Warranty Deed and Land Compensation Settlement Agreement with the Commonwealth in 2004 that transferred his interest in the Disputed ROWs to the government. Findings of Fact and Conclusions of Law at 6. The Land Compensation Settlement Agreement conveying the Disputed ROWs to the Commonwealth states that "the Commonwealth wishes to acquire [the Disputed ROWs] for a public purpose" and that "former Governor Lorenzo I. Deleon Guerrero through the Department of Public Works, certified the acquisition of [the Disputed ROWs] for a public purpose, i.e., a roadway . . . ." ER at 81. The Agreement continues that the Disputed ROWs were "taken by the Commonwealth for a public purpose" upon Governor Deleon Guerrero's certification in 1991. *Id.* From these statements, we find that it was not clearly erroneous for the trial court to conclude that the Land Compensation Settlement Agreement constituted a

taking of the Disputed ROWs by the Commonwealth. Because the Commonwealth's purchase of the Disputed ROWs was a "taking by right of eminent domain . . . of all or part of the premises," ER at 93, this purchase triggered the eminent domain clause of the Ground Lease and the trial court was, thus, correct in concluding that "Lim is entitled to damages as dictated by [the eminent domain clause]" of the Ground Lease. Findings of Fact and Conclusions of Law at 12.

¶ 42 Although the trial court concluded that Roman breached the eminent domain clause of the Ground Lease, the court refused to follow the terms of the eminent domain clause and award Lim all compensation Roman received as a result of the taking of the Disputed ROWs by the Commonwealth. ER at 93. In its order awarding no damages, the trial court reasoned that Lim was not entitled to the "total value of the [Disputed ROWs]" because the court found that Lim voluntarily relinquished his rights by entering into the Ground Lease Amendment with Roman. Order Awarding Damages at 3. The court also noted that Lim testified that the Disputed ROWs were "of no use to him [Lim]." *Id.* The trial court ultimately awarded Lim no damages because Lim failed to "provide the Court with requested information on how damages to Plaintiff Lim's leasehold interest may be equitably determined . . . ." *Id.*

¶ 43 A trial court's award of damages will be upheld unless the decision is clearly erroneous. *Ito v. Macro Energy, Inc.*, 4 NMI 46, 54 (1993) (citing *Reyes v. Ebeteur*, 2 NMI 418, 424 (1992)). Roman was the successor in interest to ownership of the Disputed ROWs and was in privity of estate with Lim when he entered into the Land Compensation Settlement Agreement with the Commonwealth. As such, the unambiguous plain language of the eminent domain clause compelled Roman to pay Lim "all compensation and damages for or on account of any land and improvements taken [by the Commonwealth] payable to Lessor for Lessor's interests as owners as well as that payable to Lessee for Lessee's leasehold interest."[11] ER at 93. Our conclusion regarding the eminent domain clause should not be construed as a statement that a trial court cannot depart from an express term in a contract. There are situations where departure may be necessary, such as when a term is unconscionable. *See* Restatement (Second) of Contracts § 208 (1981) (court may "limit the application of any unconscionable term as to avoid any unconscionable result"). In this case, however, the trial court made no findings that would justify such a departure. As there can be no dispute in this case as to the amount of compensation agreed to by the Commonwealth for acquisition of the Disputed ROWs, we reverse the trial court's order awarding no damages to Lim as clearly erroneous and remand the matter for further proceedings consistent with this opinion.

[11] The Land Compensation Settlement Agreement states that the amount of "cash compensation" for the Disputed ROWs was $248,320.14. ER at 81.

b. The Attorney Fees Clause

¶ 44 In *Estate of Ogumoro*, we determined that attorney fees clauses of leases do not touch and concern the land. 2011 MP 11 ¶ 51. We explained that: "Attorney fees are tangentially related to a lessee's use and enjoyment of real property, and promises to pay attorney fees are purely personal covenants. As such, an attorney fees clause does not run with the land absent express assumption of a leasehold provision granting the right." *Id.* Because covenants related to attorney fees do not touch and concern the land, Roman is not bound by attorney fees clause of the Ground Lease. Thus, the trial court erred in awarding Lim attorney fees and costs in the amount of $12,245.36. We vacate the trial court's award of attorney fees and costs to Lim and remand the matter for further proceedings consistent with this opinion.

G. Fraudulent Misrepresentation Based on Future Intent

¶ 45 Plaintiffs challenge the trial court's conclusion that there is no cause of action for fraud based upon a misrepresentation of future intention in the Commonwealth. In its Findings of Fact and Conclusions of Law, the trial court acknowledged that the Restatement (Second) of Torts and the majority of United States jurisdictions allow a cause of action for misrepresentation based on future intent. Nevertheless, the trial court relied on this Court's holding in *Benavente v. Marianas Pub. Land Corp.*, 2000 MP 13 ¶ 43-45, and concluded that this jurisdiction follows the minority approach. Plaintiffs argue that in *Benavente*, the Court improperly failed to consider the Restatement (Second) of Torts[12] and, alternatively, that the portions of *Benavente* relied upon by Roman and the trial court are non-precedential dicta. Roman argues that the trial court correctly interpreted *Benavente*, *Benavente* represents the majority view, and the relevant portions of *Benavente* are not dicta.[13] The existence of a cause of action is an issue of law, and thus, we review this matter de novo. *See Rayphand v. Tenorio*, 2003 MP 12 ¶ 4.

¶ 46 We begin our analysis with an acknowledgement that *Del Rosario v. Camacho*, 2001 MP 3, decided less than a year after *Benavente*, is controlling written law in the Commonwealth. Much like the instant case, the *Camacho* defendant allegedly promised his siblings that he would convey his property in Talofofo to them if they signed over their respective interests in property located in Garapan. *Id.* ¶ 11. The defendant's siblings signed over their interests in the Garapan property, but the defendant

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[12] Title 7 CMC § 3401 requires that Commonwealth courts apply the Restatements when there is no written law:

> In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary . . . .

[13] Our later analysis precludes any need to discuss whether the disputed portions of *Benavente* are dicta.

subsequently refused to convey his interest in the Talofofo property. *Id.* ¶ 20. Although the Camacho plaintiffs lost their appeal, we recognized then that the plaintiffs had articulated a theory of recovery arising from the defendant's future promise to convey his Talofofo property to his siblings.

¶ 47 *Camacho* articulates the general rule that "[o]ne who fraudulently makes a misrepresentation of fact, opinion, intention, or law for the purpose of inducing another to act or refrain from acting in reliance thereupon is liable for loss caused by justifiable reliance on the misrepresentation." *Camacho*, 2001 MP 3 ¶ 79 (citing Restatement (Second) of Torts § 525 (1977)). *Camacho* then sets forth the circumstances under which a promise is actionable in fraud:

> [T]here must be evidence that, *at the time defendant made the promise*, he made it with the intent not to perform, or with reckless disregard as to whether he could perform. Fraudulent intent or reckless disregard cannot be inferred from the mere fact of nonperformance. Additional circumstances of substantial character must be shown before an inference may be drawn.

Id. at 80 (citing *Lawrence v. Underwood*, 726 P.2d 1189, 1191 (Or. Ct. App. 1986)). Though we did not say as much in *Camacho*, "[t]he gist of fraud in such case is not the breach of the agreement to perform, but the fraudulent intent." *Sea-Land Serv., Inc. v. O'Neal*, 297 S.E.2d 647, 651 (Va. 1982) (citation and internal quotations omitted). The fraudulent intent is a present existing material fact that serves as the basis for the cause of action. *Bocchini v. Gorn Mgmt. Co.*, 515 A.2d 1179, 1189 (Md. Ct. Spec. App. 1986); *Emerick v. Mut. Benefit Life Ins. Co.*, 756 S.W.2d 513, 519 (Mo. 1988). This cause of action is narrow: if the inducing statement "is honestly made and the [stated] intention in fact exists, one who acts in justifiable reliance upon it cannot maintain an action of deceit if the maker for any reason changes his mind and fails or refuses to carry his expressed intention into effect." *High Country Movin', Inc. v. U.S. West Direct Co.*, 839 P.2d 469, 471 (Colo. Ct. App. 1992) (citing Restatement (Second) of Torts § 530 cmt. b (1976)).

¶ 48 *Camacho* applies the law as set forth in section 530 of the Restatement (Second) of Torts (1977),[14] comports with the common law majority view that there is a cause of action based on misrepresentation of future intent,[15] and is consistent with another of our prior decisions, *Rogolofoi v.*

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[14] Section 530 of the Restatement (Second) of Torts (1977) reads in relevant part: "A representation of the maker's own intention to do or not to do a particular thing is fraudulent if he does not have that intention."

[15] The cases cited by the trial court represent the overwhelming majority view. *See Gifford v. Wichita Falls & S. RR.*, 211 F.2d 494, 497 (5th Cir. 1954); *Phila. Storage Battery Co. v. Kelley-How-Thomson Co.*, 64 F.2d 834, 837 (8th Cir. 1933); *Se. Props., Inc. v. Lee*, 368 So. 2d 288, 289 (Ala. 1979); *Waddell v. White*, 108 P.2d 565, 569 (Ariz. 1940); *Stalos v. Booras*, 528 P.2d 254, 255-56 (Colo. Ct. App. 1974); *Paiva v. Vanech Heights Constr. Co.*, 271 A.2d 69, 71 (Conn. 1970); *Floyd v. Morgan*, 9 S.E.2d 717, 720 (Ga. Ct. App. 1940); *Feldman v. Witmark*, 150 N.E. 329, 329 (Mass. 1926); *Rutan v. Straehly*, 286 N.W. 639, 642 (Mich. 1939); *Klecker v. Sutton*, 523 S.W.2d 558, 562 (Mo. Ct. App. 1975); *Cerny v. Paxton & Gallagher Co.*, 110 N.W. 882, 883 (Neb. 1907); *Hunt v. Goodimate Co.*, 55 A.2d 75, 77 (N.H. 1947); *Sabo v. Delman*, 143 N.E.2d 906, 908 (N.Y. 1957); *Weiss v. Nw. Acceptance Corp.*, 546 P.2d 1065, 1068 (Or. 1976).

Guerrero, 2 NMI 468, 477 (1992), which impliedly held that a future promise to reconvey land was an actionable misrepresentation. The trial court erred in concluding that Roman's intent was immaterial to Plaintiffs' fraud cause of action.

¶ 49 There remains an issue as to whether *Benavente* is consistent with our holding today that the Commonwealth recognizes a cause of action based on misrepresentation of future intent. The trial court concluded that *Benavente* "seemingly aligned with the minority of jurisdictions"[16] that do not allow recovery for claims of fraudulent misrepresentation of future intent, because *Benavente* states that an "alleged false representation must relate to a past or existing material fact, not the occurrence of a future event." *Benavente*, 2000 MP 13 ¶ 43 (citing *TSA Int'l Ltd. v. Shimizu Corp.*, 990 P.2d 713, 725 (Haw. 1999)). However, this statement from *Benavente* cannot be read in the abstract -- it must be taken together with an additional rule statement in the same paragraph that "broken promises, unfulfilled predictions or expectations, or erroneous conjectures as to future events" are not actionable. *Id.* (quoting *TSA Int'l Ltd.*, 990 P.2d at 725). When read together, these statements indicate that *Benavente* merely restates the general rule that a cause of action for fraudulent misrepresentation cannot be based on a naked promise or a prediction of a future event. As stated in *Camacho*, proof of a fraudulent promise requires that the promisee provide substantial circumstantial evidence that the promisor never intended to keep the promise at the time the promise was made. 2001 MP 3 ¶ 80; Restatement (Second) of Torts § 530 cmt. d (1977).

¶ 50 We find further support for our harmonization of *Benavente* because the cases principally relied upon in *Benavente—Stahl v. Balsara*, 587 P.2d 1210 (Haw. 1978) and *TSA Int'l Ltd.*, 990 P.2d 713—were decided in Hawaii, which is unequivocally a majority jurisdiction. *E. Star, Inc. v. Union Bldg. Materials Corp.*, 712 P.2d 1148, 1159 (Haw. Ct. App. 1985) ("It is true that fraud cannot be predicated on statements which are promissory in their nature, but a promise made without the present intent to fulfill the promise is actionable as fraud." (citation and internal quotation omitted)); *Notley v. Notley*, 23 Haw. 724, 737-38 (Haw. 1917) ("[I]f the promise is accompanied with an intention not to perform it and is made for the purpose of deceiving the promisee and inducing him to act where otherwise he would not have done so, the same constitutes fraud." (citation and internal quotation omitted)).

¶ 51 We now consider whether Herminia, Julia, and Lim are entitled to prevail on their claims of fraudulent misrepresentation based on future intent. There is no dispute that the trial court established the

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[16] For minority jurisdictions, *see, e.g., People ex rel. Ellis v. Healy*, 20 N.E. 692, 694 (Ill. 1889); *Sachs v. Blewett*, 185 N.E. 856, 858 (Ind. 1933); *Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 499 (Tenn. 1978).

existence of all elements required for recovery on a theory of fraudulent misrepresentation based on future intent except for Roman's intent.[17]

¶ 52 The remaining issue is whether the trial court made sufficient factual findings to permit this Court to determine Roman's future intent at the time he induced Herminia, Julia, and Lim to turn their interests in the Disputed ROWs over to him. With respect to Lim, the trial court found that "Roman did not intend on pursuing a land exchange. [This representation was] made for the purpose of inducing Lim to sign the agreement." Findings of Fact and Conclusions of Law at 5. The trial court further found that "Lim also relied on the truthfulness of Roman's representation [of ownership of the Disputed ROWs] and believed Roman was going to pursue a land exchange." *Id.* These findings provide evidence of Roman's intent at the time he induced Lim to sign the Ground Lease Agreement. Therefore, as to Lim, we conclude that all elements of fraudulent misrepresentation were proven before the trial court. We remand this matter with instructions to the trial court to enter judgment for Lim on his claim.

¶ 53 With respect to Herminia and Julia, the trial court stated that "Roman's statements of future intentions [to pursue a land exchange] were made for the sole purpose of obtaining [their] property." Findings of Fact and Conclusions of Law at 5-6. However, the trial court made no finding as to Roman's actual intent at the times that he entered into the quitclaim deeds with Herminia and Julia. Although these findings are suggestive of Roman's intent at the time he induced the promises from Herminia and Julia, they are not equivalent to findings of fact. We remind the parties that we are not permitted to "read between the lines" and imply factual findings that the trial court did not make. *See* 1 CMC § 3103 ("[T]he Supreme Court may not . . . consider issues of fact de novo . . . ."); *Taylor v. State*, 269 S.W.3d 42, 45 (Mo. Ct. App. 2008) ("Findings and conclusions cannot be supplied by implication from the [trial] court's ruling."). The trial court's order is silent as to whether "*at the time defendant made the promise*, he made it with the intent not to perform, or with reckless disregard as to whether he could perform." *Camacho*, 2001 MP 3 ¶ 80. We remand this matter to the trial court for specific factual findings as to Roman's intent at the time he induced promises from Herminia and Julia. If the trial court finds such intent with respect to Herminia or Julia, the trial court shall enter judgment for Plaintiffs.

IV

¶ 54 For the foregoing reasons, we AFFIRM the trial court's conclusion that Lim was entitled to recover damages under paragraph ten of the Ground Lease. We REVERSE the trial court's: (1) award of no damages to Lim; (2) conclusion that Lim was entitled to attorney fees and costs under paragraph thirteen of the Ground Lease; and (3) conclusion that there is no cause of action for fraudulent

[17] Roman accepted the veracity of the trial court's factual determinations and instead argued at length that we should defer to the trial court and to *Benavente*.

misrepresentation based on future intention. We REMAND these issues for further proceedings consistent with this opinion. In all other respects, the judgment of the trial court is AFFIRMED.

SO ORDERED this 30 day of December, 2011.

/s/
ALEXANDRO C. CASTRO
Acting Chief Justice

/s/
EDWARD MANIBUSAN
Justice Pro Tem