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 REPLY BRIEF

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DEFENDANT/APPELLANT'S REPLY BRIEF

1. Reply to Point One: The City in its response to Defendant's Brief in Chief contends that it sought a declaratory judgment for payments not received to which it was entitled; thus, terminating the Agreement. No language that the City has produced in prior pleadings specifically requests that the Agreement be terminated and as pointed out previously, "This Agreement contains the entire agreement of the parties." (RP 14, ¶14). The City and subsequently, the Court by departing from the terms of the Agreement stepped outside the bounds of authority of a clear and unambiguous contract. All the cites to justify an "exercise of discretion" by the City do not change the simple fact that the City entered into a contract with RAD that was clear and unambiguous and any departure thereto is in itself a breach of the contract and does not constitute a supplement to which RAD must adhere. In support of *Owen v. Burn Const. Co.*, 1977-NMSC-029, 90 N.M. 297, 563 P.2d 91, the Court of Appeals in *The First Baptist Church of Roswell v. Yates Petroleum Corp.*, 2012-NMCA-064 ¶23, 281 P.3d 1235 (N.M. App.), discusses the public policy principal of freedom to contract and enforce those contracts unless they are contrary to a rule of law. "Great damage is done where businesses cannot count on certainty in their legal relationships and strong reasons must support a court when it interferes in a legal relationship voluntarily assumed by the parties." *United Wholesale Liquor Co. V.*

Brown-Forman Distillers Corp., 108 N.M. 467, 471, 775 P. 2d 233, 237 (1989).

The District Court, in its Conclusions of Law erred in determining that RAD had breached the Agreement and was thus delinquent in its payments. Further, the Court erred in declaring that the City was free to calculate a reasonable rate (in their own judgment) regardless of the terms of the Agreement, on a statewide reasonable basis as opposed to a system basis as provided in the Agreement.

The substantial evidence rule indeed applies to this matter. The evidence is clear that the formula for determining rates is valid, but the data used by the City is flawed and based on incorrect data, we have a trash-in/trash-out situation. Not only did Dennis Dysart testify that he used the audit report from June 30, 2010 (TR 3:54:55) not June 30, 2011 data, but he admitted that he used the wrong data because he had a medical procedure which "prevented" him from working. (TR 3:55:29) To use data that skewed the calculations in order to arrive at an inflated rate increase borders on fraud and in no way should RAD have been penalized by the City's sloppy and/or absent audit procedures (TR 3:59:13). RAD did not breach the Agreement by declining to pay manufactured rates. The Agreement is specific in setting forth the manner in which the calculations for rate increases can be made, and in allowing the City to depart from the specific language of the Agreement, the trial Court erred and interfered with a legal relationship. Moreover, it wasn't until the date of trial that the

City brought new information attempting to be in compliance with the Agreement terms. Further, such figures failed to consider the water loss issue in rate making even though the City lost the Motion for Summary Judgment and rehearing thereon. Such new information was not used by the City for the rates it requested.

The City argues the Agreement does not specify that the financial statements used to calculate water rate increases could only come from the immediate preceding year's financial records but could come from any prior years' financial statements. Further the City states that its fiscal year ends on June 30th and the City is unable to have audited financial statements prior to the specified time of giving notice of a rate increase. The City cannot choose any prior year, including a year in which the City had unusually large expenses and a 46% water loss (a year in which the rate was fixed by the terms of the Agreement) to calculate rate increases two years later and to use that year for future increases, at the City's discretion. The Agreement did not grant the City any discretion in determining which year the financial statements could be used for rate increases. The City was required to have audited statements for rate increases and under state law. In having failed to provide audited statements due to an alleged employee health problem is no excuse to ignore its obligations under the Agreement or law.

The City's lengthy excerpts from *United Wholesale Liquor Co. V. Brown-*

Forman Distillers Corp., 108 N.M. 467, 471, 775 P. 2d 233, 237 (1989), and *Famiglietta v. Ivie-Miller Enters.*, 126 N.M. 69, 1998-NMCA-155, 966 P.2d 777 in describing a material breach of contract are surprisingly descriptive of the breach of contract by the City itself. Certainly, the District Court by allowing the City to compute and use its own figures instead of the Agreement's requirements for an audited financial statement committed judicial error and a breach of "an essential and inducing feature of the contract []."' *Lease-it, Inc. v. Massachusetts Port Auth.*, 33 Mass. App. Ct. 391, 600 N.E. 2d 599, 602 (Mass. App. Ct. 1992). Further, the five factors referenced from the Restatement (Second) of Contracts, § 241 reinforce the damage done to RAD by the City when it breached the Agreement (contract). RAD is the injured party and has been deprived of the benefit it expected to receive from the Agreement. The District Court's ruling if not reversed definitely causes forfeiture by RAD of its contract rights Most of all, the City's conduct fell far short of comporting with the standards of good faith and fair dealing Restatement (Second) of Contracts §241 (e). To loosely interpret the Restatement's comment on flexibility of the standard of materiality to mean a complete departure from a contract is inaccurate.

The City points to the trial testimony of RAD's expert Carl Brown as having said that RAD could accept the City's proposed rate as being reasonable. (TR 2:20:03). That statement was taken out of context. In subsequent testimony, Mr.

Brown noted that the proposed rate might be reasonable if you used the City's figures but he states at TR2:26:27-36 "that data doesn't correlate to the same year. That is why I am not completely comfortable with the rates shown". And at TR 2:30:37 Mr. Brown said "There was a huge difference in production and volume 47% loss." When asked if he was comfortable with the figures based on Olga Morales's report, his response was: "Partly based on her report and experience not comfortable with the numbers they have. I have concerns about using two different years worth of data to calculate data for a coming year. In the contract it calls for actual costs and if we are looking at costs that are not completed, that is not actual, two different years and that wouldn't be appropriate to establish rate for a following year."

The allegation that RAD made unsupported claims and assertions in its Summary of Proceedings is incorrect. The trial record is clear if read in its entirety. For whatever reason, the District Court erred in its Findings and Conclusions from trial testimony. All evidence that exists supports the finding that the City used unaudited financial information from an improper time period to determine a rate increase instead of adhering to the method set out in the Agreement. Even the City admits same (TR 3:59:13). There was no conflicting issue of fact. The City's wrongful action should not be rewarded. By use of such misrepresentations the City should not be awarded a windfall based on its misrepresentations or fraud.

2. Reply to Point Two: Contrary to the City's charge that RAD did not preserve Point B, at trial, when Dennis Dysart was being questioned by Plaintiff counsel, Defendant counsel objected at TR 1:41:40 to the document being discussed. Counsel argued that Exhibit "5", the document the City used to compute its rate increase was "a document contrary to the contract". As a matter of fact, the "document" was one that Mr. Dysart admitted was a summary he had put together himself **because he had nothing to go on**. In the excerpt quoted from TR 1:40:52, Mr. Dysart stated that the numbers used were from the 12 months period prior to the prior year. In other words, as RAD's Brief in Chief states on page 15: "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 the time". (TR 3:56:23). Then at trial Mr. Dysart presented a new set of figures which had never been produced to RAD and ignored same to request an increase based on the erroneous figures.

Even if the numbers used for trial were correct, it wasn't until the day of trial that the City finally attempted to make a proper demand under the Agreement and any modification would only commence forward from the date of trial in accord with the terms of the Agreement. The trigger for increase in rates did not occur until the date of trial. The City just whipped up some wild figures which were falsely represented to gain a rate increase commencing in 2012 when under the Agreement the increase

could not commence until 2015 (a year that they didn't submit for an increase in the case). Further, even the City admitted it had at least a 26% water loss and made no adjustments for rate purposes for excessive unaccounted for water. RAD's expert Mr. Brown used the data provided and came up with a rate of approximately $2.00 per 1,000 gallons (TR 2:41:41). Even Morales testified that a $2.00 rate was reasonable (TR 12:19:12).

The fact the figures used by the City for a rate increase were misrepresented at the time the rate increase for 2012, 2013 and 2014 were requested was admitted by Mr. Dysart and the City at trial. (November 13, 2014) Regardless, Mr. Brown used the City's figures and adjusted the water loss rate for a rate of approximately $2.00 per 1,000 gallons (TR 2:41:41). The City never made an adjustment for the extreme water loss rate which results in the rate demanded by the City being unreasonable as was found in the ruling on the Motion for Summary Judgment (RP 303-304). Even Morales testified and agreed the standard recovery should be 95% (TR11:37:43), not 53% or now 74%, and that it apples in this case (TR 11:37:53).

3. Reply to Point Three: Once more, the City argues that calculations made by Dennis Dysart and acknowledged by Carl Brown were correct but those calculations were made as demonstrated repeatedly in this document and Defendant/Appellant's Brief in Chief based on piecemealed data from the wrong year.

Carl Brown did not agree that the City had used the correct data, he simply agreed that using their figures, their math was correct. Mr. Brown testified at trial that the 47% unaccounted for production volume was unreasonable and needed to be adjusted to 10% for rate making, or 5% as testified by Ms. Morales and said he didn't believe he had seen a water loss that high (RP 2:30:37-51). RAD's Findings were supported and preserved by the Court Record. The City did not operate and maintain its system efficiently as proven by the admitted 47% loss. The Court in refusing to recognize that failure erred when it failed to enforce the terms of the Agreement.

4. Reply to Point Four: RAD absolutely did preserve its claim of abuse of discretion in admitting the opinion testimony of Olga Morales. In Defendant/Appellant's Findings 35-41, Olga Morales's testimony is summarized in regard to a loan capacity rating study. All the figures and factors Olga Morales testified to were for a rate increase to RAD Water Users. One notes new loans were acquired for the City's improvements since they were covered by grants. TR: 12:03:53) Defendant/Appellant's Brief in Chief deals in detail with qualifications required to meet a Daubert challenge for an expert. Ms. Morales might have qualified as an expert if she had been testifying concerning the rate increase to RAD, but that was not the case. Repeated in her trial testimony Ms. Morales was asked questions about the validity of her conclusions related to RAD opposed to the City customers

and New Mexico counties in general. She testified that she had no knowledge concerning RAD Water Users specifically (TR 11:34:22). Please note at TR 11:31:47-11:32:14, RAD's counsel objected to Ms. Morales's testimony being used in an analysis of a rate increase for RAD: to paraphrase, counsel argued that Ms. Morales had not shown that she had done any research related specifically to determine whether the $2.81 is viable in itself. At TR 11:34:22, Ms. Morales was asked "You are not saying you completed rates under the RAD Agreement?" Her response was "Correct". In response to questioning concerning unaccounted for water loss by the City, she agreed that according to Exhibit 12, Page 18, the City had shown a $36,495.00 profit in 2010 and a $213,000.00 loss in 2011. Her explanation for the difference was that 2011 was a projection based on the 46% unaccounted for water loss. That loss projection was based on water loss by the City residential meters and had nothing to do with RAD Water Users. When Ms. Morales was informed that RAD paid for 100% of the water they used and had no water loss projected or otherwise, Ms. Morales did not disagree because she said she did not have that information (TR 11:39:55). At RP 12:08:10, RAD's counsel asked Ms. Morales if she understood that RAD served 10% of the sales of the City of Tucumcari. Ms. Morales responded at TR 12:08:23 that she did not know that information. Counsel asked if she knew RAD was a buyer off a 4 inch line and the response was "No sir" (TR 12:08:30). At TR

12:16:38-12:17:59, Defense counsel asked Ms. Morales that since the city water users did not have the expense and additional costs of operating a distribution system wouldn't a 4% rate increase to RAD be reasonable, she answered at TR 12:18:32 that she couldn't answer because she didn't have enough information. All the testimony was preserved at trial and reinforced in Defendant/Appellant's Findings demonstrating Ms. Morales ignorance of the whole picture concerning expenses, water loss, percentage of use and logistics for RAD as opposed to a regular residential water user.

Perhaps the most telling testimony by Olga Morales is summarized in the District Court's Findings of Fact and Conclusions of Law page 6, Nos. 30 and 31. The Court found that Ms. Morales testified that the reason for the City's rate increase was to service the debt on the money it hoped to borrow from the USDA. Obviously the study had nothing to do with the Agreement between the parties.

In its Brief in Chief, Defendant/Appellant cited *U.S. v. Velarde*, 214 F. 3d 1204 (2000), 54 Fed. R. Evid. Serv. 1035, 2000, *Schwarts v. Morrison*, (not reported in F. Suppl 2d (2013), 2013 WL 3216138, *Fancher v. Barrientos*, Slip Copy (2015), 2015 WL 5090360, *Dodge v. Cotter Corp.*, 328 F.3d 1212 (2003), 33 Envtl. L. Rep. 20,179, 61 Fed. R. Evid. Serv. 104 to outline the requirements a witness must meet to survive a Daubert challenge and the burden a trial judge has in making that determination.

Ms. Morales might very well qualify as an expert in statewide water use statistics but she, just as Dennis Dysart was spoon fed just enough information to make their opinions dangerous. The trial Court made an off the cuff decision to admit the testimony of Ms. Morales as an expert and in doing so abused its discretion by such admission. On a statewide basis Morales supported the 4% increase per year legislated by the City as reasonable (TR 12:07:26) in Ordinance No. 1099. Morales supported a $2.00 Tucumcari rate for water (TR 12:19:12) and a 3-5% annual rate increase (TR12:07:26). The Court's findings of a proper statewide rate as to RAD is not supported by the Morales testimony, and certainly not the basis the City charged its other customers much less the basis per the Agreement.

5. Reply to Point Five: Defendant/Appellant discussed in Reply to Point Four that a 4% water rate increase to RAD was actually more than just and reasonable considering the fact that RAD Water Users assumed its own water losses and the costs for distribution, collection and logistical challenges (TR12:16:38-12:17:59). The City in its Answer Brief stated incorrectly that RAD's expert Carl Brown fully supported the rates requested by the City of Tucumcari. As previously stated: Mr. Brown noted that the proposed rate could be reasonable if you used the audited figures but he states at TR 2:26:27-36 "that data doesn't correlate to the same year. That is why **I am not completely comfortable** with the rates shown." The City gave no valid reason that

RAD should be charged more than a 4% increase as ordered for the City, and the Trial Court erred in departing from the Agreement (contract) in his decision.

6. Reply to Point Six: The City claims it is entitled to pre-judgment interest as awarded at 15% from the time the claimant's claim accrues based on §56-8-3(A), 1978, as money due by contract. The amount of the rate increase was disputed based on the fact the City failed to provide audited financial statements to support their proposed rate increase at the time RAD was notified of the rate increase. (One notes that the **alleged audited figures** were not produced until the date of trial, November 13, 2014. The 2010 Agreement provided for an annual rate increase based on the basic cost amounts from the Seller's prior year's audited financial statements. (RP 555¶10). The requested rate increase was not based on basic costs of the City for 2011 but was based on the financial statements for 2010. Dennis Dysart testified he used the 2010 audit report not the 2011 report because the 2011 report was not available and he did not have that information at that time. (TR 3:54:55). He further testified they are not actual (not audited) figures for 2011 because they came from the 2010 audit (TR 3:56:23) even though the basis given by the City for the increase identifies the figures from June 30, 2011. RAD argued the figures for 2010 were not correct for the calculation of the rate increase in 2012 and were not in compliance with the terms of the Contract. The City attempted to use incorrect audited financial

statement to calculate a rate increase by using a false date due to a misrepresentation. The Court in it's Findings of Fact and Conclusions of Law, paragraphs 15 and 16, incorrectly stated the City used financial information for the fiscal year 2011 when Mr. Dysart testified he used the financial information from 2010 because he did not have the 2011 financial information at the time the rate increase was exercised.

The Court abused its discretion in awarding pre-judgment interest at the rate of 15% when it incorrectly found the City had used the 2011 audited financial information when the testimony of Mr. Dysart was that he used the 2010 financial information. RAD objected to paying the rate increase because of the lack of audited financial information to support the requested increased and due to the 46% substantial water loss. The Court found the rate increases were "reasonable under all the circumstances" (RP 562, #3). However, the Court did not rule the City had complied with the terms of the Contract in calculating the rate increase.

In *Smith v. McKee*, 993-NMSC-046, 116 N.M. 34, 859 P.2d 1061, the Court held that prejudgment interest is awarded as a matter of right only when a party has breached the duty to pay a definite sum of money or amount due under contract which can be ascertained with reasonable certainty by mathematical standard fixed in the contract or by established market prices. Further, because the trial court did not issue a finding or conclusion that prejudgment interest was awarded as a matter or right, the

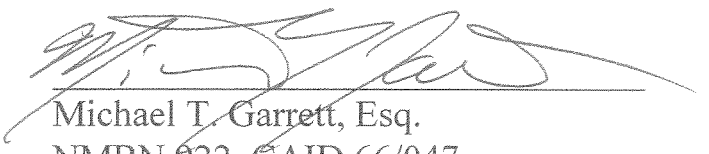
Court concluded the award was made in the trial court's discretion and would be reviewed for an abuse of discretion and reverse if its decision to award prejudgment interest is contrary to logic and reason. In this case, the trial court abused its discretion since Dennis Dysart testified the figures were from 2010 (TR 3:59:13). This Court should review the trial court's discretion for abuse of discretion based on the trial court's findings in error that the City used the financial information for the year 2011.

CONCLUSION

The points made by RAD support a reversal of the trial court's decision. RAD does request a reversal and no less than a new trial. Actually, a grant denying any relief to the City is in order. The parties may then proceed to litigate the 2015 increase.

Respectfully submitted,

GARRETT LAW FIRM, P.A.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed by Federal Express on the 25th day of January, 2016 to the Chief Clerk of the New Mexico Court of Appeals and a true and correct copy of the foregoing was mailed by USPS on the 25th day of January, 2016, addressed to the following:

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