IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

DARREL ALLRED, ROBERT ALLRED, JOHN ALLRED, BRUCE ALLRED, and WAYNE ALLRED,

Plaintiffs/Appellees,

v.

Court App. No. 34, 226

NEW MEXICO DEPARTMENT OF TRANSPORTATION,

Defendant/Appellant.

DEFENDANT/APPELLANT'S REPLY BRIEF
Appeal from the Honorable Kevin Sweazea
D-728-cv-2011-00021

Respectfully submitted,

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Certificate of Compliance

As required by rule 12-213(G) NMRA, I certify that this Brief uses a proportionally-spaced type style or typeface, such as Times New Roman, and that this Brief contains 4,319 words as calculated by Microsoft Office 2013, the word processing system used to prepare this Reply Brief.

Pursuant to Rule 12-213 NMRA, Appellant New Mexico Department of Transportation ("Defendant"), requests this Court's reversal of the district court's order finding that Defendant violated the district court's order and awarding Appellees/Plaintiffs sanctions.

I. ARGUMENT

A. The district court lacked subject matter jurisdiction following Plaintiffs' voluntary dismissal of the case with prejudice.

The parties executed the Settlement Agreement and Mutual Release ("SAMR") on December 10, 2012. RP 841. Attached as exhibits to the SAMR were: (1) the "Stipulated Permanent Injunction Order" ("SPIO") (which was entered on January 18, 2013 (RP 190)); (2) the "Motion for Entry of Stipulated Permanent Injunction and Voluntary Dismissal with Prejudice of all Remaining Claims and Counterclaims" (which was filed on February 25, 2013 (RP 205)); and (3) the draft "Order of Dismissal with Prejudice of all Remaining Claims" (which was entered by the district court on February 27, 2013 (RP 201)). RP 842 (including all three documents as exhibits to the SAMR). Not only did the SAMR reference and include the other documents as exhibits to the agreement as a whole, but the other documents also referenced one another. Specifically, the SPIO recognized that all issues between the parties were resolved through the SPIO and "through a separate simultaneously executed settlement agreement and release". RP 194. Likewise, the Motion for Dismissal with Prejudice noted that the parties

had *agreed* to enter a settlement agreement and a *stipulated* permanent injunction. RP 205. Finally, the Order of Dismissal with Prejudice of All Remaining Claims noted that the parties had agreed to a stipulated injunction, a settlement agreement, and to the "voluntary dismissal with prejudice of *all claims* and counterclaims, *known or unknown*, raised in this lawsuit or that could have been raised by the [p]arties". RP 210 (emphasis added). The Order held that "[a]ll claims" which were "raised by the Parties... *are dismissed with prejudice* upon entry of this Court's Order". *Id.* (emphasis added).

1. The SPIO was a negotiated term of settlement.

As addressed more fully in the Brief in Chief ("BIC") and evidenced by the exhibits to the SAMR, the parties negotiated and agreed to the terms of settlement, and agreed that following the settlement's execution, Plaintiffs' lawsuit would be dismissed with prejudice. RP 842. Stipulated injunctions, judgments, and orders are not judicial determinations, but rather are contracts between parties, and a court's role in "entering" such documents is clerical. *Williams v. Crutcher*, 2013-NMCA-044, ¶ 8, 298 P.3d 1184 (recognizing that "a stipulated judgment... is not considered to be a judicial determination, but a contract between the parties"); *Pope v. Gap, Inc.*, 1998-NMCA-103, ¶ 26, 125 N.M. 376, 961 P.2d 1283 (recognizing that a judgment entered by consent "is not a judicial determination of the issues raised in the action, but is primarily a reflection of the settlement

agreement between the parties" and a court's role in signing such a judgment is "only ministerial"); *French Fine Properties, Inc.*, No. CIV 04-0518 JB/DJS, 2005 WL 2313680, at *3 (D.N.M. Aug. 9, 2005) (acknowledging that parties may enter settlement agreements, including permanent injunctions, which courts may memorialize in stipulated orders).

2. *The district court lost jurisdiction after it dismissed the case with prejudice.*

Plaintiffs argue that the SPIO "was elevated to a judgment by the parties" which somehow gave the district court continuing jurisdiction. *See* AB 13, 17. Specifically, Plaintiffs argue that the documents themselves show the parties' intent to empower the district court with continuing jurisdiction in perpetuity. AB 17. However, the subject documents do not show such an intent. Plaintiffs also contend that the case was left pending (AB 23, 41), and that the district court made a "holding that the permanent injunction was n[ot] dismissed" (AB 25). Plaintiffs do not cite the record or authority for these arguments and Plaintiffs are incorrect.

a. The settlement documents cannot be read in isolation and they evidence the parties' intent to end all litigation.

As noted above, all of the subject document reference one another and were all part of the parties' settlement of the case. The Order of Dismissal with Prejudice pertained to all claims and dismissed the case *in its entirety*[1].

Plaintiffs' assertion that the "plain reading" of the SAMR and SPIO show that the documents were "separate" and could be considered in isolation of one another is incorrect. AB 17. There is no language in either document suggesting that they were intended to be considered separately from one another or that they were not part of the same package and settlement which secured the dismissal with prejudice of Plaintiffs' claims. The parties mutually agreed to the SPIO (and the district court entered it) because of the language in the SAMR (which pertained to

[1] A review of the history of this case on www.nmcourts.gov under "On-Line Case Lookup" shows that following the district court's entry of the February 27, 2013 Order of Dismissal (RP 210), the district court administratively closed this case. When Plaintiffs filed their Verified Motion to Enforce the Permanent Injunction on September 17, 2013 (RP 212) the district court inexplicably re-opened the case. Defendants raised this issue to the district court in arguing that the court lacked subject matter jurisdiction (RP 857, fn 1) and argued that the dismissal with prejudice left the district court "without jurisdiction to take any further action in the case" (RP 858). The district court never made any findings that the case *had not been closed*, and it never addressed the effect of closing the case. *See Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994) (concluding that when there was "no dispute" that the parties agreed to a settlement and the district court administratively closed the case and cleared it from its docket pursuant to Fed. R. Civ. P. 41, the case was dismissed with prejudice and the district court did not retain jurisdiction to enforce the settlement agreement absent express language in the order of dismissal or evidence of intent for the court to retain jurisdiction).

the lawsuit in its entirety) which required them to do so. Although Plaintiffs argue that the documents showed the parties intended to dismiss only the "remaining claims" (AB 23) apart from the SPIO, this argument overlooks the fact that the SAMR provided for a release of "all claims" and causes of action, and reflected the parties' intention to end all litigation. Similarly, the district court's final order pertained to claims "arising out of or relating to or resulting from the Lawsuit" which were all "dismissed with prejudice". RP 843. The SAMR, the Motion for Dismissal with Prejudice, and the Order of Dismissal with Prejudice all reflect the parties' intention to *end all litigation* for "all claims and counterclaims raised or that could have been raised by the Parties". RP 210.

b. The district court's dismissal concluded the litigation and the district court did not retain jurisdiction.

A voluntary dismissal immediately terminates a case and leaves a district court without jurisdiction to take further action. *Becenti v. Becenti*, 2004-NMCA-091, ¶¶ 2-5, 13, 136 N.M. 124, 94 P.3d 867. Following such a dismissal, a district court lacks jurisdiction to enforce an agreement between the parties, including stipulations attached to the dismissal. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 381 (1994) (holding that the district court lacked subject matter jurisdiction to enforce a settlement agreement when a stipulation and order of dismissal with prejudice "did not reserve jurisdiction in the District Court to

enforce the settlement agreement" or incorporate terms of the agreement into the order of dismissal).

A court may maintain continuing jurisdiction to enforce an agreement between the parties if the court affirmatively states in its final order that it will retain jurisdiction for that purpose. *See Santa Fe Properties, Inc. v. French & French Fine Properties, Inc.*, No. CIV 04-0518 JB/DJS, 2005 WL 2313680, at **2, 5 (D.N.M. Aug. 9, 2005) (holding that the parties specifically contemplated that the court would retain jurisdiction for enforcement of a stipulated injunction when the injunction itself stated "that the Court retains jurisdiction over the parties and the subject matter of this cause to enforce the terms of the Stipulated Order."). Absent an affirmative retention of jurisdiction, a dismissal with prejudice *closes the case* and leaves a district court without the ability to issue further judgments or orders. *Hagan Eng'g, Inc. v. Mills*, 115 Cal. App. 4th 1004, 1007-08, 9 Cal. Rptr. 3d 723, 724-25 (2003) (recognizing that following a settlement and dismissal with prejudice, a district court cannot consider a subsequent motion to enforce an agreement because "[a]bsent a pending lawsuit, a court cannot issue judgements or orders.").

Plaintiffs' Answer Brief does not address the *Kokkonen* line of cases which require district courts to affirmatively state they are reserving the jurisdiction to enforce an agreement between parties. Rather, Plaintiffs argue that the documents

evidence the parties' "intent" for continuing jurisdiction. AB 23. The documents themselves contradict this contention. Although the Order of Dismissal with Prejudice of All Remaining Claims could have included a simple sentence stating that the district court would retain jurisdiction to enforce the SPIO or to entertain an action for the SPIO's breach, it does not. *See generally* RP 210. Rather, the Order merely dismisses "[a]ll claims" in the case with prejudice. *See generally id.* Had the parties contemplated that the district court would retain jurisdiction indefinitely, and had they included such a sentence in the Order of Dismissal, it would have been a specific term of settlement that the parties would have negotiated, agreed to, and bargained for.

Although Plaintiffs are aware that their proper remedy is a breach of contract action (as evidenced by their recent new lawsuit filed just before the statute of limitations would have run on their claims), they make the cursory argument that they were not "required to file a separate action for breach of contract". AB 28. Citing to a law review article by Doug Rendleman titled *Compensatory Contempt; Plaintiff's Remedy when a Defendant Violates an Injunction*, Plaintiffs contend that the district court acted appropriately in addressing their petition for sanctions. Specifically, Plaintiffs cite the article for the proposition that: "When an aggrieved individual requests compensatory contempt, rather than bringing a separate and independent action, he simply makes a post-judgment motion. Compensatory

contempt therefore remains part of the injunction lawsuit...". AB 28-29. However, Plaintiffs omit the next two sentences of Mr. Rendleman's article which state: "The aggrieved individual retains the right to request contempt *only so long as his claim remains unsettled and unsatisfied.* If the parties settle the underlying action *the plaintiff loses the right to commence or continue compensatory contempt.*" 1980 U. ILL. L.F, 971, 974, *available at* http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2003&context=facpubs (emphasis added). Plaintiffs' strategic omission underscores the law's requirements.

The district court lacked subject matter jurisdiction to interpret the parties' agreement, enforce their agreement, and make rulings on damages for the alleged breach of the parties' agreement. None of the settlement documents contained a statement that the district court would retain jurisdiction, and Defendant has been denied numerous rights which would have been available if Plaintiffs properly filed suit for breach of contract. As a result, the district court's holdings must be reversed.

B. The district court erred in excluding John Wallace's testimony and in relying solely on non-expert testimony to establish causation.

Plaintiffs contend that the district court properly excluded the testimony of Defendant's expert witness, John Wallace, as a "discovery sanction." AB at 31-32.

Plaintiffs base this argument on their claim that Defendant failed to make Mr. Wallace available for deposition and provided no evidence supporting a scheduling conflict for Mr. Wallace's deposition. Plaintiffs do not provide any supporting record citations with regard to this allegation. AB 32. Plaintiffs also contend that Defendant failed to preserve its argument regarding Mr. Wallace's testimony. AB 31-32. Both contentions are incorrect and contradicted by the record.

On June 30, 2014, Defendant filed its Notice of Non-Appearance and Motion for Protective Order as to the deposition of John Wallace, which Plaintiffs had unilaterally noticed for July 2, 2014. RP 591. As grounds for the motion, Defendant explained that counsel was not available on July 2nd due to other depositions set for that same day, and Defendant attached those notices to its motion. RP 592, 598-603. Defendant also pointed out that Plaintiffs had noticed the deposition for New Mexico, not where Mr. Wallace was located (Arizona). RP 592. Defendant noted that it had attempted to confer with Plaintiffs' counsel regarding the deposition prior to filing the motion, but that Plaintiffs refused to provide reasonable alternatives for Mr. Wallace's deposition. *Id.* Defendant also noted in its motion, reply, and subsequent pleadings, that it had offered numerous additional dates for Mr. Wallace's deposition and that Plaintiffs had ignored all additional attempts to schedule a deposition beyond unilaterally noticing the deposition a single time. RP 592-93; 746-48; 756-63.

Plaintiffs' argument regarding Mr. Wallace's deposition is undermined by reference to the record which shows that Plaintiffs made no serious efforts to engage in discovery with regard to Mr. Wallace's opinions, and were rewarded for this conduct when the district court excluded Mr. Wallace's testimony in its entirety.

Plaintiffs' contention that Defendant failed to preserve its argument regarding the improper exclusion of Mr. Wallace's testimony is also unsupported. In addition to the instances in the record noted above and in Defendant's BIC at 11-12, Defendant also preserved the issue in its Proposed Findings of Fact and Conclusions of Law (RP 946, 970) and in its Motion to Reconsider Court's Ruling Excluding Testimony of John Wallace and Offer of Proof (RP 996-1020). The district court denied Defendant's requests that it consider Mr. Wallace's testimony. RP 1021-43; 1141-42. Thus, Defendant fairly invoked a ruling from the district court on this issue on multiple occasions. *See* Rule 12-216(A) NMRA ("To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked."). Plaintiffs' contentions must be rejected.

Plaintiffs' additional arguments regarding Mr. Wallace's testimony are similarly unavailing. Plaintiffs contend that the district court properly struck Mr. Wallace's testimony as a "discovery sanction," but they fail to address their own complicity in failing to obtain discovery regarding Mr. Wallace's opinions, and the

well-settled New Mexico law holding that when a party fails to attempt to mitigate or reduce prejudice caused by untimely or inadequate disclosure of expert testimony, that party cannot benefit from its inaction. *Leithead v. City of Santa Fe*, 1997-NMCA-041, ¶ 27, 123 N.M. 353, 940 P.2d 459 (holding that party "cannot complain about unfairness when it did not take all the measures reasonably available to protect itself as a litigant."). Plaintiffs also ignore New Mexico law holding that a failure to disclose an expert witness in a timely or adequate manner does not preclude testimony of the expert, and that the district court had numerous, more fair options at its disposal to cure any alleged prejudice. *Chavez v. Bd. of Cty. Comm'rs. of Curry County*, 2001-NMCA-065, ¶ 37, 130 N.M. 753, 31 P.3d 1027 (holding that testimony of expert disclosed one week before trial was admissible where opposing party demonstrated no prejudice and rejected the court's offer of additional time to prepare for cross-examination of expert); *American Nat. Property & Cas. Co. v. Cleveland,* 2013-NMCA-013, ¶ 31, 293 P.3d 954 (holding that late disclosure of expert testimony is cured by the restriction of testimony to previously disclosed subject matters and offending party making the expert available for pretrial deposition at its expense); *Martinez v. New Mexico Dep't. of Transp.*, 2011-NMCA-082, ¶ 31, 150 N.M. 204, *overruled on other grounds by Martinez v. N.M. Dep't. of Transp.*, 2013-NMSC-005, 296 P.3d 468 (holding that trial court cured any potential prejudice created by late disclosure of

expert witness by allowing interview of expert and call rebuttal witness, and noting that these "are appropriate remedies even when a witness is not disclosed until after the trial begins"); *Mayeux v. Winder*, 2006-NMCA-028, ¶¶ 35-39, 139 N.M. 235, 131 P.3d 85 (explaining that New Mexico case law supports exclusion of even witnesses who are not disclosed until trial only where prejudice to opposing party is severe because the testimony is crucial to a party's case, or where party has gained a tactical advantage by willfully failing to disclose the intention to call a witness); *State v. Manus,* 1979-NMSC-035, ¶ 40, 93 N.M. 95, 597 P.2d 280, *overruled on other grounds*, *Sells v. State*, 1982-NMSC-125, 98 N.M. 786 (*citing People v. Clark,* 293 N.E. 2d 666 (1973) and holding that the opportunity to depose belatedly designated witness prior to trial serves to cure any prejudice caused by surprise).

Plaintiffs' argument that Defendant's offer of proof was "untimely" fails for similar reasons. No final order or judgment had been entered by the district court when Defendant filed its offer of proof regarding Mr. Wallace's testimony, and the district court remained free to reconsider its interlocutory verbal rulings. *See* Rule 1-054(B)(1); *Melnick v. State Farm Mut. Auto. Ins. Co.*, 1998-NMSC-012, ¶ 5, 106 N.M. 726, 749 P.2d 1105. Likewise, a district court may consider new material as part of a motion for reconsideration so long as the delay in presenting the material was not for strategic reasons, and the relevance of the new material outweighs any

prejudice. *In re Estate of Keeney*, 1995-NMCA-102, ¶ 12, 121 N.M. 58, 60-61, 908 P.2d 751. Thus, the offer of proof submitted by Defendant to the district court was timely. As discussed in Defendant's BIC, the district court's exclusion of Mr. Wallace's testimony was error and served to compound previous errors made by the district court in terms of its rulings. Plaintiffs' arguments to the contrary are unsupported by the record evidence and by New Mexico law and must be rejected.

The district court further erred when it relied solely on non-expert testimony regarding the cause of the alleged damages to Plaintiffs' property. Expert testimony is required to prove complex matters such as the cause of a flood or damages; lay testimony will not suffice. *Davis v. City of Mebane*, 132 N.C. App. 500, 503-4, 512 S.E.2d 450, 453 (N.C. Ct. App. 1999) (holding that expert testimony was required to prove causation with regard to flooding allegedly caused by negligent construction of a diversion dam project); *Alost v. United States*, 73 Fed. Cl. 480, 495 (Fed. Cl. 2006) *aff'd sub nom. Morgan v. United States*, 254 Fed. Appx. 823 (Fed. Cir. 2007) (rejecting lay testimony of plaintiffs as to causation of flooding and holding that causation of flooding "is a complex issue which must be addressed by experts."). The district court stated on the record that it was striking Plaintiffs' proffered expert testimony as to the cause of the flooding[2], but still

[2] The district court struck Mr. Niccoli's testimony after Defendant moved to strike previously undisclosed causation testimony during the hearing. The district court

concluded that Defendant's actions or inactions caused the flooding on Plaintiffs' property, apparently solely on the basis of non-expert testimony. This was improper, and constitutes reversible error.

C. The district court's ruling that Defendant willfully violated its order was erroneous and unsupported by substantial evidence.

Plaintiffs makes several arguments regarding the appropriate standard with regard to civil contempt, each of which fails as a matter of law. First, Plaintiffs contend that willfulness is not an element of contempt, and that Defendant cannot argue that it did not willfully "disobey the injunction." AB at 33-34. Defendant noted in its BIC that willfulness is not an element of contempt. However, where the district court analyzed willfulness as an element of civil contempt, this Court reviews that determination accordingly. *See* BIC at 40, fn. 11. Plaintiffs fail to address Defendant's argument that the district court's finding of willfulness was not supported by the evidence presented, and they fail to present any authority to the contrary.

Plaintiffs cite *Spear v. McDermott*, 1996-NMCA-048, 121 N.M. 609, for the proposition that "alleged inability to comply, even if self-created, is no defense" to a civil contempt proceeding. AB at 34. *Spear* does not stand for this proposition. Instead, this Court noted in *Spear* that inability to comply with a court order *is* a

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did not rule on Defendant's motion pursuant to *Daubert/Alberico*, which was filed before the July 2014 hearing.

defense to a contempt sanctions, where such inability is not self-created. *Id.* at ¶ 29. Plaintiffs, apparently recognizing this principle despite their erroneous citation, argue that Defendant's inability to comply was self-created because Defendant could have complied with the injunction if it had chosen to. AB at 34. This circular argument ignores the evidence presented to the district court regarding Defendant's limited resources and discretion to allocate those resources. BIC at 41. In addition, Plaintiffs' argument ignores the fact that the district court received no evidence to support a finding that Defendant was able to comply with the SPIO, and in fact *made no such finding*. BIC at 41.

Plaintiffs reach to make their arguments. Plaintiffs contend that that "[t]he record establishes that DOT could have re-entered the Creek within two weeks before the flood as flows and rain events before September 15, 2013...did not impede DOT from entry." AB at 34. Plaintiffs, like the district court, cite nothing to support this proposition, likely because it is contradicted by the record. *See* BIC at 10; 33; 7-25-2014 CD 3:14:46-3:17:15 (Testimony by Gene Paulk that he would not have allowed maintenance activities in creek after September 10, 2013 based on creek flows). Plaintiffs also contend (without supporting evidence) that "DOT personnel left on the Creek both testified that had they been allowed to remain...they could have completed required maintenance within one week." AB at 34. Again, this contention misapprehends the record. Lester Peralta testified

that he believed he and another NMDOT employee could have completed the maintenance required by the SPIO within a week *if additional rain events had not erased their progress*. Mr. Peralta also testified that because it did rain, this goal could not be met. 7-25-2014 CD 11:45:40-11:47:16.

In addition to making unsupported evidentiary arguments, Plaintiffs also misunderstand the applicable standard of review. Plaintiffs contend evidence presented on July 25, 2014 that Defendant had substantially complied with the terms of the SPIO by obtaining 9 feet of clearance under, below and above the bridge, with the exception of 100' upstream, should be ignored by this Court on review because the substantial evidence standard involves some deference to the district court. AB at 34-35. Substantial evidence review requires this Court to determine whether any rational fact-finder could conclude that the proof requirement below was met. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). As Defendant pointed out in its BIC (and Plaintiffs do not address), no rational finder of fact could have concluded, based on the evidence presented, that Defendant willfully violated the SPIO. Mr. Peralta's testimony regarding Defendant's substantial compliance with the SPIO further undercuts the district court's findings in this regard.[3] As a result, the district court must be reversed.

[3] Defendant also argued that the district court improperly precluded Defendant from arguing the potential impact of this evidence at the hearing on July 25, 2015. BIC at 33, fn. 6. Plaintiffs do not address this argument.

D. The district court erred when it read a "reasonable time" requirement into the SPIO while disregarding its actual contents.

Plaintiffs assert that the district court appropriately read a requirement into the SPIO that NMDOT "complete maintenance within a reasonable time from the trigger of the maintenance." AB at 35-36. Plaintiffs contend this was appropriate because the SPIO is silent as to time frames for completion of maintenance. Defendant argued below and in its BIC that the district court erred by reading terms into the SPIO, including the "implied conditions" referenced by the district court as to maintenance timeframe and resources. BIC 29-35; RP 1032, ¶ 56. Nowhere is this error plainer than in the district court "implying" a reasonable time frame for diligent completion of maintenance by concluding that the SPIO is "silent" as to a timeframe. To the contrary, the SPIO is not silent as to a time frame for Defendant's completion of maintenance; instead, the SPIO specifically states that "maintenance must be diligently pursued until completion recognizing that, *force majeure*, regulatory restrictions...or otherwise, will *ultimately dictate the Defendant's maintenance time frames.*" RP 194 at ¶ 14 (emphasis added). The district court gave no weight to either the *force majeure* or the "or otherwise" clause of the SPIO, despite the plain language of the agreement that those very factors would dictate what constituted a "reasonable" time frame for maintenance.[4]

[4] *Hagerman v. Cowles*, 1908-NMSC-015, 14 N.M. 422, is inapplicable to the present situation. In *Hagerman*, the agreement between the parties contained no

The district court's decision to "imply" terms into the SPIO was possible only because the district court disregarded the terms the parties agreed to, which is reversible error.

CONCLUSION

For the foregoing reasons, and those contained in Defendant's Brief in Chief, Defendant respectfully requests that this Court reverse the district court's orders and final judgment, and remand with instructions to close the case, or for other such relief as the Court deems appropriate on remand.

Respectfully submitted,

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time frame for completion of the work. *Id.* at ¶ 2. In the absence of a term regarding time, the district court correctly implied a reasonable time frame. *Id.* at ¶ 3. In the present case, the district court ignored the provisions of the SPIO which would "ultimately dictate Defendant's maintenance time frames" and instead created its own timeframe at the behest of Plaintiffs. Further, *Hagerman* states that when a dispute arises as to whether a contract is timely performed and the dispute is based only upon the construction of a written contract, the question is one of law, not of fact. *Id.* at ¶ 4. Because the district court lacked a valid legal basis to reform the agreement between the parties, this constitutes error and a basis for reversal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was served by electronic means on the following this 24th day of November, 2015.

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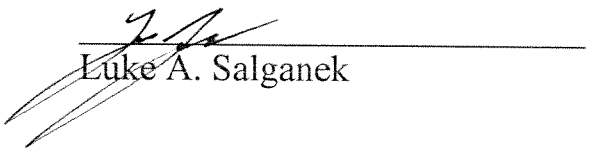

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