IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

RAYMOND L. KYSAR, PATSY SUE KYSAR, and THE KYSAR FAMILY TRUST,

Plaintiffs/Appellants,

v.

BP AMERICA PRODUCTION COMPANY, f/k/a AMOCO PRODUCTION COMPANY,

Defendant/Appellee,

and

WILLIAM KARL JOHNSON, et al.,

Defendants.

Court of Appeals No. 29,756
District Ct. No. CV-2005-824-1

ANSWER BRIEF OF APPELLEE

On Appeal from the Eleventh Judicial District Court
County of San Juan, State of New Mexico
The Honorable Robert A. Aragon

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Nature of the Case

Before trial began, the district court decided the parties' respective dispositive and evidentiary motions. After the jury was selected, but before opening statements, the court granted a motion made by Defendant BP America Production Company ("BP"), and thereby prohibited Plaintiffs' counsel from discussing or reading, *during his opening statement*, from appellate opinions issued in the course of an earlier dispute between the parties. Displeased with these interlocutory rulings, Plaintiffs refused to move forward with their case. Plaintiffs' counsel's statement that he had no evidence to present prompted BP's counsel to propose a directed verdict in BP's favor. Faced with what it described as an "unprecedented dilemma," the court did not know whether it could direct a verdict before it had heard any evidence at all. At that point, the parties stipulated to the directed verdict.

While the Stipulated Order Granting Directed Verdict in Favor of Defendant (the "Stipulated Order") was entered without prejudice to the parties' rights to appeal, neither the parties' stipulation, nor the Stipulated Order itself, determined what those rights were. Rather, the parties' stipulation preserved whatever rights to appeal the parties were afforded by law. The parties had no power to deprive the district court of its power to revisit its interlocutory rulings, to thereby create

appellate rights that did not otherwise exist, or to bestow upon this Court jurisdiction that it does not otherwise have. *See Coursen v. A.H. Robins Co., Inc.*, 764 F.2d 1329, 1342 (9th Cir. 1985); *Snyder v. Celina Mut. Ins. Co.*, No. 10-05-20, 2006 WL 3598393, *2 (Ohio Ct. App. Dec. 11, 2006).

BP disagrees with Plaintiffs about the scope and effect of the stipulation. The parties agreed that the directed verdict should be entered without prejudice to their appellate rights, but they did not agree, or try to agree, on the nature or scope of the appellate rights they had. Case law suggests that Plaintiffs cannot appeal from a directed verdict entered with their consent. Ultimately, this Court, rather than the parties, must determine the contours of Plaintiffs' appellate rights.

If Plaintiffs' consent does not bar their appeal, this Court must determine which claims Plaintiffs have waived. Plaintiffs originally brought twelve claims; eleven were pending when trial commenced. The preliminary rulings that caused Plaintiffs' shutdown affected only the trespass-related claims. BP submits that Plaintiffs waived the non-affected claims when they refused to proceed. Any other conclusion would allow Plaintiffs to circumvent the rule against interlocutory appeals.

Even if Plaintiffs' consent does not bar their appeal, and even if they did not waive their non-trespass claims, there is no basis for reversal, because the district

court's rulings—which were interlocutory and preliminary in any event—were correct.

Summary of Relevant Facts

BP leases the minerals underlying Plaintiffs' property (the "Kysar Ranch"), pursuant to two 1948 oil and gas leases. In one lease, C.H. Nye acquired the oil and gas underlying portions of Sections 22, 27 and 28 in San Juan County, New Mexico from Jessie Maude Keys (the "Keys Lease"). RP 623-28. In the other, Nye leased the oil and gas underlying portions of Sections 28, 33 and 34 from Onofre and Alvina Jaquez (the "Jaquez Lease"). *Id.* 629-31. The Jaquez Lease covers the southern portion of the Kysar Ranch, and the Keys Lease covers the northern portion. *Id.* 584. As a result of a series of assignments, BP is now the lessee under both leases. *Id.*

Mr. and Mrs. Jaquez and Keys also owned the surface estates associated with these mineral leases. In 1949, Mr. and Mrs. Jaquez conveyed their surface estate, together with half of the underlying oil, gas and mineral rights, to Keys. *Id.* 632-34. In 1956, Keys deeded the unified surface estate to Henry and Georgia Knowlton, reserving the entire mineral estate. *Id.* 635-37.

Thus, once Keys conveyed to the Knowltons, all of the minerals had been severed from the surface estate. Half of the Jaquez mineral estate had been severed when Mr. and Mrs. Jaquez reserved it from the conveyance to Keys; the other half

of the Jaquez mineral estate, along with the Keys mineral estate, were severed when Keys reserved them from her conveyance to the Knowltons. Access to the minerals was not an issue, however, because when Keys conveyed the surface to the Knowltons, she expressly reserved an express right of ingress and egress to access the oil, gas and other minerals. *Id.*

The surface estate that the Knowltons acquired from Keys has become the Kysar Ranch. The Knowltons sold to the Kysars in 1983, subject to all prior reservations of oil, gas and other minerals. *Id.* 638. The Kysars have owned the surface since 1983. *Id.* 264.

Meanwhile, after they leased the oil and gas to Nye, Keys and Mr. and Mrs. Jaquez conveyed their mineral estates to various successors, assigns and heirs. *Id.* 639-53. Those successors, assigns and heirs are the current mineral owners and the lessors under the Keys and Jaquez Leases.

BP currently operates six wells on the Kysar Ranch. *Id.* 398. There are only two roads that access these wells: the "Bridge Road," which crosses that portion of the Kysar Ranch held under the Keys Lease, and the "Back Gate Road," which starts at the southeast corner of the Kysar Ranch and travels north, first crossing the Jaquez Lease and then traveling up through the Keys Lease. *Id.* 265. Since the 1980's, the Kysars have asked that BP, its predecessors, and their agents refrain from using the Bridge Road, and that all wells be accessed through the Back Gate

Road. *Id.* 268; 398. BP and its predecessors have accommodated this request and, since the 1980's, they have used the Back Gate Road to operate wells on the Keys Lease as well as the Jaquez Lease. *Id.* 396. Until this litigation, the Kysars never contested the use of their surface for that purpose. *Id.*

In 1992, BP's predecessor, Amoco, approached the Kysars about placing a new well ("Sullivan E Well") within a 36.84-acre portion of the Kysar Ranch that was covered by the Keys Lease as well as a 1992 Communitization Agreement. *Id.* 40-41. The Kysars, believing that the well might hinder their cultivation of alfalfa, replied that they did not want the Sullivan E Well on their land. *Id.* 41. To accommodate the Kysars, Amoco drilled the well on adjacent BLM land, which is also subject to the 1992 Communitization Agreement. *Id.*

Like the wells on the Kysar Ranch, the Sullivan E Well can only be accessed by the Bridge Road or the Back Gate Road. *Id.* Consistent with the Kysars' directives and historical practice, Amoco used the Back Gate Road to access the Sullivan E Well. *Id.*

The Kysars have been unhappy about the wells on their ranch since they acquired it and, since 1983, have raised a number of issues with Amoco and BP. Most of those issues were resolved in January of 2000, when the Kysars and Amoco entered into a global settlement agreement (the "2000 Settlement Agreement"). In that agreement, both sides agreed to release each other from all

known and unknown claims they had or may have had against each other, specifically including all claims that Amoco's operations had damaged the Kysar Ranch, constituted an unreasonable use of the surface, or otherwise constituted trespass. *Id.* 1531-33. The only claims excluded from this settlement were those associated with Amoco's use of the Back Gate Road to access the Sullivan E Well, which was outside, but adjacent to, the Kysar Ranch. *Id.* 1532.

The Kysars then sued Amoco on that limited issue: whether Amoco had a right to cross the Kysar Ranch in order to gain access to a well located outside the Kysar Ranch, on property that was communitized with a portion of the Kysar Ranch. *Id.* 41. The federal district court granted Amoco's motion for summary judgment in that case. On appeal, the Tenth Circuit certified two questions to the New Mexico Supreme Court: (1) whether an oil and gas lessee has the right to access the surface estate of the unitized portion of a lease in order to reach other lands also unitized; and (2) whether an oil and gas lessee has the right to access the surface estate of the non-unitized portion of a lease in order to reach other unitized lands. *Id.* 45.

In *Kysar v. Amoco Prod. Co.*, 2004-NMSC-025, ¶¶ 39, 46, 135 N.M. 767, 93 P.3d 1272, the New Mexico Supreme Court held that, based on the terms of the 1992 Communitization Agreement, Amoco had a right to cross the communitized portion of the Kysar Ranch, but no right to cross the non-communitized portion.

RP 33, 35. Consistent with these holdings, in *Kysar v. Amoco Prod. Co.*, 379 F.3d 1150, 1157 (10th Cir. 2004), the Tenth Circuit affirmed in part and reversed in part the district court's grant of summary judgment. RP 44. In its remand instructions, the Tenth Circuit mandated that "any calculation of damages (as well as the determination of whether the tort or contract claims lie at all) in this case must take into account the Kysars' request and Amoco's agreement not to locate the well on the Kysars' alfalfa field, but rather to use existing roads to other wells as far as possible." *Id.*

The parties resolved their dispute over access to the Sullivan E Well in the spring of 2005, and memorialized their resolution in a confidential agreement (the "2005 Settlement Agreement"). RP 5. Thereafter, BP sought to discuss with the Kysars mutually agreeable locations for future wells on the Kysar Ranch. *Id.* 384-85, 380-81. The Kysars failed to respond to BP's requests and, instead, on June 20, 2005, filed this action, asserting, *for the first time*, that BP could no longer use the Back Gate Road to access wells on the Keys Lease, and that BP's continuing efforts to access its wells *located on the Kysar Ranch* constitute a trespass. *Id.* 6, 11-12.[1]

Plaintiffs' Complaint alleged twelve separate causes of action against BP: (1) quiet title; (2) declaratory relief; (3) trespass and ejectment; (4) violation of

[1] In addition to BP, Plaintiffs named, but never served, several additional defendants, whose names still appear in the caption of this matter.

court rulings and contempt; (5) breach of contract; (6) breach of good faith and fair dealing/nondisclosure; (7) unreasonable and excessive use of surface; (8) unjust enrichment; (9) property damage; (10) nuisance; (11) failure to make adequate provisions for reclamation and restoration; and (12) injunctive relief. *Id.* 9-18. As Plaintiffs acknowledge, the primary issue is whether BP is trespassing when it crosses the surface of the Jaquez Lease to reach its wells located on the Keys Lease. BIC 1. In the court below, the parties each filed various motions for summary judgment and motions *in limine*. The court granted BP's motion for summary judgment on Plaintiffs' quiet title claim, and held that BP was the current lessee under the Keys and Jaquez Leases and that, under each lease, BP has "the right to enter upon and use as much of the surface overlying that lease as is reasonably necessary to develop and produce the oil and gas covered by said lease." *Id.* 1599-600. The court preserved eleven claims for trial, including Plaintiffs' principal claim that BP's use of the Back Gate Road to access wells on the Keys Lease constitutes a trespass.

Trial commenced on May 18, 2009. The next day, after the jury was chosen, Plaintiffs' counsel requested "some guidance for opening statement." May 19, 2009 Tr. ("Tr.") 3:2-3. He told the court that he intended to publish to the jury, during his opening statement, blown-up excerpts from the opinions issued by the Tenth Circuit and the New Mexico Supreme Court in connection with the parties'

earlier dispute. *Id.* 3:14-22; 16:8-11. BP's counsel objected, arguing that the prior opinions were irrelevant, and that it was improper to publish the law to the jury during opening statements. *Id.* 14:18-21; 15:9-12. The court agreed, and prohibited Plaintiffs' counsel "from making any display of those placards and as well as any mention of them or their content to the jury during the course of opening statement." *Id.* 29:19-30:6.

Plaintiffs' counsel then asked the court to revisit its previous ruling excluding evidence of the 2005 Settlement Agreement. *Id.* 30:15-19. The court declined to reverse its ruling. *Id.* 46:8-12. Plaintiffs' counsel then inexplicably requested permission to tell the jury about the 2005 Settlement Agreement. *Id.* 46:24-47:15. The Court denied this request. *Id.* 48:1-4.

When the court asked if the parties were ready to proceed, *id.* 48:5, Plaintiffs' counsel indicated that he could not give "an opening statement of any kind that's intelligible." *Id.* 48:11-13. He asked the court to certify an interlocutory appeal. *Id.* 48:18-19. When the court asked whether this request was emanating from the rulings relating to his opening statement, Plaintiffs' counsel responded, "No, it's the culmination of all the rulings that have been made over the last two years which leave me with essentially no case and no ability to present it." *Id.* 51:25-52:3. However, when the court asked why he had not sought an interlocutory appeal *before* commencing trial and selecting a jury, Plaintiffs'

counsel responded that it was because the court had not ruled until that day that he could not discuss the previous decisions *in his opening statement*. *Id.* 52:8-12.

BP's counsel argued that there was no justification for certifying an interlocutory appeal, because most of the issues raised by Plaintiffs' counsel had not yet been ruled on by the court, including the meaning of the previous *Kysar* opinions. *Id.* 63:22-64:3. Then, in light of Plaintiffs' counsel's statement that his case was based entirely on the two *Kysar* decisions, BP's counsel moved for a directed verdict. *Id.* 63:19-64:19. Plaintiffs' counsel agreed that this suggestion was "a good one." *Id.* 65:11.

When Plaintiffs' counsel confirmed that "97 percent" of his case rested on the two prior *Kysar* decisions, *id.* 65:18-19, the court clarified that its ruling on the *Kysar* opinions was *not* an evidentiary ruling. *Id.* 65:24. It noted that the relevance of the earlier *Kysar* opinions was not yet clear, and explained that the court was *not* prohibiting Plaintiffs from seeking to introduce them into evidence. *Id.* 66:1-4. Rather, it was simply prohibiting Plaintiffs' counsel from mentioning the earlier opinions *during his opening statement*. *Id.* 65:21-66:4, 13-16.

Plaintiffs' counsel nonetheless insisted that prohibiting him from mentioning the previous decisions in opening statement "guts our case." *Id.* 67:1. The court reiterated that the decisions were unmentionable in opening statement, but stated, "if you have evidence that you wish to present that renders those opinions

admissible, then you can seek to do that." *Id.* 67:2-4, 10-12. The court further stated that it could not *at that point* definitively determine what evidence Plaintiffs would be able to present during trial, as this would require making "evidentiary rulings in a vacuum." *Id.* 67:19. Despite the court's repeated statements that it was only excluding the prior *Kysar* opinions from opening statements, and that it was not deciding whether Plaintiffs could admit *evidence* of those decisions *during trial*, Plaintiffs' counsel nonetheless insisted that he had no case to present, and agreed to "put[] [his] neck on the block for a directed verdict." *Id.* 72:17-19.

The court then noted that Plaintiffs had posed an "unprecedented . . . dilemma." *Id.* 71:14-15. Acknowledging that a stipulated directed verdict was "creative," BP's counsel nonetheless argued that Plaintiffs' refusal to proceed left little choice. *Id.* 69:25-70:6. Plaintiffs' counsel agreed, and the parties' counsel jointly prepared a stipulated order, which the court accepted. *Id.* 76:15-17.

The Stipulated Order notes that "each party reserved the right to challenge the Court's [evidentiary] rulings on appeal." RP 1969. The Stipulated Order further provides that, in light of the parties' stipulation, Plaintiffs' claims should be dismissed and Defendant is entitled to judgment as a matter of law. *Id.* The Stipulated Order thus enters judgment in favor of BP and against Plaintiffs on *all issues* raised by Plaintiffs' complaint, and dismisses Plaintiffs' claims, *with prejudice*, and without leave to amend. *Id.* 1969-70.

On appeal, Plaintiffs challenge the order granting partial summary judgment to BP on Plaintiffs' quiet title claim, the prohibition on discussion of the earlier *Kysar* opinions during opening statement, and the *in limine* rulings: prohibiting Plaintiffs from offering evidence or testimony in support of their claim that the consent Kysar gave to Amoco/BP to use the Back Gate Road for access to wells on the Kysar Ranch was fraudulently or mistakenly induced, *id.* 1691-92; prohibiting Plaintiffs from testifying that BP has withheld any information or documents in this matter, *id.* 1979-80; prohibiting Plaintiffs from offering evidence in support of any claim for damages for any alleged trespass by Amoco or BP, occurring prior to June 20, 2005, *id.* 1695-96; prohibiting Plaintiffs from introducing any evidence concerning any payments they have received for access to the Kysar Ranch, *id.* 2009-10; and prohibiting evidence concerning the 2005 Settlement Agreement, *id.* 2003-04.

ARGUMENT

I. Plaintiffs Waived the Right to Appeal the Directed Verdict and the Interlocutory Rulings Merged Therein.

A. A Judgment Entered on Consent is Not Appealable.

"[A] party cannot appeal a judgment entered with its consent." *Slaven v. Amer. Trading Transp. Co., Inc.*, 146 F.3d 1066, 1070 (9th Cir. 1998) (citing *Nashville, C. & St. L. Ry. Co. v. United States*, 113 U.S. 261, 266 (1885) ("[A] decree, which appears by the record to have been rendered by consent, is always

affirmed, without considering the merits of the cause.")). "Relief on appeal from a consent judgment is available only on a showing of either lack of actual consent, fraud in obtaining consent, lack of [] jurisdiction, or mistake." *Coughlin v. Regan*, 768 F.2d 468, 470 (1st Cir. 1985). Further, interlocutory rulings merge into the final judgment of the court, and if the final judgment is not appealable, the interlocutory rulings are equally non-appealable. *See Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 527 (10th Cir. 1992) (disallowing appeal from partial summary judgment granted prior to consent judgment on basis that partial summary judgment was interlocutory order that merged with consent judgment).

The New Mexico Supreme Court has followed this rule. *See Gallup Trading Co. v. Michaels*, 86 N.M. 304, 523 P.2d 548 (1974); *see also Palmer v. Palmer*, 2006-NMCA-112, ¶ 22, 140 N.M. 383, 142 P.3d 971 (citing *Gallup Trading* in support of holding that appellant's consent to summary judgment was "dispositive of this appeal.") In *Gallup Trading*, the court stated the "general rule" that:

> A judgment by consent is in effect an admission by the parties that the decree is a just determination of their rights on the real facts of the case had they been found. It is ordinarily absolutely conclusive[] between the parties, and cannot be appealed from or reviewed on a writ of error.

86 N.M. at 305, 523 P.2d at 549 (quoting *Shaw v. Spelke*, 147 A. 675, 677 (1929)). Applying this rule, the court concluded that, "when appellant consented to the

entry of summary judgment against him, . . . he thereby acquiesced in the judgment and lost his right to appeal." *Gallup Trading*, 86 N.M. at 305, 523 P.2d at 549.

B. The Lack of Consent Exception to Non-Reviewability

In *Rancho Del Villacito Condos., Inc. v. Weisfeld*, 121 N.M. 52, 908 P.2d 745 (1995), the New Mexico Supreme Court discussed, but did not decide, whether to recognize a "lack of consent" exception to the strict rule of non-reviewability set forth in *Gallup Trading*. The plaintiff brought a malpractice claim against his former attorney, who had also served as an arbitrator in a dispute between the plaintiff and a third party. In making his malpractice claim, the plaintiff sought to make the defendant's arbitration decision – finding that waiver and estoppel had occurred – binding on the defendant for purposes of determining whether his earlier advice to the plaintiff – that his acts did not constitute waiver – constituted malpractice. The trial court refused to give the arbitration agreement binding effect, and would not enter the arbitrator's specific findings into evidence. Believing he could not present a *prima facie* case of malpractice without a ruling that the arbitration decision findings of waiver and estoppel were admissible and binding on the defendant, the plaintiff "declined to present a case and consented to a dismissal with prejudice in order to bring an appeal from a final judgment." *Id.* at 54, 908 P.2d at 747.

Stating that judgments by consent are generally not appealable, *id.* at 54-55, 908 P.2d at 747-48, the Court nonetheless noted that some courts have recognized a "lack of consent" exception "when an adverse ruling by the trial court would effectively *preclude* recovery by the plaintiff or is *completely dispositive* of the case." *Id.* at 55, 908 P.2d at 748 (emphasis added). The Court discussed *Hense v. G.D. Searle & Co.*, 452 N.W.2d 440 (Iowa 1990), wherein the Iowa Supreme Court allowed review of a consent judgment when "the plaintiff's consent [was] not truly voluntary when viewed in the light of prior rulings which [had] precluded recovery." *Weisfeld*, 121 N.M. at 55, 908 P.2d at 748 (quoting *Hense*, 452 N.W.2d at 444).[2] In the end, the Court concluded that it "need not decide whether to recognize a 'lack of consent' exception," because the trial court's rulings "were not completely dispositive of the cause of action" and did not "preclude recovery by [the plaintiff], but rather "merely foreclosed one possible basis for recovery." *Weisfeld*, 121 N.M. at 55-56, 908 P.2d at 748-49. The Court explained that,

[2] Courts that have adopted a "lack of consent" exception make clear that, in order for this exception to apply, the trial court's interlocutory rulings must leave the appellant with *no* case to present. *See, e.g.*, *Hense*, 452 N.W.2d at 445 ("Plaintiff cannot reasonably claim that her acquiescence in the subsequent summary judgment . . . was not truly voluntary in the sense that the court's denial of a seventh continuance – right or wrong – made her defeat inevitable."); *Taylor v. Baker*, 566 P.2d 884, 887 (Or. 1977) (in determining whether to allow an appeal, court must distinguish between "those cases where the summary judgment determines the action from those where the plaintiff merely seeks premature appellate review of an interlocutory partial summary judgment order"). Clearly, an interlocutory decision relating solely to the contents of opening statements has no such effect.

although the plaintiff "attempted to conclusively establish Weisfeld's negligence through the novel application of collateral estoppel," once the trial court ruled against this approach, the plaintiff "still could have presented a traditional case of malpractice, calling expert witnesses to testify that Weisfeld's advice, although not technically inaccurate, fell below the standard of care and resulted in damage to Kruskal." *Id.* at 56, 908 P.2d at 749. Accordingly, the Court held that the plaintiff was "not entitled to appeal from his voluntary dismissal of his malpractice claim." *Id.*

C. Under This Precedent, Plaintiffs Waived Any Right to Appeal.

By stipulating to entry of a directed verdict against them, Plaintiffs waived their right to appeal the directed verdict and the court's interlocutory rulings. At the very least, Plaintiffs waived their right to a trial on the claims as to which the interlocutory rulings were not specifically relevant. Under the strict appellate waiver rule set forth in *Gallup Trading*, the Stipulated Order is "absolutely conclusive" between the parties, and Plaintiffs are foreclosed from appealing either the Stipulated Order or the interlocutory rulings, which were merged therein. 86 N.M. at 305, 523 P.2d at 549.

The lack of consent exception discussed in *Weisfeld,* if adopted in New Mexico, would not apply in this case. Under that exception, Plaintiffs would be entitled to appeal the directed verdict only if the court's rulings were completely

dispositive of their claims, and only if those rulings completely precluded any recovery by Plaintiffs on any of their claims. Such is not the situation here. Although Plaintiffs' counsel argued that he could not present a case because of "a culmination" of the court's rulings, when pressed, it was clear that he felt he could not proceed essentially because of the ruling that he could not discuss the previous *Kysar* opinions *in his opening statement.* Tr. 52:8-12. As the court repeatedly told Plaintiffs' counsel, that ruling was *not* an evidentiary ruling, it was not intended to prohibit him from attempting to show the relevance of the prior opinions *at trial*, and, if relevance was demonstrated, the opinions might have been admitted. *Id.* 65:21-66:1-4, 13-16.

The court's ruling did nothing but set boundaries for opening statements. It had no bearing on Plaintiffs' evidence, and it certainly did not *dispose* of their case. As in *Weisfeld*, Plaintiffs' counsel merely perceived that he could not *successfully* present his case without referring to the *Kysar* opinions in his opening statement. But as in *Weisfeld*, Plaintiffs still could have presented a case, and thus, the ruling did not entitle them to appeal from the stipulated directed verdict.

Similarly, the order granting BP's motion for partial summary judgment was dispositive only as to one of the twelve claims brought by Plaintiffs, namely, their quiet title claim. The court determined only that BP had the right to enter upon the Keys Lease to access wells on the Keys Lease itself, and the right to enter upon the

Jaquez Lease to access wells on the Jaquez Lease itself. RP 1599-600. Importantly, the court *did not* reach the issue that Plaintiffs admit is central to this lawsuit: whether BP has the right to enter upon the Jaquez Lease to reach its wells located on the Keys Lease. The court's order neither disposed of nor precluded Plaintiffs' primary claims that BP is trespassing when it crosses the Jaquez Lease to reach its wells on the Keys Lease. Like the ruling relating to opening statements, the partial summary judgment order thus affords no right to appeal from the stipulated directed verdict as to those claims.[3]

None of the other orders prevented Plaintiffs from proceeding with the trial. The court *denied* BP's summary judgment motion on Plaintiffs' claim for breach of the duty of good faith and fair dealing. *Id.* 1598. And while the court prohibited Plaintiffs from arguing that BP has withheld documents in this matter and from offering evidence that Kysar's consent to BP to use the Back Gate Road was fraudulently or mistakenly induced, those preliminary rulings, at most, precluded Plaintiffs only from proving their claim by these specific theories. In light of the court's denial of BP's motion for summary judgment, the *in limine* rulings clearly left Plaintiffs free to pursue any and all other theories to prove their

[3] Neither were Plaintiffs prevented from trying these claims by the ruling excluding evidence of any payments Plaintiffs have received for access to the Kysar Ranch. The court did not impede or limit Plaintiffs' right to present evidence on the proper measurement of damages, diminution in market value. Indeed, Plaintiffs could have tried their trespass claims, even without any evidence of damages, and could have requested, in addition to injunctive relief, nominal damages.

breach of duty claim. Under these circumstances, Plaintiffs have waived their right to a trial on this claim by consenting to the directed verdict.

The remainder of the rulings challenged by Plaintiffs were *in limine* and thus, by their nature, *preliminary*. The term "*in limine*" "has been defined as '[o]n or at the threshold; at the very beginning; preliminarily.'" *Luce v. United States*, 469 U.S. 38, 41 n.2 (1984) (quoting Black's Law Dictionary 708 (5th ed. 1979)). "A ruling on the threshold of trial does not preclude the court changing its ruling based on other developments during trial." *Thweatt v. Ontko*, 814 F.2d 1466, 1470 (10th Cir. 1987). Indeed, "the district court may change its ruling at any time for whatever reason it deems appropriate." *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995). Moreover, a motion *in limine* itself is no more than "a request for guidance by the court regarding an evidentiary question, which the court may provide at its discretion to aid the parties in formulating trial strategy." *Id.* at 146 (citation omitted). "A ruling on a motion *in limine* is therefore essentially an advisory opinion by the trial court." *United States v. Luce*, 713 F.2d 1236, 1239 (6th Cir. 1983), *aff'd*, 469 U.S. 38 (1984).

Under these principles, the *in limine* rulings cannot be deemed to have definitively precluded the admission of any evidence offered by Plaintiffs, or to have disposed of Plaintiffs' entire case. Indeed, as the court below stated, it was not making any definitive rulings as to the admissibility of evidence, as such

rulings could not be made in a vacuum, but rather would have to await the concrete factual context of trial. Tr. 67:19. The *in limine* rulings thus do not provide a basis for Plaintiffs' appeal of the stipulated directed verdict.

Without question, none of the challenged rulings were dispositive of, or precluded recovery on, the claims as to which they did not apply. Specifically, the rulings had no impact at all on Plaintiffs' ability to proceed with their claims for trespass from June 20, 2005 to the present, injunctive relief, property damage, excessive use, nuisance, or failure to take proper reclamation measures. Because the rulings had no impact on these claims, Plaintiffs cannot argue that the rulings left them with *nothing* to present on these claims. Plaintiffs thus abandoned these claims when they stipulated to the directed verdict and agreed that they were unable to present sufficient evidence to establish *any* of their claims.

Indeed, "[t]o hold otherwise would be to allow plaintiffs to bring piecemeal appeals and to test alternative theories in the appellate courts at the expense of the defendant." *Weisfeld*, 121 N.M. at 56, 908 P.2d at 749; *see also Taylor*, 566 P.2d at 887 ("[I]f litigants were permitted to seek appellate review of one portion of their claim while holding other theories in abeyance, to be refiled in the event of an adverse appellate ruling, . . . [the] policy of not allowing piecemeal appeals . . . would be defeated."). Any other conclusion would improperly permit Plaintiffs to use a stipulated directed verdict as a substitute for an interlocutory appeal. This

would "circumvent[] the normal channels of civil procedure and, in effect, . . . convert what is a permissive appeal into a final appeal as of right." *Matter of Guardianship of S.P.B.*, 458 N.W.2d 391, 1990 WL 100709, *3 (Wis. Ct. App. May 16, 1990). Allowing any error in interlocutory rulings to result in a remand for trial on *all* of Plaintiffs' claims would simply be "contrary to the policy behind the final judgment rule." *Id.*

D. The Parties' Reservation of the Right to Appeal Is Irrelevant.

The fact that the parties' stipulation preserved their rights to appeal does not change this analysis. Indeed, the plaintiff in *Weisfeld*, just as Plaintiffs here, had consented to a dismissal with prejudice for the sole purpose of bringing an appeal from a final judgment, and thus fully intended to preserve his right to appeal. The Court nonetheless held that the plaintiff was not entitled to appeal from the voluntary dismissal of his claim. Other courts have specifically held that, even where the parties have expressly reserved the right to appeal interlocutory orders, any appeal is foreclosed by consent to entry of an adverse judgment.

For example, in *Snyder*, after the trial court granted the plaintiffs' motion *in limine* precluding the defendant from introducing certain documents and deposition testimony, the parties entered into an agreed judgment entry, which specifically indicated that the defendant preserved its "legal issues, contentions and evidence" for appeal. 2006 WL 3598383, at *1. On appeal, the court dismissed for lack of

jurisdiction, explaining that, "[a]lthough the parties entered into the agreed judgment entry at issue to expedite this appeal, and the agreed judgment entry was no doubt well intended, the parties cannot agree to give this court jurisdiction that it does not otherwise possess." *Id.* at *2.

Similarly, in *Rauda v. Oregon Roses, Inc.*, after denying the defendant's motion to dismiss, the court entered a stipulated judgment that resolved all of the plaintiffs' claims, but reserved to the defendant a right to appeal denial of its motion to dismiss. 986 P.2d 1157, 1158 (Or. 1999). The court of appeals affirmed, and the defendant petitioned for review. The Supreme Court of Oregon held that the stipulated judgment was not appealable and, accordingly, dismissed the appeal, explaining that "a stipulated judgment does not become appealable simply because it contains words that purport to preserve one party's right to appeal or assign error to some interlocutory ruling by the trial court." *Id.* at 1160. The court further explained that "a party cannot attempt to create, by agreement, the right to appeal from a stipulated judgment." *Id.* Because the stipulated judgment was not appealable, the parties' attempt to reserve for the defendant a right to appeal for the purpose of assigning error to the denial of the motion to dismiss was "of no legal effect." *Id.* The court noted that such reservation amounted to an "attempt[] to preserve a right of appeal that defendant never possessed." *Id.* (citation omitted).

Additionally, in *Gillum v. Republic Health Corp.*, 778 S.W.2d 558 (Tex. Ct. App. 1989), the trial court had granted summary judgment on the plaintiff's claims against the corporate defendant, Republic. Because the plaintiff believed that liability of the *individual* defendants was dependent upon the same underlying issues raised by the evidence submitted in support of, and in opposition to, the summary judgment entered in favor of Republic, all parties to the suit agreed that a final judgment "be entered in order that litigation can become final for the purposes of appeal." *Id.* at 562. On appeal, the plaintiff argued that the agreement regarding the final judgment was, in fact, a contract, and the defendants should be required to abide by the contract as expressed in the final judgment and allow the plaintiff to appeal the judgment rendered in favor of the individual defendants. *Id.* The court rejected the plaintiff's contract argument, explaining:

> [T]he contractual obligation Gillum now seeks to enforce is an agreement to appeal, or attack, the judgment, and the rule precluding a party from appealing from an agreed judgment applies regardless of whether the language contained in the agreed judgment purports to preserve any errors or a right to appeal.

Id. The parties' agreement thus was not binding on the appellate court and, consequently, the court held that the plaintiff could not appeal the final judgment in favor of the individual defendants. *Id.* at 562-63.

Under this precedent, the parties' stipulation in this case does not rescue Plaintiffs from their consent to a directed verdict against them on all of their

claims.[4] Plaintiffs' stipulation to a directed verdict forecloses their right to challenge the court's interlocutory rulings on appeal. Accordingly, this Court should find that Plaintiffs have waived their right to appeal the directed verdict and the rulings merged therein, or, at the very least, that Plaintiffs have waived their right to a trial on the claims to which the rulings are not specifically relevant.

II. Remand For Trial of Plaintiffs' Claims Is Unwarranted Because None of the Court's Rulings Constitutes Error.

Even if this Court finds that Plaintiffs have not waived the right to appeal, there is no basis for granting the relief Plaintiffs request. None of the rulings challenged on this appeal were made in error. Accordingly, there is no basis for a reversal of any of those rulings, or of the directed verdict.

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[4] Some courts have suggested that an appeal might be permitted following an *express* reservation of the right to appeal *specific rulings* that preceded the entry of a judgment by consent. For instance, in *Love v. Turlington*, 733 F.2d 1562 (11th Cir. 1984), the plaintiff settled her individual claims following the court's denial of class certification. Because the plaintiff had expressly reserved the right to appeal the certification order when she agreed to dismiss her individual claims, her appeal was allowed. *Id.* at 1564. Other courts have paid lip service to this "express reservation" exception, while finding that the appellant had failed to make such a reservation. *See, e.g. Coughlin*, 768 F.2d at 470; *Shores v. Sklar*, 885 F.2d 760, 764 n.7 (11th Cir. 1989). Even under this exception, a reservation is not valid unless it specifies the pretrial rulings to be appealed, because, as the court pointed out in *Shores*, "all interlocutory orders are merged into the final judgment." *Id.* at 763.

A. The District Court Did Not Misapply Precedent, and Properly Excluded Evidence of the Previous Litigation Between the Parties.

Plaintiffs argue that the court below failed to properly apply the decisions issued by the Tenth Circuit and the New Mexico Supreme Court in the previous litigation between the parties. Specifically, Plaintiffs assert that the court's partial summary judgment order somehow violated the earlier *Kysar* opinions, and that the court improperly excluded evidence of those opinions. BIC 14. The appeal from the partial summary judgment order presents a question of law, and is subject to *de novo* review by this Court. *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971. This Court reviews the exclusion of evidence of the *Kysar* opinions for an abuse of discretion, and reviews any underlying legal issues *de novo*. *DeWitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 13, 146 N.M. 453, 212 P.3d 341.[5]

1. The Earlier *Kysar* Opinions Are Not Dispositive.

Plaintiffs have brought new and different claims in this case that were not raised, much less addressed, in the earlier litigation between the parties. The sole issue addressed in the earlier litigation was whether Amoco had a right to cross over the Kysar Ranch via the Back Gate Road and/or the Bridge Road in order to gain access to the Sullivan E Well located *outside of the ranch*, on adjacent BLM

[5] This standard of review is also applicable to all of the court's evidentiary rulings addressed in the following sections of this Answer Brief.

land. As the New Mexico Supreme Court specifically noted, in that earlier litigation, "[t]he Kysars [were] not contesting Amoco's use of these roads to access the wells located on their ranch." *Kysar*, 2004-NMSC-025, ¶ 8 (RP 23). By contrast, this is precisely what the Kysars are contesting here: BP's use of the Back Gate Road to access wells located on the Keys Lease portion *of their ranch.* Unlike in the previous litigation, here, BP has been crossing portions of the Kysar Ranch to access wells located *on the Kysar Ranch*, not on someone else's property. This case thus involves the sole issue of BP's access to its wells located on the Kysar Ranch, which indisputably was not addressed by either court in the previous litigation. Indeed, Plaintiffs themselves had admitted that, until this litigation, they never contested the use of their surface by BP for the purpose of accessing its wells located *on the Kysar Ranch.* RP 396.

Moreover, the decisions in the previous litigation were based on the legal rights and relationships created by the 1992 Communitization Agreement. The Tenth Circuit divided the issue of BP's right to cross the Kysar Ranch to access the Sullivan E Well into two questions, certified to the New Mexico Supreme Court: (1) whether an oil and gas lessee has the right to access the surface estate of the unitized portion of a lease in order to reach other lands also unitized; and (2) whether an oil and gas lessee has the right to access the surface estate of the non-unitized portion of a lease in order to reach other unitized lands. *Kysar*, 379 F.3d

at 1154-55 (RP 45). The New Mexico Supreme Court answered the first question in the affirmative, and expressly based its answer on the unitization agreement itself and the law regarding such agreements. *Kysar*, 2004-NMSC-025, ¶¶ 29-39 (RP 30-33). The Court answered the second question in the negative, based on a provision in the mineral lease that stated that any future communitization agreement "shall not have the effect of continuing this lease in force insofar as it covers the land not included within such unit." *Id.* ¶¶ 40-51 (RP 33-37). In essence, the Court held that BP could not use the Back Gate Road to reach the Sullivan E Well located on adjacent BLM land, because the access route was not within the boundaries of the communitized area.

In the instant case, BP's right to be on the Kysar Ranch is not dependent on any communitization agreement. BP's right to cross portions of the Kysar Ranch to access its wells located on the Kysar Ranch derives from such things as the oil and gas leases themselves, the deeds and reservations in the chains of title, as well as the parties' statements and course of conduct. *See id.* ¶ 24 (RP 29) (stating that New Mexico law is consistent with the general principle of oil and gas law that "when an oil and gas lease grants to the lessee a particular tract of land for the purpose of exploring, drilling, mining and producing oil and gas, the lessee gains by implication the right to enter upon and use as much of the surface as may be

necessary for the lessee's operations."). The New Mexico Supreme Court characterized this right as "an implied easement by necessity." *Id.* ¶ 25 (RP 29).

Because the relevant facts and legal issues in the previous litigation are different from those in this case, the previous litigation has no preclusive effect. The doctrine of *res judicata* does not apply, because this action is not identical to the previous litigation. *Ullrich v. Blanchard*, 2007-NMCA-145, ¶ 15, 142 N.M. 835, 171 P.3d 774. The doctrine of collateral estoppel is equally inapplicable, as neither the facts nor the issues raised herein were actually litigated and necessarily determined in the earlier case. *Id.* ¶ 19. The issue in the previous litigation related to rights under a communitization agreement to cross a lease, which was only partially included in the communitized acreage, in order to access an off-lease well. The instant case involves neither an off-lease well, nor communitization. Moreover, because this case is not in the course of the same litigation as that in which the *Kysar* opinions were issued, the law of the case doctrine does not apply. *State ex rel. King v. UU Bar Ranch Ltd. P'ship*, 2009-NMSC-010, ¶ 21, 145 N.M. 769, 205 P.3d 816 (holding that appellate decisions on issues of law, made at one stage of a lawsuit, are "binding on subsequent trial courts as well as subsequent appeals courts *during the course of that litigation.*") (emphasis added).

2. The Grant of Partial Summary Judgment Was Proper.

In granting partial summary judgment to BP on Plaintiffs' quiet title claim, the court reached no determination contrary to those reached in the earlier *Kysar* opinions. The court simply held that BP has the right to enter upon the Keys Lease to access wells on the Keys acreage, and the right to enter upon the Jaquez Lease to access wells on the Jaquez acreage. RP 1599-600. The court simply applied the standard principle, expressly approved in the earlier *Kysar* litigation, that oil and gas leases include the right to use as much of the surface as is reasonably necessary for the operations of such lease. *Kysar*, 2004-NMSC-025, ¶¶ 24-25 (RP 29). The court's partial summary judgment order thus neither violated the earlier *Kysar* opinions nor misapplied precedent, and should be affirmed.

3. The Prohibition on Mentioning the Previous Kysar Opinions During Opening Statement Was Proper.

Plaintiffs erroneously claim that the court excluded entirely from the trial any evidence of the previous *Kysar* decisions. BIC 14. In fact, the court's ruling was that Plaintiffs' counsel was prohibited from displaying his blowups of portions of the *Kysar* decisions, or mentioning those decisions or their content to the jury, *during the course of opening statement.* Tr. 29:19-30:6. Indeed, the court reiterated that the ruling was not an evidentiary ruling and instead applied only to opening statement, that the court was not prohibiting Plaintiffs from seeking to introduce the decisions into evidence, and that if Plaintiffs had evidence they

wished to present that would render the opinions admissible, they were free to do so.[6] *Id.* 65:24; 66:1-4, 13-16; 67:2-4, 10-12.

The court properly prohibited Plaintiffs from displaying or discussing the earlier *Kysar* opinions during opening statement. "Opening statements are not to be used for the purpose of arguing what may be the applicable law." *Lam v. Lam*, 188 S.E.2d 89, 90 (Va. 1972). Thus, "[l]egal arguments offered during the course of an opening statement are improper." *Cent. Telecomm., Inc. v. TCI Cablevision, Inc.*, 610 F. Supp. 891, 904 (W.D. Mo. 1985). The court committed no error when it prevented such an argument.

Further, because the earlier *Kysar* opinions have no preclusive effect under principles of *res judicata*, collateral estoppel, law of the case or otherwise, they are completely irrelevant to the jury's determination of the issues in this case. Displaying and discussing irrelevant case law with the jury would have caused unnecessary confusion of the issues. The court's exclusion was well-justified and well within its discretion. *See* Rule 11-402 NMRA (providing that irrelevant evidence is inadmissible); Rule 11-403 NMRA (providing that even relevant

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[6] Both parties submitted written orders memorializing the ruling on the earlier *Kysar* opinions. BP's version accurately reflected that the court's prohibition applied only to opening statement. RP 2005-06. Plaintiffs' counsel disapproved the order, and submitted an alternative version that misleadingly characterized the ruling as a blanket prohibition on introducing or referencing the earlier *Kysar* decisions. *Id.* 2014-15. BP's counsel did not approve Plaintiffs' version. The court inexplicably signed both versions, without a presentment hearing.

evidence may be excluded if its probative value is substantially outweighed by the danger of confusing the issues).

B. The District Court Properly Excluded Evidence that Kysar's Consent Was Fraudulently Induced and that BP Withheld Documents in this Litigation.

BP moved for an order *in limine* after Plaintiffs proposed jury instructions suggesting a claim that the permission Kysar had given BP to enter the Kysar Ranch was the product of misrepresentations. RP 1619-22. The court granted the motion, and prohibited Plaintiffs from offering evidence to support a claim that Kysar's consent was fraudulently or mistakenly induced. *Id.* 1691-92. This order was proper, because Plaintiffs never pled mistake or fraud in their Complaint, and never amended their pleadings to so allege. In the absence of any pleading of fraud or mistake, Plaintiffs were foreclosed from offering testimony or evidence in support of such claims during trial.

BP filed another motion *in limine* after receiving a letter from Plaintiffs' counsel alleging that BP withheld information relating to production volumes and revenue generated by wells on the Kysar Ranch. *Id.* 1763-72. By that point, the court had already ruled upon all of the parties' discovery issues. Long before the letter was sent, the court had specifically prohibited Plaintiffs from asking questions or seeking documents related to BP's production amounts, gross revenues and expenses, calculation of royalties, and damages by oil and gas wells.

At the same time, the court did order BP to produce production records for all wells located on the portion of the Kysar Ranch covered by the Keys lease, and to produce an affidavit from a BP records custodian verifying that such records had been produced. *Id.* 1771-72. BP fully complied with this order, as it did with all of the court's rulings. *Id.* 1595-96. Because BP thus was in full compliance with the court's discovery rulings, it would have been incorrect, irrelevant and prejudicial for Plaintiffs to claim that BP withheld relevant information during this litigation. Accordingly, the court properly granted BP's motion, prohibiting Plaintiffs from testifying, arguing or otherwise implying that BP withheld any information or documents in this matter. *Id.* 1979-80.

Plaintiffs do not attack the intrinsic merit of either of these rulings, but suggest instead that the rulings improperly assume as a matter of law that no duty of good faith and fair dealing exists between BP and Plaintiffs. BIC 23. However, neither ruling was based on, or dispositive of, the issue of whether BP owed a duty to Plaintiffs. Rather, the rulings addressed the limited issues of whether Plaintiffs were entitled to present evidence on misrepresentation and fraud claims they never pled, and whether Plaintiffs were entitled to tell the jury that BP had failed to meet its discovery obligations during litigation, when such assertions were plainly false.

Indeed, the parties put the issue of whether there is a duty of good faith and fair dealing squarely before the court on motions for summary judgment. The

court denied both parties' motions, finding that whether a contract exists between the parties was an unresolved issue of material fact. RP 565-66, 1597-1600. The court thus left the issue for the jury to decide. Of course, by stipulating to the directed verdict, Plaintiffs chose not to hear what the jury had to say. In any event, because the court below did not reach the issue of whether a duty of good faith and fair dealing exists between the parties, this issue is not properly before this Court on appeal. The sole issue before this Court is whether the *in limine* rulings were a proper exercise of the court's discretion. Because both rulings were proper, neither was an abuse of discretion; both should be affirmed.

C. The District Court Properly Excluded Evidence of Alleged Trespass by Amoco or BP Prior to June 20, 2005.

There is no dispute that prior to June 20, 2005, BP was entitled, by virtue of the Kysars' undisputed permission, to access its wells on the Kysar Ranch. Although Plaintiffs attempted to inject a claim that their undisputed permission was mistakenly or fraudulently induced, they failed to plead any facts to support that claim, and it was properly excluded. For this reason, the court properly refused to admit evidence of trespass prior to 2005.

As the Complaint alleges, years ago, the Kysars prohibited BP from using the Bridge Road to service their wells and gave "permission and directions" to BP to use the Back Gate Road "to access the existing wells on the Kysar Ranch." *Id.* 6. Accordingly, for decades, BP and its predecessors used the Back Gate Road,

which runs through the Jaquez Lease, to access *all* wells on the Kysar Ranch, including those located on the Keys Lease. Indeed, other than the Bridge Road, this is the *only* way to access BP's wells. Ignoring these facts, Plaintiffs' Complaint includes the unsupported, contradictory and ultimately nonsensical allegation that BP's permission to use the Back Gate Road did not include the right to access wells on the Keys Lease acreage. *Id.* 11. However, Plaintiffs *specifically admitted* in their response to BP's motion to exclude evidence of pre-filing trespass damages that, prior to the "No Trespassing" posting of the Back Gate Road in June 2005, they had given BP permission to use the Back Gate Road to access all of BP's wells *on the Kysar Ranch. Id.* 1647. Thus, it is undisputed that, prior to June 2005, BP had permission to use the Back Gate Road to access its wells on the Keys Lease.[7]

Nonetheless, Plaintiffs attempt to characterize BP's exercise of this express permission as trespass. Basically, Plaintiffs argue that the Kysars' permission was legally ineffective because it was granted due to misrepresentations by BP. BIC

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[7] Indeed, in the 2000 Settlement Agreement, the parties expressly released each other from "any and all claims that they have or may have against one another" with respect to claims specifically defined to include claims that BP's predecessor's "oil and gas operations have damaged, constituted an unreasonable use, *or have otherwise constituted a trespass*" to the Kysar Ranch. RP 1531-33 (emphasis added). Accordingly, contrary to Plaintiffs' mischaracterization of the 2000 Settlement Agreement as relating only to "surface damage issues, such as the prairie dog control," BIC 4, in 2000, the Kysars released BP from the very trespass issues Plaintiffs has sought to litigate in this action.

29. However, Plaintiffs are not entitled to argue fraud in support of their trespass claim, when they did not plead mistake or fraud in their Complaint, affirmatively allege fraud in any motion, or attempt to amend their pleadings to include claims of fraud or mistake.

Accordingly, the court properly discounted Plaintiffs' newly-concocted story of misrepresentation and mistake and, based on the fact that BP had undisputed permission to use the Back Gate Road to access its wells on the Keys Lease, properly granted BP's motion to exclude evidence in support of any claim for damages for any alleged trespass by Amoco or BP, occurring prior to June 20, 2005. RP 1695-96. Given BP's authorization, prior to the Kysars' posting of the Back Gate Road in June 2005, to use the Back Gate Road to access all of its wells on the Kysar Ranch, any evidence of such damages would be irrelevant, and its admission surely would cause unnecessary confusion of the issues properly before the jury. *See* Rules 11-402 and 11-403 NMRA. For these reasons, the order should be affirmed.

D. The District Court Properly Excluded Evidence of Payments Received by the Kysars for Access to the Kysar Ranch.

New Mexico law is clear that the measure for damages for trespass is the difference between the value of the property immediately before the trespass and immediately after the trespass. UJI 13-819 NMRA; *see also* NMSA 1978, § 30-14-1.1 (amount of damages for trespass is based on the "value of the damage of the

property injured or destroyed"). Nonetheless, Plaintiffs argue that they should have been permitted to testify about the amounts paid to them by BP and Coleman Oil & Gas ("Coleman") for easements on the Kysar Ranch, to access wells located off the Kysar Ranch, as the relevant measure of damages for BP's alleged trespass. BIC 31. In support of their position, Plaintiffs rely on UJI 13-716 NMRA and UJI 13-717 NMRA, jury instructions for use only in condemnation or eminent domain actions. *Id.*

Plaintiffs fail to explain how these instructions apply here. Although Plaintiffs insist that these instructions state a "general rule" that an owner may testify as to the fair market value of his or her property, Plaintiffs cite no law to suggest that any such rule is applicable to *trespass* claims. Indeed, none of the cases cited by Plaintiffs holds that an owner's testimony as to the fair market value of his or her property is admissible and relevant to the proper measure of damages in a trespass case. *See Richardson v. Rutherford*, 109 N.M. 495, 787 P.2d 414 (1990) (case for conversion, fraud, and misuse, abuse and neglect of buildings and equipment); *Tres Ladrones, Inc. v. Fitch*, 1999-NMCA-076, 127 N.M. 437, 982 P.2d 488 (quiet title action); *City of Albuquerque v. Ackerman*, 82 N.M. 360, 482 P.2d 63 (1971) (eminent domain proceeding); *State ex rel. State Highway Comm'n v. Chavez*, 80 N.M. 394, 456 P.2d 868 (1969) (condemnation proceeding).

Plaintiffs erroneously insist that diminution of property value is not the only measure of damages for trespass. BIC 33-34. According to Plaintiffs, damages for trespass should take into account "the fair value of the right to use the property as the trespasser did," or the value of the minerals "in place." *Id.* 34, 37. However, none of the cases cited by Plaintiffs questions the premise that, under New Mexico law, the measure of damages in a trespass action is based on the difference in the value of the property immediately before and immediately after the trespass.

First, both *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231 (Va. 1946), and *Phillips Petroleum Co. v. Cowden*, 241 F.2d 586 (5th Cir. 1957), are out-of-jurisdiction cases that involved claims for assumpsit. In *Raven Red Ash Coal*, the plaintiff was allowed to recover damages for the use and occupation of his land by the defendant because he brought an action for assumpsit, not for the tort of trespass, under which he admitted he could not prove damages. 39 S.E.2d at 233. The court recognized that if the plaintiff had "maintain[e]d an action for tort, he [would] be limited to nominal damages only." *Id.* at 236. Likewise, in *Phillips Petroleum*, the court specifically stated that, although the plaintiffs were unable to establish that the trespass had caused any damage to the plaintiffs as measured by the decrease in market value, "Texas belongs to the minority of states that permit a landowner to waive the trespass and sue in assumpsit for the reasonable value of

the use and occupation." 241 F.3d at 592. No such permission exists in New Mexico.

Because the Kysars' claim is for trespass and not for assumpsit, neither *Raven Red Ash Coal* nor *Phillips Petroleum* applies. Plaintiffs' Complaint does not state a claim for assumpsit, Plaintiffs never moved to amend to add such a claim and, on appeal, Plaintiffs do not even pretend to suggest that their claims fairly include a claim for assumpsit. Accordingly, neither *Raven Red Ash Coal* nor *Phillips Petroleum* provides authority for Plaintiffs' argument that the value of their easements is an appropriate measure of damages on their trespass claim.

The remainder of the cases Plaintiffs cite address mineral owners' claims of subsurface trespass on their minerals, and thus are inapposite. *See Carter Oil Co. v. McCasland*, 207 F.2d 728 (10th Cir. 1953) (applying Oklahoma law, finding defendant guilty of conversion for drilling and producing oil and gas after assigning rights to drill and produce); *Edwards v. Lachman*, 534 P.2d 670 (Okla. 1974) (defendant committed subsurface trespass by drilling for and producing oil and gas it did not own under plaintiff's adjacent property); *Alvarado Min. & Mill. Co. v. Warnock*, 25 N.M. 694, 187 P. 542 (1919) (mining company mined ore belonging to plaintiff without his permission and plaintiff sought damages for conversion). In each of these cases, the defendant was taking production it did not own. Accordingly, the court allowed the plaintiff to recover the value of that

production. In contrast, here, BP is the rightful lessee of the entire mineral estate under the Kysar Ranch, and has never produced any oil or gas it did not own. Plaintiff has failed to cite any authority to support their novel theory that the Kysars, as surface owners, are entitled to damages for *surface* trespass by BP based on production from BP's *own* oil and gas wells.

Moreover, even if the fair market value of Plaintiffs' property were a proper consideration in determining damages for BP's alleged trespass, neither of Plaintiffs' easement payments in fact reflected fair market value, and, accordingly, any testimony regarding those payments would be irrelevant. First, the amount paid by BP for an easement to use the Back Gate Road to access the off-lease Sullivan E Well was not determined after an arms-length negotiation, but rather in the context of settlement of the previous litigation between the parties. Rather than reflect the fair market value of the easement, the amount paid by BP represents the value to BP of settlement of a protracted litigation.

Nor could the amount paid by Coleman for an easement along the Back Gate Road to reach its *off-lease* wells be considered to reflect the fair market value of an easement to BP to access its *on-lease* wells. Notably, Coleman, unlike BP, has no interest in the mineral estate beneath Plaintiffs' property, and therefore has no right to use so much of Plaintiffs' surface as is reasonably necessary to access its wells. Moreover, although Plaintiffs sought to testify that they received a sum of

approximately $715,000 for the easement, Plaintiffs and Coleman did not negotiate for an easement in that amount. Rather, they reached an agreement, *before the Coleman well was even drilled*, that the Kysars would receive two percent of whatever production Coleman was able to take from the well. Thus, if the well had been drilled and then had become a dry hole, the Kysars would have received *nothing* in exchange for granting the easement. The amount that the Kysars ultimately received was not what the Kysars had negotiated or expected from their agreement, and thus does not reflect the fair market value of the easement. For these reasons, the order excluding evidence of any payments Plaintiffs received for access to the Kysar Ranch, including but not limited to the Back Gate Road, and including but not limited to the amounts paid by Coleman and the amount paid by BP, RP 2009-10, should be affirmed.

E. The District Court Properly Excluded Evidence of the 2005 Settlement Agreement.

Plaintiffs erroneously state that the court prohibited Kysar from "testifying about the scope and intent of the limited settlement agreements which he and BP signed in 2000 and 2005." BIC 42. The court's order challenged by Plaintiffs on appeal explicitly states that it excludes evidence only as to the 2005 Settlement Agreement.[8] RP 2003, 2011-12. In fact, the court denied Plaintiffs' motion to

[8] Both BP and Plaintiffs submitted proposed orders to the court memorializing its oral ruling. *See* RP 2003-04, 2011-12. Although Plaintiffs disapproved BP's

exclude evidence of the 2000 Settlement Agreement, and entered an order admitting that document into evidence. *Id.* 1689-90. On Plaintiffs' request that the court revisit this order, the court specifically found "a distinction in the contents of the two settlement agreements" that rendered the 2000 Settlement Agreement admissible, and the 2005 Settlement Agreement not admissible. Tr. 46:8-12. Accordingly, none of the court's rulings prohibited Plaintiffs from testifying about the contents, intent or scope of the 2000 Settlement Agreement, or arguing about the meaning of the release included therein.

On the other hand, the court properly prohibited admission of or reference to evidence concerning the 2005 Settlement Agreement, pursuant to which the parties settled the Sullivan E Well litigation. First and foremost, by its very terms, the agreement specifically provided that it was to be confidential. It is in the interest of public policy that courts enforce such agreements as written. *See Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶ 31, 123 N.M. 526, 943 P.2d 560.

Moreover, as set forth above, the facts and issues litigated in the Sullivan E Well litigation are distinct from, and irrelevant to, the facts and issues here. That BP ultimately paid Plaintiffs for the use of the Back Gate Road to access a well that is not located on Plaintiffs' property is not relevant to whether BP was entitled

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proposed order, it was signed by the court, and Plaintiffs cite to this order in their BIC.

to use the same road, or otherwise go upon Plaintiffs' property, to reach wells on Plaintiffs' property for which BP has valid oil and gas leases.

Nor is the 2005 Settlement Agreement relevant to interpret the parties' intent in drafting the 2000 Settlement Agreement. In the 2000 Settlement Agreement, the parties agreed to a global release of all claims they had or may have had against each other as of January 1, 2000, including all claims that Amoco's operations had damaged the Kysar Ranch, constituted an unreasonable use of the surface, or otherwise constituted trespass. RP 1531-33. However, the parties specifically carved out from that agreement any claims associated with the use of the Back Gate Road to access the Sullivan E Well. *Id.* 1532. The 2005 Settlement Agreement memorialized the resolution of the very claims over access to the Sullivan E Well that had been excepted from the 2000 Settlement Agreement. Accordingly, neither the litigation that led up to 2005 Settlement Agreement nor the agreement itself was in any way based on the 2000 Settlement Agreement, or indicative of the parties' intent in drafting the global release included therein. The order excluding evidence of the 2005 Settlement Agreement thus should be affirmed.

F. The District Court Did Not Rely on "Easement by Estoppel."

Plaintiffs contend that the court erred in allowing BP to argue easement by estoppel. Although Plaintiffs state that they asked the court to exclude this

argument, they point to no motion to such effect, and no ruling denying their request. BP has combed the record, but is at a loss as to what ruling contains the alleged error.

Moreover, Plaintiffs have not identified any decision made by the court in reliance on the theory of easement by estoppel. Plaintiffs have provided this Court with no authority that simply permitting a party to make what may or may not be a losing legal argument constitutes error. Litigants have wide latitude in crafting their legal theories. In the absence of some erroneous ruling by the district court, there is no reversible error.

CONCLUSION

For the foregoing reasons, BP respectfully requests that this Court deny the relief requested by Plaintiffs in all respects.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2010, I served a copy of the foregoing document to counsel of record by the following means:

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