IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

PHILLIP GRASSIE, as Personal Representative and Executor of the Estate of WALTER GRASSIE,

Plaintiff-Appellee,

vs.

Cause No. 28,050

ROSWELL HOSPITAL CORPORATION, d/b/a EASTERN NEW MEXICO MEDICAL CENTER,

Defendant-Appellant.

Appeal from the Fifth Judicial District Court
The Honorable Ralph D. Shamas
D-0504-CV-2006-00286

DEFENDANT-APPELLANT'S REPLY BRIEF

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G) NMRA, undersigned counsel certifies that this brief was prepared using a proportionally-spaced typeface and that the body of the brief contains 4,395 words.

ARGUMENT

I. PLAINTIFF FAILED TO REBUT EASTERN HOSPITAL'S ARGUMENT THAT THE PUNITIVE DAMAGES AWARD SHOULD BE REVERSED BECAUSE IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, BECAUSE PLAINTIFF'S THEORY OF RECOVERY FAILS AS A MATTER OF LAW, AND BECAUSE THE AWARD IS UNCONSTITUTIONAL

a. Eastern Hospital's Brief in Chief Complied With Rule 12-213(A)(4) NMRA

In its Brief in Chief, Eastern Hospital argued that the punitive damages award against Eastern Hospital's CEO, Rich Robinson, was not supported by substantial evidence. (BIC 15-16.) Contrary to Plaintiff's arguments in his Answer Brief, Eastern Hospital did not argue in its Brief that the punitive damages award against Eastern Hospital for the conduct of Dr. Collins and the nurses was not supported by substantial evidence; rather Eastern Hospital's argument as to those damages goes to whether the damages award fails as a matter of law. (BIC 13-15.) Plaintiff's argument in his Answer Brief addressing whether the punitive damages award against Eastern Hospital for the conduct of Dr. Collins and the nurses was supported by substantial evidence misconstrues the arguments made in the Brief in Chief and is otherwise not pertinent to the issues on appeal. (AB 18-22.)[1]

[1] On August 13, 2008, Plaintiff filed a Reformatted Answer Brief. All citations are to that brief and not Plaintiff's original Answer Brief, filed August 4, 2008.

Eastern Hospital's Brief in Chief identified with particularity the reasons why the punitive damages award against Mr. Robinson was not supported by substantial evidence and included all relevant facts. (BIC 4-6, 15-16.) Indeed, Plaintiff's own statement of facts as to Mr. Robinson's conduct was largely duplicative of Eastern Hospital's. (*Compare* BIC 4-6 *with* AB 9-12.) Eastern Hospital therefore fully complied with the requirements of Rule 12-213(A)(4) NMRA and Plaintiff's waiver argument in that regard is not well-taken.[2]

b. Plaintiff Cannot Recover Punitive Damages Against Eastern Hospital for the Conduct of Mr. Robinson Because He Lacked the Requisite Mental State and Because Plaintiff's Negligent Hiring and Management Claim Fails as a Matter of Law

According to Plaintiff, Mr. Robinson's granting of privileges to Dr. Collins was done with "indifference to and willful disregard for the safety of Eastern's ER patients." (AB 27.) The evidence adduced at trial, however, belies such an assertion.

As discussed in Eastern Hospital's Brief in Chief and below with respect to Plaintiff's negligent hiring claim, *see* Section III, *infra*, the evidence presented at trial indicated that Mr. Robinson's actions in granting privileges to Dr. Collins comported with the contract between Eastern Hospital and Chaves Emergency Group and was otherwise standard in the profession. (Tr. (Vol. 6), pp. 1532-34;

[2] As an aside, Plaintiff's statement of facts is not entirely supported by the record and a number of Plaintiff's "facts" even lack citations to the record.

Tr. (Vol. 7), pp. 1730-36; Tr. (Vol. 9), p. 1975.) Eastern Hospital also presented evidence that granting privileges to a physician who lacks board certification is not negligence. (Tr. (Vol. 7), pp. 1741-44; Tr. (Vol. 9), pp. 1972-74; Tr. (Vol. 5), pp. 1216-17, 1237.) Plaintiff presented no evidence to the contrary.

Moreover, while Plaintiff makes much of the fact that Dr. Collins left the military after one year and was asked to leave two hospitals, Plaintiff failed to present any evidence, expert or otherwise, that Dr. Collins' past employment history should have indicated to Mr. Robinson that Dr. Collins was an incompetent physician.

Mr. Robinson's actions, which he and others described at trial as being wholly in compliance with his obligations as CEO of Eastern Hospital, simply do not rise to the level of culpability required to support an award of punitive damages.

Further, as discussed below in Section III, *infra*, the negligent hiring claim is not itself supported by substantial evidence, expert or otherwise. Because the negligent hiring claim lacks substantial evidence, the punitive damage award against Eastern Hospital necessarily fails as a matter of law. *See Gonzales v. Sansoy*, 103 N.M. 127, 129, 703 P.2d 904, 906 (Ct. App. 1984) ("An award of punitive damages must be supported by an award of compensatory damages."). The punitive damages award against Mr. Robinson should therefore be reversed.

c. Plaintiff Cannot Recover Punitive Damages Against Eastern Hospital for the Acts of Dr. Collins and the Nurses

Plaintiff based his claim for punitive damages against Eastern Hospital for the conduct of the nurses and Dr. Collins on a "cumulative acts" theory originating in *Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 270, 881 P.2d 11, 15 (1994). While Plaintiff argues that Eastern Hospital "knowingly ignored" *Chavarria v. Fleetwood Retail Corp.*, 2006-NMSC-046, 140 N.M. 478, *Chavarria* is simply not helpful to the question of whether Plaintiff's cumulative acts theory fails as a matter of law. Indeed, while *Chavarria* acknowledges the theory, it does so in dicta with no discussion. *See id.* ¶ 21. Moreover, recently proposed revisions to UJI 13-1827 NMRA, which were published in the Bar Bulletin in May 2008, do not embrace such a theory of liability for punitive damages. *See Proposed Revisions to the Uniform Jury Instructions—Civil*, Vol. 47, No. 20, SBB 18 (May 12, 2008).

The problem with such a theory of liability is aptly demonstrated by the result in the instant case. While Plaintiff argues that proximate cause need not be established as to all participants in a cumulative conduct theory, the lack of proximate cause as to two of the three participants in Plaintiff's cumulative conduct theory effectively allowed the jury to award punitive damages for the acts of only one individual—Dr. Collins—without finding that Dr. Collins had the requisite managerial capacity to speak or act for Eastern Hospital, or that Eastern Hospital otherwise ratified Dr. Collins' actions, or even that cumulative actions of

its employees and agents indicated that Eastern Hospital had a culpable mental state. This cannot be the result contemplated by *Clay*.

Plaintiff also offhandedly asserts in a footnote that Eastern Hospital did in fact ratify the conduct of its employees and agents by introducing an x-ray log at trial that was allegedly fraudulently created. (AB 17 n.7.) Aside from the fact that there is no evidence in the record that the document was fraudulently created apart from Plaintiff's counsel's own assumptions, the unauthorized acts at issue in this case were not the introduction of evidence of trial, but the conduct of Eastern Hospital's employees and agents in the emergency room on August 19, 2005. Plaintiff's argument in this regard is therefore not well taken.

d. The Punitive Damages Award Violates Due Process

i. Plaintiff's Unsupported Assertions Regarding Chaves Emergency Group and Community Health Systems Encouraged the Jury to Award Punitive Damages for Unconstitutional Reasons

It is axiomatic that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003). In this case, Plaintiff's counsel's comments at trial encouraged the jury to punish Eastern Hospital, on behalf of the community, for engaging in business with Chaves Emergency Group and for having a corporate parent that, according to Plaintiff, "preyed on small towns." (Tr. (Vol. 9), pp. 2141-42.) While Plaintiff argues in his

Answer Brief that the conduct of Eastern Hospital's employees and agents was reprehensible, the reality is that Plaintiff's inappropriate and unsupported comments below, which suggested that Eastern Hospital and associated entities were "unsavory" businesses, strongly indicate that the award of punitive damages in this case violated Due Process. *See id.*; *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (2007).

ii. The Ratio of Compensatory Damages to Punitive Damages is so Disproportionate as to Violate Due Process

Relying on *Campbell*, Plaintiff incorrectly asserts that "any ratio under ten to one is generally regarded as per se constitutional." (AB 31.) While *Campbell*, 538 U.S. at 425, recognizes that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process, the opinion does not state that a ratio under ten to one is *per se* constitutional. Rather, as indicated by the United States Supreme Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), ratios above the four to one level are likely to "be close to the line . . . of constitutional impropriety."

Awards of punitive damages that exceed this ratio are generally only permissible in two instances: (1) where "a particularly egregious act has resulted in only a small amount of economic damages"; and (2) where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996); *see*

also Exxon Shipping Co. v. Baker, 128 S.Ct. 2605, 2622 (2008). Plaintiff has not argued in his Answer Brief that either scenario is present in this case.

iii. The Comparable Criminal Penalties Suggested By Plaintiff Fail to Justify the Excessiveness of the Punitive Damages Award

Relying on *Chavarria*, Plaintiff argues that "the possibility of a jail sentence justifies a substantial punitive damages award." (AB 32.) However, as indicated in *Aken v. Plains Elec. Generation & Transmission Co-op., Inc.*, this statement simply indicates that the potential for imprisonment may be used to counterbalance a small statutory fine. 2002-NMSC-021, ¶ 27, 132 N.M. 401 (citing *Gore*, 517 U.S. at 583). Notably, however, the mere possibility of imprisonment fails to justify the award of punitive damages in this case. *See, e.g., Stogsdill v. Healthmark Partners, LLC*, 377 F.3d 827, 834 (8th Cir. 2004) (remitting punitive damages from a 10:1 ratio to a 4:1 ratio, even though civil and criminal penalties could reach upwards of $10,000 and there was a risk of six years' imprisonment).

Moreover, "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *Campbell*, 538 U.S. at 428. Thus, "[g]reat care must be taken to avoid use of the civil process to assess criminal penalties." *Id.*

For these reasons, the award of punitive damages in this case does not comport with Due Process requirements and should be reversed.

II. PLAINTIFF FAILED TO REBUT EASTERN HOSPITAL'S ARGUMENT THAT THIS CASE SHOULD BE REVERSED AND REMANDED FOR A NEW TRIAL BECAUSE OF ERRORS IN THE JURY INSTRUCTIONS

a. Eastern Hospital Preserved its Objections to the Jury Instructions and Special Verdict Form

Eastern Hospital adequately apprised the district court of the bases for its objections to UJI 13-1827 and the special verdict form. Rule 1-051(I) NMRA provides that "[f]or the preservation of any error in the charge, objection must be made to any instruction given." In his Answer Brief, Plaintiff argues for a narrow application of the rule, asserting that a formal objection must be made and that such an objection must be made at a particular point during the trial. (AB 34-39.)

Rule 1-051(I) is not applied in the narrow manner that Plaintiff suggests. Instead, our rules of preservation provide that "formal exceptions are not required" and that an objection must simply invoke a ruling or decision by the district court. Rule 12-216(A) NMRA. Moreover, Rule 1-051(I) simply requires that the objection be made "before retirement of the jury" and not at any particular time prior to that point.

Contrary to Plaintiff's assertion, Eastern Hospital fully explained the basis for its objections to the omission of direct and vicarious liability in the punitive damages instruction:

> [The punitive damages instruction] doesn't state, your Honor, the critical language about direct and vicarious liability with respect to managerial capacity and ratification, which is relevant with respect to

> any alleged conduct rising to the level of punitive damages on the part of Nurse Rodrigues and Nurse Miller.
>
> I mean, I thought we had sort of talked about that yesterday. This is kind of a mishmash of the cumulative conduct. I presume it is an attempt at referencing Ferrellgas, the Ferrellgas case. And "corporate conduct" maybe is an attempt to reference ratification.
>
> But that's not a correct statement of the law in New Mexico.
>
> . . .
>
> . . . Ratification by a corporation of inappropriate behavior is what is prohibited and what can be the basis of punitive damages. And this just opens a huge box of Pandoras if you leave it like this.

(Tr. (Vol. 9), pp. 1954-56.) While Plaintiff argues that Eastern Hospital's later objection to the instruction lacked specificity, the above-quoted discussion indicates that Eastern Hospital advised the court at length about its position on this part of the charge.

Eastern Hospital similarly informed the district court of its objections to the special verdict form. In discussing the special verdict form with the court, counsel for Eastern Hospital argued, among other things, that one of the problems with the special verdict form was that "Mr. Robinson [was] singled out as a separate player when Eastern New Mexico Medical Center [was] also mentioned." (Tr. (Vol. 9), p. 2077; *see also* Tr. (Vol. 9), p. 2071, 2074.) Plaintiff's preservation argument is therefore not well-taken. *See* Rule 12-216(A) NMRA.

b. The Jury Was Improperly Instructed on Punitive Damages

Plaintiff argues that because the Directions for Use for UJI 13-1827 indicate that "[i]n an unusual or complex case, it may be appropriate to modify this general form of instruction to instruct the jury clearly and correctly on the law," the modified instruction given by the district court comports with New Mexico law on punitive damages. (AB 44-45.) Such an argument misconstrues the Directions for Use.

In noting that UJI 13-1827 NMRA may be modified in "unusual or complex" case, the Directions for Use refers to the Committee Commentary. The Committee Commentary explains that the types of modifications contemplated by the Directions for Use include inserting language into the general instruction to "specify the kind of conduct allegedly giving rise to direct or vicarious punitive damages liability against various parties." More importantly, the Committee Commentary also recognizes that "[t]he standard for an award of punitive damages vicariously against an employer or principal is addressed in *Albuquerque Concrete Coring Co. v. Pan Am World Services, Inc.*, 118 N.M. 140, 879 P.2d 772 (1994), *Brashear v. Baker Packers*, 118 N.M. 581, 883 P.2d 1278 (1994), and *Rhein v. ADT Automotive, Inc.*, 122 N.M. 646, 930 P.2d 783 (1996)." The Directions for Use and Committee Commentary therefore provide no justification for the district

court's modification of UJI 13-1827 to eliminate the recognized legal bases for punitive damages against Eastern Hospital for the acts of its employees and agents.

c. **The Special Verdict Form Improperly Allowed the Jury to Award Punitive Damages Against Eastern Hospital Twice for the Same Acts**

Plaintiff's assertion that direct liability provides the basis for Eastern Hospital's liability for Mr. Robinson's conduct is a doubtful proposition the liability of a corporate entity for the acts of officers and directors is vicarious, not direct. *See Am. Continental Ins. Co. v. Am. Cas. Co.*, 103 Cal.Rptr.2d 632, 640 n.8 (Cal. Ct. App. 2001) ("[C]orporations often are held vicariously liable for the torts of their directors and officers."). Moreover, such an assertion fails to address why, if Eastern Hospital was ultimately liable for Mr. Robinson's conduct, both names were on the special verdict form.

More importantly, however, Plaintiff's argument misses the point. Regardless of Plaintiff's theory of liability, the special verdict form allowed the jury to award punitive damages against Eastern Hospital twice for the same conduct. On these grounds, reversal of the jury's verdict is appropriate. *See Zimmer v. Travelers Ins. Co.*, 521 F. Supp. 2d 910, 937 (S.D. Iowa 2007); *see also Montoya v. AKAL Sec., Inc.*, 114 N.M. 354, 357, 838 P.2d 971, 974 (1992) (stating that double recovery is prohibited as a matter of law).

III. PLAINTIFF'S NEGLIGENT HIRING CLAIM FAILS BECAUSE IT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Regardless of whether Plaintiff labels his claim "simple negligence" or "negligent credentialing," Plaintiff is nonetheless incorrect that expert testimony was not needed to prove his claim. While "there is no general rule or policy requiring expert testimony as to the standard of care" in a simple negligence action, expert testimony may be necessary under certain circumstances:

> The test of need of expert testimony is whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable.

Butler v. Acme Mkts., Inc., 445 A.2d 1141, 1147 (N.J. 1982) (citation omitted); *see also FFE Transportation Servs., Inc. v. Fulgham*, 154 S.W.3d 84, 90 (Tex. 2004) ("Expert testimony is necessary when the alleged negligence is of such a nature as not to be within the experience of the layman." (internal quotation marks and citation omitted)).

This Court has implicitly recognized that while expert testimony is not required in ordinary negligence cases, it may be needed where the acts at issue are outside the common knowledge of jurors. *See Andrus v. Gas Co.*, 110 N.M. 593, 596, 798 P.2d 194, 197 (Ct. App. 1990). In this case, Plaintiff alleged that Eastern Hospital's alleged failure to follow the emergency services contract provisions regarding privileges, constituted negligence. (Tr. (Vol. 4), p. 873.) As

demonstrated below and in Eastern Hospital's Brief in Chief, the act of approving a physician for work in a hospital emergency room through a hospital's credentialing is "beyond the experience and ken of the ordinary fact finder." *Neff v. Johnson Mem. Hosp.*, 889 A.2d 921, 926 (Conn. Ct. App. 2006); *Frigo v. Silver Cross Hosp. & Med. Center*, 876 N.E.2d 697, 723 (Ill. Ct. App. 2007); *Welsh v. Bulger*, 698 A.2d 581, 585 (Pa. 1997); *Johnson v. Misericordia Cmty. Hosp.*, 301 N.W.2d 156, 172 (Wis. 1981). Plaintiff presented no evidence at trial regarding the significance, if any, of Eastern Hospital's decision to grant credentials to Dr. Collins in light of Eastern Hospital's contract with Chaves Emergency Group and Dr. Collins' employment history. In the absence of any expert testimony regarding the significance of such allegations in the context of granting a physician privileges in a hospital, Plaintiff's claim fails as a matter of law.

Further, Plaintiff's assertion that an alleged departure from a contractual term demonstrates that Eastern Hospital was negligent is similarly not well-founded. While the cases cited by Plaintiff in his Answer Brief generally support the proposition that policies or procedures may be admissible at trial to support a claim of negligence, Plaintiff failed to present any evidence that the contract between Eastern Hospital and Chaves Emergency Group constituted the governing standard of care as to Eastern Hospital's decision to grant privileges to Dr. Collins. *See Titchnell v. United States*, 681 F.2d 165, 173 (3d Cir. 1982) ("Mere failure to

act in accordance with one's own internal procedures . . . will not automatically thereby render a health care facility negligent."); *FFE Transportation Servs., Inc.*, 154 S.W.3d at 92 (holding that internal policies or procedures "do not, taken alone, establish the applicable standard of care"). Plaintiff's negligent hiring claim should therefore be reversed as a matter of law.

IV. PLAINTIFF FAILED TO REBUT EASTERN HOSPITAL'S ARGUMENT THAT THE UPA CLAIM WAS IMPROPERLY SUBMITTED TO THE JURY BECAUSE THE PRACTICE OF MEDICINE AND OPERATION OF A HOSPITAL ARE EXEMPT FROM THE UPA AND BECAUSE THE REPRESENTATIONS AT ISSUE DO NOT CONSTITUTE "FALSE OR MISLEADING" STATEMENTS

a. Plaintiff Failed to Respond to Eastern Hospital's Argument that his UPA Claim Fails as a Matter of Law

Contrary to Plaintiff's assertions, Eastern Hospital has consistently maintained that, as a matter of law, a plaintiff cannot maintain a claim under the New Mexico Unfair Trade Practices Act, NMSA 1978, §§ 56-12-1 to -26 (1953, as amended through 2007), where such a claim is predicated on malpractice or negligence. (BIC 41-43; RP 732-33, 1508-12.) Significantly, Plaintiff fails to address or distinguish the numerous cases cited by Eastern Hospital in support of this proposition, and therefore has, in effect, conceded the point. *See Santa Fe Pacific Gold Corp. v. United Nuclear Corp.*, 2007-NMCA-133, ¶ 41, 143 N.M. 215.

As thoroughly discussed in Eastern Hospital's Brief in Chief, representations made by hospitals and medical care providers in advertisements that allude to the

quality or type of care at an institution are exempted from unfair trade practices statutes. *See Haynes v. Yale-New Haven Hosp.*, 699 A.2d 964, 973 (Conn. 1997); *Simmons v. Stephenson*, 84 S.W.3d 926, 928 (Ky. Ct. App. 2002); *Darviris v. Petros*, 812 N.E.2d 1188, 1193 (Mass. 2004); *Nelson v. Ho*, 564 N.W.2d 482, 486-87 (Mich Ct. App. 1997); *Quimby v. Fine*, 724 P.2d 403, 405-06 (Wash. Ct. App. 1986). This is because the failure to meet the standard of care promised in an advertisement necessarily implicates questions of medical malpractice and negligence. *See Haynes*, 699 A.2d at 973. A plaintiff's recourse under such circumstances is not a suit under the Unfair Trade Practices Act, but an action for negligence and malpractice. *See id.* at 973-74; *Simmons*, 84 S.W.3d at 928; *Darviris*, 812 N.E.2d at 1193; *Nelson*, 564 N.W.2d at 486-87; *Quimby*, 724 P.2d at 405-06.

Plaintiff has failed to provide any reason why the holdings in *Haynes* and the numerous other cases cited by Eastern Hospital should not also apply in this case. As discussed in Eastern Hospital's Brief in Chief, the representations at issue in this case directly implicate the standard of care issues and are therefore not actionable under the UPA.

b. Plaintiff Failed to Rebut Eastern Hospital's Argument that the Representations at Issue Were Not False or Misleading Under the UPA

In his Answer Brief, Plaintiff mistakenly claims that Eastern Hospital did not preserve its argument that the representations at issue in Plaintiff's UPA claim

were not false or misleading because Eastern Hospital apparently never uttered the word "puffery" below. (AB 49.) Plaintiff's argument is without merit.

"To preserve a question for review it must appear that a ruling or decision by the district court was fairly invoked[.]" Rule 12-216(A) NMRA; *see also Woolwine v. Furr's, Inc.*, 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987). Below, Eastern Hospital argued on numerous occasions that Plaintiff's UPA claim should not be presented to the jury because Plaintiff failed to demonstrate that the representations were false or misleading, as required under the Act. (RP 727-35, 1511; Tr. (Vol. 7), pp. 1558-66; Tr. (Vol. 9), pp. 2075-76.) More specifically, Eastern Hospital argued below that

> The only evidence of advertising in this case is of such a general nature, there is nothing specific in any of the advertising. And it's just unspecific. It's so unspecific as to be—we say as a matter of law, it cannot be deceptive advertising under the unfair practices act. Nothing in any of the materials that have been brought up so far says anything other than the vaguest terms, you know, that we have a good ER, ER plus, and that sort of thing . . . And additionally, the website materials are, again, of a very general nature like that. So in addition to the other grounds that we argued in the first place to dismiss the unfair practices act, in the first place, but just that the type of advertising that's been brought out here is so general that as a matter of law, it can't be deceptive.

(Tr. (Vol. 7), pp. 1558-59.) While not explicitly stating the word "puffery," Eastern Hospital's arguments below adequately apprised the district court of the fact that the representations at issue were too vague and nonspecific to constitute violations of the UPA. *See, e.g., Lens Crafters, Inc. v. Vision World, Inc.*, 943 F.

Supp. 1481, 1489 (D. Minn. 1996) (holding that statements "that are expressed in broad, vague, and commendatory language" constitute mere puffery and are therefore not actionable). The court rejected Eastern Hospital's arguments and allowed the claim to go to the jury. (Tr. (Vol. 7), p. 1566.) This is all that Rule 12-216(A) requires.

In his Answer Brief, Plaintiff failed to discuss the numerous cases cited by Eastern Hospital in support of its assertion that the representations were not false and misleading, and therefore not actionable under the UPA. (BIC 43-44.) As demonstrated by these cases, only statements that are specific enough such that they can be "objectively confirmed" are actionable under unfair trade practices statutes. *See X-IT v. Walter Kidde Portable Equip., Inc.*, 155 F. Supp. 2d 577, 628 (E.D. Va. 2001). By way of contrast, representations like the ones made in the present case, which are stated in "broad, vague, and commendatory language" are simply not actionable. *Lens Crafters, Inc.*, 943 F. Supp. at 1489; *see also Mason v. Chrysler Corp.*, 653 So.2d 951, 953-54 (Ala. 1995). The jury's verdict as to Plaintiff's UPA claim should therefore be reversed.

V. THE DISTRICT COURT'S DENIAL OF EASTERN HOSPITAL'S MOTION FOR LEAVE TO FILE A THIRD-PARTY COMPLAINT AGAINST CHAVES EMERGENCY GROUP WAS AN ABUSE OF DISCRETION

Plaintiff incorrectly asserts that Eastern Hospital could have filed a third-party complaint without leave of the court at the time it answered Plaintiff's

Amended Complaint. (AB 50.) Rule 1-014(A) NMRA, however, provides that a third-party plaintiff may only file a third-party complaint without leave of the court within ten days after the "original answer" is served. Eastern Hospital's only option after Plaintiff filed his Amended Complaint—which enlarged Plaintiff's original one-page Complaint to six pages and added allegations that Eastern Hospital was jointly and severally liable for the conduct of another "corporate entity"—was to ask the court for leave to file a third-party complaint.

Moreover, while objecting to the motion on the grounds the third-party complaint would cause undue delay, Plaintiff sought and obtained an extension of the discovery deadline. (RP 685.) Thus, as indicated in Eastern Hospital's Brief in Chief, any claimed delay or burden by Plaintiff with respect to the filing of a third-party complaint is disingenuous.

As detailed in Eastern Hospital's Brief in Chief, the district court's denial of the motion was highly prejudicial. Plaintiff's baseless arguments and innuendo regarding the corporate existence and structure of Chaves Emergency Group incited the jury to award damages against Eastern Hospital for the conduct of the third party. Because the district court's order denying Eastern Hospital's motion was an abuse of discretion, the verdict against Eastern Hospital should be reversed.

CONCLUSION

For the foregoing reasons, and those discussed in the Brief in Chief, Eastern Hospital respectfully requests that the Court reverse the jury's verdict and the district court's order denying its motion for a new trial or remittitur.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2008, I caused a true and correct copy of Defendant-Appellants' Reply Brief to be served via U.S. Mail, postage prepaid, to the following:

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