IN THE COURT OF APPEALS OF THE

STATE OF NEW MEXICO

CITY OF TUCUMCARI,
A New Mexico Corporation,

Plaintiff/Appellee,

vs.

RAD WATER USERS COOPERATIVE,
a New Mexico Cooperative Association,

Defendant/Appellant.

Ct. Appeals No. 34569

District Court of Quay County
No. D-1010-CV-2013-00023

APPEAL FROM THE TENTH JUDICIAL DISTRICT COURT
QUAY COUNTY, NEW MEXICO
HON. GERALD E. BACA

DEFENDANT/APPELLANT'S BRIEF IN CHIEF

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G. Did the Court abuse its discretion when it ordered prejudgment interest at the rate of 15% with no findings of bad faith or delay by RAD. This issue was preserved at trial on November 13, 2014.

SUMMARY OF PROCEEDINGS

References to the record in this proceeding shall be abbreviated as Record Proper (RP) and tape of the trial (CD 0:00).

This is an appeal of the Final Judgment entered by the Honorable Gerald E. Baca, District Judge by assignment, in the Tenth Judicial District Court of Quay County, New Mexico on February 5, 2015.

This cause of action arose by the City of Tucumcari's filing a declaratory judgment action respecting increases in water rates levied by the City of Tucumcari, a municipal corporation located in Quay County, New Mexico (hereinafter "City"), to RAD Water Users Cooperative established pursuant to N.M.S.A. 1978 §53-8-1, et seq. (hereinafter "RAD"). RAD protested the increases due to the City failing to follow the written agreement. RAD operates a rural water distribution and billing system in Quay County, New Mexico consisting of approximately 200 cooperative members and purchases water from the City. In 1987 a dispute over water rates between the City and several rural water cooperatives, including RAD, was resolved by a Decision in Quay County Consolidated District Court Case No. D-1010-CV-86-00109 setting forth the criteria for the City to determine rate increases for the water cooperatives. (RP 58) On January 1, 2010, the City and RAD entered into a ten-year Agreement for Sale and Purchase of Water (hereinafter "Agreement") which

established a specific criteria for the City to determine rate increases, if any, for the purchase of water by RAD. (RP 62) The Agreement specifically provided "This Agreement contains the entire agreement of the parties". (RP 65, ¶14) The Agreement provides the criteria for the cost of producing water, as follows:

> Beginning July 1, 2012, the cost of producing water shall be calculated based on the costs for the following:
>
> Administration of water department (10%)
> Producing water
> Distributing water
> Laboratory costs directly attributable to the water department
> Warehousing parts for the water department
> Depreciation attributable to water department only
> Interest on bonds directly benefitting water department.
>
> No cost attributable to the sewer department is, nor shall be in the future, including in the calculation of the water rates.
>
> **No cost of capital improvements to the water system, is nor shall be in the future, included in the calculation of the water rate.**
>
> The basic cost amounts to be used shall be those found in the Seller's audited financial statements.
>
> Purchaser or their agents may examine Seller's relevant records upon reasonable notice to the Seller. (RP 63-64, ¶6)
>
> ...
>
> The cost of producing water shall be recomputed by the Seller yearly no earlier than sixty (60) days prior to June 30th of each year using the formula to be given sixty (60) days before such modification shall go into effect. (RP 64, ¶8)

The Agreement specifically provided for a fee of $2.00 per 1,000 gallons of water delivered from June 1, 2010 through June 30, 2011 and $2.19 per 1,000 gallons of water delivered from June 1, 2011 through June 30, 2012. (RP 63, ¶6).

On June 25, 2012 the City gave written notice to RAD of a water rate increase from $2.19 to $2.81 per 1,000 gallons beginning July 1, 2012. (RP 67). The City later stipulated the rate increase would not be effective until September 2012. (RP 263). Attached to the City's June 25, 2012 letter was a Finance Department Revenue and Expenditures Statement dated May 31, 2012. (RP 68). RAD disputed the figures presented in the City Finance Department's statement on the basis the figures were not from the City's 2011audited financial statement and refused to pay the increase (the 2010 figures were used but had been marked as the 2011 figures), however, RAD continued to pay at the rate of $2.19 per 1,000 gallons. (RP 352). The Agreement does not provide for interest on delinquent payments.

The Rural Community Assistance Corporation, funded by the United States Department of Agriculture Rural Development, prepared for the City of Tucumcari a Water Utility Financial Plan & Rate Analysis dated June 7, 2011 (hereafter "Analysis"), using the figures obtained from the City for the year 2009 (hereinafter the "Analysis"). (RP 25). The Analysis does not consider the limitations imposed by the Agreement, but computed rates based on substantial increases in cost of capital

improvements which the Agreement prohibits. The Analysis Findings & Recommendations states the national recommended recovery rate average has been established between 88% and 95% in order to operate a sustainable enterprise. During the year 2009, the City had a recovery rate of 53%, which does not promote conservation and is not a long term sustainable rate structure. (RP 42). The Analysis recommendation to the City was to identify meters 12-15 years old to be replaced with newer more efficient technology such as Smart Meters, convert to a fully automated system and made reference to non-operating master meters, and the responsibility to know what is pumped vs. what is delivered in order to have a good handle of its finances. (RP 43). Further, the City should consider valving-off sections of town where it is not feasible to have service available. (RP 45). The Analysis proposed a rate increase of 13% to 17%. (RP 41).

On December 29, 2011 the City adopted Ordinance 1099 which sets an annual rate increase of four percent (4%) to all residential and commercial customers inside and outside customers. (CD 9:58). The City by the adoption of Ordinance 1099 has legislatively set the reasonable and just increase for water rates at four percent (4%).

On March 19, 2013 the City filed an amended Complaint for Declaratory Judgment and for Breach of Contract against RAD seeking to declare the City had correctly calculated the water rate increase pursuant to the Agreement; actual

damages sustained as a result of RAD's failure to pay for water consumed at the rate of $2.81 per 1,000 gallons; to vacate the decision entered in Quay County Cause No. D-1010-86-00109 which does not allow the costs for water loss due to outdated meters and no longer consistent with the financial realities that exist at the current time; and to establish new rate structures for the calendar year 2013 and thereafter consistent with the Analysis. (RP 19-24). The City of Tucumcari has mailed to RAD notices of rate increases for the years 2013 and 2014. The Amended Complaint did not request prejudgment interest.

The trial was held on November 13, 2015. Over the objections of RAD's counsel, Olga Martinez was admitted as an expert on determining water rates throughout the State of New Mexico. Olga Martinez testified she prepared the Analysis for the City of Tucumcari (CD 11:11:50). The City had approached the USDA for funding in 2010 and the USDA requested and funded the Analysis. The request for funding from the USDA was for infrastructure improvements (CD 11:12:42). The Analysis was based on historical unaudited data for the three years provided by the City showing the City was not recovering enough money and there was no reserve in case of an emergency (CD 11:17:44). The water losses are caused by the old infrastructure and old water meters (CD 11:21:09). It is Olga Martinez' understanding the City has replaced the old meters which will help with the water loss

(CD 11:22:26). Debt reserve is mandatory for a new loan for infrastructure improvements with the USDA. Such reserve and improvements were included in her proposed rates. Further, she did not consider contract obligations such as the Agreement. (CD 12:02:56). The City did not pursue the loan (CD 12:03:06).

Dennis Dysart, Finance Director of the City, testified he prepared the calculations for the City in requesting the water rate increase for RAD. Using the June calculations he came up with a figure of $2.81 for RAD and after he reviewed his numbers prior to trial and he changed the numbers to a rate of $3.43 (CD 1:44:14; RP 160). Even the City admits its computations are all over the board. Such position was not advanced until years later. Since the City had already billed RAD the $2.81 the City decided to keep that increase and use the $2.81 rate for that year. (CD1:44:30). Dennis Dysart picked up the individual totals from the different departments, removed the administrative charges and transfers that did not relate to RAD (CD 1:45:43). Upon cross-examination of the calculations for the 2012 rate increase, Dennis Dysart testified he was required to use the last audit report which was June 30, 2010 (CD 3:54:55) not June 30, 2011. He further testified the 2011 audit report was not available because he had an emergency heart procedure and he did not have the information at that time (CD 3:55:29). They are not actual figures for 2011 because they came from the 2010 audit (CD 3:56:23) even though the basis

given by the City for the increase identifies the figures are from June 30, 2011. At the time of trial, Dennis Dysart was waiting for the completed 2014 audit report (CD 3:58:03). Once again the City has admitted error. The City did not reveal the error in misidentifying the year error until trial. With such errors RAD should not be charged interest prior to notice. Agreement to determine adjusting the rate were never available, not even at trial, much less audit reports for 2012 and 2014 were not available. The Agreement required the timely audit reports.

Following the trial, on December 10, 2014 RAD filed Requested Findings of Fact and Conclusions of Law (RP 511) and on January 5, 2015 the City filed its Requested Findings of Fact and Conclusions of Law. (RP 523). The Court entered its Decision Letter on December 12, 2014. (RP 519). On February 5, 2015 the Court entered its Findings of Fact and Conclusions of Law and Order. (RP 538). The Court concluded that RAD had breached the Agreement and was delinquent in its payments to the City since August 25, 2012; the City's established rates for the calendar years 2012, 2013 and 2014 are reasonable under all the circumstances, and RAD owes the City for the unpaid increases in outstanding water charges from August 25, 2012 until the present, plus pre- and post-judgment interest thereon; and in light of the stipulation by RAD that the contract between the parties, and not the terms of the Stipulated Judgment controls, the City is free to calculate a reasonable water rate for

RAD for future use, and is not restricted to the formula specified in Quay Cause CV-86-000109, nor the Agreement. (RP 547-548). The Order granted the City judgment against RAD for all past due charges from August 25, 2012, until the present with pre-Judgment interest at the rate of 15% and with post-Judgment interest at the rate of 8-3/4% until paid in full. (RP 547-548). The Court's Conclusion that the City is free to calculate a reasonable water rate for RAD for future use terminates the Agreement between the parties which did set forth the criteria for calculating the water rate increases.

ARGUMENT

A. Did the Court err when it terminated the Agreement between the parties when such relief was not plead.

The City and RAD entered into a ten (10) year Agreement for sale and purchase of water on January 10, 2010, the terms of which set the criteria for the City to increase the water rate for RAD. (RP 62). The City, pursuant to the Declaratory Judgment Act, §44-6-1, et seq., requested the district court to construe and declare its right to increase the water rates for RAD. (RP 21, ¶11). Neither of the parties requested the court to terminate the Agreement. The district court made findings regarding the Agreement and the terms for the water rate increase beginning July 1, 2012. (RP554-555, ¶¶ 8, 9, 10, and 11). However, the district court's Conclusions of Law stated "In light of the stipulation by defendant that the contract between the parties, and not the terms of the Stipulated Judgment controls, plaintiff will be allowed to calculate a reasonable water rate for defendant for future use, and is not restricted to the prior formula specified in Quay Cause CV-86-000109." (RP 562 ¶4). The Agreement contained the same criteria as the Stipulated Judgment for increasing the water rates. (RP 63, ¶6). The Agreement further stated "This Agreement contains the entire agreement of the parties." (RP 14, ¶14). The district court disregarded the

Agreement, failed to interpret the terms of the Agreement, and failed to enforce the terms of the Agreement.

In *Owen v. Burn Const. Co.*, 1977-NMSC-029, 90 N.M. 297, 563 P.2d 91, the Court stated that it is well settled in New Mexico that where the language of a contract is clear and unambiguous, the intent of the parties must be ascertained from the language and terms of the agreement. Further, "It is not the province of the court to amend or alter the contract by construction and **the court must interpret and enforce the contract which the parties made for themselves**".

In *CC Housing Corp. v. Ryder Truck Rental, Inc.*, 1987-NMSC-117, 106 N.M. 577, 746 P.2d 1109, the Court affirmed the district court stating:

> When discerning the purpose, meaning, and intent of the parties to a contract, **the court's duty is confined to interpreting the contract that the parties made for themselves, and absent any ambiguity, the court may not alter or fabricate a new agreement** for the parties. (Citations omitted). (Emphasis added).

In *Yankee Atomic Elec. Co. v. New Mexico and Arizona Land Co.*, 632 F.2d 855 (10th Cir. 1980), the Court reversed the lower court and stated:

> ...it is fundamental that courts cannot change or alter contract language for the benefit of one party and to the detriment of another party. Every contract must be interpreted according to its own terms, and construed to effectuate the manifest intent of the parties. The courts of New Mexico have consistently considered and construed contracts as a whole, and considered contractual provision which is clear and unambiguous as conclusive. (Citations omitted).

This court ruled the City was free to calculate a reasonable water rate for RAD for future use and is not restricted to the prior formula specified in the Agreement. The Court failed to interpret and enforce the Agreement between the parties. The Agreement provides the criteria for determining water rate increases (taken from the Decision in the Quay County Cause). (RP 63, ¶6). The parties did agree the Decision in the Quay County Cause was not controlling but the Agreement was the controlling document. The court's findings for the water rate increases for the years 2012, 2013, and 2014 "was reasonable and consistent with rate charged by privately owned public utilities in New Mexico". (RP 561, ¶¶ 46, 47, & 48). The court did not find the City had calculated the rate increases pursuant to the criteria of the Agreement. In ruling the prior Quay County Order was no longer binding on the parties, the district court, by its ruling, disregarded the Agreement of the parties and treated the Agreement as no longer binding. However, the district court made no finding the Agreement was not binding on the parties. The Agreement specifically sets forth the manner for calculating the increases in water rate.

RAD objected to the City's inclusion of increases in capital improvements to the water system. Thus, the City's inclusion of capital increases to include improvements to the residential system by a grant should have required the proposed rates be rejected.

RAD objected to the operating costs for unaccounted for loss of 47% of water produced. The industry standard is not to exceed 10%. Thus, the figures used to justify a rate increase are derived by the use of unrecoverable cost figures. RAD suggested the 47% less 10% or 35% of the water costs be reduced as unreasonable.

RAD objected to the failure to compute water by an unaudited statement. The City only gives an excuse, and plows forward to 2013 and 2014 with the unaudited figures and the unjustified increase for 2012. Even at time of trial the City did not have audited figures for 2014. Such violation of the Agreement cannot be ignored.

The Agreement clearly sets the criteria for determining the rate increases which should have been enforced by the court in this case and for the remaining terms of the Agreement. The ruling by the court for the City to be free to determine the rate increases had absolutely nothing to do with interpreting or enforcing the terms of the Agreement.

B. Did the Court err when it failed to construe and to enforce the terms of the Agreement as written in allowing the City to compute and use its own financial statements instead of the Agreement's requirement for an audited financial statement. This issue was preserved at trial on November 13, 2014.

Montoya v. Villa Linda Mall, Ltd., 1990-NMSC-053, 110 N.M. 128, 793 P.2d 258, the Court, in ruling on the terms of a lease agreement, stated:

> It is black letter law that, absent an ambiguity, a court is bound to interpret and enforce a contract's clear language and cannot create a new agreement for the parties. *See CC Housing Corp. v. Ryder Truck Rental, Inc.*, 106 N.M. 577, 746 P.2d 1109 (1987).
>
> ...
>
> Every word or phrase must be given meaning and significance according to its importance in the context of the whole contract. (Citations omitted.

In this case the Agreement provides the criteria for calculating the cost of producing water as set forth in paragraph 6 of the Agreement and set forth above. (RP 63).

The district court's Requested Findings of Fact and Conclusions of Law, paragraphs 15 and 16, stated the City calculated the increase in water rates pursuant to the terms of the Agreement using the financial information for fiscal year 2011 as the fiscal year 2012 had not come to an end. (RP 556). However, Dennis Dysart, the City's Finance Director, testified that he was required to use the last audit report which was June 30, 2010. (CD 3:54:55). He further testified the 2011 audit report was not available because he had an emergency heart procedure and he did not have the information at that time. (CD 3:55:29). The figures used are not actual figures for 2011 because they came from the 2010 audit. (CD 3:56:23). Dennis Dysart further testified that he picked up the individual totals from the different departments,

removed the administrative charges and transfers that did not relate to RAD. (CD 1:45:43). The City did not use audited financial records to calculate the water rate increase as provided in paragraph 6 of the Agreement. (RP 63). The City alleges the New Mexico State Auditor audits the City's records, however, the City has produced no evidence the figures used in their calculation for the water rate increase was from State audited figures.

15 U.S.C.A. §7201 DEFINITIONS defines the term "audit" as being an examination of financial statements by an independent public accounting firm in accordance with accepted auditing standards. A public entity cannot provide financial information on an internal audit by its own employee with figures he "picked up from the different departments" which might be incorrect to determine an increase in water rates.

Here the district court failed to recognize the term "audited financial statement" as having any meaning in interpretation of the Agreement. As stated in *Montoya*, the court is bound to interpret and enforce a contract's clear language and cannot create a new agreement for the parties.

C. Did the Court err when it failed to construe and to enforce the terms of the Agreement as written in allowing the City to ignore its obligations to operate and maintain the City's system in an efficient manner by allowing water production to have an unaccounted loss of 47%. This issue was preserved at trial on November 13, 2014.

The Analysis prepared by Olga Martinez at the request of the USDA for the City of Tucumcari found the City had a recovery rate of 53% on water pumped versus water sold for the year 2009. That is a water loss of 47% while the national recommended recovery rate average has been established between 88% and 95% to operate as a sustainable enterprise. (RP 87). Ms. Martinez made recommendations for reducing the water loss including replacing water meters over 12 to 15 years of age which the City did in 2011. She further stated that a supervisor for the City made reference to the non-operating master meters. (RP 88). Further recommendation was for the City to consider valving-off sections of the town where it is not feasible to have service available. (RP 90).

The Agreement between the City and RAD provides:

> 9. Seller shall, at all times, operate and maintain its system in an efficient manner and shall take such action as may be necessary to furnish Purchaser with quantities of water specified herein. Temporary or partial failures to deliver water shall be remediated with all possible dispatch. (RP 64).

The City is obligated under the terms of the Agreement to operate and maintain its system in an efficient manner, however, operating the system with a recovery rate of 53% when the national recommended average established is 88% to 95% cannot be accepted as an efficient manner. In order for the City to even have the minimum recovery rate of 88%, the City must identify and repair or correct the causes of their water loss. Water loss can be caused by meters which are not registering the correct flow of water, leaking valves and pipelines, and the non-operating master meter. Individuals are charged for water from their meter and if the individual does not maintain the water leaks their residence, they are charged with the water loss. However, in this case the City is attempting to pass the cost of its water loss on to its customers through a water rate increase instead of maintaining their system with a recommended minimum recovery rate.

The capital improvements are specifically excluded for rate making in the Agreement. Thus, the City improvements would not increase RAD's rates.

The district court failed to enforce paragraph 9 of the Agreement requiring the City to operate and maintain its system. See *Montoya*.

D. Did the Court err when it allowed the City to use financial data for the year 2010 in calculation of the 2012 rate increase instead of the 2011 year financial data. This issue was preserved at trial on November 13, 2014.

The district court's finding that the City calculated the water rate increase for the fiscal year 2012 using the financial information for fiscal year 2011 was a misstatement of the facts and in total disregard of the terms of the Agreement requiring the use of the prior years figures. Dennis Dysart, the City's Finance Director, testified that he used the 2010 financial information for the fiscal year 2012 the determining the rate commencing July 1, 2012, all contrary to the Agreement. The failure of the City to have audited records for 2011 and 2014 is its fault, not RAD. (CD 3:56:23). The Agreement provides the cost of producing water shall be recomputed by the Seller yearly no earlier than sixty (60) days prior to June 30th of each year using the formula to be given sixty (60) days before such modification shall go into effect. (RP 64, ¶8). The City's 2010 year-ending figures showed a large loss for the water department. (RP 514). The City's 2011 year-ending figures show a profit for the water department. (RP 514). By using the 2010 figures in calculating the 2012 water rate increase, the City is taking advantage of a loss in the water department which creates a larger rate increase, however, using the correct year of 2011 which was a profit year, the rate increase would have been lower. Allowing the City to use the financial data from 2010 as opposed to the 2011 financial data, all the time representing it was the correct financial data, was in complete disregard of the terms of the Agreement. For the City to use the incorrect financial data for the water

rate increase and represent it was for the year 2011 was tantamount to fraud. Also, at trial date the City admits that the figures it used were incorrect. At most the City was not entitled to a change in rate until after the trial.

Without further reductions as required by the Agreement, the City made a judicial admission in the figures provided for the use of Olga Morales. The Analysis of Olga Morales, based on the figures provided by the City, reports the City had a net profit from the operating revenue for the periods June 30, 2008 of $63,339.00, June 30, 2009 of $115,045.82 and June 30, 2011 of $213,415.00. Out of four years, 2010 was the only year with a loss of $36,495.00. (RP 42).

In *Smith v. Price's Creameries, Div. Of Creamland Dairies, Inc.*, 1982-NMSC-102, 98 N.M. 541, 650 P.2d 825, the Court held that failing a showing of ambiguity in a contract, or evidence of fraud, where the parties are otherwise competent and free to make a choice as to the provisions of their contract, it is fundamental that the terms of contract made by the parties must govern their rights and duties. Further, when the evidence is undisputed that the contract was freely entered into between the parties, it is not the province of the courts to alter or amend a contract made by the parties for themselves. *Owen v. Burn Const. Co.*, 90 N.M. 297, 563 P.2d 91 (1977). The courts cannot change or modify the language of a contract, otherwise legal, for the benefit

of one party and to the detriment of another. *Yankee Atomic Elec. Co. v. New Mexico and Ariz.*, 632 F.2d 855 (10th Cir. 1980).

In this case, the court abused it discretion by allowing the City to use the 2010 financial data to calculate a water rate increase for the year 2012 in total disregard of the terms of the Agreement of the parties. In *Gardner-Zemke Co. v. State*, 1990-NMSC-034, 109 N.M. 729, 790 P.2d 1010, the Court stated:

> In interpreting a contract, it "must be considered and construed as a whole, with meaning and significance given to each part in its proper context with all other parts, so as to ascertain the intention of the parties". *Schultz & Lindsay Constr. Co. v. State*, 1972-NMSC-013, 83 N.M. 534, 535, 494 P.2d 612, 613 (1972).

E. Did the Court err in allowing the "expert" testimony of Olga Martinez based on 2009 financial data provided by the City for new rate structures to be implemented in 2012. This issue was preserved at trial on November 13, 2014.

In *U.S. v. Velarde*, 214 F.3d 1204 (2000), 54 Fed. R. Evid. Serv. 1035, 2000 CJ C.A.R. 3092, the court stated:

> Rule 702 "imposes a special gatekeeping obligation on the trial judge to ensure that an opinion offered by an expert is reliable." *Charley*, 198 F.3d at 1266. As the Supreme Court made clear in *Kumho*, "where [expert] testimony's factual basis, data, principles, methods, or their application are called sufficiently into question...the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'"
>
> ...

> While we recognize that the trial court is accorded great latitude in determining how to make *Daubert* reliability findings before admitting expert testimony, ***Kumho* and *Daubert* make it clear that the court must, on the record, make *some* kind of reliability determination.** "[T]trial-court discretion in choosing the manner of testing expert reliability is not discretion to abandon the gatekeeping function." *Kumho*, 526 U.S. at 158-159, 119 S.Ct. 1167 (Scalia, J., concurring). (Emphasis added).

In *Schwarts v. Morrison*, (not reported in F. Supp.2d (2013), 2013 WL 3216138, on a motion to strike the Court stated:

> Under Rule 104(a), the proponent has the burden of establishing that admissibility requirements are met by a preponderance of the evidence. *Id.* While a district court is "accorded great latitude in determining how to make *Daubert* reliability findings,...the court must, on the record, make some kind of reliability determination." *U.S. v. Velarde, supra,* 214 F.3d at 1204, 1209.

In *Fancher v. Barrientos*, Slip Copy (2015), 2015 WL 5090360 the Court's Memorandum Opinion and Order discusses the legal standard of Federal Rule of Evidence 702 as follows:

> Federal Rule of Evidence 702 governs the admissibility of expert testimony. It provides:
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based upon sufficient facts or data;

...

The *Daubert* Court emphasized that the district court's focus must be solely on the expert's principles and methodology, not the expert's conclusions. *Daubert*, 509 U.S. at 595.

...

The district court, however, has no discretion as to whether it may or may not perform the gate-keeping function. *United States v. Turner*, 285 F.3d 919, 913 (10th Cir. 2002).

In *Dodge v. Cotter Corp.*, 328 F.3d 1212 (2003), 33 Envtl. L. Rep. 20,179, 61 Fed. R. Evid. Serv. 104, the Court in discussing a standard of review stated:

A natural requirement of the gatekeeper function is the creation of "a sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law." *Goebel*, 215 F.3d at 1087; *see also Dodge I*, 203 F.3d at 1200 n. 12 (urging the district court on remand to "vigilantly make detailed findings to fulfill the gatekeeper role crafted in *Daubert* "to ensure that each "particular opinion is based on valid reasoning and reliable methodology"). In *Velarde*, we observed that "*Kumho* and *Daubert* make it clear that the [district] court must, on the record, make some kind of reliability determination." 214 F.3d at 1209. Thus, **we held in *Goebel* that when faced with a party's objection, a district court "must adequately demonstrate by *specific findings on the record* that it has performed its duty as gatekeeper**." 215 F.3d at 1088 (emphasis added). "Without specific findings or discussion on the record, it is impossible on appeal to determine whether the district court carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to admit the expert testimony." *Id.* (quotations omitted). "In the absence of such findings, we must conclude that the court abused its discretion in admitting such testimony." *Id.* (Emphasis added).

F. Did the Court err when it ignored the City's legislative 4% annual increase in rates as a just and reasonable rate increase for RAD. This issue was preserved at trial on November 13, 2014.

On December 29, 2011 the City adopted Ordinance 1099 which provided water rates for residential and commercial customers within the City's limits and water rates for domestic and commercial customers outside the City's limits at 4% per year. (RP 557, ¶¶ 22, 23 & 24). The City has argued the legislature has conferred upon municipalities to sell its municipal waters by contract upon conditions acceptable to the municipality. N.M.S.A. §3-27-8, 1978. (RP 152). Although not applicable to customers for resale, the City in adopting Ordinance 1099 set the increase at 4% as just and reasonable for its customers. RAD purchases water from the City and operates its own water system for only residential customers who reside outside the City limits. If the City has determined a 4% increase is just and reasonable for its customers, then 4% is also just and reasonable for RAD. RAD is not an industrial customer who uses the water for production of a product for profit. In summation, counsel for RAD argued for the 4% increase as just and reasonable. In response to the district court's inquiry of the 4% increase, Counsel for the City stated the City could live with a rate of $2.81 for the next couple of years and then receive a 6% increase moving forward. (CR 4:23:51).

G. Did the Court abuse its discretion when it ordered prejudgment interest at the rate of 15% with no findings of bad faith or delay by RAD. This issue was preserved at trial on November 13, 2014.

Section 56-8-4 N.M.S.A., 1978 Judgments and decrees; basis of computing interest, states:

> A. **the judgment shall be allowed on judgments and decrees for the payment of money from entry** and shall be calculated at the rate of eight and three-fourths percent per year, unless:
>
> ...
>
> > (2) the judgment is based on tortious conduct, bad faith or intentional or willful acts, in which case interest shall be computed at the rate of fifteen percent.
>
> B. Unless the judgment is based on unpaid child support, **the court in its discretion may allow interest of up to ten percent from the date the complaint is served upon the defendant** after considering, among other things:
>
> > (1) if the plaintiff was the cause of unreasonable delay in the adjudication of the plaintiff's claims, and
> >
> > (2) if the defendant had previously made a reasonable and timely offer of settlement to the plaintiff.

The district court's Conclusions of Law stated:

> 3. The plaintiff's rates for the calendar years 2012, 2013, and 2014, are reasonable under all the circumstances, and the Defendant owes plaintiff for all outstanding water charges from August 25, 2012 until the present, plus pre- and post-Judgment interest thereon. (RP 562, ¶3).

The district court's Order stated:

> A. Judgment shall be entered in favor of plaintiff and against defendant for all past due charges from August 23, 2012, until the present with pre-Judgment interest at the statutory rate of 15% and with post-Judgment interest at the rate of 8-3/4% until paid in full. (RP562, ¶A).

In this case the district court made no findings that RAD acted in bad faith, tortious conduct, or delay in this action. The City's Amended Complaint was filed on March 19, 2013. (RP 19).

In *Martinez v. Pojoaque Gaming, Inc.*, 2011-NMCA-103, 150 N.M. 629, 264 P.3d 725, the Court ruled Workers' Compensation Judge did not abuse its discretion when it denied the plaintiffs request for pre-judgment interest when plaintiff did not argue that defendant caused any unreasonable delay in the proceedings or that defendant made an unreasonable settlement offer prior to trial.

In *Behrens v. Gateway Court, LLC*, 2013-NMCA-097, 311 P.3d 822, the Court ruled the district court did not abuse its discretion in not awarding pre-judgment interest stating the "district court does not abuse its discretion if its reasons are supported by logic and not contrary to reason." Prejudgment interest is governed by

statute and is designed to facilitate settlement and prevent delay. The Court further stated the "two factors listed in Section 56-8-4(B) are not exclusive; the [district] court should take into account all relevant equitable considerations that further the goals of Section 56-8-4(B)." *Gonzalez v. Surgidev Corp.*, 1995-NMSC-036, 120 N.M. 133, 150, 899 P.2d 576, 593 (1995). In the present case the City did not plead for pre-judgment interest, RAD did not unduly delay the case and the district court made no findings that RAD acted in bad faith, tortious conduct, or delay in this action.

The district court abused its discretion by granting post-judgment interest from August 25, 2012 when the district court's Order was entered on February 5, 2015 (RP 553) and the City's Amended Complaint was filed on March 19, 2013. (RP 19). The district court further abused its discretion in granting pre-judgment interest with no finding that RAD had acted in bad faith, tortious conduct or delay in this action at the rate of fifteen percent when the statutory rate is "up to ten percent".

Further, the trial court erred in awarding pre-judgment interest when the settlement offer was first made on date of trial. With the City failing to provide the audited financial reports commencing July 1, 2011 and never providing any audited financial reports commencing July 1, 2013, how was anyone in a position to settle. Notwithstanding, RAD continued to pay the prior rate of $2.18 per thousand gallons

timely and to pay the increase rate ordered by the trial judge within a few days after the judgment was entered to stop the interest.

CONCLUSION

The rulings of the district court are an abuse of discretion in failing to construe and enforce the terms of the January 10, 2010 Agreement between the parties; terminating the Agreement between the parties; granting the City the right to calculate rate increases as it determines; admitting the testimony of Olga Martinez as an expert when the data she was provided by the City was for 2009 and this rate increase dispute was for 2012; and, allowing the City to use unaudited financial statements for the year 2010 in its calculations of rate increases for the year 2012. The district court's order for pre-judgment interest was based with no finding of bad faith or delay by RAD and was not in compliance with §56-8-4 N.M.S.A., 1978 which allows pre-judgment interest from the date of filing of the complaint not August 25, 2012 when the increased amounts were not paid. Additionally, the district court's order for post-judgment interest from August 25, 2012 is not in compliance with §56-8-4 N.M.S.A., 1978 which provides post-judgment interest from the entry of the order or judgment.

The City agreed it would accept $2.81 per 1,000 gallons for several years and then commence increases at 6% per year. By stating it would accept this increase in water rates, the City accepted this increase as just and reasonable. The district court

ruled the City was free to calculate a reasonable water rate for future use and was not restricted to the prior formula when the City had stated what they would accept as just and reasonable.

VI. PROCEEDINGS

All hearings in this matter were tape recorded in their entirety.

VII. PRIOR APPELLATE HISTORY

There have been no prior appeals. The Defendant/Appellant timely filed a Notice of Appeal in the District Court on March 5, 2014. Defendant/Appellant filed a Motion to extend time to file docketing statement on March 30, 2014 which was granted on April 3, 2015. The docketing statement filed on August 25, 2015. On September 14, 2015 Defendant/Appellant filed a Motion for enlargement of time to file brief in chief which was granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was deposited in the U. S. Mail, first class, with postage prepaid, on the 6th day of November, 2015, addressed to the following:

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