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BEFORE THE NEW MEXICO COURT OF APPEALS

THE ELDORADO AREA WATER AND SANITATION DISTRICT, a governmental Subdivision of the State of New Mexico

Plaintiff/Appellee,

v.

THE JOSEPH AND ALMA MILLER REVOCABLE TRUST

and

JOSEPH F. MILLER, Trustee,

Defendant(s)/Appellant.

No. 34524
Santa Fe County
No. D-101-CV-2012-01329

APPELLANTS' BRIEF IN CHIEF

Honorable Sarah Singleton, District Judge

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STATEMENT OF PROCEEDINGS

The Eldorado Water and Sanitation District ("District") filed its complaint against the Joseph and Alma Miller Revocable Trust ("Miller") on May 10, 2012, (R-1) and it's Amended Complaint on June 19, 2014. (R-543). The complaints alleged that the District sought an electric easement across Miller's property which he was developing as the Cimarron Subdivision to service a District well (Well 18) located in the heart of Miller's proposed development. There was an easement to Well 18 for water lines through the development, but the electric easement was around the perimeter of the property which the District found to be inconvenient. Miller resisted the request to relocate the electric easement, preferring to grant all internal utility easements when development approvals were granted. In response, the District withheld service commitments needed to process Miller's development ("will serve" letters), forcing Miller to prematurely grant the new electric easement. The complaints then contend that Miller delayed in providing a survey identifying the precise location of the easement which then required the District to rent a generator to run the well, causing damages. The District filed several motions to try to compel Miller to locate the easement where the District wanted and without regard to Miller's development needs. The Court denied the motions, but finally ordered the parties to negotiate a location or the Court would decide. (R-51 and 127; R-130 and 189). Days later, the parties agreed to a location. (R-

192) and the Court then entered an order recognizing the "diligent efforts of both parties." (R-218) Despite Miller following the Court orders, the Court awarded damages and punitive damages against Miller because of the delay in locating the easement and getting PNM approval.

The amended Complaint added several paragraphs (R-554, ¶¶47-50) contending that the parties had entered into a development agreement for Miller's Spirit Wind West development whereby Miller was to transfer 4.8 acre feet of water rights to the District in exchange for credits against the District's water rights fee of $25,000.00 per acre foot. The District contended that the attempted transfer of the 4.8 feet of water rights was ineffective, and therefore Miller was not entitled to the credit. Miller countered that the District in secret State Engineer proceedings voluntarily abandoned the water rights in exchange for other concessions, hid what it did from Miller for years and first raised this claim in the amended complaint filed in June of 2014. The Court agreed with the District, ruling that Miller had to live with what the District did with his water rights and pay the water rights fee if Miller wanted water from the District. (R-887, 904)

Also tried in these proceedings was the issue of which party should reimburse the other party for survey and trenching costs relating to the electric easement and the issue of whether the District had to provide water to Miller's home? The Court enter judgment in favor of the District. (*Id.*).

On June 3, 2013, and on June 19, 2014 Miller filed answers and counterclaims. (R-255, 614). Affirmative defenses of failure to mitigate, set offs, waiver, estoppel and laches, among others, were raised. *Id.* The counterclaim was for breach of contract, injunctive relief, declaratory relief and punitive damages.

The breach of contract and punitive damage claim alleged the District's failure to issue "will serve" letters needed to allow Miller to continue with his development applications. The District had issued a form of "will serve" letter in 2008, but the form was unacceptable to the County and the District did little if anything to break the log jam. Miller finally worked out a form of "will serve" with the County, but this took almost three years. Still, when presented with the acceptable form, the District refused to sign the new "will serve" letters, instead using the letters to compel Miller to grant the electric easement previously discussed. This claim was dismissed. (R-887, 904).

Miller also claimed that the District had agreed to continue to provide water service to the Miller's home but when Miller demanded that water service be continued, the District refused, instead charging Miller with a $12,000.00 connection fee and with the cost of new infrastructure required by the District. The Court ruled that Miller would have to pay these new infrastructure costs if he wanted water. (R-887, 904).

The District Court denied Miller's counterclaim.

SUMMARY OF FACTS AND STANDARDS OF REVIEW

This case involves about six separate issues between the parties: 1. Whether Miller should have been assessed delay damages; whether the District could destroy Miller's water rights and require Miller to pay an additional $120,000 in water rights fees; whether the District was liable for damages for its refusal to timely provide effective "will serve" letters; whether the District could charge Miller for new infrastructure costs when the District agreed to *continue* water service to Miller's home; which party should be responsible for reimbursing survey and trenching costs and whether punitive damages and the punitive rate of interest were properly assessed against Miller.

STANDARDS OF REVIEW

The following standards of review will apply to the various issues, will be identified here and applied as each issue is addressed:

1. *De Novo* When Facts Not in Conflict:

Standard of review should be *de novo. Concerned Residents of Santa Fe North, v. Santa Fe Estates, Inc.,* 2008-NMCA-042, ¶22, 143 N.M. 811, 182 P.3d 794. ("The parties did not argue that genuine issues of material fact existed on the issue of waiver and acquiescence. We will review the issue of waiver and acquiescence *de novo*"); *Associated Home and RV Sales, Inc., v. Bank of Belen,* 2013-NMCA-018 ¶1, 294 P.3d 1276 ("We apply our *de novo* review to the

question of 'whether the district court applied the correct controlling legal principle to the facts and the court's application of that principle to the facts'"); *Ponder v. State Farm Mut. Auto. Ins. Co.,* 2000-NMSC-033, ¶7, 129 N.M. 698, 12 P.3d 960 and *Lucero v. Sutten,* 2015-NMCA-010, ¶6 341 P.3d 32 (when relevant facts are undisputed, the appellate review is *de novo*).

2. Substantial Evidence.

Miller v. Bank of America, N.A., 2014-NMCA-053 ¶10, 326 P.3d 20 provides: *"Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion." Landavazo v. Sanchez,* 1990-NMSC-114, ¶7, 111 N.M. 137, 802 P.2d 1283 ("Substantial evidence is such relevant evidence that a reasonable mind would find adequate to support a conclusion in reviewing a substantial evidence claim").

3. Abuse of Discretion:

Sandoval v. Baker Hughes Oilfield Operations, Inc., 2009-NMCA-095, ¶14, 15 215 P.3d 791, 146 N.M. 853 describes abuse of discretion:

> "An abuse of discretion occurs when a ruling is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." Sims v. Sims, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153. "When there exist reasons both supporting and detracting from a trial court decision, there is no abuse of discretion." Moreland, 2008-NMSC-031, ¶ 9 (internal quotation marks and citation omitted). We "do not find an abuse of discretion unless the court's ruling exceeds the bounds of all reason or is arbitrary, fanciful or unreasonable." Mayeux v. Winder, 2006-NMCA-028, ¶ 34, 139 N.M. 235, 131 P.3d 85 (filed 2005) (internal quotation marks and citation omitted).

> Furthermore, this Court will determine that a district court has abused its discretion "when it applies an incorrect standard, incorrect substantive law, or its discretionary decision is premised on a misapprehension of the law." Klinksiek v. Klinksiek, 2005-NMCA-008, ¶ 4, 136 N.M. 693, 104 P.3d 559 (filed 2004) (internal quotation marks and citation omitted). In addition, we have ruled that "[w]here the court's discretion is fact-based, we must look at the facts relied on by the trial court as a basis for the exercise of its discretion, to determine if these facts are supported by substantial evidence." Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶ 60, 134 N.M. 77, 73 P.3d 215 (internal quotation marks and citation omitted).

It is reasonable to conclude that a damages award that is clearly out of proportion to an injury or that shocks the conscience or that is not supported by the evidence would be one against the logic and effect of the facts and circumstances before the court, or against the reasonable, probable, and actual deductions to be drawn from the facts and circumstances of the case. Cf. State v. Hargrove, 81 N.M. 145, 147, 464 P.2d 564, 566 (Ct. App. 1970) (stating that "an abuse of discretion is an erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn from such facts and circumstances" (internal quotation marks and citation omitted)).

4. *De Novo* Review of Documents.

Cable v. Wells Fargo Bank New Mexico, N.A., 2010-NMSC-017, ¶10, 148 N.M. 127, 231 P.3d 108 provides:

> The legal inquiry in this case involves the interpretation of trust language and the application of statutes to the trust and its terms. Both tasks also require de novo review. Arch, Ltd. v. Yu, 108 N.M. 67, 71, 766 P.2d 911, 915 (1988) ("When the issue to be determined rests upon the interpretation of documentary evidence, this Court is in as good a position as the trial court to determine the facts and draw its own conclusions."); State v. Nick R., 2009-NMSC-050, ¶11, 147 N.M. 182, 218 P.3d 868 ("Statutory construction is a matter of law we review de novo.").

POINT I
MILLER SHOULD RECEIVE CREDIT FOR WATER RIGHTS

STANDARD OF REVIEW

The applicable facts relating to this issue are not in material dispute and the review should be *de novo.* Further there is no substantial evidence to support the conclusion of the Court. Finally failure to impose equitable remedies in response to the actions of the District constitutes abuse of discretion.

SUMMARY OF FACTS[1]

The Court's findings identified below essentially found that Miller had no valid water rights. This was never established as Miller was never given the opportunity to address the issue before the District voluntarily abandoned them. As explained, these rights should have been and could have been defended and this was the District's obligation and Miller's right. Further, the finding that the District could keep the benefits of the agreement and not restore Miller's rights rings hollow as it was the District that destroyed these rights.

Under Miller's Development Agreement relating to Spirit Wind West, (District's Ex. 1). Miller was obligated to transfer 4.8 acre feet of water rights associated with a Miller well in exchange for credits against the District's Water Rights Fees. After Miller made the transfer, the District, in private negotiations

[1] On this issue, the Court's Findings Nos. 92, 95-102, 104-107 are challenged. The Court erred in not adopting Miller's Proposed Findings beginning at R-873 Nos. 1-34.

with the State Engineer, agreed to abandon any claim to the Miller water rights in exchange for the State Engineer recognizing other rights. The District's testimony was that these rights were worthless so Miller has no complaint. That, however, is not a conclusion that the District is allowed to unilaterally draw.

Jerry Cooper has been on the District's Board for approximately ten (10) years. (TR-I-30). When a developer seeks water from the District, the developer is charged three types of fees; a water source fee; a water rights fee; and, a system service fee. (TR-I-34).

Miller sought water for his Spirit Wind West Subdivision and accordingly the parties entered into a Development Agreement. (TR-I-37; District's Ex. 1). Paragraph B dealt with the water rights fee which was in part covered by Miller transferring "four and eight-tenths (4.8) acres-feet of water rights associated with Well No. RG-18523" (otherwise known as Well 11). On October 20, 2008, Miller signed a quit claim deed and water utility easement which, among other things, transferred all of Miller's "right, title and interest and claim of ownership ..." to water rights associated with Well RG-18523. (Miller's Ex. AA -7-A)).

The transfer deed was accepted without comment from the District and no issue about water rights was raised for some five years.

In early 2009, the District began negotiations with the State Engineer on the amount of District water rights that would be recognized by the State Engineer.

(TR-I-59) In attendance were State Engineer attorneys, technical people, several groups of protesters and District attorneys Mr. DuMars and Mr. Gentry. (TR-I-80)

In 1972 litigation between a District predecessor, Eldorado at Santa Fe, and the State Engineer resulted in a stipulated judgment. (Miller's Ex. AA-1) allocating water rights to some 80 wells that had been drilled over the years on the Eldorado holdings. Well 11 (RG-18523) was placed into the category found in Paragraph 2 of the Judgment. These wells were to be placed into beneficial use within a reasonable time and would have water rights measured by the well's ***capacity*** as it existed on December 31, 1970. (*Id.*) Miller, who was the only witness who had years of experience with Well 11, confirmed that it was a highly productive well (TR-III-92), was refurbished by the District's predecessor, Eldorado Utilities, was connected to the system and was continued to be used by the District when it took over in 2004-5. (TR-II-198-201) Miller, who later owned the well, put it to use by furnishing water to his residence and using it for livestock and watering grasses. (TR-III-69-71).

Miller's Exhibit AA-5 reflects efforts by Eldorado Utilities to increase the declared capacity in Well 11 from the originally declared 4.8 acre feet. The State Engineer resisted and stated that even though Well 18423 had been re-drilled, "It is the State Engineer's opinion that the 1972 judgment limits the capacities for each well as of Dec. 31, 1970. The declaration provides that the amount of water for

each of these wells is 4.8 afa." (*Id.* P. 2). Accordingly, as of that date the State Engineer thought a 4.8 acre foot declaration was appropriate and Eldorado Utilities thought it should be multiples of that amount.

The District's Exhibit 36, discussed by Mr. Cooper. (T-I-110-112) is a letter from the State Engineer again rejecting Eldorado Utility's attempt to increase the declaration relating to Well 11 from 4.8 acre feet to 242 acre feet In rejecting this request, State Engineer stated: "... the Stipulation and Judgment dated December 29, 1972, were negotiated in good faith, and the final decisions were based on the existing declarations at the time. To change the declarations in our opinion is a violation of the Stipulation and Judgment." (P. 2). Accordingly, the State Engineer considered the declaration attributing 4.8 acre feet of water rights to Well 11 to be inviolate. Naturally if the District wanted to abandon them, the State Engineer was not going to object.

Instead of defending these water rights, the District abandoned them, using them apparently as a bargaining chip to obtain concessions from the State Engineer. This was a mediated settlement (TR-I-67-8) where the District came to negotiations with a list of wells that would be included in its inventory. Well 11 was specifically left off the list. (TR-I-90). The District did this with the knowledge that Miller was relying upon the District to protect the validity of these water rights. (TR-I-90, 94). These proceedings were all conducted in Miller's

absence even though the District provided to the State Engineer copies of Miller's Spirit Wind West Development Agreement. (TR-I-119). Even though the 1972 Judgment allowed for water rights up to the capacity of the well, the District had no idea what the well capacity was and made no investigation. (TR-I-88). The District discussed the 84 wells identified in the 1972 Judgment and stipulated that they would only claim the water rights to 14 wells. (TR-I-62-63) As Mr. Cooper stated so succinctly, the District negotiated for the wells it wanted and as for the rest, including Well 11, "... all the rest of it is thrown in the trash can." (TR-I-65).

Mr. Cooper testified that the District in discussions with the State Engineer determined that Well 11 would not be reasonably put to beneficial used and should not have water rights attributed to it. (TR-I-64) However, this was not the District's decision to make in Miller's absence, particularly given the history of this well and, as discussed later, the District's contractual obligations.

When Mr. Cooper, was asked whether he had informed Mr. Miller of what the District was doing with the Well 11 water rights, Mr. Cooper did not "remember specifically telling him" though in discussions Cooper may have made reference to the proceedings. However, he knew of nothing in writing to Mr. Miller. (TR-I- 94-95). It should be recalled that Well 11 was Miller's well, not the District's. The District only had a right to its water.

The final Partial License Agreement, which was the stipulated negotiated agreement between the District and the State Engineer recognized that Eldorado in 1971 had claimed 4.8 acre feet of water rights to be attributable to Well 18523. (District's Ex. 45, P. 1-2). The Agreement also recognized the 1972 Judgment and the rights attributed to Well 18523 among others. (*Id.* P.4 ¶ 2). The Agreement also notes that in 1997, the District's predecessor, Eldorado Utilities Inc., filed an amended declaration claiming that RG-18523 actually had a capacity of 242 acre feet per year. (*Id.* P. 6). The parties then agreed to stipulate as to the District's water rights (*Id.* P. 10). Except for the water rights provided for in the stipulated Agreement, the District agreed to give up all other rights that it had under the 1972 Judgment. (TR-I-65). This License Agreement was signed on June 4, 2010. As of that date, the District knew that it had abandoned any water rights associated with Well 11.Nevertheless, instead of informing Miller what it had done with Well 11, on December 30, 2011, a year and one half after the signed License Agreement, the District signed a "will serve" letter for Spirit Wind, knowing that it had destroyed Miller's water rights credit under the Development Agreement. (Appellant's Ex. I).

Under the Spirit Wind Development Agreement Miller had the right to notice in writing if there were any problems with the Development Agreement. (District's Ex. 1 ¶ IV(A)). If there was any attack on any of the provisions in the Development Agreement by an "administrative tribunal" or "a person or persons

not a party hereto," the parties were to intervene if not named as a party, employ counsel to defend the agreement and do all things reasonably necessary to "protect and defend the validity, enforceability and effectiveness of this Agreement." (*Id.* ¶1-V(E)). It also provides that the parties shall exercise "good faith" and perform with "due diligence" and without "evading or seeking to evade the spirit and purpose of this agreement." (*Id.* P. 1V(F)). This Development Agreement also provided that if there was any failure to perform, written notice would be provided specifying in detail the nature of the alleged default and allowing for the right to remedy the default. (*Id.* P. 4(F)).

Every one of these provisions were violated by the District to the prejudice of Miller. As Mr. Cooper admitted at TR-I-96-97, Miller was not provided with any written notice of the District's assault on his water rights until approximately five years after the development agreement was signed and three years after the District made its deal with the State Engineer. (*Id.*).

ARGUMENT AND AUTHORITY

1. Breach of contract. By not complying with any of its obligations to preserve and protect the integrity of the agreement or providing notice to Miller, but instead stipulating away the Miller water rights, the District breached its contract with Miller and damaged Miller in the amount of the $125,000.00 for his lost credit. The effect should be that the District cannot deny Miller's water rights

credit. See Rules 13-822 and 823 NMRA 2008, 2014 (defining breaches of contract).

2. Due Process: The State Engineer and the District had the Miller Development Agreement and knew that this was his well and knew the property right Miller had in these water rights. Miller was entitled to notice prior to the District and the State Engineer (governmental entities) terminating all water rights in Well 11. See *T.H. McElvan Oil & Gas Limited Partnership v. Benson-Montin-Greer Drilling Corp.,* 2015-NMCA-004, 340 P.3d 1277 (Due process is violated by not exercising due diligence in notifying those with an interest in the transaction.) and *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶25, 122 N.M. 524, 928 P.2d 250. ("Procedural due process requires the government to give notice and an opportunity to be heard before depriving an individual of liberty or property").

3. Good Faith and Fair Dealing. By secretly bargaining away the rights to Well 11 and not informing Miller for almost five years that his $125,000.00 credit was destroyed violates the covenant of "good faith and fair dealing". See Rule 13-832-NMRA, 2012, defining every contract's implied covenant of good faith and fair dealing. See also *Sanders v. FedEx Ground Package System, Inc.,* 2008-NMSC-040, ¶7, 144 N.M. 449, 188 P.3d 1200 which holds that the implied

covenant of good faith and fair dealing "requires that neither party do anything that will injure the rights of the other to receive the benefit of their agreement.")

4. A party cannot profit from his own wrong. See *Mendoza v. Tamaya Enterprises, Inc.,* 2010-NMCA-074, ¶10, 148 N.M. 534, 238 P.3d 903. In our case, the District voluntarily bargained away the rights that Miller transferred to the District and otherwise destroyed the benefits of the well that he owned. It then waited five years to notify Miller of this knowing that prejudice would increase as time passed. Indeed, even when the District filed its initial complaint (R-1) no mention was made of this. These water rights were traded away during negotiations knowing that the District could turn around and charge Miller for them. The District should now not be able to so profit. The District could have notified Miller that there was a question about his water rights and Miller could have defended them. The well was put to beneficial use and its capacity as of 1970 could be determined by hydrological tests and projections. The District admits that it had no idea about the capacity of Well 11.

5. Rescission and restitution: The Court erred in granting partial rescission whereby Miller's credit for water rights was removed. However, there was no restitution made to Miller. The water rights were not returned to Miller, and that was because the District voluntarily destroyed them. The District is now permitted to retain the benefits of the contract such as water wells it received and a

reduction of Miller's previously bargained for water taps. The District has therefore ratified the contract because it did not provide restitution and it should be required to accept the $125,000.00 credit.

In *Branch v. Chamisa Development Corp. Ltd.,* 2009-NMCA-131, ¶24 147 N.M. 397, 223 P.3d 942 the plaintiff was held to ratify the contract because he could not or would not provide restitution. "[A] party who has ratified a contract cannot thereafter seek to rescind it." Since he District has ratified the Development Agreement and cannot restore Miller's rights, it must accept the credit.

6. Estoppel and laches. By secretly bargaining away the water rights to Well 11 and delaying informing Miller of this fact for some five years, the District's right to require Miller to pay $125,000.00 for the rights that the District itself bargained away is barred by the doctrines of estoppel and laches. See *C & H Construction & Paving Co. Inc., v. Citizens Bank,* 1979-NMCA-077, ¶32, 93 N.M. 150, 162, 163, 597 P.2d 1190, 1202, 1203 ("... estoppel 'is the preclusion, by acts or conduct, from asserting a right which might otherwise have existed, to the detriment and prejudice of another, who, on reliance in such acts and conduct, has acted thereon') Miller relied upon the silence of the District in assuming that the water rights were viable by pushing ahead on five years of development efforts. Five years later he finds out that the District abandoned them and his development costs suddenly increased by $125,000.00.

"Laches is designed to prevent 'litigation of a stale claim where the claim should have been brought at an earlier time and the delay has worked to the prejudice of the party resisting the claim.' *Garcia*, 111 N.M. at 588, 808 P.2d at 38. The core of the doctrine is concern over staleness and prejudice. 2 John Norton Pomeroy, A Treatise on Equity Jurisprudence §419d (Spencer W. Symons ed., 5th ed. 1941)". *Village of Wagon Mound v. Mora Trust*, 2003-NMCA-035, ¶41, 133 N.M. 373, 62 P.3d. 1255. The District actually filed its initial complaint in 2012 and did not raise the claim until its amendment two years later.

This issue was directly litigated and Miller submitted proposed findings.

EASEMENT DELAY DAMAGES

STANDARD OF REVIEW

The facts relating to this issue are not in material dispute and the review should be *de novo.* Further there is no substantial evidence to support the conclusion of the Court. The disagreements between the parties were brought before the Court and resolved through entered orders. The Court can review the Court's orders *de novo.*

FACTS AND PLEADINGS[2]

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[2] On this issue, the Court's Findings Nos. 54, 69, 70, 72, 73, 76, 77, 78, and 87 are challenged. The Court erred in not adopting Miller's Proposed Findings beginning at R-860 Nos. 5-28.

The Court's findings identified below find that Miller did not follow the Court's orders in locating the electric easement, did not keep the District appraised of Miller's efforts with PNM and improperly delayed the easement location process. These findings are belied by the fact that these issues were presented to the Court, orders were entered on how the parties should proceed and Miller followed the orders.

The District owned a water well (Well 18) located in the heart of a development Miller had been working on for years called Cimarron Subdivision. The District had an easement to Well 18 and for its waterlines, but needed a more convenient easement for three phase electric lines to the well. (TR-I-183-185). The District did have a utility easement around the boundary of the Miller property, but believed that using that easement would be too difficult. (TR-II-95). The District approached Miller for an easement through the proposed Cimarron Development. Miller would be granting utility easements through his property, as he required three phase service himself for his property to the north. (TR-II-149-150). However, Miller wanted to wait for development approval for Cimarron to avoid conflicts between easements and the lot and road configurations the County might require. (TR-I-187-190). The District did not want to wait for County approvals, but it had no right to any easement. To get their easement, however, the District decided to leverage its obligation to provide "will serve" letters for

Miller's developments to force Miller to grant the easement. Accordingly, on December 30, 2011, Miller and the District entered into an agreement whereby the District would release the will serve letters for Miller's developments once Miller granted the easement. (Miller's Ex. V).

The exact location of this easement, however, was not specifically determined. It was contemplated to be located along the east side a proposed Cimarron road known as Colinas Drive. (District's Ex. 14, TR-II-38, 41) Since this was going to be an easement for PNM, the electric utility, it required PNM approval. The problem with an easement on the east side was its potential interference with existing water lines. (TR-II-38, 41, 109). The electric easement was to be 10 feet wide. (TR-II-41). The parties tried to place the electric easement on the east side of Colinas Drive, but had trouble first finding and then accommodating the water lines. Miller's attempted easement location was rejected by PNM because of this problem. (TR-II-50, TR-III-87) On the west side of Colinas Drive was Highway 285. (District's Exs. 19, 47) On the east side of Colinas Drive was the Cimarron Development and its proposed lots and commercial area.

For the first seven months following the December 30, 2011, agreement, the District could not find its own waterlines and had no records of the "as built

drawings" (TR-II-42, 43, 51, 134), a prerequisite to locating any electric easement. Miller had no "as built drawings." (TR-II-43).

It is because of delays in locating District waterlines and the time it took to agree to the location that Miller was charged for delay damages during this period of time. It is, however, clear from the pleadings themselves and, specifically, the orders of the Court that Miller neither breached any contract nor violated any Order of the Court which could give rise to the award of any delay damages.

Between December 2011 and May 15, 2012, the District was still unable to find its own waterlines. The District had a waterline easement and was free to do whatever it needed to finds its own waterlines.

On May 15, 2012, the District filed a motion for a preliminary injunction complaining that the survey Miller had prepared for the easement was rejected by PNM because it crossed the waterline easement. (R-60 ¶¶39-41). The District sought an order to allow the District to enter on Miller property and prepare its own survey. (R- 64). Miller responded in part that the District had not yet located its waterlines so the precise location of the easement could not be determined. (R-87-95). Also, Miller had prepared a proposed easement and had done what he could. (R-124).

On May 20, 2012, the Court entered its Order setting out the rights and obligations of the parties. (R-127). The Court did not grant the relief sought by the

District and noted, properly, that the District needed to locate its own waterlines so that the easement could be established. The latest survey by Miller which was Exhibit C to the Miller response, (R-124) was to be taken to PNM for possible approval. If it was rejected, then the order provided that easement should be placed "*adjacent*" to Colinas Drive and would be no more than 10 feet in width. (R-127). Miller as of May 20, 2012, had done nothing wrong.

On July 26, 2012, the District filed a motion for an order to show cause (R-130) claiming that the District had prepared a survey and Miller had to sign off. Finally, after six months from the granting of the easement, the District found its own waterlines. (R-133, ¶ 9). PNM apparently objected to the Miller survey which Miller presented at the May hearing. (R-133). The District's position was that any easement agreed to between the District and PNM had to be signed by Miller. (TR-II-98).

At (R-142) Miller responded that the easement which the District was trying to force Miller to sign did not comply with the May Order. (R-145). The easement being presented to Miller expanded easement rights to allow installation of above ground utility lines which Miller could not have in his development and which was not part of the Court's order. Also, the plat prepared by the District was based upon an old master plan and Colinas Drive was not in the location reflected on the plat. (R-145). All of that had previously been communicated to the District. *Id.* ¶ 9.

Further, as shown in Exhibit at R-162 (see also the District's Ex. 47), the easement proposed by the District was not adjacent to the road at least three areas. Instead, it pushed further east into the Miller property making it effectively wider than 10 feet, violating the May 2012 Order. (R-162). This was not just a technical issue. By this easement expanding east into the Miller subdivision, 12 lots were impacted. County ordinance actually required these commercial building sites to be within 20 feet of the paved part of Colinas. Cutting into the building sites violated the ordinance. (TR-II-140-141, 145, Miller's Ex. AA-8 and the Court's Order).

There was, however, a simple solution. As shown on Exhibit C to Miller's response (R-160), it was suggested by Miller to the District that since there was a problem trying to coordinate an electric easement with a waterline easement the electric easement should be placed on the other side of the road. Exhibit C suggests moving the electric lines to the "east". However, the author, undersigned counsel, had the directions wrong. It should have been "west." Clearly, however, the proposal was to have the waterlines on one side of the road and the electric utilities on the other side. This offer was not accepted until the end of November 2012, as discussed later, when the District was "so frustrated, [it] said if it's acceptable to PNM, it's acceptable to us." (TR-II-58). There were also other proposed options presented that could accommodate the water lines on the east side. (Ex. C, R-160).

The District's reply brief on its motion for order to show cause was filed on August 13, 2012, (R-173). Notice of completion of briefing and request for hearing was not made by the District until September 11, 2012. The hearing was set for November 20, 2012. (R-182).

On November 28, 2012, following the hearing, the Court issued its Order. (R-189). Miller was ***not*** ordered to sign the easement presented by the District. Instead, the parties were to try to work out with PNM a final location for the easement. If no agreement was reached then the parties were to mediate. If mediation did not work, then the Court would establish the location of the easement. *Id.* This was the sum total of the rights and obligations of the parties as of November 28, 2012.

Accordingly, by this time Miller had done nothing wrong, again. While the District contended that Miller was intentionally delaying, the question is whether what Miller did violate anything he was required to do. The parties and PNM simply could not agree on a location of the easement, apparently because the waterline easement would not allow this easement to work on the east side of Colinas Drive.

On December 5, 2012, the District filed a report with the Court relating to its November 28, 2012, Order. (R-192). Now, the District finally accepted the Miller

plat which had the electric utility easement located on the west side of Colinas Drive. This offer had been on the table to the District since July 16, 2012. (R-160).

Thereafter, it was PNM that was the problem. As the District noted in its Motion Requesting Order Extending Time to Commence Mediation (R-215) filed December 7, 2012, the parties had met and agreed on the Miller plat (R-216, ¶3) and the parties had expended "diligent efforts." *Id.* ¶ 4. PNM, however, had not been available to complete the process. *Id.*

The Court then entered an Order recognizing that the parties had agreed on a form of survey and had performed diligently. (R-218-219). The parties were finally able to work through PNM, and the easement was recorded on December 28, 2012. (District's Ex. 19).

ARGUMENT

To summarize, the District had no right to arbitrarily select where the easement was going to be. The Court fully recognized that. The parties had a dispute over where the easement was going to be located. They tried to force it over into the east side, but it was either interfering with the water lines or pushing into Miller's building sites. The July offer by Miller was to put the electric lines on the other side of Colinas Drive. That offer was ignored. By July 2012, the District was still unable to locate its own water lines which was necessary if the easement was to be placed on the east side. The Court ordered that the District was to find its

water lines and then the parties could work on locating an easement. After the waterlines were found the District prepared a survey which located the easement in violation of the Court's May 2012 Order. Miller was not required by the Court to sign the easement proposed by the District. Finally, within days of the Court's last Order in November of 2012, the District relented and agreed to locate the electric lines on the west side of Colinas Drive. Thereafter, any delay was attributable to PNM.

These are uncontested facts which are entered into the pleadings in this case. The District on two occasions brought Miller before the Court to have it determined that Miller was violating some obligation. The Court's final directive was for the parties to agree or mediate with PNM an easement location. The District and Miller did this within days following the Order. Put simply, Miller has done nothing wrong and there is no basis for finding that Miller needed to pay exorbitant costs associated with running a generator during the months that the District was looking for its own waterlines and then preparing an easement which violated Court orders. Miller in each instance followed and relied upon the directives of the Court's orders and the "law of the case" should prevent now punishing Miller from doing as required.

> The doctrine of "law of the case ... relates to litigation of the same issue recurring within the same suit." *Cordova v. Larsen,* 2004 - NMCA- 087, ¶ 10, 136 N.M. 87, 94 P.3d 830. "Under the law of the case doctrine, a decision on an issue of law made at one stage of a case

> becomes a binding precedent in successive stages of the same litigation." *Id.* (internal quotation marks and citation omitted). It is based on " a matter of precedent and policy; it is a determination that, in the interests of the parties and judicial economy, once a particular issue in a case is settled it should remain settled." *Laughlin v. Convenient Management Services, Inc.,* 2013 -NMCA- 088, ¶ 20, 308 P.3d 992,

This issue was directly litigated and Miller submitted proposed findings.

THE DISTRICT'S FAILURE TO PREPARE AND DELIVER "WILL SERVE" LETTERS THREE YEARS AFTER DEMAND

STANDARD OF REVIEW

The facts relating to this issue are not in material dispute and the review should be *de novo.* Further there is no substantial evidence to support the conclusion of the Court. Further, certain documents speak for themselves and can be reviewed *de novo.*

FACTS[3]

In these findings, the Court found that the District did not refuse to sign any "will serve' letters, was not the cause of any delay and did not foresee that by delaying a development application any damages would result. As described below, the District had the obligation to develop an acceptable "will serve" letter, did not do so, and knew that it was holding up Miller's efforts. The claim that an affordable housing agreement caused the delay was not supported by any evidence.

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[3] On this issue, the Court's Findings Nos. 14, 17, 26, 27, 30, 33 and 34 are challenged. The Court erred in not adopting Miller's Proposed Findings beginning at R-862 Ns. 10 and 11; and beginning at R-867 Nos. 3-34.

Miller testified that the obtaining an affordable housing agreement only took a short time. (TR-III-94-95).

Miller filed a counterclaim against the District for damages because his developments were delayed for almost three years by the District's failure to perform its obligation to provide "will serve" letters.

The District is a water and sanitation district which services a distinct area which includes the Miller subdivisions. For any development to occur which relies upon District water, Santa Fe County requires that the District provide a letter assuring the County that the District is ready, willing and able serve the particular development. Without a "will server" letter, according to the District's witness, Penny Ellis-Green, County Growth Management Director, (TR-II-3), without an adequate "will serve" letter no development application is allowed to go forward." (TR-II-7, 8, 28).

On August 27, 2007, as part of a settlement of litigation between the District and various land owners, a settlement agreement was entered into which required the District to issue "will serve" letters upon demand of the land owners, which included Miller. (Miller's Ex. M, P. 3, ¶3).

On August 24, 2010, the District agreed to "work with the appropriate governmental entity to ensure its 'will serve' letter is in force and effect ..." (Miller's Ex. P, §1V).

The District was aware that when development agreements are signed between the District and the developer, there arises the obligation to issue a "will serve" letter. (TR-I-34-5). Development agreements were signed with Miller's three developments on October 17, 2008. (Miller's Exs. N, O and Q). The District representatives also recognized their obligation to prepare "will serve" letters upon request. (TR-I-140, 152).

The District, in accordance with its obligation executed "will serve" letters on October 20, 2008. (TR-II-207-8, Miller's Ex. G). However, when Miller took these letters to the County, the County rejected them as being inadequate. (TR-II-207-210). The District representatives admitted that Miller told the District that the County would not accept their particular form of letter. (TR-I-57). Miller informed them of this fact at various times. (TR-I-141). The response to this, according to Mr. Jenkins of the District, was to inform the County that there was nothing wrong with the facilities at the water district and that the "District's 2008 'will serve' letter remains valid." (Miller's Ex. AA-19, TR-I-142-3)Mr. Jenkins conferred with a few staff members but never developed an acceptable "will serve" letter. (TR-I-142). When Miller informed Jenkins about the County's refusal to accept the letter, the response was not that the District would take care of the matter. Instead, Jenkins did nothing except ask Miller to "give me some details". (TR-I-141).

Mr. Chakroff, the District's manager, stated that in response to Miller's complaints about inadequate "will serve" letters, after August of 2010, Chakroff contacted the County about the will serve letters. (TR-I-179). No satisfactory "will serve" letter was developed. Instead Chakroff's final position, which was aligned with Jenkin's position, was that "... we had given them all of the information they needed ... and they had the will-serve letter that stated that." (TR-I-190). Miller, finally frustrated at the refusal of the District to meet the County's requirement and the passage of years, took it upon himself to set up a mediation using the Court of Appeals mediator sometime in the late summer/early fall of 2011. (TR-I-193). The mediation was with Miller and the County and the District was invited to attend. Prior to the mediation process the District was informed that it needed to provide an unconditional letter both by the mediator and the County. (TR-I-195). Finally Miller, through the efforts of the Court of Appeals mediator, was able to get the attention of the District. In a very short period of time, the District and County were able to work out their differences and a draft form of "will serve" letter was provided to the District in late September of 2011. (TR-I-134, 136, 202-3). The District accepted the draft and the County was satisfied. As Mr. Jenkins testified, the two forms of letters (District's Exs. 48 and 43 and Miller's Exs. G and I) were not significantly different. (TR-I-127). In fact the main difference was changing the language in the second paragraph after "water service" from "subject to

completion of the above conditions ..." (Miller's Ex. G(2)) to "Subject to the satisfaction of the Requirements ..." This was a minor change which could have been made years before had the District simply put forth some effort.

However, it did not stop there. The District, now in September of 2011, had a form of "will serve" letter which it could sign, which would satisfy its contractual obligations to Miller and would satisfy the requirements of the County. Instead of signing the letters in September and allowing Miller to move ahead, it admittedly refused to sign the letter because withholding the letter could force Miller to grant the electric easement. As Mr. Jenkins testified after reviewing the Miller's Ex. A-11, since Miller was not going to give an easement to the District unless the District signed the "will serve" letter, the District was not going to give Miller the "will serve" letter unless it got the easement. (TR-I-151). The only difference, however, was that the District was contractually obligated to provide an adequate "will serve" letter to Miller (TR-I-152) and Miller had no obligation to provide the District with any easements. The District essentially admitted that it was holding Miller's "will serve" letters hostage in order to extort a free easement.

Finally, the District got its way and the parties entered into an easement agreement on December 30, 2011, which provided that the District would "cause to be executed the 'will-serve' letter to the County of Santa Fe ..." (Miller's Ex. V, P. 2, ¶2).

In this agreement the parties stipulated in the "Whereas" clause that the "form" of the 2008 "will serve" letters was "inadequate for necessary County approvals of the developments ..." It took three years for the District to tweak the language in its 2008 "will serve" letter to meet its contractual obligations. Even then it still withheld the letter for more than three months. (Miller's Ex. I).

The District has an obligation to deal with Miller and see that the "will serve" letters were adequate as part of their obligation of good faith and fair dealing both under common law and contractually. (Appellant's Exs. N, P. 7, Exs. O, P. 9 and Ex. Q, P. 6). While the "will serve" letters were not being issued, everything was on hold. (TR-II-209). Once Miller got the corrected "will serve" letters everything moved forward. (TR-I-210).

ARGUMENT

The District violated its contractual obligations including the covenant of good faith and fair dealing. See, *Sanders v. FedEx Ground Package System, Inc., supra* and *Bourgeous v. Horizon Healthcare Corp.,* 117 N.M. 434, 438, 872 P.2d 852, 856 (1994).

Instead, the District committed extortion by requiring Miller to agree to a PNM easement in exchange for the District releasing the "will serve" letter which it had been under contractual obligation to obtain and provide for the previous three years. The issue of the "will serve" letter only involved the language.

Nothing about water rights or the State Engineer was involved. It was only minor language tweaking.

Extortion consists of the communication or transmission of any threat to another by any means whatsoever with the intent thereby to wrongfully obtain anything of value or to wrongfully compel the person threatened to do or refrain from doing any act against his will. *Southwest Distributing Co. v. Olympia Brewing, Co.,* 1977-NMSC-050, 90 N.M. 502, 504, 565 P.2d 1019, 1021 and *Durand v. Middle Rio Grande Conservancy, Dist., et al.,* 1941-NMSC-041, 46 N.M. 138, 123 P.2d 389.

The uncontroverted operative facts were that the District contractually obligated itself to develop and issue effective "will serve" letters. The letters issued in 2008 were rejected because of their form. The District representatives announced that the County should be satisfied with what it had. Years later, through Miller's efforts, Miller accomplished what the District should have done. The District then withheld the letters for three months to force Miller to grant the electric easement. The District breached its contractual and common law obligations to Miller. Again, this issue was directly litigated and Miller submitted requested findings.

THE DISTRICT'S OBLIGATION TO PROVIDE MILLER WITH WATER

STANDARD OF REVIEW

The facts relating to this issue are not in material dispute and the review should be *de novo.* Further there is no substantial evidence to support the conclusion of the Court. Finally, the District's obligation comes down to a review of its contract with Miller, a *de novo* review.

FACTS[4]

The Court in these findings found that despite the District contractually being bound to *continue* to provide Miller's house with water, it could require that Miller pay many thousands of dollars to build new infrastructure before water would be supplied. Such is an absurd interpretation of clear contractual language and the meaning of the word "continue."

On August 25, 2006, Miller and the District entered into a Settlement, Well Transfer and Water Supply Agreement. (Miller's Ex. L and the District's Ex. 54). In this Agreement the District quitclaimed to Miller the District's interest in Well No. 11. (Miller's Ex. L, P. 2 ¶¶ , 2) and in ¶7 P. 3 agreed: "The District shall ***continue*** to provide water to all of Miller's present accounts with the District, wherever located including service to Miller's house and associated buildings adjacent to Well No. 11, in accordance with the District's usual policies and procedures." This also provided that Miller could request a discontinuation of the service. A dispute arose when after Miller and the District agreed that the service

[4] On this issue, the Court's Findings Nos. 108-111 are challenged. The Court erred in not adopting Miller's Proposed Findings beginning at R-882 Nos. 1-9.

to the house would be discontinued Miller requested that the water be turned back on or "continued." The District refused unless Miller paid for expensive new distribution lines plus some other infrastructure. *See,* TR-I-87-89. In the Agreement Well No. 11 was deeded to Miller and despite this, the District agreed to "continue" servicing all of Miller's accounts including water to Miller's house.

According to the District's Manager, Mr. Chakroff, as soon as Miller obtained ownership of Well 11, the District could no longer provide Miller's house with water, as, according to the District, Miller's only water source to his house was through Well 11 which the District deeded to Miller. (TR-II-82-84). While Miller disputed that he was receiving water from Well 11, this issue is not relevant. The District agreed to continue service and if it could not fulfill that obligation because in the same Agreement it deeded away Well 11, that was the District's problem, not Miller's. It should also be noted that Miller's account relating to water to his house was not closed until four years after the Exhibit L Agreement. (TR-I-120). The District's, and the Court's, interpretation of the Agreement is that the obligation to continue service did not mean that his service would be restored. Instead the District could refuse to continue service unless Miller paid for brand new infrastructure, including new distribution lines, pumps and well connections. (TR-II-87-88) That is not a continuation of service, that is requiring a customer to build infrastructure to provide a service which the District could not otherwise

continue. Miller was receiving service at the time of the Exhibit L Agreement, and the District needed to continue service and retain the capacity to continue service. This would require Miller to pay the same costs and charges that he was previously paying such as a monthly fee and any additional charges relating to water use.

The Agreement is clear. The District was obligated to continue service. If, as the District contends, it disabled itself from being able to continue service when it transferred its interest in Well 11, then it needed to regain its capacity. If it could not continue service upon the signing of the Agreement, then it was in breach. That Miller and the District agreed to discontinue service did not mean that Miller had to pay to cure the District's breach when he asked to have the water turned back on. *Benz v. Town Center Land, LLC.,* 2013 NMCA-111, ¶30, 314 P.3d 688 holds that while a court is no longer restricted to the bare words of an agreement in interpreting the intent of the parties to a contract, if there is no ambiguity in the contract contained within the scope and context of the contact, and there is no extrinsic evidence casting ambiguity on the language, then "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".

Whether an agreement contains an ambiguity is be resolved as a matter of law. *Id.* ¶29. If there is an absence of ambiguity then a court "may interpret the meaning as a matter of law". *Id.* ¶30. It is Miller's position that there is no

ambiguity. The day after the Agreement was signed, the District was obligated to have the capacity to service Miller's home to the same extent that it was servicing the home before the Agreement was signed. By the District's own admission, it did not have that ability upon the signing of the Agreement and was in breach.

This issue was directly litigated and Miller submitted proposed findings.

FAILURE TO MITIGATE

STANDARDS OF REVIEW

The facts relating to this issue are not in material dispute and the review should be *de novo.* Further there is no substantial evidence to support the conclusion of the Court.

FACTS[5]

Here, the Court found that Miller should pay some $60,000.00 for delay damages. The District apparently paid in excess of $130,000.00 to run a generator while it pursued an electric easement. For a few thousand dollars it could have quickly condemned an easement. This is a classic case of failure to mitigate damages.

At TR-II-94, the District's manager testified that because the District did not have an electric easement, it cost the District $131,000.00 to run a generator to pump water out of Well 18 for about a year. While the Court concluded that Miller

[5] On this issue, the Court erred in not adopting Miller's Proposed Findings beginning at R-860 Nos. 29, 30 and 31.

was not responsible for the entire time that the District was running a generator the Court did require Miller to pay the District $60,943 for these costs. (Court's Conclusion No. 20 at R-903). The District, being a *quasi*-municipality, had the power of dominant eminent domain (NMSA 1978 §73-21-16(J); TR-II-111). As such it had the right to make a deposit in Court and gain immediate entry. (*Id.* and NMSA 1978 §42A-1-9 and 10). The District believed that the fair market value of the easement would be somewhere between $1,000.00 and $3,500.00. (TR-II-111).

When asked why the District did not pay for a few hours of a lawyer's time to draft a petition and motion and order of entry, the District Manager claimed that he was concerned about the cost of condemnation. (TR-II-112). However, the easement agreement between the District and Miller dated December 30, 2011, (Miller's Ex. V at P. 3, ¶7) provided that the District would not have to pay for the easement if Santa Fe County granted final plat approval within one (1) year "of the date the Trust files the application ..." According to Subparagraph B, however, if the County did not grant the approval within one (1) year then, and "if the parties have failed to negotiate the price the District shall file an action to determine the value of the Easement, calculated as set forth in NMSA 1978 §42A-1-26 (1981), the date of the taking being the date of initial grant of the Easement." Accordingly, given that there was a high likelihood that there would be no final plat approval within one (1) year of the development application, the District was looking at a

condemnation action in any event. Further, once the District was allowed immediate entry, provided it located the easement so as to not present any interference with the subdivision plans, there likely would have been not much for lawyers to argue about.

Rule 13-860 NMRA (1991) provides that, "A party may not recover his damages for any cost or loss which [he][she] reasonably could have avoided". *Elephant Butte Resort Marina, Inc., v. Wooldridge,* 1985-NMSC-014, 102 N.M. 286, 694 P.2d 1351 (1985) imposes upon the non-breaching party a duty to use "reasonable diligence" to mitigate damages, and the standard for reasonable diligence involves commercial reasonableness. The District claims to have paid about $10,000.00 per month to run a generator. For about one half of that amount, the District could have filed pleadings, made its deposit and had its easement. As a matter of law the District failed to mitigate its damages.

This issue was directly litigated and Miller submitted proposed findings.

NO PROOF OF DAMAGES

STANDARD OF REVIEW

The evidence of damages is not in dispute and a *de novo* review should apply. Dismissing the testimony relating to damages as unworthy of any consideration constitutes an abuse of discretion.

FACTS[6]

In these findings the Court found that Miller's damages for the delay caused by the District in issuing valid "will serve" letters were too speculative. Miller presented credible and unimpeached evidence that a delay in obtaining development approvals causes damage.

The trial court ruled relating to Miller's counterclaim for the three year delay in issuing the "will serve" letters that the "Defendants provided no evidentiary support that they are entitled to consequential damages as a result of any claimed breach." (Conclusion No. 17 at R-903). As previously discussed, the County Growth Management Director testified that "without an adequate 'will-serve' letter a subdivision application is not allowed to go forward." (TR-II-7, 8 and 28).

Miller has had a long history as a developer since the 1970s. (TR-II-17-19). He also continued to acquaint himself with other developments in the Eldorado area. (TR-II-20, 21, 22-24). As an experienced developer and having a low basis in his development lands, Miller was competent to determine profits through estimating reasonable prices for his lots and for packages involving lots and modular homes. (TR-III-21-2, 25-27). The Tierra Bello Subdivision received final plat approval for Phase I which consisted of nine lots in March of 2013. (TR-II-

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[6] On this issue, the Court's Findings Nos. 7, 35 and 36 are challenged. The Court erred in not adopting Miller's Proposed Findings beginning at R-867 Nos. 35-37.

173-4). The Cimarron Development obtained preliminary and final approval for four lots which contained proposed storage units in November of 2011. (TR-II-173-4).

Miller also testified that he sells his products at affordable prices and has had success in doing so. (TR-III-28). His basis was only $800 per acre. (TR-III-31).

On the Cimarron project the plan was for 86 storage units and in determining profits Miller took into account the basis in the land, the number of storage units, (86), the costs involved and the profits per storage unit. (TR-III-31-33).

There is nothing in the record which conflicted with Miller's profit estimate and nothing in the record which conflicted with Miller's represented expertise and experience. Concerning establishing lost profits on an incipient business, *Sunnyland Farms Inc. v. Central New Mexico Elec. Co-Op., Inc.,* 2013-NMSC-017, ¶¶26-27 301 P.3d 387, provides that the burden on a plaintiff claiming lost profits from an unestablished business is to prove that lost profits would likely have resulted had the operation been allowed to continue. The dollar amount of the lost profit damages, however, only requires reasonable certainty as to the fact of damages and not to the amount of damages. While Miller testified that these projections were speculative, there was nothing to cast doubt on Miller's experience and projected costs, absorption rates and likely profits. While any projections can be called speculative, the Miller testimony certainly met the

Sunnyland Farms standards and should not have been ignored as wholly incompetent. This was an abuse of discretion to simply ignore competent testimony. This issue was directly litigated am Miller submitted proposed findings.

TRENCHING AND SURVEY FEES[7]

Here the Count found that Miller should not be reimbursed for survey and trenching fees. Miller presented the invoice for the survey that was used to establish the easement location and presented an invoice for trenching. Nothing presented justified denying Miller his reimbursement rights.

Miller's Exhibit V P. 2, ¶3 and ¶5 is the December 30, 2011, easement agreement and provides that the parties would evenly divide survey and trenching costs. Both sides submitted claims for trenching and survey fees. The District's Exhibit 21 is its survey invoice. The District claimed that Miller owed one half of that amount, (TR-II-67-68) and the Court agreed. As discussed above, this survey violated the Court's order and was never used. Instead, Miller's survey was used and the invoice for that is Miller's Exhibit AA-18. (TR-II-48). Not allowing reimbursement for the bill for preparing the survey that was used is an abuse of discretion.

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[7] On this issue, the Court's Findings Nos. 82 and 83 are challenged. The Court erred in not adopting Miller's Proposed Findings beginning at R-864 Nos. 1-7.

Miller also paid a trenching bill which is Miller's Exhibit AA-17. (TR-II-45-47). While there was testimony that the District paid an invoice for trenching, it is uncontroverted that Miller also paid for trenching and he should likewise be reimbursed.

PUNITIVE DAMAGES AND PUNITIVE INTEREST RATE

Here the standard of review is substantial evidence. Nothing supported the award of punitive damages.

The Court erred in awarding punitive damages and applying a punitive rate of post judgment interest. NMSA 1978 §56-8-4 provides that if a "judgment is based on tortious conduct, bad faith or intentional or willful acts," interest shall run at fifteen percent (15%). There is nothing about Miller being blindsided by the District destroying the water rights in Well 11 or following the directives of the Court in establishing the location of the easement which even approaches "tortious conduct, bad faith, intentional or willful acts".

The law does not punish a party whose motivation is simply to protect his own interests. See, *Fikes v. Furst,* 2003-NMSC-033, ¶23, 134 N.M. 602, 81 P.3d 545. ("One acting to protect his [or her] property rights is privileged to interfere even if he does so with malice ... The inquiry, in the end, should be to determine the party's primary motivation for the interference. If it was primarily improper, then the person has no privilege. If it was primarily proper, then liability should not

attach". Miller thought there was 4.8 acre feet of water attributed to Well 18, as that was the 40 year old declaration on file with the State Engineer. Miller was also careful about where the electric easement was located because he did not want it interfering with his development plans. These motivations are protected. *Bogle v. Summit Investment, Company, LLC,* 2005 NMCA-024 ¶28, 137 N.M. 80, 107 P.3d 520 holds that an intentional breach of contract by itself ordinarily cannot result in punitive damages even if the breach is flagrant. Something more is required such as fraud, violating community standards of decency, an intention to inflict harm, etc. In the case at bar it is doubtful that Miller breached any contact much less engaged in fraudulent or intentionally malicious conduct. He was simply transferring water rights he thought he had and trying to locate the PNM easement so that it would not interfere with his development prospects. Imposing punitive damages and a punitive rate of interest was an abuse of discretion.

CONCLUSION

The delay damage award should be reversed as Miller did nothing improper. The water rights credit should be reinstated as the District instead of defending these rights and notifying Miller of the proceedings, violated their contractual obligations by throwing the rights "in the trash can." Any punitive damage award and interest rate should be reversed. Miller should be reimbursed for survey and trenching costs and have water returned to his home without further cost. Finally,

the District should be found to have breached its contracts by delaying in delivering "will serve" letters to Miller, and the matter should be remanded for an evidentiary hearing on damages.

STATEMENT OF COMPLIANCE

We are using Times New Roman and this brief contains 10,549 words, 900 lines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that on the 11th day of April, 2016, a true copy of the foregoing was mailed First Class mail, postage pre-paid to:

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