

**COPY**

IN THE COURT OF APPEALS  
OF THE STATE OF NEW MEXICO

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

Plaintiffs/Appellees,

v.

NEW MEXICO DEPARTMENT  
OF TRANSPORTATION,

Defendant/Appellant.

COURT OF APPEALS OF NEW MEXICO  
FILED

SEP 21 2015

*MacB*

N.M. Ct. App. No. 34,226 & 34,461  
Dist. Ct. No. CV-201100021  
Catron County

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DEFENDANT/APPELLANT'S BRIEF IN CHIEF

Appeal from District Court of Catron County  
The Honorable Kevin R. Sweazea

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ORAL ARGUMENT REQUESTED

MILLER STRATVERT P.A.  
Cody R. Rogers  
Luke A. Salganek  
3800 E. Lohman Ave., Suite H  
Las Cruces, New Mexico 88011  
Telephone: (575) 523-2481  
Facsimile: (575) 526-2215

*Attorneys for Defendant-Appellant*

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

Pursuant to Rule 12-214 NMRA, Defendant requests oral argument on this appeal. This case involves issues of first impression in New Mexico pertaining to settlement agreements, continuing jurisdiction of district courts, and the authority to award sanctions/contempt damages. Oral argument would be helpful to the Court in explaining factual proceedings and the above issues of first impression.

### **SUMMARY OF PROCEEDINGS AND BACKGROUND FACTS**

On June 17, 2011, Plaintiffs filed their "Complaint for Negligence, Inverse Condemnation, Injunctive Relief and Damages." RP 1. Plaintiffs alleged that Defendant improperly designed a bridge spanning Whitewater Creek in Glenwood, New Mexico, and that Defendant's failure to conduct maintenance in the creek bed, in conjunction with the improper design of the bridge, allowed sediment aggradation beneath the bridge. Plaintiffs alleged that this aggradation of sediment, in conjunction with seasonal rainfall, caused Whitewater Creek to flood onto surrounding properties owned by Plaintiffs, resulting in property damage. Plaintiffs sought monetary damages associated with Defendant's negligent maintenance of the bridge pursuant to the New Mexico Tort Claims Act, (NMSA

1978 § 41-4-6), as well as damages and costs associated with alleged inverse condemnation, and injunctive relief to require Defendant to maintain the creek bed as they desired.

On December 10-11, 2012, the parties executed a "Settlement Agreement and Mutual Release" ("SAMR"). RP 841. The SAMR stated that "[t]he Parties have agreed to the entry of a Stipulated Permanent Injunction Order" (RP 842) and contained a dispute resolution clause which required future disputes to be submitted to an arbitrator (RP 843 at Section 4). The SAMR contained no exemption from this dispute resolution procedure for the Stipulated Permanent Injunction Order ("SPIO"), and neither does the SPIO. The district court entered the SPIO, submitted by the parties, on January 18, 2013. RP 190.

The SAMR required the parties to enter a stipulation of dismissal with prejudice. RP 842. The parties filed a Motion for Entry of Stipulated Permanent Injunction and Voluntary Dismissal with Prejudice of All Remaining Claims and Counterclaims on February 25, 2013. RP 205. The district court entered its Order of Dismissal with Prejudice of All Remaining Claims on February 27, 2013. RP 210.

Notwithstanding the dismissal of the case and the SAMR's dispute resolution procedure, Plaintiffs filed a "Verified Motion to Enforce Permanent Injunction for Relief for Violation of Permanent Injunction and Request for

Emergency Hearing” (“Verified Motion”) on September 17, 2013. RP 212. On November 22, 2013, Plaintiffs also filed a “Petition for Sanctions and Damages Against New Mexico Department of Transportation For Violation of Permanent Injunction.” RP 360. The Verified Motion alleged that after the accumulation of sediment in the creek triggered Defendant’s maintenance requirement in the SPIO, Defendant failed to diligently conduct maintenance, resulting in damage to Plaintiffs’ property. Plaintiffs contended that if Defendant had completed its maintenance, Plaintiffs’ property would not have been flooded or otherwise damaged.

The district court scheduled an evidentiary hearing to determine whether Defendant had violated the terms of the SPIO. At the hearing on October 9, 2013, the district court determined that it would conduct a separate hearing on the issue of alleged damages and hear evidence regarding only whether Defendant violated the SPIO. 10-9-2013 CD 2:39:14-2:40:16.<sup>1</sup>

The focus of the October 9<sup>th</sup> hearing was whether Defendant complied with the requirements of the SPIO by working to diligently complete maintenance. 10-

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<sup>1</sup> The proceedings were recorded by audio in this matter. The references herein are to the applicable CD’s for the referenced proceeding, and are referred to by the date of the proceeding. The latter references are to the time-stamps shown by the Log contained in the record proper (RP 268-87 (10-9-2013); RP 561-66 (2-27-2014); RP 819-21 (7-22-2014); RP 885-904 (7-24-2014); RP 905-27 (7-25-2015); RP 1082-83 (10-21-14); RP 1146-1149 (12-8-2014)), and which appear when the CD is played using For The Record Player, version 5.6.2.0. *See* Appendix to Rule 23-112 NMRA, Section I.D.

9-2013 CD 10:44:04-25. The SPIO contained a maintenance trigger which required Defendant to conduct maintenance activities in the creek bed “when the average distance between sediment accumulations to the low chord of the bridge is 7 feet.” RP 191. The SPIO required that when maintenance was triggered, “sediment shall be removed in accordance with the approved PCN<sup>2</sup>, to return the distance between the channel bottom and the low chord of the bridge to 9 feet.” RP 192. The SPIO further stated that the maintenance “shall be *diligently* pursued until completion, recognizing that, *force majeure*, regulatory restrictions, and conditions provided for upon approval of Defendant’s PCN, *or otherwise*, will ultimately dictate the Defendant’s maintenance time frames.” RP 193-94 (emphasis added). The SPIO was silent as to time frames for completion of maintenance, did not define the term “diligently”, and did not state what resources (including manpower or equipment) were required to comply with the SPIO.

The evidence presented at the October 9, 2013 hearing established that Defendant was notified of the maintenance trigger by Plaintiffs on July 28, 2013, and began maintenance activities on August 2, 2013. 10-9-2013 CD 1:08:57-1:09:19. Defendant assigned members of the Cliff Maintenance Patrol from Defendant’s District 1 to complete the maintenance. *Id.* Maintenance Patrol

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<sup>2</sup> A Pre-Construction Notice (“PCN”) is a permit to conduct maintenance activities in the creek that Defendant must apply for and obtain from the United States Army Corp of Engineers.

employees are tasked with completing all maintenance activities for Defendant, including mowing, patching and repair of roadways, and other maintenance activities to maintain roadway safety. 10-9-2013 CD 1:27:09-1:30:50. The Cliff Patrol worked daily, including Saturdays, through August 27, 2013, to complete maintenance in the creek. Defendant also “borrowed” additional manpower from a neighboring patrol to assist the Cliff Patrol in the creek maintenance. 10-9-2013 CD 1:12:05-1:14:06. The Cliff Patrol had some equipment available to it, and borrowed additional equipment from the Silver City Patrol, including dump trucks, a loader, a backhoe and pickup trucks. 10-9-2013 CD 1:36:40-1:41:47. Defendant did not have a bulldozer available. 10-9-2013 CD 1:59:39-2:04:29.

As of August 26, 2013, Defendant had obtained clearance of 12 feet in the pilot channel, as required by the SPIO, and had reached 8 feet of clearance beneath the bridge, which was nearly compliant with the requirements of the SPIO. 10-9-2013 CD 1:14:25- 1:14:50. On August 26-27, 2013, rainfall and sediment aggradation negated progress and reduced the clearance beneath the bridge to approximately 6 feet as of August 28, 2013. 10-9-2013 CD 1:14:25- 1:14:50. At this time, given the lack of net progress caused by ongoing rain, District 1 Maintenance Engineer Gene Paulk mobilized a heavy equipment crew to continue maintenance while allowing the Cliff Patrol to return to its regular maintenance activities, which were required to safely maintain roadways. 10-9-2013 CD

1:14:52-1:15:57; 1:27:09-1:30:50. The heavy equipment crew, which had been working along I-25 in response to the Silver fire, initially reported that it would be available on September 30, 2013. 10-9-2013 CD 1:15:58- 1:17:46. When Plaintiffs expressed dissatisfaction with this timeline, Paulk ordered the heavy equipment crew to mobilize more quickly, and it was rescheduled to begin work in Whitewater Creek on September 16, 2013. 10-9-2013 CD 1:18:47-1:19:50. The heavy maintenance crew had three bulldozers and additional loaders available. 10-9-2013 CD 2:07:02-2:07:37. Extraordinary rainfall and flooding occurred in the Glenwood area on September 14-15, 2013, causing damage to Plaintiffs' property.

At the conclusion of the October 9, 2013 hearing, the district court concluded that Defendant violated the SPIO because: (1) it reduced the size of the crew working to achieve completion of maintenance when it allowed "borrowed" workers from another patrol to return home; and (2) Defendant failed to allocate other unspecified resources and equipment, which the district court held constituted a failure to "diligently" pursue maintenance. 10-9-2013 CD 2:33:52-2:38-59. The district court entered an order on October 25, 2013, stating that Plaintiffs could petition the court for damages and sanctions and that the court would schedule a hearing to address liability, causation, and damages. RP 290.

Defendant filed a motion asking the district court to reconsider its finding that Defendant violated the SPIO, arguing that it had devoted significant resources

to maintenance and could not ignore its obligation to the public in maintaining the safety of the roadways. RP 293. Defendant argued that it acted diligently and that it had achieved substantial compliance when rainfall events beyond its control negated its progress. Defendant argued that the SPIO allowed Defendant discretion to determine timeframes and priority of maintenance, and that the district court's reading of the SPIO introduced terms into the agreement which had not been negotiated or agreed upon. Defendant further contended that the Tort Claims Act damages limitations were applicable to Plaintiffs' property damage claims, and that claims asserted based on negligent design of the bridge were barred by sovereign immunity.

The district court denied Defendant's motion to reconsider. RP 572. The court determined that the Tort Claims Act damage limitation would not apply to Plaintiffs' claims for property damages because it was inapplicable to damages awarded as "sanctions." 2-27-2014 CD 10:31:18-10:40:28. The district court scheduled a hearing to address the remaining issues on July 24-25, 2014. RP 583.

On July 21, 2014, Defendant simultaneously submitted a letter to the district court and Plaintiffs' counsel stating that the district court lacked subject matter jurisdiction because the case had been dismissed with prejudice eighteen months earlier and there was no retention of jurisdiction to resolve disputes related to the SAMR or the SPIO. RP 1076. Defendant also pointed out that the SAMR

contained a mandatory dispute resolution clause which Plaintiffs had not complied with. On July 22, 2014, the district court held a telephonic hearing on the jurisdictional issue and concluded that it had jurisdiction to proceed because the scheduled hearing was “a contempt proceeding”. RP 1039.

On July 23, 2014, Defendant filed a motion to enforce the parties’ settlement agreement and the district court’s prior dismissal of the case. RP 831. Defendant argued that the parties had agreed in writing that all disputes arising out of performance of any promises or terms of the SAMR, including the SPIO, were to be addressed through the dispute resolution provisions of the SAMR and the SPIO was a contract which required the parties to perform in accordance with the terms of the contract. Defendant also filed a motion requesting the district court vacate the hearing based on the district court’s lack of subject matter jurisdiction. RP 856. Noting that the district court had dismissed the matter with prejudice in February 2013, and that no writing evidenced an intent for the district court to retain jurisdiction to address disputes regarding the parties’ performance of the SAMR or SPIO, Defendant observed that the district court only retained jurisdiction to address motions pursuant to Rule 1-060 NMRA, and that no such motion had been filed.

The district court denied both motions on July 24, 2014. 7-24-2014 CD 10:10:31-10:47:11. The district court then took evidence from the parties on

causation and damages. Plaintiffs introduced evidence that on the night of September 14-15, 2013, flood waters entered Plaintiffs' hayfield from the north end (furthest from the bridge), rather than the south end (which is closer to the bridge); that floodwaters flowed downstream across the hayfield from north to south (towards the bridge), and that debris was deposited by the floodwaters only on the north-western corner of Plaintiffs' hayfield. 7-24-2014 CD 1:03:24-1:15:22. Evidence was also introduced by Plaintiffs that they regularly maintained the flood control dikes on the northern end of the hayfield because annual rain events and associated flooding caused them to be damaged and eroded. 7-24-2014 CD 11:34:12-11:38:59; 1:29:06-1:32:13. None of Plaintiffs' witnesses knew the elevation points of the hayfield, bridge, or other relevant areas, or how these elevation differences would have impacted the alleged flood profile. 7-24-2014 CD 1:36:10-1:36:31; 1:51:59-1:53:50; 7-25-2014 CD 10:00:55-10:01:57. Darrell Allred testified that flashes of lightning from a nearby thunderstorm allowed him to observe the level of Whitewater Creek rising steadily along the entire visible length of the creek, and then overtop suddenly and *uniformly* to flood his property. 7-24-2014 CD 3:37:10-3:43:48. An aerial photograph introduced in evidence taken following a significant flood in 1979 (before construction of the bridge) and one taken approximately ten (10) days after the September 2013 flooding, showed nearly identical flooding patterns as to Plaintiffs' hayfield.

Evidence was introduced that during Defendant's August 2013 maintenance efforts, Defendant actually achieved the required 9 feet of clearance under the bridge and all required areas, *before* August 26-27, except for 100' upstream of the bridge. 7-25-2014 CD 11:24:26-11:29:20. Paulk, the District 1 Maintenance Engineer, testified that flows in the creek were such that crews could not have safely entered Whitewater Creek after September 10, 2013. 7-25-2014 CD 3:14:46-3:17:15.

Both parties had submitted motions to exclude or limit the testimony of proffered expert witnesses prior to the July hearing. RP 717, 764. Before expert testimony began, Defendant suggested to the district court that, because time was becoming an issue, the court should simply hear the testimony of the experts and accord it whatever weight it deemed appropriate. The district court agreed and allowed Plaintiffs' proffered expert to testify. 7-25-2014 CD 11:50:44-11:51:38.

Plaintiffs' expert, Walter Niccoli, contended that on September 14-15, 2013, Whitewater Creek sedimented "uniformly" *backwards* from the bridge approximately 2000 feet upstream and then overran its banks onto the north-western corner of Plaintiff Darrell Allred's property. 7-25-2014 CD 1:15:35-1:26:50. He testified he had done no hydraulic modeling to determine whether this was possible, that such a phenomenon was not recognized in the scientific or peer-reviewed literature, that it not been subject to testing or other validation, and that

he had not considered other potential causes of the flooding. 7-25-2014 CD 1:15:35-2:02:32.

Defendant called its expert, John Wallace. After laying the foundation for Wallace's qualifications, Plaintiffs objected to Wallace's opinions and argued the substance of their motion regarding Defendant's expert. The district court, despite its prior ruling, allowed argument on the motion and struck the testimony of Defendant's expert in its entirety. 7-25-2014 CD 3:19:01-3:50:34. In turn, Defendant moved to strike the majority of Niccoli's testimony on several grounds. The court granted Defendant's motion in part and struck all of the testimony presented by Niccoli that had not previously appeared in a written report, including his testimony as to the causation of damages. 7-25-2014 CD 3:50:41-4:04:09; 4:11:22-4:12:25. No other scientific or technical evidence was presented by Plaintiffs as to the cause of the flooding or damages in September 2013.

Plaintiffs submitted estimates from a contractor and family friend suggesting a cost of approximately \$266,964.00 to repair the damage to Plaintiff Darrell Allred's field. 7-24-2014 CD 2:26:46-3:08:29. Plaintiffs also sought substantial compensation for Plaintiff Darrell Allred's own personal time and resources spent mitigating damage caused by the floods or otherwise maintaining his property. 7-24-2014 CD 4:38:20-4:44:49; 7-25-2014 CD 9:49:24-10:00:15; 10:01:58-10:03:20. Plaintiffs did not request attorney fees at the hearing. No evidence was presented

to suggest that Defendant had engaged in intentional or wrongful conduct to support an award of sanctions. The district court ruled from the bench in favor of Plaintiffs and against Defendant. 7-25-2014 CD 4:53:23-5:03:34.

The district court allowed the parties to submit proposed findings of fact and conclusions of law. RP 929, 946. Defendant filed a motion requesting the district court reconsider striking the testimony of its expert, and providing an offer of proof regarding Wallace's testimony. RP 995. The district court entered its "Findings of Fact and Conclusions of Law" on October 7, 2014, reflecting its findings in favor of Plaintiffs. RP 1021.<sup>3</sup>

On October 16, 2014, the Court entered its "Final Order and Judgment" awarding Plaintiffs "sanctions in the form of compensatory damages to Plaintiffs in addition to reasonable attorneys' fees and costs from the filing of Plaintiffs' motion to enforce the permanent injunction, filed September 17, 2013, to present." RP

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<sup>3</sup> On October 15, 2014, Defendant filed a motion to amend or correct the district court's "Findings of Fact and Conclusions of Law." RP 1072. Defendant noted that the district court had erroneously made reference to "*ex parte*" communications to the district court, referring to the July 21, 2014 letter to the district court and Plaintiffs regarding subject matter jurisdiction. Defendant pointed out that no *ex parte* communication had occurred, and that Plaintiffs' counsel had responded to the letter in identical fashion. Plaintiffs did not oppose the motion and the parties submitted a stipulated order for entry by the district court. The district court held a teleconference on the matter on October 21, 2014, and denied the unopposed motion because it considered the letter to be *ex parte* because it was "not filed in open court". RP 1082-1083. On November 3, 2014, the district court entered its order denying Defendant's motion. RP 1127.

1080. The district court awarded “sanctions in the form of compensatory damages” in the amount of \$408,764.00, and directed Plaintiffs to submit a cost bill and attorneys’ fees affidavit. The district court also denied Defendant’s motion to reconsider excluding its expert’s testimony and offer of proof.

On October 24, 2014, Plaintiffs filed their cost bill and attorney’s fees affidavit totaling \$54,301.41. RP 1084.

On October 30, 2014, Defendant filed its objections to Plaintiffs’ attorney fee affidavits and cost bill. RP 1121. Defendant pointed out that Plaintiffs were seeking costs specifically designated as non-recoverable under Rule 1-054(D)(3). Defendant also pointed out that Plaintiffs were attempting to recover attorney’s fees for tasks appropriately performed by support staff. With regard to Plaintiffs’ expert fees, Defendant noted that the district court had previously ruled at the hearing on July 24-25, 2014 that it was striking significant portions of Plaintiffs’ expert’s testimony, including all testimony related to causation presented at the hearing. Defendant requested that as a result of this ruling, the district court should reduce any award of expert witness fees proportionately.

On December 8, 2014, the district court held a hearing on Defendant’s objections to Plaintiffs’ attorney fee affidavits and cost bill. The district court overruled Defendant’s objections, finding that award was a sanction, and Rule 1-054(D) did not apply. The district court further ruled that attorney fees were

recoverable for secretarial/clerical staff, and that all of Plaintiffs' expert fees would be awarded with no *pro rata* reduction for the testimony excluded. RP 1146-1149. On December 23, 2014, the district court entered its order awarding Plaintiffs requested costs, attorney fees and expert witness fees in the amount of \$54,301.41, for a total judgment of \$463,065.41. RP 1150.

## ARGUMENT

### **A. The District Court Lacked Subject Matter Jurisdiction.**

Following the execution of the SAMR on December 10, 2012 (RP 841) and entry of the SPIO on January 18, 2013 (RP 190), Plaintiffs filed their motion for voluntary dismissal with prejudice pursuant to Rule 1-041 NMRA. RP 205. The district court entered its Order of Dismissal with Prejudice of All Remaining Claims on February 27, 2013. RP 210. On September 17, 2013, nearly ten months after the execution of the SAMR, Plaintiffs filed their "Verified Motion to Enforce" the SPIO in an attempt to reopen the closed case. RP 212. Because the district court had dismissed the action with prejudice and did not reserve jurisdiction to address any further disputes between the parties, the district court lacked subject matter jurisdiction to consider Plaintiffs' motion or make subsequent rulings in the closed matter.

1. *Plaintiffs voluntarily dismissed the case with prejudice and the district court lacked subject matter jurisdiction to conduct further proceedings.*

A voluntary dismissal immediately terminates a case leaving a district court without jurisdiction. *See Becenti v. Becenti*, 2004-NMCA-091, ¶¶ 2-5, 13, 136 N.M. 124, 94 P.3d 867 (holding that a voluntary dismissal terminates a case and district courts lack jurisdiction thereafter to take further action in such cases); *Bd. of Ed., Penasco Indep. Sch. Dist. v. Rodriguez*, 1968-NMSC-163, ¶ 5, 79 N.M. 570, 446 P.2d 218 (recognizing that a voluntary dismissal of a suit leaves the parties as though the suit had never been brought and “jurisdiction of the court is immediately terminated” because a district court is without further jurisdiction to take additional action). A subsequent action in a dismissed case necessarily implicates a district court’s subject matter jurisdiction. *Bd. of Ed., Penasco Indep. Sch. Dist.*, 1968-NMSC-163, ¶ 6. Subject matter cannot be conferred by consent of the parties (*Id.* ¶ 7) and can be raised at any time, even on appeal. *Becenti*, 2004-NMCA-091, ¶ 13. *See also McCuiston v. McCuiston*, 1963-NMSC-144, ¶¶ 10, 14, 73 N.M. 27, 385 P.2d 357 (“After voluntary dismissal, the court was without further jurisdiction and had no right to render any judgment” and “the parties were out of court for every purpose” so the “trial court had no jurisdiction to enter the order appealed from.”); *Cordova v. Larsen*, 2004-NMCA-087, ¶ 14, 136 N.M. 87, 94 P.3d 830 (“[A] court without jurisdiction to hear a case cannot issue a valid order on the merits of that case.”).

When a court has dismissed a case with prejudice, that court lacks the jurisdiction to enforce settlement agreements between the parties unless the order of dismissal shows that the court retained jurisdiction or incorporated the settlement agreement into the dismissal. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 381 (1994) (holding that the district court lacked subject matter jurisdiction to enforce a settlement agreement when a stipulation and order of dismissal with prejudice “did not reserve jurisdiction in the District Court to enforce the settlement agreement” or incorporate terms of the agreement into the order of dismissal); *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994) (concluding that when there was “no dispute” that the parties agreed to a settlement and the district court administratively closed the case and cleared it from its docket pursuant to Fed. R. Civ. P. 41, the case was dismissed with prejudice and the district court did not retain jurisdiction to enforce the settlement agreement absent express language in the order of dismissal or evidence of intent for the court to retain jurisdiction).

2. *The district court did not retain continuing jurisdiction to take any further action in the case.*

Both the SAMR and SPIO were negotiated, agreed to by the parties, and were material terms of settlement between them. New Mexico law has recognized that stipulated judgments, stipulated orders, and stipulated injunctions, are not judicial determinations on the merits, but rather are contracts between the parties.

*Williams v. Crutcher*, 2013-NMCA-044, ¶ 8, 298 P.3d 1184 (recognizing that “a stipulated judgment... is not considered to be a judicial determination, but a contract between the parties”); *Lewis v. City of Santa Fe*, 2005-NMCA-032, ¶ 11, 137 N.M. 152 (“It is well established in this state that settlements and judgments entered by consent of the litigants essentially represent contractual agreement.”); *Owen v. Burn Const. Co.*, 1977-NMSC-029, ¶ 13, 90 N.M. 297 (“It is true, as pointed out by the Court of Appeals, that a stipulated judgment is not considered to a judicial determination; rather, it is a contract between the parties”) (internal citation and quotations omitted). Because a stipulated order is not a judgment on the merits after the conclusion of litigation, “it is not a judicial determination of the issues raised in the action, but is primarily a reflection of the settlement agreement between the parties.” *Pope v. Gap, Inc.*, 1998-NMCA-103, ¶ 26, 125 N.M. 376, 961 P.2d 1283. Accordingly, a court’s role in entering a stipulated judgment is “ministerial”. *Id.* (recognizing that a district court’s role in signing a “consent judgement” is “only ministerial” because there were no issues “actually adjudicated” between the parties).

In cases where a dismissal order explicitly *allows* a district court a reservation of jurisdiction, it is appropriate for a district court to take future actions, including contempt proceedings for an alleged violation of an injunction, in order to *enforce* an injunction. *See Santa Fe Properties, Inc. v. French &*

*French Fine Properties, Inc.*, No. CIV 04-0518 JB/DJS, 2005 WL 2313680, at \*5 (D.N.M. Aug. 9, 2005) (holding that when the court specifically retained jurisdiction over an action for the enforcement of an injunction pertaining to a party's use of an internet domain name, the court could entertain contempt proceedings for an alleged violation of the injunction and enforcement of the settlement agreement between the parties). However, absent an affirmative retention of jurisdiction, a dismissal with prejudice leaves a district court lacking subject matter jurisdiction to issue further judgments or orders. *See Hagan Eng'g, Inc. v. Mills*, 115 Cal. App. 4th 1004, 1007-08, 9 Cal. Rptr. 3d 723, 724-25 (2003) (recognizing that following a settlement and dismissal with prejudice, a district court cannot consider a subsequent motion to enforce an agreement because “[a]bsent a pending lawsuit, a court cannot issue judgements or orders.”). Holding otherwise implies that a district court naturally retains jurisdiction in perpetuity, and can reopen a case to address an alleged breach of an agreement and any damages flowing from that breach, matters which are more properly addressed through a claim for breach of the settlement agreement.<sup>4</sup> *See id.* 115 Cal. App. 4th at 1009-10 (dismissing the notion that a court has “some eternal control over cases

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<sup>4</sup> Plaintiffs are apparently aware that an action for breach of contract is the appropriate vehicle for such a claim, having filed a lawsuit regarding the facts which underlie this case on September 9, 2015, titled “Complaint (Protective Filing) For Breach of Contract, Negligent Maintenance and Operation, Demand For Arbitration (In The Alternative) And Damages.” *See* D-728-CV-2015-00015, State of New Mexico, County of Catron, Seventh Judicial District Court.

which have been voluntarily dismissed with prejudice” and suggesting that a court’s retention of jurisdiction can be handled through an explicit “conditional dismissal” of suit rather than a dismissal with prejudice).

Neither the SAMR nor the SPIO contained any statement that the district court would retain any type of jurisdiction over the case. The SAMR specifically contemplated that the parties had reached an agreement for the resolution of “all claims” (RP 841), that they “acknowledge they will not ever again be able to assert any claim(s) as against each other arising out of or relating to or resulting from the Lawsuit” (RP 843), and that any future disputes between them pertaining to “any of the promises made... [or] over a party’s performance”, would be submitted to the mandatory dispute resolution provision. (RP 843). Additionally, the SAMR required that following the settlement, Plaintiffs’ lawsuit would be dismissed with prejudice. RP 842. At no point did Plaintiffs move the district court to reopen or set aside the order dismissing the case with prejudice, and such a motion would have been unavailing in this case. *See* Rule 1-060 NMRA (stating that a party may seek relief from a judgment or order due to clerical mistakes, newly discovered evidence, fraud, a void judgment, satisfaction of judgment, or “other reason justifying relief from the operation of judgment”).

There is no statement in either the SAMR or the SPIO which conferred continuing jurisdiction on the part of the district court to either enforce the parties’

agreement, determine whether a breach of the agreement had occurred, what potential damages might be for a breach, or to award damages for a breach. *See Paulucci v. Gen. Dynamics Corp.*, 842 So. 2d 797, 799-800, 803 (Fla. 2003) (holding that when a settlement agreement specifically contemplated the district court's retention of jurisdiction to enforce its terms, a party could appropriately file a motion "to enforce the Settlement Agreement", but "if a party is claiming a breach of the agreement and is seeking general damages not specified in the agreement, the appropriate action would be to file a separate lawsuit."). Both the SAMR and SPIO referenced one another and contemplated the other's existence as a necessary part of settlement, and accordingly, both documents were part of the parties' settlement and could not be read in isolation. Even if the SPIO could be read as a stand-alone contract between the parties, it should be noted that Plaintiffs' Verified Motion, despite its title, did not seek the district court's assistance in *enforcing* the agreement between the parties. *See* RP 396 (admitting that Plaintiff was not asking the district court to order Defendant "to do something"); 7-24-2014 CD 10:23:05-10:23:39 (admitting that Plaintiff was not asking the court to order Defendant to "go dig dirt out from under the bridge."). Rather, Plaintiffs sought *damages* for the alleged *breach* of the agreement between the parties.

Although Defendant challenged the district court's subject matter jurisdiction (RP 856), the district court summarily determined that it had jurisdiction to award damages for the breach of the parties' settlement agreement pursuant to New Mexico's Constitution, and provided no analysis of its reasoning. RP 1039; *and see generally* 7-24-2014 CD 10:46:16-10:47:15. The district court repeatedly referred to its "inherent authority" to enforce its own orders as the basis for this jurisdiction. *Id.* However, because the district court was not actually asked to enforce any agreement, including the SPIO, the district court apparently determined that it had perpetual jurisdiction to not only enforce the agreement between the parties, but to interpret the agreement, adjudicate whether there had been a breach, and to award damages. Aside from lacking the subject matter jurisdiction to make its ultimate ruling, the district court deprived Defendant of the right to a peremptory challenge, a jury trial, affirmative defenses, and discovery/litigation on the parties' intentions in forming the contract to determine whether there was a meeting of the minds on its terms, all of which would have been available to Defendant if Plaintiffs properly filed suit for breach of contract.

Although the district court initially recognized that the SPIO was a contract between the parties (2-27-2014 CD 10:16:12-10:17:13), the district court operated under the misapprehension that its ministerial act in entering the SPIO operated to convey the jurisdiction necessary to consider evidence and award monetary

damages flowing from an alleged breach of that contract. This was error, and the resulting order appealed from lacks the force of law. *Hinsdale v. Farmers Nat. Bank & Trust Co.*, 823 F.2d 993, 995-96 (6th Cir. 1987) (dismissing the appeal, vacating the district court’s judgement, and holding that following a stipulated dismissal with prejudice the district court lacked jurisdiction to enforce a settlement agreement between the parties, and “the parties were in a position to seek enforcement of the settlement agreement only by means of an independent action for specific performance or by means of a Rule 60(b) motion”); *Viejo Bancorp, Inc. v. Wood*, 217 Cal. App. 3d 200, 206, 265 Cal. Rptr. 620, 622-23 (Ct. App. 1989) (concluding that following a voluntary dismissal, the action was “no longer pending” and “in the absence of a motion... to vacate the dismissal, the court was without subject matter jurisdiction of the old action.”).

**B. The district court erred in failing to acknowledge that SAMR and SPIO were contracts, erred in construing the contract between the parties, and in concluding that defendants breached the contract.**

“We review a district court’s interpretation of an unambiguous contract *de novo*.” *Smith & Marrs, Inc. v. Osborn*, 2008-NMCA-043, ¶ 10, 143 N.M. 684, 180 P.3d 1183 (internal quotation marks omitted). “This Court will not rewrite a contract to create an agreement for the benefit of one of the parties that, in hindsight, would have been wiser.” *Watson Truck & Supply Co., Inc. v. Males*, 1990-NMSC-105, ¶ 11, 111 N.M. 57, 60. “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." *CC Hous. Corp. v. Ryder Truck Rental, Inc.*, 1987-NMSC-117, ¶ 6, 106 N.M. 577, 579.

1. *The SAMR and SPIO functioned as a contract between the parties.*

The SAMR executed by the parties on December 11, 2012 was a contract. A settlement agreement is a contract under New Mexico law, and is construed as a contract. *Bd. Of Educ. v. Dep't. of Pub. Educ.*, 1999-NMCA-156, ¶ 14, 128 N.M. 398; *Builders Contract Interiors, Inc. v. Hi-Lo Industries, Inc.*, 2006-NMCA-053, ¶ 8, 139 N.M. 508 ("Because a settlement agreement is a species of contract, we also recognize and give effect to the intersecting 'strong public policy of freedom to contract' that has been enforced in New Mexico.") (internal citations omitted).

As discussed above, the SPIO was also a contract rather than a judicial determination. The district court acknowledged that the SPIO was a contract (2-27-2014 CD 10:16:12-10:17:13), but rather than requiring Plaintiffs to seek relief for breach of contract, held that it maintained jurisdiction to "enforce" the SPIO, even though Plaintiffs were not seeking enforcement of the agreement, but rather damages flowing from an alleged breach. The district court erred in proceeding in this manner. Even if the district court's proceedings could be construed as a

proceeding regarding Defendant's alleged breach of contract, the district court erred in interpreting the contract between the parties.

The role of the court in construing contracts "is to give effect to the intention of the contracting parties." *Bogle Farms, Inc. v. Baca*, 1996-NMSC-051, ¶ 22, 122 N.M. 422. In construing contracts, it is important to note that "[t]he parol evidence rule bars admission of evidence extrinsic to the contract to contradict and perhaps even supplement the writing." *Memorial Med. Ctr., Inc. v. Tatsch Const., Inc.*, 2000-NMSC-030, ¶ 16, 129 N.M. 677 (internal citation and quotations omitted). Where a contract is unambiguous, the Court may interpret the meaning as a matter of law. *Mark V., Inc. v. Mellekas*, 1993-NMSC-001, ¶ 12, 114 N.M. 778, 781. A contract is ambiguous "only if it is reasonably and fairly susceptible of different constructions. The mere fact that the parties are in disagreement on the construction to be given does not necessarily establish ambiguity." *Vickers v. North Am. Land Dev., Inc.*, 1980-NMSC-021, ¶ 9, 94 N.M. 65, 68. There was no argument below that the contract between the parties, either the SPIO or the SAMR, were ambiguous, and the district court made no such finding. As a result, all that remained was for the district court to construe the contract between the

parties.<sup>5</sup> The district court erred significantly in doing so, as described more fully below.

2. *The district court erred in its determination that the SPIO was severable from the SAMR.*

The district court initially correctly viewed the SPIO as a contract between the parties, as opposed to a judicial determination or court order. However, the district court abandoned this notion, ruling that the SPIO was separate from the SAMR, and that the two documents did not have to be interpreted in conjunction with one another. RP 1040; 7-24-2014 CD 10:25:17-10:25:58; 10:36:07-10:37:17; 10:41:31-10:46:01. In arriving at this conclusion, the district court accepted Plaintiffs' statements regarding their intentions when negotiating the agreement, while rejecting Defendant's attempts to focus on the written agreement. *Id.* This construction of the agreements ignored the plain language of the contract, and relied instead upon the extrinsic arguments of Plaintiffs' counsel as a basis for interpreting the agreement. *Id.*

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<sup>5</sup> Defendant's argument in this regard is presented in the alternative. Defendant's position is that the district court lacked jurisdiction to do anything after it dismissed the case with prejudice, and that Plaintiffs should have pursued an action for breach of contract. At no time were contempt proceedings the appropriate vehicle for resolving a dispute about performance of a contract. Even if the district court construed Plaintiffs' Verified Motion as a claim for breach of contract over which it maintained subject matter jurisdiction, the district court erred in its construction of the agreement.

The SAMR stated, in relevant part:

“the Parties have reached an Agreement, by and among themselves, for resolution of all claims, actions, causes of action, causes, demands damages, costs, losses, expenses, compensation and suits, of any kind or nature whatsoever, both known and unknown, contingent and non-contingent, foreseen and unforeseen, to person and property, including but not limited to those for tort, contract, fraud, self-dealing, bad faith, punitive or exemplary damages, costs, attorneys fees, and any other claims without limitation for unknown injuries or damages of any nature which may have resulted in the past or may in the future develop from or by reason of any act or omission of the parties with regard to or arising out of this Lawsuit.”

– RP 841.

The SAMR required the parties to: (1) enter into a Stipulated Permanent Injunction Order, and “perform in accordance with the Order”; (2) dismiss the lawsuit with prejudice; and (3) cooperate fully in the implementation of the agreement. RP 842.

The SAMR states “[t]he Parties have agreed to the entry of a Stipulated Permanent Injunction Order (“Order”) in the form attached hereto as Exhibit F and the Parties shall perform in accordance with the Order.” RP 842. Pursuant to the SAMR, Plaintiffs agreed to release Defendant from “any and all claims... arising out of or relating to or resulting from the lawsuit.” RP 842-43. The SAMR reflected, at Section 7, the parties’ agreement that “as against each other, the acceptance and execution of this Agreement is a complete and final bar to any and all claims... arising out of or relating to or resulting from the Lawsuit.” RP 844.

The district court erred in separating the SAMR and the SPIO rather than reading them together as an agreement between the parties. RP 1040. The agreements cannot be separated because absent the SAMR, the SPIO would not exist. The only record evidence which exists as to why the SPIO was agreed to by the parties and entered by the district court is the language in the SAMR which required them to do so. There is no language in either document suggesting that the documents are separate. Thus, there is neither a factual or legal basis to support the district court's conclusion that the documents were separable.

Defendant argued to the district court that the language of the SAMR reflected two important points of agreement between the parties: (1) the language of the SAMR was broad in terms of the scope of the agreement and the waiver of past, present and future claims, reflecting the parties' intent to end litigation as to the issues raised in the Lawsuit; and (2) the SAMR contained an extra-judicial dispute resolution clause that was similarly broad. RP 947. By refusing to read the SAMR and SPIO as part of a single agreement, the district court erred in analyzing each of these issues and in construing the contract between the parties.

The SAMR makes no reference to exempting the SPIO or performance under the SPIO from the SAMR or the mandatory dispute resolution provision contained at Section 4. The SPIO is likewise silent as to exempting itself from the SAMR or Section 4. None of the writings of the parties contain any suggestion

that the SPIO should be exempted from the SAMR or Section 4. The SAMR does not limit Section 4's mandatory procedure to any specific areas or subject matters. Despite this plain language, the district court ruled that the SPIO was exempt from Section 4 of the SAMR, and that instead the district court retained jurisdiction to address performance issues through its contempt powers. 7-24-2014 CD 10:25:17-10:25:58; 10:36:07-10:37:17; 10:41:31-10:46:01. As noted above, the district court found no ambiguity in the agreement between the parties, yet relied exclusively on Plaintiffs' arguments regarding the parties' intentions in arriving at this conclusion. This constituted an attempt to rewrite the agreement between the parties based on parole evidence, which is improper under New Mexico law. *See Watson Truck & Supply Co., Inc.*, 1990-NMSC-105 at ¶ 11. *See also Horne v. Los Alamos Nat. Sec., L.L.C.*, 2013-NMSC-004, ¶ 38, 296 P.3d 478 ("When the parties agree to arbitrate any potential claims or disputes arising out of their relationships by contract or otherwise, the arbitration agreement will be given broad interpretation, unless *the parties themselves* limit arbitration to specific areas or matters.") (emphasis in original); *Clay v. New Mexico Title Loans, Inc.*, 2012-NMCA-102, 288 P.3d 888 ("If the parties have clearly and unmistakably agreed that an issue is subject to arbitration, a court must enforce that agreement without further inquiry."). The district court's error in severing the agreements was thus compounded when the district court then refused to examine the potential impact

of the SAMR on the Plaintiffs' Verified Motion, including whether the SAMR barred or limited such claims, and whether such claims should be subjected to the mandatory dispute resolution process contained in the SAMR.

3. *The district court erred in reforming the agreement between the parties by adding terms not agreed upon by the parties, and omitting terms specifically agreed to by the parties.*

In addition to erroneously severing the agreement as described above, the district court erred when it read terms into the agreement between the parties that were not agreed to by the parties, and then held that Defendant's failure to comply with the non-existent terms constituted a violation of the agreement. Defendant argued that the terms of the SPIO were plain and unambiguous, and that the district court was attempting to add language to the SPIO that simply wasn't present. Specifically, Defendant argued that: (1) the district court was interpreting the SPIO to require "continuous" pursuit of maintenance efforts once maintenance was triggered; (2) that the district court was reading language into the SPIO to require allocation of manpower and resources that were to the satisfaction of the district court or Plaintiffs; and (3) that the district court was interpreting the SPIO to require Defendant to prioritize maintenance under the SPIO ahead of Defendant's other statutory and common law duties, such that maintenance under the SPIO became Defendant's top priority. 10-9-2013 CD 2:29-12-2:32:37; 2-27-2014 CD

10:00:39-10:07:56; 10:14:56-10:15:43. Defendant contended that none of these requirements appeared in the agreement between the parties.

With regard to the required maintenance, the SPIO states, in its entirety, that “maintenance must be diligently pursued until completion recognizing that, *force majeure*, regulatory restrictions, an conditions provided for upon approval of the Defendant’s PCN, or otherwise, will ultimately dictate the Defendant’s maintenance time frames.” RP 194 at ¶ 14. The SPIO contains no requirements regarding the time frame within which maintenance must be completed once the maintenance requirement is triggered. *Id.* The SPIO contains no requirement that Defendant pursue maintenance “continuously” once the maintenance requirement is triggered, or that once maintenance begins, Defendant cannot adjust the type of crew and resources it uses to complete maintenance. *Id.* The SPIO contains no requirements regarding the resources or manpower that shall be used to complete maintenance, and places no priority on the completion of maintenance relative to Defendant’s statutory or common law responsibilities. *Id.* “Diligently” is not defined by the SPIO. *Id.*

The unambiguous language of the SPIO requires only that Defendant “diligently pursue maintenance until completion.” RP 194 at ¶ 14. Nonetheless, the district court found that Defendant violated the SPIO because it: (1) reduced the size of the crew conducting maintenance activities when it released workers

from other patrols to return to their own duties; (2) chose to discontinue the efforts of the Cliff Patrol after their progress was substantially erased by a rain event, and instead mobilize the heavy equipment crew; and (3) failed to prioritize maintenance at Whitewater Creek above all other activities, maintenance and otherwise, that Defendant was required to conduct by not obtaining other manpower and equipment from other districts or sources to complete maintenance. RP 1031-1033 (finding *e.g.* that “DOT did not devote sufficient resources, in the form of personnel and heavy equipment to timely complete the maintenance” and that DOT decided “to not continuously prosecuted the maintenance work after the work was undertaken”); 10-9-2013 CD 2:33:52-2:38-59; 7-25-2014 CD 4:28:06-4:48:45. None of these findings are directed towards a failure to comply with requirements which actually exist in the SPIO.

To find that Defendant violated the SPIO because it reduced crew size to allow its employees to perform other maintenance duties, or made decisions regarding the allocation of its maintenance crew in relation to its other statutory and common law duties, the district court read terms into the agreement between the parties that are not present in the SPIO, and thus reformed the agreement. Because the SPIO was unambiguous, the *only* proper role for the district court was “to give effect to the intention of the contracting parties.” *Bogle Farms*, 1996-NMSC-051, ¶ 22. Had the parties wished to include specific requirements in the

SPIO such as “continuous” pursuit of maintenance, timeframes for completion, prioritization of maintenance, size of crew, or equipment used, they were free to do so. The district court’s role was not to revise the parties’ agreement for them where no ambiguity exists in the written agreement. *Smith v. Price’s Creameries, Div. of Creamland Dairies, Inc.*, 1982-NMSC-102, ¶ 9, 98 N.M. 541, 650 P.2d 825 (“Failing a showing of ambiguity of 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.”).

The district court also omitted terms the parties did agree upon when it interpreted the SPIO. In addition to the district court’s determination that the SAMR was unrelated to the SPIO, the court also disregarded two important areas of discretion given to Defendant by the SPIO: the *force majeure* and the “or otherwise” clause of the SPIO. RP 194 at ¶ 14

The district rejected the argument that the historic rainfall of September 2015 constituted a *force majeure* under the terms of the SPIO because the rain event, while “large” and potentially constituting a “15 or 20 year event”, was not “extreme or of biblical proportions.” RP 1029. The district court also ignored Defendants’ contentions and evidence (including testimony from Plaintiffs’ expert) suggesting that the drainage at Whitewater Creek had been substantially altered by

the Whitewater-Baldy complex fire in 2012, and that increased sedimentation was likely for a period of several years, which might alter Defendant's ability to complete maintenance under the SPIO. 7-25-2014 CD 1:15:35-2:02:32; RP 609-613. The district court ignored Defendant's contention that it had actually achieved substantial compliance with the SPIO on August 26, 2013 by reaching 9 feet of clearance in nearly all of the required area, and that a *force majeure* in the form of additional rain events negated that progress, causing a new trigger for maintenance under the SPIO and constituting a separate event.<sup>6</sup> RP 950-951; 956; 964. The district court also rejected the evidence presented by Defendant that the District 1 heavy equipment crew and other resources were impacted by response to the Silver fire and other wildfires. *Id.*; 7-25-2014 CD 4:28:06-4:48:45. The district court ignored Defendant's undisputed evidence that high flows in Whitewater Creek made the use of manpower or equipment in Whitewater Creek impossible after September 10, 2013, instead finding that "no evidence" was introduced in this regard. RP 1029-1030; 7-25-2014 CD 3:14:46-3:17:45. The district court rejected Defendant's argument that it had discretion, under the "or otherwise" clause of the SPIO, to determine how it would appropriately allocate its manpower and resources in order to comply with the SPIO and its statutory and

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<sup>6</sup> The district court precluded Defendant from making this argument after the applicable evidence was introduced at the hearing on July 25, 2014. 7-25-2014 CD 4:28:06-4:48:45.

common law duties to the public. *Id.*; 10-9-13 CD 2:33:52-2:38-59. In its Findings of Fact and Conclusions of Law, the district court specifically *omitted* the “or otherwise” clause from its rendition of the SPIO. RP 1023 at ¶ 9.

The district court’s refusal to analyze Defendant’s compliance with the SPIO in conjunction with the “or otherwise” clause was problematic for a number of reasons. The district court’s refusal to analyze the “or otherwise” clause was not supported by any reasoning or finding, and had the practical effect of rendering the “or otherwise” clause mere surplusage, which ignores New Mexico law regarding contract interpretation. *Mayfield Smithson Enterprises v. Com-Quip-Inc.*, 1995-NMSC-034, ¶ 14, 120 N.M. 9 (“A contract must be construed as a harmonious whole, and every word or phrase must be given significance according to its importance in the context of the whole contract.”) (internal quotations omitted). The “or otherwise” clause contained in the SPIO served the purpose of ensuring that Defendant would have a measure of reasonable discretion as to how to prioritize its duties, and how to allocate its resources. Indeed, Defendant, as a governmental entity, is not at liberty to simply ignore its other duties, nor to elevate a contractual obligation to a private individual over its duties to the public at large.<sup>7</sup> To suggest otherwise would be to ignore the language of the parties’

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<sup>7</sup> As this Court has noted, Defendant has a “well settled” “duty to maintain roadways in a safe condition for the benefit of the public.” *Lujan v. New Mexico Dep’t. of Transp.*, 2015-NMCA-005, ¶ 12, 341 P.3d 1 (internal quotations

agreement, and to place Defendant in the impossible position of allowing a private citizen to dictate how it allocates resources and manpower. The SPIO does not support this result, and New Mexico law does not support such an interpretation of the SPIO. *Castle v. McKnight*, 1993-NMSC-076, ¶ 9, 116 N.M. 595 (“[C]ontract will not be interpreted giving discretion to one party in a manner which would put one party at the mercy of another, unless the contract clearly requires such an interpretation.”) (internal citations and quotations omitted).

The district court erred by reforming an unambiguous agreement and by adding and omitting terms based on its own erroneous construction. This error was compounded by the finding that Defendant violated the reformed agreement, and accordingly, the district court should be reversed as to its efforts to reform the agreement between the parties.

4. *The district court compounded its error in reforming the SPIO by incorrectly determining that Defendant violated the reformed agreement*

After reforming the SPIO by removing the “or otherwise” clause and any effect of the *force majeure* clause, along with adding terms that required continuous maintenance efforts and specific allocations of resources, it was not surprising that the district court found Defendant to have violated the reformed

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omitted). *See also* NMSA 1978 § 67-3-16 (charging Defendant with duty to “construct, repair and maintain...public roads and highways within the state, as in their judgment will best subserve the interest of the general public.”).

SPIO, and that this violation caused damages to Plaintiffs. This finding was not supported by sufficient evidence under either version of the SPIO.<sup>8</sup> The evidence presented to the district court in October 2013 and July 2014 was largely undisputed. The district court determined that Defendant's actions constituted a violation of the SPIO because Defendant did not "diligently" and "continuously" pursue maintenance. RP 1032. The district court's application of the law to the facts was erroneous, as discussed above.

The district court assessed liability, causation and damages at the July 2014 hearing. In addressing causation, the district court assumed that because Defendant had not completed the required maintenance before the flooding which occurred on Defendants' property on September 14-15, 2013, the two events were causally linked. There was no evidence to support such a link. No evidence was presented to the district court regarding how sediment accumulation at the bridge could have caused or contributed to flooding 2000 feet upstream, but not near the bridge itself. Plaintiffs' expert testified that the high flows in Whitewater Creek on September 14-15, 2013 would have created a "scour effect" that would have

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<sup>8</sup> This Court reviews the district court's findings of fact under the substantial evidence standard. This Court reviews the district court's legal conclusions *de novo*. *C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, ¶ 17-18, 112 N.M. 504; *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 12, 123 N.M. 329. A reviewing court may not assess the weight of evidence except "[w]here an issue to be determined rests upon the interpretation of documentary evidence . . . ." *Maestas v. Martinez*, 1988-NMCA-020, ¶ 15, 107 N.M. 91, 92.

created several feet of additional clearance beneath the bridge during peak flows, negating or reducing any lack of clearance attributable to Defendant's maintenance activities. 7-25-2014 CD 1:26:51-1:42:35. Plaintiffs produced no evidence regarding the relevant elevations of the bridge and hayfield to determine whether or how flowing water would impact those areas. Plaintiffs' proffered expert agreed that the elevation on the northern end of the hayfield would *have to be* lower than the elevation at the bridge to support his theory of the flooding, but was unaware of the elevation of either.<sup>9</sup> 7-25-2014 CD 1:15:35-2:02:32. Indeed, no evidence was presented to explain to the district court how the slowing of flows at the bridge during the flood could have caused Whitewater Creek to leave its banks 2000 feet upstream of the bridge and flood the northern end of Plaintiffs' upstream hayfield.

No evidence was introduced to the district court regarding whether the high flows caused by the rainfall on September 14-15, 2013, simply caused Whitewater Creek to overflow its banks and flood Plaintiffs' property, as it had done since at least 1979. Although Niccoli testified that the reduced clearance at the bridge caused the creek to sediment and overflow "uniformly" at least 2000 feet upstream,

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<sup>9</sup> The district court erroneously struck testimony from Defendant's hydrology expert, John Wallace, who conducted an elevation study of the relevant area and determined that the damaged areas of Plaintiffs' property were between 10-20 feet *higher* than the bridge. Wallace also concluded that any effects from reduced clearance at the bridge would have extended no more than 400 feet upstream, not 2000 feet upstream where the damage to Plaintiffs' property occurred. The district court gave no weight to this evidence.

the district court struck this testimony. Thus, Plaintiffs produced no scientific evidence regarding hydrology, hydraulics, flood profiling or geomorphology to support a link between Defendant's alleged maintenance failures and the damage to Plaintiffs' property. Instead, the district court relied solely on Plaintiff Darrell Allred's testimony that he witnessed the flood waters flood the hayfield uniformly following a "backsurge" of water from the bridge.<sup>10</sup>

An act or failure to act is a "cause" of injury or harm, if, unbroken by an independent intervening cause, it contributes to bringing about the injury or harm, and if the injury or harm would not have occurred without it. UJI 13-305 NMRA. Allred's testimony alone was not a sufficient substitute for scientific testimony as to whether Defendant's actions or failure to act caused flood damages to Plaintiffs' property. As a result, there was insufficient evidence to support the district court's findings that Defendant's actions caused damages to Plaintiffs' property.

The district court erred in reforming the contract which led to additional error in finding that Defendant violated the reformed agreement. The evidence relied upon was insufficient to support a finding of a violation of the SPIO, or that

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<sup>10</sup> The district court criticized Defendant's cross-examination of Allred on this point, stating that it was "demeaning" and "belittling" to question how Allred was able to observe this event in the middle of the night from across the creek, and why, although Allred took dozens of photos during the flood, he had no photos of the alleged "uniform" flooding.

any such violation caused damages to Plaintiffs' property in conjunction with the flooding on September 14-15, 2013.

**C. The District Court Erred In Awarding Damages.**

*1. The district court erred in awarding civil contempt damages.*

The district court characterized its award of \$463,065.41 to Plaintiffs as damages for civil contempt, and alternatively as “sanctions” for Defendant’s violation of the SPIO. This was both legal error and factually unsupported by the record evidence.

a. The district court lacked jurisdiction to award contempt sanctions.

As discussed above, the district court lost jurisdiction over the case when it entered a dismissal with prejudice and did not reserve jurisdiction to address any disputes between the parties about performance of the SAMR or the SPIO. Because the SPIO functioned at law as a contract, rather than an enforceable judicial determination, the district court could not use its contempt powers to address an alleged breach of contract. Where a court lacks subject matter jurisdiction, it cannot issue an enforceable civil contempt citation. *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988). As a result, because the district court lacked subject matter jurisdiction over the case, it could not entertain contempt proceedings against Defendant, nor enter civil contempt sanctions against them. This error of law warrants reversal.

b. The evidence does not support an award of civil contempt sanctions.

The district court based the award of nearly half a million dollars in “contempt” sanctions on a single factual finding. RP 1042. The district court held that “DOT’s decision to not continuously prosecute the maintenance work after the work was undertaken, was a deliberate, conscious decision by DOT management, and was in willful and wanton disregard to the danger of flooding to Plaintiffs’ property. The aforementioned willful decision by DOT to violate the Stipulated Judgement constitutes contempt of court.” RP 1032-1033. New Mexico law regarding civil contempt compels reversal of the district court’s findings in this regard. Civil contempt sanctions require: (1) knowledge of the court’s order; (2) ability to comply.<sup>11</sup> See *Dial v. Dial*, 1985-NMCA-059, ¶ 17, 103 N.M. 133; *Rhinehart v. Nelson*, 1990-NMCA-136, ¶ 28, 111 N.M. 319. New Mexico law is clear that the “willfulness” required to support a contempt finding is significant.

The decision by Defendant to switch from its maintenance patrol crew to the heavy equipment crew was thoroughly explained by Defendant’s personnel at the October 2013 and July 2014 hearings. There was no evidence that Defendant was

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<sup>11</sup> This Court has clarified that despite earlier case law which included “willfulness” as an element of civil contempt, no such showing is required. See *Spear v. McDermott*, 1996-NMCA-048, ¶ 41, 121 N.M. 609. However, where a district court analyzes the willfulness requirement under *Rhinehart*, this Court reviews accordingly. *Tue Thi Tran v. Bennett*, No. 32,677, mem. op. at ¶ 41 (N.M. Ct. App. May 28, 2014). The district court made a specific finding of willfulness and analyzed the matter under the *Rhinehart* standard. RP 1041.

aware of the potential for momentous rainfall in September, or that it made the decision to activate the heavy maintenance crew in order to endanger Plaintiffs' property. Instead, the evidence showed a clear basis for Defendant's decision, and showed Defendant required the heavy equipment crew to mobilize *earlier* than previously reported in response to complaints by Plaintiffs. This evidence was simply insufficient to support a finding of contempt.

There was no evidence presented to the district court to suggest that, given the other priorities Defendant was addressing (forest fires and potential flooding from the fires), the abnormal rainfall in September 2013, and the increased sedimentation of Whitewater Creek as the result of the 2012 fire, Defendant ever had the ability to comply with the SPIO, particularly as reformed by the district court. All the evidence presented to district court instead demonstrated that although Defendant was attempting to comply with the SPIO, continuing issues regarding the availability of manpower and equipment, coupled with weather, delayed compliance. As a result, the district court lacked a basis for such a finding, and indeed, did not specifically make such a finding. RP 1021-1041. Absent a finding that Defendant was able to comply with the SPIO, the district court should be reversed in this regard.

“In a civil contempt proceeding, the court has the power to coerce or force compliance with a court order, or in the alternative, the court can impose sanctions

by way of compensating the aggrieved party and awarding that party his or her attorney fees and costs.” *Rhinehart*, 1990-NMCA-136, ¶ 28, 111 N.M. 319. However, “[a]warding compensatory sanctions is only available if petitioner wins the action in the original suit.” *Id.* The underlying suit in the present case was settled by agreement of the parties, and dismissed; no party can be accurately be said to have “won” the underlying lawsuit. Further, the majority of New Mexico case law regarding the award of damages in the contempt context deal with an award of damages associated with prosecuting the contempt action and gaining enforcement of a court order that a party obtained *after* litigation and a judicial determination in its favor. *El Paso Prod. Co. v. PWG P’ship.*, 1993-NMSC-075, ¶ 31, 116 N.M. 583. There is no valid legal basis for the district court to have awarded what amounted to property damages, as contempt damages, where no party prevailed as to the underlying lawsuit and no party actually obtained a judicial determination on the merits of the underlying case. Instead, the SPIO was part of a settlement agreement between the parties, and functioned at law as a contract.

The district court improperly used its contempt powers to find Defendant had breached its contract with Plaintiffs. This is an improper use of the district

court's contempt powers. The appropriate action, and therefore measure of damages, if any, was for breach of contract.<sup>12</sup>

2. *The district court erred in refusing to limit Plaintiffs' claimed damages according to New Mexico law.*

Finally, the district court erred in refusing to properly consider and apply the law on property damages to Plaintiffs' recovery. As Defendant argued below, New Mexico law is clear that the appropriate damages to be awarded for damage to real property is the difference between the value of the property immediately before the occurrence and immediately after. RP 971; UJI 13-1819 NMRA. There was no evidence presented below as to either measure, and thus no legally valid basis to award damages for alleged lost value of real property. The district court made no findings in this regard. RP 1021-1041. Instead, the district court appears

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<sup>12</sup> The prevailing party in a breach of contract action is entitled to "all damages flowing naturally from the breach", which are considered "general damages" that give the plaintiff whatever value he or she would have obtained from the breached contract. *Sunnyland Farms, Inc. v. Central New Mexico Elec. Co-op., Inc.*, 2013-NMSC-017, ¶ 11, 301 P.3d 387. In addition, a party may be entitled to "special" or "consequential" damages, which compensate the party for the loss of the benefits of the contract, if those damages were objectively foreseeable to the parties to the contract. *Id.* Attorney's fees are not available to the prevailing party in an action for breach of contract unless specifically provided for in the contract, or by law. *Aboud v. Adams*, 1973-NMSC-026, ¶¶ 34-38, 84 N.M. 683. Finally, certain costs of litigation are properly awarded to a prevailing party in a breach of contract action. Rule 1-054(D)(2) NMRA. In the present case, the district court, improperly proceeding under its contempt powers, ignored these principals and awarded Plaintiffs attorney's fees, damages well beyond those recoverable for breach of contract, and costs in excess of those permissible under Rule 1-054 NMRA.

to have allowed Plaintiffs to recover the cost of repairs, both past and future. RP 1033-1034. Recovery for damages based on the cost of repairs is generally permissible only with regard to personal property, not real property. Compare UJI 13-1813, 13-1814, 13-1816, 13-1818 with UJI 13-1819.<sup>13</sup> The district court also rejected Defendant's arguments that much or all of Plaintiffs' personal labor on the property after the flooding actually constituted mitigation of damages, rather than compensatory damages. RP 957; 971; 1033-34. In fact, the district court made no findings as to mitigation, and did not reduce damages awarded to Plaintiffs accordingly. *Id.* Finally, the district court awarded Plaintiffs \$15,000.00 in damages associated with Plaintiffs' *pre-flood* "assistance" to Defendant during its August 2013 maintenance efforts. The district court provided no legal basis for this award. RP 1033. The evidence submitted to the district court was that Plaintiff Darrell Allred volunteered to assist Defendant's employees with his bulldozer in this regard. 7-25-2014 CD 9:13:31-9:22:37. This award of "damages" for activity Plaintiffs volunteered to do *prior* to any damage to their property is legally and factually unsupported.

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<sup>13</sup> In certain situations not applicable to this case, evidence of the cost of repairs to real property may be relevant as to the issue of diminution of value, or may be considered as a measure of damages. However, the "cap" on damages to real property is the lesser of diminution in value *or* repairs. *McNeill v. Burlington Resources Oil & Gas Co.*, 2008-NMSC-022, ¶¶ 14-17, 27, 143 N.M. 740. In the present case, no evidence as to diminution of value was presented to the district court at all, and thus no proper basis to admit evidence regarding the cost of repairs.

Since the district court's findings with regard to Plaintiffs' alleged damages to real property were not supported by any evidence, they must be reversed.

**CONCLUSION**

The district court improperly exercised its contempt powers to allow Plaintiffs to pursue a breach of contract claim against Defendant. In doing so, the district court exceeded its jurisdiction, erred in interpreting the parties' agreement and improperly awarded damages to Plaintiff.

For the foregoing reasons, Defendant respectfully requests this Court vacate and/or reverse the rulings of the district court.

Respectfully submitted,

MILLER STRATVERT P.A.

By \_\_\_\_\_

Cody R. Rogers

Luke A. Salganek

*Attorneys for Defendant-Appellant*

3800 E. Lohman Ave., Suite H

Las Cruces, New Mexico 88011

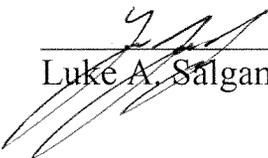
Telephone: (575) 523-2481

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was served by electronic means on the following this 21<sup>st</sup> day of September, 2015.

**VIA E-MAIL:**

Peter V. Domenici, Jr.  
Domenici Law Firm, P.C.  
320 Gold Avenue S.W., Suite 1000  
Albuquerque, NM 87102  
*Attorneys for Plaintiffs-Appellees*



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Luke A. Salganek

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