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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SUSAN BISHOP and MARK SKOFIELD,
as Class Representatives in their capacities as
Personal Representatives of the Estate of
RICHARD H. SKOFIELD,

COPY

Plaintiffs/Appellants,

v.

Court App. No. 25,510

THE EVANGELICAL GOOD SAMARITAN SOCIETY,
a foreign corporation, d/b/a
MANZANO DEL SOL GOOD SAMARITAN VILLAGE,

Defendants/Cross-Appellants.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
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APPELLANTS' BRIEF IN CHIEF

On Appeal From the Second Judicial District Court

The Honorable Wendy S. York (presiding until appeal)
The Honorable Linda M. Vanzi (currently presiding)

SUPREME COURT OF NEW MEXICO
FILED
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SUMMARY OF PROCEEDINGS

Background

First constructed in 1981, and expanded in the years that follow, Manzano del Sol Good Samaritan Village ("Manzano del Sol") is one of over 200 facilities owned and operated by the Defendant, Evangelical Lutheran Good Samaritan Society ("Good Samaritan"), and one of nine facilities operated in New Mexico. Record Proper ("RP") 4714 ¶ 3. Good Samaritan is the single largest "not for profit" supplier of nursing home beds in the country, and the tenth largest irrespective of profit-status. Transcript of Proceedings ("TR") Vol. 8 at 128. Manzano del Sol consists of two facilities within the same community: independent living apartments and a nursing home, both operated to significant competitive advantage, TR Vol. 7 at 229; Vol.10 at 16-18 (describing facility and age), as non-profits when compared to "for profit" facilities. Within the Good Samaritan network, facilities are expected to stand alone on their own individual financial merits. TR Vol. 6 at 24 and 30-32. Within the network, Manzano del Sol was amongst the most profitable. TR Vol. 6 at 44; Vol. 7 at 27 and 77; Vol. 8 at 122.

Since 1985, Manzano del Sol has been governed by the Continuing Care Act. NMSA § 24-17-1, *et seq.* (1985) ("CCA"). The CCA applies to profit and non-profit facilities. RP 4714 ¶ 8. At Manzano del Sol's independent living apartments, while there are numerous incidental charges, residents pay for housing in two separate ways. First, they pay a substantial "entrance fee," which Manzano del Sol completely controls, and which is only partially refundable under limited circumstances. TR Vol. 7 at 128 and 168-69. Second, residents pay "monthly service fees" (or rent) on a monthly basis. Rent is set by Manzano del Sol, subject to Good Samaritan's managerial approval. *See, e.g.,*

TR Vol. 6 at 23; Vol. 8 at 5. This action relates to rate-setting practices for the apartment component of the Manzano del Sol operation. TR Vol 8, 109-110.

Manzano del Sol evaluates its rates starting in approximately July the year before a rate is effective, and sets it approximately one month before it is first effective. *See, e.g.*, TR Vol. 9 at 133. Its assessment of financial need consists of evaluating several factors. First, Manzano del Sol reviews its estimated revenue position through the existing year, second, it considers new construction and investments it intends to make, third, it funds its depreciation (sets aside funds for future capital investment), and fourth, it surveys for-profit competitors with an eye to matching their increases. RP 4718 ¶ 28 (discussing comparison to "for profit" facilities); TR Vol. 6 at 144; Vol. 7 at 15 and 156; Vol. 9 at 48-53, 135 (facility must "cover that good"), and 139 ("We don't want to be too low either."); Vol. 10 at 52-61 and 64 ("I also check around to see how competitive we are, and then I evaluate what we need to increase them to."). Based on these factors, rates are increased or held constant. *See also* TR Vol. 10 at 132-133.

Manzano del Sol deposits its liquid assets into a private mutual fund operated by Good Samaritan, and during the class period in this matter, routinely achieved untaxed overall rates of return on equity in excess of 20%. RP 4716 ¶¶ 17-18. It achieved these rates for three reasons: 1) the value of the physical assets at Manzano del Sol; 2) high earnings of investments; and 3) charitable donations. *See, e.g.*, RP 4717 ¶ 24; TR Vol. 7 at 168-69 and 226; Vol. 8 at 55-56; Vol. 9 at 53 and 119. Even as Manzano del Sol experienced extraordinary returns on its liquid assets and substantial growth in the value of its equitable assets, the facility raised the rental rates on its residents. RP 4715 ¶ 12.

Procedural History of the Case

This case first was filed on July 30, 1999, RP 1, and the Amended Complaint was filed on April 24, 2001, RP 428. On August 14, 2001, the class was certified, RP 1033, and on July 8, 2002, the order approving the form of notice was entered, on the basis of a definition to which the Plaintiffs' objected. RP 2135; TR Vol. 5 at 64. In September of 2002, over seven days, the matter was tried to the bench. TR Vols. 5-11. On December 3, 2002, the Court filed it's first findings of fact and conclusions of law. RP 3388.

Following the entry of findings, numerous post-trial motions were heard. The motions pertinent to this appeal included the Defendant's Proposed Findings of Fact (Amended and Supplemental), RP 3443, and related pleadings, the Plaintiff's Motion for Pre and Post-Judgment interest, RP 3505, and related pleadings, the motion to reconsider that decision (a motion subsequently granted and incorporated into the Amended Findings of Fact and Conclusions of Law), RP 3760, and related pleadings. The various issues raised by the post-trial pleadings culminated in a letter ruling reopening the proceedings to hear evidence regarding turnover, RP 4181, and a reopened trial on May 4, 2004 on that same issue. TR Vol. 17. In advance of that reopened trial, the Plaintiffs and the Defendant briefed the issue of turnover evidence, *see* RP 4492, *et seq.*, and RP 4518, *et seq.*, and the District Court entered judgment for the Plaintiffs on December 28, 2004, RP 4707, and its Amended Findings of Fact on December 30, 2004, RP 4713. The notice of appeal was filed by the Plaintiffs on December 30, 2004.

Damages Award

The evidence at trial showed that Good Samaritan's accountant felt a reasonable rate of return was between 12-15%, *see* TR Vol. 7 at 85; Vol. 8 at 218, despite evidence

showing that the rate of return only fell below 15% in 1998, and only dropped below the minimum of the range proposed by Good Samaritan's own accountant in 1999. RP 4716 ¶¶ 17-18; 4717 ¶ 22(b). Additional evidence reflected that in 1995, Manzano del Sol's administrator felt that 12.7% was "a very healthy figure." RP 4717 ¶ 22(a). Even though the contracts between residents and Manzano del Sol required that any increase be based on "economic necessity, the reasonable cost of operating MANZANO, the cost of care and reasonable return on investment," RP 4715 ¶ 10, Manzano del Sol never intentionally applied all of those factors in assessing any increase against the residents. RP 4715 ¶ 13; TR Vol. 6 at 38 and 181; Vol. 9 at 80-81.

The rates imposed on the Plaintiffs were imposed on all apartments in the independent living apartment facility. The evidence of damages showed that for the period of 1993 through the entirety of 1997, the accumulated damages to the class were $1.113 million, and requested prejudgment interest dating to the initial overcharges. RP 4723 ¶ 59; TR Vol. 7 at 219. The District Court, however, awarded damages less than that and refused to allow prejudgment dating to the dates of the overcharges, RP 4726 ¶ 5. The District Court reduced the Plaintiffs' damages based on "turnover" and "credits" (for 1998 and 1999 rates below the 15% threshold), to $154,415.

ARGUMENT

I. The District Court Erred in Failing to Compensate The Plaintiffs For their Lost Use of Money Dating From the Date the Money Was Wrongfully Taken.

The Plaintiffs requested that they be compensated for the wrongful overcharges, and requested that the Court award both the amount of the overcharges and prejudgment interest to fully compensate them for their losses. RP 4723 ¶ 59. The District Court, however, awarded only prejudgment interest to the date of the filing of the Complaint. RP 4726 ¶ 5. The issue was preserved as reflected in the findings of fact and conclusions of law, and the testimony relating to the Plaintiffs' damages. RP 4723 ¶ 59.

The standard of review applicable to the appropriate measure of damages in a breach of contract case is "substantial weight." *Hudson v. Village Inn Pancake House of Albuquerque, Inc.*, 2001-NMCA-104, 131 N.M. 308, 35 P.3d 313. The decision whether to award prejudgment interest as damages may be "abuse of discretion." *Kueffer v. Kueffer*, 110 N.M. 10, 791 P.2d 461 (1990); *see also Smith v. McKee*, 116 N.M. 34, 36, 859 P.2d 1061, 1063 (1993) (decision to award prejudgment interest would be reversed "only if its decision to award prejudgment interest is contrary to logic and reason.").

A. To Fully Compensate the Plaintiffs for the Harms Suffered in the Overcharges By Manzano del Sol, the Plaintiffs Should Be Awarded Prejudgment Interest Dating to the Date of the Overcharges.

It is hornbook law that the "general theory of damages is to make the injured party whole." *Hood v. Fulkerson*, 102 N.M. 677, 680, 699 P.2d 608, 611 (1985). In a breach of contract case, a damage award should fully compensate the injured party. *Camino Real Mobile Home Park Partnership v. Wolfe*, 119 N.M. 436, 443, 891 P.2d 1190, 1197 (1995), and where the breach involves a lost use of money, the trier of fact should award damages to the date of breach reflecting the value of the lost use of money.

Grynberg v. Roberts, 102 N.M. 560, 698 P.2d 430 (1985); *Ranch World of New Mexico, Inc. v. Berry Land & Cattle, Inc.*, 110 N.M. 402, 796 P.2d 1098 (1990). Put differently, prejudgment interest as a damage is meant to compensate a plaintiff for injuries resulting from the defendant's failure to pay and the loss of use and earning power of plaintiff's funds expended as a result of the defendant's breach. *Economy Rentals, Inc. v. Garcia,* 112 N.M. 748, 819 P.2d 1306 (1991) (holding that such damages are necessary "to compensate a plaintiff for injuries resulting from the defendant's failure to pay and the loss of use and earning power of plaintiff's funds wrongfully taken as a result of the defendant's breach."); *see also Kueffer*, 110 N.M. 10, 791 P.2d 461; *State ex rel. Bob Davis Masonry, Inc. v. Safeco Ins. Co. of America*, 118 N.M. 558, 883 P.2d 144 (1994) (in context of claim against surety for failure to pay, "It has long been black-letter law that '[i]nterest normally commences to run against the principal from the date that he violates his obligation and, since the surety is liable for the principal's entire debt, he will be liable also for such interest on the debt.'") (citation omitted).

As found by the District Court, the Plaintiffs introduced evidence showing that the overcharges were imposed from 1993 and throughout the class period. TR Vol. 7 at 200 and 219. However, the District Court awarded only limited prejudgment interest. In doing so, the District failed to fully and adequately compensate the Plaintiffs for their damages. The finding implicit in the Court's findings regarding damages, and rejecting the Plaintiffs' request for prejudgment interest to the date of the overcharges, that the Plaintiffs' damages were less, *see* RP 4723-24 ¶¶ 58-65, has no support for it, and the Plaintiffs request that this Court remand the matter with instructions to amend conclusion 5 (RP 4726 ¶ 5) to award prejudgment interest to the date of the overcharges.

Here, the District Court found that the Defendant had never attempted to comply with the Continuing Care Act, or with its contracts with the residents of the independent living apartments. The Court took notice that the Defendant offered no evidence whatsoever that it would have complied with the CCA had it made an analysis contemporaneous with the increases it imposed. RP 4715 ¶ 13. Implicit in the Court's findings is the recognition that the damage flowing from the increases was suffered in each of the years the overcharges were imposed, TR Vol. 7 at 200, however, the prejudgment interest awarded was only a fraction of the fair value of the losses to the elderly residents of Manzano del Sol.

By failing to grant the Plaintiffs their complete prejudgment interest, the District Court also disregarded evidence that the Defendant had been permitted to profit from the overcharges from the date the money was received. It was free to invest the funds in accumulating equity, funding depreciation, depositing assets into mutual funds or for paying executive salaries. A portion of the funds were sent to the corporate offices, *see* RP 4724 ¶ 65, and the Defendant was not restricted from any use of those funds before or after the Complaint was filed. The free use of the funds was a central reason for the high rates of return, because the Defendant was free to invest it and reap the benefits of participating extensively in the stock market. *See, e.g.,* RP 4716 ¶ 20 (noting "significant investment income gains during the class period."). While the Plaintiffs were denied the use of their funds, the Defendant was given unfettered use of the same.

Our courts have long recognized that a party in breach of contract should not be permitted to profit from the wrong committed. *See McKee*, 116 N.M. at 37, 859 P.2d at 1064 (collecting cases). Here, while recognizing that prejudgment interest is appropriate,

the District Court made no findings supporting the decision to reject the award of damages including prejudgment interest to the date of the breach. The lack of findings is reversible error, *see Mascarenas v. Jaramillo*, 111 N.M. 410, 414-15, 806 P.2d 59, 63-64 (1991), and the matter should be remanded for "inclusion of interest within the judgment at the statutory rate calculated from the date of breach." *Id.* at 415, 806 P.2d at 64.

II. The District Court Erred In Reducing the Plaintiff Class' Damages by Giving a Credit for Charges Below the Statutory Threshold in Finding 64.

Based on argument offered by the Defendant after the initial trial evidence had closed, the Court allowed the Defendant a "credit" against damages for increases that could have been imposed for the calendar years of 1998 and 1999, but were not. The basis for the allowance was not at all clear, however, the basis seems to be the theory that if rates were below the statutory threshold and might have been raised higher, the charges not imposed constituted negative damages.

This issue was preserved both directly and indirectly. The Court first found damages to the class in excess of $1.11 million, and then awarded credits of over $598,000. RP 3401 ¶ 66. After various other modifications addressed elsewhere in the briefing, the Court found damages to be slightly over $888,000 and the appropriate credits to be slightly over $558,000. RP 4724 ¶ 64. The issue of the credits was preserved by the Plaintiffs' tender of proposed (preliminary and final) findings of fact and conclusions of law not discussing credits, and raised indirectly in the pretrial bench memorandum. RP 2463-2466.

The standard of review applicable to this issue is somewhat unclear. To the extent that the issue is a matter of law, the standard of review is *de novo*. *See, e.g., Garcia v. Herrera*, 1998-NMCA-066 ¶ 6, 125 N.M. 199, 959 P.2d 533 (*citing Strata*

Prod Co. v. Mercury Exploration Co., 1996-NMSC-016, 121 N.M. 622, 627, 916 P.2d 822, 827, in turn holding that "We are not bound, however, by the trial court's legal conclusions and may independently draw our own conclusions of law on appeal.").

Likewise, where, as here, the issue is one of the application of law to facts, the standard of review is *de novo*. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450.

A. The District Court Erred in Failing to Adhere to *Capo v. Century Life Ins.* and in Awarding a Credit in Finding 64.

The District Court granted "credits" against the Plaintiffs' damages premised on the argument that for the calendar years of 1998 and 1999, the Defendant increased rates less than it might have done in compliance with the Continuing Care Act. In allowing the Defendant these credits, the Court reduced the Plaintiffs' damages below the damages actually suffered by the Plaintiffs and did so in violation of *Capo*.

In *Capo*, the Court considered a case where the insurer issued an insurance policy based on circumstances that made the provenance of the policy, but not its terms, offensive to state law. *Capo v. Century Life Ins.*, 94 N.M. 373, 610 P.2d 1202 (1980). The insured in that instance was required to obtain a life insurance policy as a component of granting a loan, and when litigation on the question of the policy ensued, the insured raised the illegality of steering as a defense to the insurance policy. *Id.* at 377, 610 P.2d at 1206. The Court declared that "Where the law creates an illegality that is designed for coercion of one party and the protection of another, the party so protected may have his remedy even though the transaction is completed." *Id.* (citation omitted). Ordering the assignee to return improperly assessed insurance premiums, the Court continued, saying "To permit National, Century's assignee, to retain the premiums paid would in effect

validate the illegal contract, nullify the statutory penalty and permit National to take advantage of the criminal act."

Here, it is undisputed that the Defendant did nothing to comply with the CCA's four-pronged analysis, nor did they confirm that they had met the terms of the contracts with the residents of Manzano del Sol. TR Vol. 6 at 21-23; Vol. 7 at 13 (addressing records). The Court allowed the Defendant's accidental compliance in 1998 and 1999 to merit imposition of additional fees. The Court did so, functioning as a post hoc rate-setter for the Defendant – in effect, asking itself "Had Manzano del Sol known what I now know when they set rates in 1998 and 1999, what was the highest rate they could have set?" This decision had two principal effects on the Plaintiffs. The first is that it treated damages suffered in 1993 as fungible with those seen in 1999 by treating residents in 1999 as the same as those in 1993. The second is that it confused the basic standard of the Continuing Care Act with retrospective equity, a claim that the District Court explicitly rejected. RP 4720 ¶ 40 and 4726 ¶ 4 (rejecting claim for unjust enrichment on legal grounds).

B. The Damages Awarded After Offset Failed to Completely Compensate the Plaintiffs for the Injury Suffered as a Consequence of the Illegal Contract.

A novel statute nationally, the Continuing Care Act functions to prohibit increases unless and except four conditions are met. Those four conditions are imposed by the requirement that all contracts shall contain, among other elements, the condition that "increases shall be based upon economic necessity, the reasonable cost of operating the community, the cost of care and a reasonable return on investment." NMSA § 24-17-

5(B)(11). These conditions apply to for-profit and not-for-profit communities, § 24-17-11(A), and the statute was passed in 1985.

The Defendant included this language in its contracts, however, as the Defendant later testified, it had no documents reflecting compliance with the CCA and no evidence that it had complied with each of the four elements. TR Vol. 6 at 38 and 181; Vol. 9 at 80-81. Its basic rent-setting model (used even today) consisted of three basic steps: 1) calculating costs over the prior calendar year; 2) calculating the new construction that was desired for the new year; and 3) determining whether 1) and 2) required an increase in rates. In some years, the Defendant called other for-profit facilities in the Albuquerque market to competitors to assess how much their rates were increasing, because "we don't want to be too low either," and then Manzano del Sol proceeded to raise its rates by a similar or the same margin. RP 4718 ¶ 28; TR Vol. 6 at 144; Vol. 9 at 139. Compounding the problem, the Defendant's own administrator took the view that the Act did not apply to it, all but repudiating a term of a contract that Manzano del Sol issued.

(1) Mandatory Statutory Compliance as it Relates to the Claims Upon Which Damages Were Awarded.

At all times relevant, the Defendant had the obligation to comply with the CCA in setting its increases. The statutory language (incorporated into the contracts) is triggered only by increases, and not by existing rates. Put differently, a CCA-regulated community could initially charge whatever rates it wanted, and make as much profit as desired, provided that it did not increase the rates. NMSA § 24-17-5(B)(11). Here, however, Manzano del Sol raised its rates for five consecutive years, each requiring the statutory analysis. Evidence at trial reflected that at no point did Manzano del Sol consider the four components CCA (and the contracts) in setting rates, although it had unintentionally

considered some of the factors as part of its rate-setting analysis. *See, e.g.*, RP 4715 ¶¶ 12-13; TR Vol. 6 at 38 and 181; Vol. 7 at 13.

Using a retrospective assessment of increases in a facility, the damages suffered in each calendar year correlate to the rates of return on equity in excess of a threshold. More directly, when an increase is imposed in a given year, and the rate of return is in excess of the threshold, all income from monthly service fees charged that year in excess of the threshold constitute damages to the residents of Manzano del Sol. The Plaintiffs explained this model – a common sense way to reflect the functioning of the four-pronged analysis over a time period – at length through their expert, Bruce Malott and demonstrated damages. TR Vol 7 at 198-200 and 218-219; Vol. 8 at 82.

This model differs from traditional prospective rate setting because well after the fact, a trier of fact is in position to evaluate whether Manzano del Sol's increases offended the Continuing Care Act. The CCA itself creates a cause of action for this type of evaluation. NMSA § 24-17-15 ("resident" may bring action to "recover actual and punitive damages for injury resulting from a violation of the Continuing Care Act."). As the District Court concluded, the measure of damages "are those payments of rent that apartment residents paid above their appropriate obligation to pay under the Continuing Care Act." RP 4723 ¶ 58. Based on this approach, the damages are "vested" or actual damages as soon as they are above the threshold, meaning that damages suffered in 2004 are "vested" and not reduced by damages subsequently "not suffered" in future years.

The District Court's conclusion to offset future charges based on rent being below the threshold in 1998 and 1999 is both contrary to the evidence of the case, *see* RP 4715 ¶ 12, if the Court saw the charges in 1998 and 1999 as an offset, and to the CCA. Even if

the rates in 1998 and 1999 were intended to serve as offset – and there is no evidence that they were – allowing a credit for those potential charges against damages historically suffered treats the two items of damages as fungible when they are not.

(2) Damages Awarded Under a Breach of Contract Claim Must Make the Plaintiffs Whole.

The District Court never clarified what theory formed the basis for the assertion of the credit based on the 1998 and 1999 charges. The only basis known for an offset of damages within the context of the same conduct known, and when treated as mitigation of damages arises from cases where a tortfeasor causes an incidental benefit while in the commission of the tort itself. *See* Restatement (Second) of Torts § 920 (giving example of an unprivileged surgery causing amelioration of pain and suffering). Not only does that doctrine apply exclusively to torts, but it is limited to offsetting of damages caused by the same precise tortious violation of rights or duties. *See id.* § 920(Comment b); *see also Lovelace Medical Center v. Mendez*, 111 N.M. 336, 805 P.2d 603 (1991). In the context of contractual claims, "the purpose of allowing damages in a breach of contract case is the restoration to the injured of what he has lost by the breach, and what he reasonably could have expected to gain if there had been no breach." *Allen v. Allen Title Co.*, 77 N.M. 796, 798, 427 P.2d 673, 675 (1967).

The District Court's award of a credit violates this central principal because the claim upon which relief was granted was for the breach of contract. *See* RP 4723 ¶¶58-65. Cases holding that contractual damages are compensatory, and should be measured by the lost benefits, are legion. *Torrance County Mental Health Program, Inc. v. New Mexico Health and Environment Dept.*, 113 N.M. 593, 830 P.2d 145 (1992) ("The general rule for the measure of damages in a breach-of-contract action permits the

nonbreaching party to recover the loss in value of the performance promised by the breaching party, less any cost or other loss that the nonbreaching party has avoided by not having to perform."); *Bd. of Educ. of Alamogordo Pub. Sch. Dist. No. 1 v. Jennings*, 102 N.M. 762, 765, 701 P.2d 361, 364 (1985); *see also Louis Lyster, Gen. Contractor, Inc. v. Town of Las Vegas*, 75 N.M. 427, 430, 405 P.2d 665, 667-68 (1965) (in context of failure to perform work, measure of damages is difference between contract price and cost to plaintiff of having another complete the work).

(3) The Defendant Should Not Be Better Off Than Had it Performed the Contract and the District Court's Award Perversely Rewarded the Violation of the Continuing Care Act and the Contracts with the Elderly Residents.

Although there is a general rule that in a breach of contract claim, "that, regardless of the character of the breach, an injured party should not be put in a better position than had the contract been performed," *Paiz v. State Farm Fire and Cas. Co.* 118 N.M. 203, 212, 880 P.2d 300, 309 (1994), the District Court's ruling had the effect of leaving the breaching party in a better position than had the contract been performed. Here, the nature of the contract leads to this result where, as here, the District Court imposed a credit for the rates in 1998 and 1999. RP 4724 ¶ 64 (imposing a credit of over $557,000). The central distinction between the common breach of contract case, as reflected in *Louis Lyster* and this case, is the nature of the promise made.

The Defendant did not covenant to impose rates that precisely matched a reasonable rate of return on investment, the Defendant covenanted in the negative – that its increases "shall be based upon economic necessity, the reasonable cost of operating MANZANO, the cost of care and reasonable return on investment." RP 4715 ¶ 10. The consequence of the covenant, and indeed the CCA, is that Manzano del Sol is free to

charge as little as it desired, and even is free to increase its rates as much as it desired, provided that its rate of return did not exceed a reasonable return on investment. RP 4717-19 ¶¶ 23, 29-35. The District Court's implicit conclusion, that a credit for rates not imposed in 1998 and 1999 represented an offset for the cost to the Plaintiff, had Manzano del Sol complied with the contract erroneously characterizes the contract, because the contract neither gives rise to a right to assert a future offset for historic undercharges nor a guarantee that the community will maximize its rate of return on investment.

Capo creates an exception to the general rule of contractual damages, in that the benefit to a breach of an illegal contract should never accrue to the party who engaged in the illegality, and that illegal party may not retain the benefits of the contract, even where the innocent party has no actual damages. *Capo*, 94 N.M. at 377, 610 P.2d at 1206. While one subsequent Court may have unintentionally limited *Capo*, *see Smith v. Tinley*, 100 N.M. 663, 674 P.2d 1123 (1984), this interpretation is evidently dicta, and not consistent with the more modern interpretation of *Capo's* holding. *See Jipac, N.V. v. Silas*, 800 A.2d 1092 (Vt. 2002) ("In these circumstances, the innocent party may be entitled to restitution for any consideration given as part of the illegal transaction."); *see also Pucci Distributing Co. v. Stephens*, 106 N.M. 228, 741 P.2d 831 (1987).

Here, what the District Court has done is assert as a "credit" based on a defense that was not asserted. RP 0021 (reflecting only three affirmative defenses to original complaint); RP 622-623 (reflecting 5 affirmative defenses, none asserting a credit or counterclaim for potential rates). When the transaction is seen as the exchange of rent for housing, and when the rental fees are in excess of the conditions of the contract and the Continuing Care Act, RP 4715 ¶¶ 13, 29-30, *Capo* requires that all the proceeds of that

exchange be returned to the innocent party: "Where the law creates an illegality that is designed for coercion of one party and the protection of another, the party so protected may have his remedy even though the transaction is completed." *Capo*, 94 N.M. at 377, 610 P.2d at 1206; *Jipac, N.V. v. Silas*, 800 A.2d 1092; *see also Measday v. Sweazea*, 78 N.M. 781, 784, 438 P.2d 525, 528 (Ct. App. 1968) ("The general rule is that transactions in violation of a statute prescribing penalties are void."). By assessing a credit against the complete restitution fails to completely compensate the Plaintiffs for their injuries and should be reversed.

C. The Assertions of Credits for Subsequent Years Against Damages Suffered in Previous Years Impliedly and Wrongfully Created a Right of Restitution on the Part of the Defendant as Against the Plaintiffs.

The Court decision to give a "credit" for rates that might have been charged in 1998 and 1999 was inappropriately set rates and failed to adequately compensate the Plaintiffs for their injuries. Even had the Defendant introduced evidence that the rates in 1998 and 1999 were intended to ameliorate the harm of prior rate-setting misconduct, it would not justify reducing the Plaintiff's damages. As our Courts have repeatedly indicated, restitution by voluntary payments are simply not allowed. It was undisputed at trial that the Defendant had the sole and exclusive power to set rates at Manzano del Sol, and that it exercised that power in setting rates for 1998 and 1999.

In claiming a "credit" or an "offset" or asserting any other right to claim income for those years when it was voluntarily not charged (and not charged for unrelated reasons), New Mexico law supports the Restatement (First) of Restitution which holds:

> A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons.

Restatement (First) of Restitution § 112; *see also Cheesecake Factory, Inc. v. Baines*, 1998-NMCA-120, 125 N.M. 622, 964 P.2d 183; CJS, Payment § 104 ("As a general rule, a person cannot, either by way of set-off or counterclaim, or by direct action, recover money which he or she has voluntarily paid with a full knowledge of all the facts, and without any fraud, duress, or extortion, even if no obligation to make the payment existed.").

The *Cheesecake Factory* rationale is indistinguishable in effect from the case at bar insofar as the "credit" is based on a voluntary decision not to charge a higher rate, in effect a transfer of potential payments from the facility at Manzano del Sol to the residents. Here, the benefit conferred is the freedom from higher rates. The District Court's imposition of credits not only violates the principles that govern restitution, but allows the Defendant a second bite at historic charges and a chance to reconsider what the rates might be. *Cf.* Restatement (First) of Restitution § 2 ("A person who officiously confers a benefit upon another is not entitled to restitution therefor."); *Mountain States Tel. & Tel. Co. v. N.M. Corp. Comm'n*, 90 N.M. 325, 563 P.2d 588 (1977).

The Continuing Care Act (and the contracts with the residents) are quintessential rate setting provisions. They prospectively limit, procedurally consistent with general rules applicable to rate-setting policies and statutes. *Mountain States*, 90 N.M. at 341, 563 P.2d at 604 ("(t)here is no better established rule with regard to the prescription of rates for a public utility than the one that holds that rate fixing may not be accomplished retroactively .... Past deficits may not be made up by excessive charges in the future nor may past profits be reduced by disallowances to future operating expense.") (*quoting Pacific Teleph. & Teleg. Co.*, 80 P.U.R.(N.S.) 355, 369 (Calif. Pub. U. Com'n 1949)).

Although *Mountain States* recognizes that statutes may allow for retroactive rate setting, nothing in the Continuing Care Act, or even the contracts with residents authorizes retroactivity.

Nor is it reasonable to see the retrospective application of rate-setting as a function of proper practices that occasionally permits interim adjustments of rates. *See generally In re: U S West Communications, Inc.*, 1999-NMSC-016, 127 N.M. 254, 980 P.2d 37 (interim adjustments allowed to prospective rates). Here, not only did the Court supply analysis expressly not engaged in by the Defendant in assessing rates, *see* RP 4715 ¶ 13, but did so in a manner contrary to the limited authority to craft relief created by the Continuing Care Act.

As the Act provides, an action may only be brought "for injury resulting from a violation of the Continuing Care Act," NMSA § 24-17-15, and not more generally for rates that might have been charged at a particular time. As the Court could not be engaged in retrospective historic ratesetting with effects assessed against an even more retrospective category of patrons, it follows that the District Court impliedly concluded that the Plaintiffs' damages were less than the overcharges as determined by the revenue obtained by illegal rates. This, analysis, however, relies upon an erroneous standard of law as to damages. *See, e.g., Hood*, 102 N.M. at 680, 699 P.2d at 611 ("The general theory of damages is to make the injured party whole."). Nor is "windfall" to the plaintiff a reason to avoid imposing the full measure of wrongdoing on a defendant. *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958) ("if there must be a windfall, certainly is it more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing.").

As referenced above, in a claim for breach of contract, damage awards should fully compensate the injured party. *Wolfe*, 119 N.M. at 443, 891 P.2d at 1197. All consequential damages flowing from the breach of contract are compensable, *see Shaeffer v. Kelton*, 95 N.M. 182, 187, 619 P.2d 1226, 1231 (1980), including damages representing the loss of use of money. Whether characterized as consequential or general damages, the loss of use of money – for the damages suffered in 1994. 1995, and the years that follows represent consequential damages which properly should be paid. *Wolfe*, 119 N.M. at 443, 891 P.2d at 1197. By reducing damages suffered in prior years, based on retrospective rate-setting for subsequent years, the District Court failed to adequately compensate the Plaintiffs for their harm.

III. The Court's Finding 65 Errs in Imposing Deductions Based on Turnover Where There Was No Explicit Evidence of Turnover at Trial, the Burden of Proving Turnover Fell on the Defendant Which Did Not Meet its Burden, and Where the Defendant Relied on Illegal Contracts as the Basis for Imposing a Deduction for Turnover.

In Finding 65, the District Court determined that turnover of the residents should function as a reduction of overall damages. The Plaintiffs respectfully submit that this finding is erroneous in several regards: 1) the District Court improperly imposed the burden of proof of turnover on the Plaintiffs; 2) the turnover issue relied upon asserting illegal conduct as a defense to damages, or implied waiver of rights as a defense to claims; and 3) the finding is not supported by evidence.

These issues were preserved directly and indirectly. In the Court's original findings of fact, the District Court reduced damages based on a turnover rate, RP 3400-01 ¶¶ 62-67, and in post-trial briefing, and subsequent to the reopened trial, the District Court again imposed reductions in damages based on turnover, RP 4723-24 ¶¶ 60-65.

Prior to the reopened trial, the Plaintiffs objected to the imposition of any turnover, RP 4492-4500, and at the reopened trial, the Plaintiffs only introduced any evidence of turnover after the District Court advised that she would enter judgment against the Plaintiffs if they did not do so. TR Vol. 17 at 4 ("But I will say that if the turnover rate is not brought forward, I am faced with the unenviable decision of, very possibly throwing the verdict out.").

The standard of review applicable to this issue is not immediately clear, as several may apply, depending on the mode of analysis. To the extent that it is limited to strictly the question of the burden of proof, it appears to be *de novo*. *See City of Albuquerque v. Chavez*, 1997-NMCA-034, 123 N.M. 258, 939 P.2d 1066, *rev'd on other grounds*, 1998-NMSC-033, 125 N.M. 809, 965 P.2d 928 (reversing on grounds relating to the merits of the constitutional analysis, but not, apparently, on the basis of the scope of review, which apparently was *de novo*). To the extent that it relates to the decision to open trial for additional evidence, it is abuse of discretion, *Cienfuegos v. Pacheco*, 56 N.M. 667, 248 P.2d 664 (1952), and to the extent that it relates to the sufficiency of the evidence, the standard of appellate review would be "substantial evidence." *Toltec International, Inc. v. Village of Ruidoso*, 95 N.M. 82, 84, 619 P.2d 186, 188 (1980).

A. The Defendant Bore the Burden of Proof in Asserting a Reduction of Damages and Did Not Carry its Burden of Proof at Trial.

The record reflects that the Defendant raised turnover after the 2002 trial and advocated that a reduction be imposed on the Plaintiffs' damages, triggered, in part, by the District Court's findings of fact. *See, e.g.*, RP 4184-4209, 4279-4343, and 4292-4409. In the briefing, the Defendant took the position that as it related to damages, the burden of proof was the Plaintiffs, *see* RP 4408 (*citing DeVaney v. Thriftway Marketing*

Corp., 124 N.M. 512, 953 P.2d 277 (1997), and asserting that "Turnover was not an affirmative defense of Good Samaritan."). However, the burden evidently fell on the Defendant to prove their central assertion on this issue, that damages were less than asserted to be, or that there was a set off, a credit or other deduction.

New Mexico generally imposes the burden of proof on the party benefited by the positive conclusion. *See Kuchan v. Strong*, 39 N.M. 281, 46 P.2d 55, 56 (1935) ("Generally the question of burden of proof will be tested by inquiring which party had the affirmative of the issue, as determined by the pleadings."). More modern cases have held likewise, *see, e.g., J. A. Silversmith, Inc. v. Marchiondo*, 75 N.M. 290, 294, 404 P.2d 122, 125 (1965) ("it is well settled that the party alleging the affirmative has the burden of proof."). While a Plaintiff does bear the burden of proof as to damages claimed, this is somewhat misleading, as the law does not require specificity in damages, and given the remedial nature of the claims made, the burden should not have been imposed as it was.

While a plaintiff – claiming damages in the affirmative – bears the burden of proving them, courts repeatedly have rejected the theory that damages must be proven specifically. *Story Parchment Co. v. Paterson Parchment Paper Co.,* 282 U.S. 555, 565 (1931) ("while the damages may not be determined by mere speculation and guess, it will be enough if the evidence show the extent of damages as a matter of just and reasonable inference"); *see also J. Truett Payne Co. v. Chrysler Motors Corp*., 451 U.S. 557, 565-68 (1981) ("it does not 'come with very good grace' for the wrongdoer to insist on specific and certain proof of the injury which itself has inflicted."); *Bigelow v. RKO Radio Pictures, Inc*., 327 U.S. 251, 264 (1946). Although New Mexico has no in-state precedent specifically dealing with class action damages, our authorities on damages

reflect a similar commitment to flexibility and a reflection of the importance of compensation for injuries suffered. *See Mascarenas*, 111 N.M. at 415, 806 P.2d at 64; *Fredenburgh v. Allied Van Lines, Inc.*, 79 N.M. 594, 446 P.2d 868 (1968) ("The measure of damages should be that which fully and fairly compensates for the injuries received."); *Jackson v. Goad*, 73 N.M. 19, 385 P.2d 279, 281-82 (1963) ("Proof of the cause of the damages being thus certain, mere uncertainty as to the actual amount will not preclude recovery.").

Here, the Defendant not only refused to introduce direct evidence of turnover (nor did the Defendant's evidence demonstrate why, or to what degree, turnover should be imposed, *cf.* TR Vol. 8 at 74-78, but the Defendant affirmatively renounced its burden of proof. The only reference to turnover in the original trial were questions about the model used to calculate damages, *id.* Given the want of evidence, the Plaintiffs respectfully submit that there is insufficient evidence to sustain the finding of turnover within Manzano del Sol and Finding of Fact 65 should be overruled.

B. The Court Erroneously, Implicitly Concluded that the Defendant Could Rely on Illegal Contracts as a Defense and that New Residents Waived their Rights To Be Free from Unjust Overcharges.

The question of turnover was premised on the argument that residents that moved into Manzano del Sol within the class period "agreed" to the rates they suffered and could not present a claim for damages suffered until the next increase. This argument misses two central points: first, the Defendant cannot rely on illegal contracts as a defense to liability; and second, the Defendant cannot (and did not) demonstrate that the new residents knowingly accepted rates that offended the rights protected by the CCA, and waiving their rights to be free of excessive charges. The CCA protects even non-

residents, NMSA § 24-17-3 ("'resident' means, unless otherwise specified, an actual or prospective purchaser of, nominee of or subscriber to a continuing care contract"), and ~~gives rise to a claim for damages even as a non-resident "resident." NMSA § 24-17-15.~~ The Defendant offered no proof that the CCA was not intended to encompass those individuals, or that they waived their rights to challenge illegal rates of which they were a victim. TR Vol 10 at 28-29 and 87.

The rules of law applicable to waiver of rights have long been established in all contexts. *See, e.g., Wells Fargo Bank v. Dax*, 93 N.M. 738, 605 P.2d 245 (Ct. App. 1979); *State v. Rascon*, 89 N.M. 254, 550 P.2d 266 (1976). This Court has required that "to be valid, waivers not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of relevant circumstances and likely consequences. *State ex rel. Dept. of Human Services v. Perlman*, 96 N.M. 779, 635 P.2d 588 (Ct. App. 1981). The argument offered by the Defendant was that, as contracts were formed to allow entry to the residents, they waived whatever rights they had to question the rates imposed on them during the period before their initial increase in monthly rent at Manzano del Sol. The Defendants offered no evidence at all substantiating that any resident knowingly accepted a rate above a reasonable return on equity and did so understanding that the rate they were to be charged was illegal at the time it was charged.

In failing to tender evidence that the residents entering Manzano del Sol during the class period knowingly waived their rights, the Defendant failed to carry its burden of proof. *State v. Padilla*, 2002-NMSC-016 ¶ 19, 132 N.M. 247, 46 P.3d 1247 ("Although no particular litany of questions may be required, there must be a sufficient colloquy to satisfy the trial court's responsibilities; a knowing and voluntary waiver cannot be

inferred from a silent record."). Nor is the burden of proof a light one, *see State v. Greene*, 92 N.M. 347, 588 P.2d 548 (1978) ("The state bears a heavy burden of establishing such waiver by a preponderance of the evidence. Courts indulge in every reasonable presumption against waiver."). Nor can a party asserting waiver presume it to exist or imply its existence, *see Ed Black's Chevrolet Center, Inc. v. Melichar*, 81 N.M. 602, 604, 471 P.2d 172, 174 (1970) ("In no case will a waiver be presumed or implied, contrary to the intention of the party whose rights would be injuriously affected thereby, unless, by his conduct, the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.").

The Defendant offered no evidence, except the implication that, as residents entered the facility and a contract was a predicate to entry, the contract was signed waiving any rights to challenge the rates imposed. Here, the District Court seemed to infer waiver – and not the opposite presumption – which seems to be the rule of law. While the review may seem to be substantial evidence, review of waiver of known rights is occasionally *de novo*, *State v. Spriggs-Gore*, 2003-NMCA-046, 133 N.M. 479, 64 P.3d 506 (in context of criminal case), while other cases treat it as a matter of substantial evidence, *Crutchfield v. New Mexico Dept. of Taxation and Revenue*, 2005-NMCA-022 ¶ 28, 137 N.M. 26, 106 P.3d 1273. Here, however, there is no finding that the incoming residents of Manzano del Sol waived their rights to challenge the rates or even agreed that they were not harmed by the illegal rental rates. The Defendant opted not to tender a finding of fact explicitly discussing waiver of rights, nor was there evidence sufficient to sustain it had it been submitted.

The issue of waiver of rights directly relates to whether incoming residents at Manzano del Sol are "injured" by rates that the District Court previously found to be illegal. Whether the Court relied on the contracts with terms that were inherently illegal or at least contrary to public policy set out in the Continuing Care Act, or whether the Court impliedly found that waiver precluded a claim for the incoming residents (for the months preceding the next increase), the District Court applied substantively unconscionable contract terms against the incoming residents to preclude that portion of their claims. *Gathman v. La Vida Llena*, 103 N.M. 506, 510, 709 P.2d 675, 679 (1985).

The Defendant's argument regarding "agreement to the rates" is also difficult because it was the Defendant that tendered the rates and impliedly asserted that the contractual rates complied with the Continuing Care Act. Testimony reflected that residents were tendered the proposed contract, a copy of the Continuing Care Act and other documents either obscurely reflecting information regarding Good Samaritan or originally prepared by the New Mexico Agency on Aging. Under these circumstances, the Defendant implied that its rates were consistent with the Continuing Care Act. *See Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, ¶¶ 13-14, 121 N.M. 728, 918 P.2d 7.

While the Defendant's argument does not use parol evidence to modify a term of the contract, the Defendant does attempt to infer intention and agreement to circumstances not supported by the evidence and contradicted by extrinsic evidence. The evidence here demonstrates that potential residents reasonably inferred from the circumstances that the rates proposed were consonant with the Continuing Care Act, especially as the Defendant specifically provided such information in the course of

purporting to comply with the CCA. TR Vol. 6 at 29-32; Vol. 9 at 22-25; Vol. 10 at 55. While there are certain uses to which extrinsic evidence can be put, *see Wilburn v. Stewart*, 110 N.M. 268, 270, 794 P.2d 1197, 1199 (1990) (*quoting Levenson v. Mobley*, 106 N.M. 399, 403, 744 P.2d 174, 178 (1987) ("Evidence extrinsic to a written contract is properly admitted to determine the circumstances under which the parties contracted and the purpose of the contract."); 3 A. Corbin, Corbin on Contracts § 580 (1960) (evidence offered to show fraud in inducement admissible to show collateral factors that have legal effect, even if it directly relates to terms of agreement)). Even if the representation is innocently made, the District Court should have considered those surrounding circumstances and inferred only that potential residents intended to agree only to those rates that complied with the Continuing Care Act. TR Vol. 6 at 147. As the Defendant admitted, Manzano del Sol failed to disclose the fact that they had never attempted to comply with the CCA or the contracts, TR Vol. 6 at 40-42, and this omission, unintentional or otherwise, should not be used adversely to the Plaintiffs' interests.

What makes the post-trial assertion of "agreement to the rates" by the Defendant even more problematic is that from July 30, 1993 to the end of 1997, the Court found that the rates charged produced an excessive return on investment under the CCA and the contracts. The "monthly service fees" allegedly "agreed to" were themselves in violation of the CCA, and the District Court erroneously permitted the Defendant to raise illegal contracts as a defense to the Plaintiffs' claims for damages.

Courts have long held that an illegal contract is no defense to a claim for damages arising from that contract. *See Melton v. United Retail Merchants of Spokane*, 163 P.2d 619, 627 (Wash. 1945) ("It is also well established that the defendant cannot defeat the

plaintiff's right of action by setting up the illegal contract, which was really the actual foundation of the plaintiff's claim."). Nor, can a party properly seek the Court's assistance in enforcing an illegal contract. *See Cochrane v. Dellfava*, 517 N.Y.S.2d 854 (City Court 1987) ("It is the settled law of this State (and probably of every other State) that a party to an illegal contract cannot ask a court of law to help him carry out his illegal object."); *Mueller v. Burchfield*, 224 S.W.2d 87, 88 (Mo. 1949) ("the law will not aid such a person in enforcing a contract which he had no right to make."). The public policy adopted long ago by our Supreme Court is indistinguishable in its equity:

> We have not overlooked the numerous authorities cited by appellants to the effect that the law will not lend its aid to the enforcement of an immoral agreement or one in contravention of public policy, and from this rule of law there can be no dissent. ... We find no support in the authorities nor in morals for the construction that one may wrong another, and then set up the wrong as a defense, when called to account.

Chavez v. Myer, 13 N.M. 368, 85 P.2d 233, 237 (1906). More recently, in *Capo*, the Supreme Court strongly advised against enforcing illegal contracts against the victims or to the betterment of the illegal party. *Capo*, 94 N.M. at 376, 610 P.2d at 1205 ("This principle involves a well recognized public policy that no court will lend its aid to persons who base their causes of action upon immoral or illegal acts. The illegality inhering at the inception of such contracts taints them throughout and effectually bars enforcement.") (citation omitted); *see also Southern States Life Ins. Co. v. McCauley*, 81 N.M. 114, 116, 464 P.2d 404, 406 (1970) ("However, the rule is otherwise when they are not so situated and the statute places a penalty on one and not on the other. The party at fault under the statute cannot gain an advantage by his own act."). By both finding the illegality, and then enforcing the illegality against the victims of the illegality, the District Court violated this central, equitable, tenet of the law.

Here, the issue is also a matter of the District Court's construction of the term "actual damages" and the nature of a civil action under the CCA is what, in part, complicates this matter. NMSA § 24-17-15 permits an action to be brought "to recover actual and punitive damages resulting from a violation of the Continuing Care Act." The District Court's conclusion that the rates charged to incoming residents were not damages, even though the same rates charged to existing residents were damages, overlooked both the Defendant's rate-setting approach and the fact that rates were set at a single instance, across the entire complex, each year. That the rates themselves caused the harm was a central finding of the District Court. By not allowing the Plaintiffs to recover all of their consequential damages flowing from the illegal increases in rent, the District Court failed to give the CCA its full and adequate remedial effect. *See Michaels v. Anglo-American Auto Auctions, Inc.*, 117 N.M. 91, 94, 869 P.2d 279, 282 (1994) (when presented with a remedial statute, "We should broadly construe the statute 'to suppress the mischief and advance the remedy.'") (*quoting Albuquerque Hilton Inn v. Haley*, 90 N.M. 510, 512, 565 P.2d 1027, 1029 (1977)).

Here, as it relates to the four-prong pre-increase analysis, the mischief to be suppressed is rate increases in excess of those four factors, the remedy to be awarded would be all damages proximately flowing from the method of the increase. By allowing the Defendant to retain even part of the profits improperly obtained by illegal increases, the District Court neither suppressed the mischief nor advanced the remedy created by the Continuing Care Act. In failing to accomplish the purposes of the CCA, the District Court also failed to ensure that the Defendant was denied profit for its conduct. *See, e.g., American Diver's Supply Manufacturing Corp. v. Boltz*, 482 F.2d 795 (10th Cir. 1973).

IV. The District Court Erroneously Applied the Statute of Limitations to Bar Claims for Damages Flowing from an Increase Imposed in 1993, Prior to the Start of the Class Period, but Suffered Within the Class Period.

In calculating damages, after the matter was tried, and the Court's original findings of fact were entered, the Defendant proffered the argument that any damages for overcharges from an increase imposed outside the class period, even though its impacts were felt within the class period must be barred as a matter of law. This issue was preserved first in the Defendant's briefing regarding additional or amended findings, RP 3445 and in the Plaintiff's response to that briefing, RP 3893-3947 and the reply thereto, RP 3948-3969. At the Court's direction, damages attributable to the 1993 increase were subtracted from the damages award presented in the final judgment.

The standard of review applicable to a decision whether to apply a statute of limitations to a particular claim is *de novo*. *Inv. Co. of the S.W. v. Reese*, 117 N.M. 655, 657, 875 P.2d 1086, 1088 (1994) (describing applicable standard as being "whether the district court correctly applied the law to the facts.").

A. The District Court erred in Failing to Apply the Rule of Law in *Longacre* to Allow the Plaintiffs to Recover for Damages Suffered Within the Class Period.

The District Court excluded damages suffered from an increase imposed in late 2002, effective January 1, 2003, and the effects of which were felt throughout the class period. TR Vol. 8 at 80. The Court did so based on the conclusion that damages from the 1993 increase were imposed outside the class period, and were barred by the six-year statute of limitations. The Plaintiffs respectfully submit that the District Court did not correctly apply the law of statutes of limitation in analogous circumstances and erroneously excluded damages for which the Plaintiffs should be compensated.

Our Supreme Court recognizes that in the context of installment payments, each payment gives rise to a separate statute of limitations. In *Longacre*, the Court found that erroneous monthly payments by PERA gave rise to individual rights of action as to each overpayment, and found that the statute of repose did not completely bar all recovery. *State ex rel. PERA v. Longacre*, 2002-NMSC-033, 133 N.M. 20, 59 P.3d 500. Although *Longacre* had done nothing wrong (except to accept the overpayments), the Court found that the conduct was a "continuing wrong," and allowed the State to recover overpayments up to one year prior to the discovery of the overpayment.

Longacre was one of several opinions allowing recoupment of overpayments within the statute of limitations even though the "original mistake" occurred well before the statutory bar. *City of Carlsbad v. Grace*, 1998-NMCA-144 ¶ 14, 126 N.M. 95, 966 P.2d 1178 (in context of mistake that occurred sixteen years before bringing action, finding the argument "more persuasive," but finding not preserved in lower court); *Plaatje v. Plaatje*, 95 N.M. 789, 790-91, 626 P.2d 1286, 1287-88 (1981) (in case with divorce final over five years before action brought, finding that "For this reason, the statutory time limitations upon the plaintiff's right to sue for her portion of each installment commences to run from the time each installment comes due.").

The claims in *Longacre* are functionally indistinguishable from those at Manzano del Sol. As in *Longacre*, the residents at Manzano were impacted by a decision (erroneous in *Longacre*, illegal in the case at bar) that was taken outside the statute of limitations. However, the consequences were felt within the statute of limitations. The scope of the damages should be affected by two calculations – the amount of the overcharge and the month in which it was suffered. Just as the *Plaatje* Court recognized

that for installment payments, an action matures when each installment payment is due, *Plaatje*, 95 N.M. at 790-91, 626 P.2d at 1287-88 (1981) (*citing Abbott v. City of Los Angeles*, 50 Cal.2d 438, 326 P.2d 484 (1958), which, in turn, stated: "The right to receive periodic payments under a pension is a continuing one and any time limitation upon the right to sue for each installment necessarily commences to run from the time when that installment actually falls due.") (citation omitted)). The right to receive correct payments is indistinguishable from the right to be free from excessive rent.

Other courts, in analogous contexts, have recognized the same principle. *Hart v. Int'l Tel. & Tel. Corp.*, 546 S.W.2d 660 (Tex. Ct. App. 1977) (payments due within statutory window are actionable); *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983) (where conduct was part of a continuing pattern that continues after statutory date, the conduct is actionable). In *Baker*, the Seventh Circuit recognized the profound injustice in permitting a wrongdoer to raise statute of limitations against all claims, where the misconduct continues within the statutory period. *Baker v. F & F Investments*, 420 F.2d 1191 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970) (in case where long-running, discriminatory commercial contracts were in place, the Court observed that the contracts were "a prolonged and continuing invasion of the rights of the purchasers."); *see also Miller v. Beneficial Management Corp.*, 977 F.2d 834, 843 (3rd Cir. 1992) (allowing suit based on violation outside of statute of limitations but suffered within statute of limitations, and commenting that: "To hold otherwise would permit perpetual wage discrimination by an employer whose violation of the Equal Pay Act had already lasted without attack for over two years."). It is beyond dispute that the residents of Manzano del Sol, at least as of 1986, had the right to be certain that their rental payments were not

increased illegally; the increase in 1993 exceeded the permissible rate of return and some, but not all, of its effects were felt in 1993 and the years that followed. The Plaintiffs should not be barred from recovering those damages.

The only adverse authority in New Mexico is *Tull*, a case involving an allegation about a written contract (that did not require a pay increase when duties were changed) and ordinances and other requirements (that might have required a pay increase), and two employees who waited seven years to bring an action barred after three. *Tull v. City of Albuquerque*, 120 N.M. 829, 830-31, 907 P.2d 1010, 1011-12 (Ct. App. 1995). The *Tull* Court recognized that in the narrow category of employment cases, the continuing wrong theory has not been widely approved of, however, *Tull* has since been characterized by the Supreme Court as "noting application of 'continuing wrong' theory in cases involving contracts requiring periodic payments," *see Longacre*, 2002-NMSC-033 ¶ 23, and should best be seen as limited to its facts. *See generally Maher v. Tietex Corp.*, 500 S.E.2d 204 (S.C. Ct. App. 1998) (citing *Tull* in context of other employment cases and noting facets of employment law that produce its result).

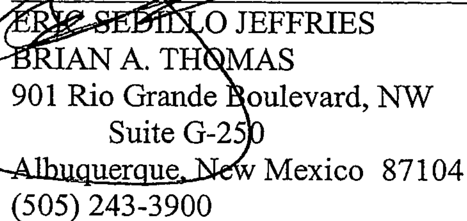
Here, like *Longacre*, a "single wrong" lead to a "continuing wrong." The decision to increase fees itself causes no compensable damage to a resident of Manzano del Sol, even if the increase decided upon is illegal. To the contrary, it is not until the payments are due that any consequence from the decision is felt, and the impact was felt month by month, until the fees were increased once again. Where the damages are imposed by the incremental payments, the continuing wrong approach is the better calculated to afford the Plaintiffs equity and justice.

CONCLUSION

The Plaintiffs respectfully request that this Court order this matter remanded to the District Court with instructions to amend the judgment allowing for compensation for the Plaintiffs' full measure of damages in the amount of $1,112,662, with prejudgment interest to run from August 1, 1993, and for such proceedings are necessary and appropriate to bring this matter to a conclusion.

Respectfully submitted,

JEFFRIES, RUGGE & ROSALES, P.C.



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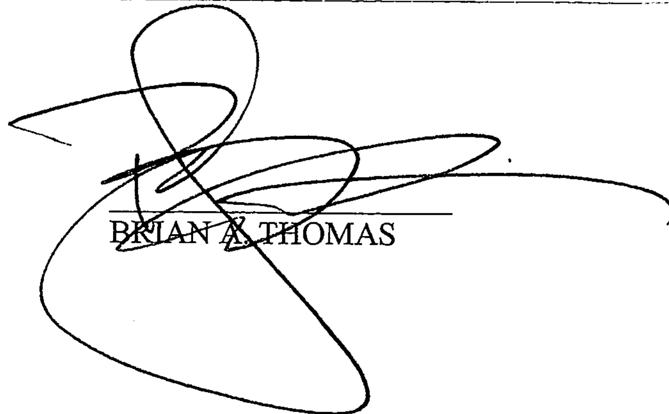
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief in Chief was transmitted by First Class Mail to all counsel of record in this matter on this, the 31st day of October, 2005.



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