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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

FEB 27 2006

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

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.

APPELLANTS' REPLY BRIEF

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

MAR - 7 2008

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ARGUMENT

I. Prejudgment Interest In the Instant Case is Necessary to Fully Compensate the Plaintiffs for the Lost Use of their Funds.

The Plaintiffs were charged improper fees, dating to July 30, 1993, but, having been made victims of this imposition, the Plaintiffs were allowed to recover interest beginning only in 1999. Put differently, the Defendants have had the use of the Plaintiffs' money for twelve years, the Plaintiffs themselves, only six. By creating this gap of recovery, the Court's award failed to fully compensate the Plaintiffs for their lost use of money. While the Defendant narrowly argues this as a matter of statutory construction, relegating the Plaintiffs' claim for prejudgment interest to a statutory question, the issue is broader.

From at least 1909, it has been the rule that prejudgment interest is allowed, as a matter of law, on breach of contract or wrongful detainer of money. *De Palma v. Weinman*, 15 N.M. 68, 103 P. 782 (1909). Where not provided as a matter of law, the award of prejudgment interest is entrusted to the discretion of the trier of fact. *Kennedy v. Moutray*, 91 N.M. 205, 572 P.2d 933 (1977). The Defendant's argument that prejudgment interest may only be awarded when one of the statutory grounds is satisfied is legally incorrect and mischaracterizes the Plaintiffs' argument for additional damages. *See, e.g., Hillelson v. Republic Insurance Co.*, 96 N.M. 36, 627 P.2d 878 (1981) (discussing common law of prejudgment interest); *see also* Restatement (Second) of Contracts § 337 (outlining common law of prejudgment interest). Prejudgment interest is a compensatory damage, and should have been awarded here, to the date of the first litigated overcharge.

When tried to a bench, a lack of findings justifying the refusal to award damages otherwise recoverable is reversible error. *Sunwest Bank v. Colucci*, 117 N.M. 373, 377-79, 872 P.2d 346, 350-52 (1994). The Defendant does not argue that such findings were made by the

District Court. The failure to award the interest failed to fully compensate the Plaintiffs for the full value of their lost use of money, a consequential injury for the breach of contract. *See, e.g., United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 488, 709 P.2d 649, 657 (1985). This Court should remand the matter to add the prejudgment interest to which the Plaintiffs are entitled to fully compensate them for the lost use of their money. *Camino Real Mobile Home Park Partnership v. Wolfe*, 119 N.M. 436, 443, 891 P.2d 1190, 1197 (1995); *Ranch World of New Mexico, Inc. v. Berry Land & Cattle, Inc.*, 110 N.M. 402, 796 P.2d 1098 (1990) (discussing equities of awards of prejudgment interest).

As a matter of law, a wrongdoer should not be permitted to profit from its harmful conduct, and that prejudgment interest should be awarded to compensate the nonbreaching party for the damages flowing from a breach of contract. *Economy Rentals, Inc. v. Garcia*, 112 N.M. 748, 762, 819 P.2d 1306, 1320 (1991). There is no dispute that the Defendant's use of the Plaintiffs' money has been of substantial benefit to the Defendant, even today, the use continues and the Plaintiffs are still denied the use of their own money.

The Defendant's central argument in opposition seems to be that it could not ascertain the amount it owed. However, these claims are little more than arguments that its contracts were not breached (a finding that was not appealed) or that the Defendant's contracts were ambiguous (and should be construed against the Plaintiffs). In the context of prejudgment interest, our courts have rejected these arguments wholesale. *State Trust & Savings Bank v. Hermosa Land & Cattle Co.*, 30 N.M. 566, 597, 240 P.469, 481 (1925) ("[Mere] difference of opinion as to amount is … no more reason to excuse [defendant] from interest than difference of opinion whether he legally ought to pay at all, which has never been held an excuse.") (*quoting Laycock v. Parker*, 103 Wis. 161, 79 N.W. 327 (1899)). Here, while the Defendant may claim a

difference of opinion, their arguments, however, are little more than a claim of a difference of opinion, not an assertion of a legally-sufficient excuse for nonpayment of prejudgment interest dating to the date of the breach of contract.

The Defendant correctly argues that the Plaintiffs seek to recover prejudgment interest as a matter of discretion, under either NMSA § 56-8-3 or § 56-8-4. While the Defendant suggests that such damages cannot be awarded because the amounts payable are indefinite, this argument has been rejected provided the threshold of a duty to pay is found. *See O'Meara v. Commercial Ins. Co.*, 71 N.M. 145, 376 P.2d 486 (1962). The only requirement is that the obligation be cognizable (and not, free of dispute as to the existence). The District Court's findings of such a threshold – coupled with the Defendant's own expert's admission that a rate of return between 12-15% seemed reasonable – show that the amounts of overcharges were identifiable, as well as the fundamental fact of overcharging. In failing to return the Plaintiffs' money, the Defendant wrongfully detained the Plaintiffs' funds.

The Defendant's other arguments regarding the propriety of awarding postjudgment interest at all do not respond to the central point: a plaintiff in a breach of contract claim, when the defendant is found to have breached the contract, is fully entitled to recover all consequential damages, including lost use of money. By failing to fully compensate the Plaintiffs, the District Court committed reversible error.

II. The Imposition of Reductions in Damages for Credits or Turnover is Contrary to New Mexico Law and the Equities of the Case

A. The Appropriate Standard of Review is *De Novo*.

The Defendant argues at some length that the appropriate standard of review is substantial deference to the trier of fact on damages. However, when the matter is tried to the

bench, and when the basis of a reduction of damages is premised on a legal argument, the appropriate standard is closer to *de novo* than to the Defendant's proposed standard.

Where the question raised in the appeal is a matter of application of law to facts, or a construction of law, the appellate standard of review is *de novo*. *Strata Prod Co. v. Mercury Exploration Co.*, 1996-NMSC-016, 121 N.M. 622, 627, 916 P.2d 822, 827 ("We are not bound, however, by the trial court's legal conclusions and may independently draw our own conclusions of law on appeal."); *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450. The cases cited by the Defendant, only some of which involved bench trials, all relate to the same general issue: where a plaintiff sought more and received less than requested, or received more than a defendant would have preferred, the review is deferential.

However, the issue raised here is legal, not factual. The reduction of damages was imposed when the Court found that historic damages could legally be offset by a subsequent decision not to increase rates. That later election not to increase was never intended by the Defendant to restore unjust overcharges to the Plaintiffs. At minimum, the appropriate standard of review is not unbridled deference, as advocated by the Defendant, but instead a mixed standard of review, to which, at least as to some of the analysis, the standard is *de novo*. *Jicarilla Apache Nation v. Rodarte*, 2004-NMSC-035, ¶¶ 23-24, 136 N.M. 630, 103 P.3d 554.

B. By Imposing a Credit for 1998 and 1999, the District Court Imposed an Offset Neither Pleaded nor Claimed by the Defendant.

The Defendant has taken the inconsistent positions that the CCA is both unintelligible and that it permits the Defendant to recoup fees for 1998 and 1999 that it did not charge. The Defendant's does not clearly elucidate a legal basis for asserting that it is entitled to recover uncharged fees by recoupment or offset against historic damages. Moreover, at trial, the Defendant provided no evidence showing what those specific reductions should be.

As a foundation, our courts recognize that an otherwise legal contract that is illegal in its formation can be enforced, but only by one type of party: an innocent one. *Capo v. Century Life Ins.*, 94 N.M. 373, 610 P.2d 1202 (1980). In *Capo*, the Supreme Court permitted both the enforcement of the insurance contract, and the compelled return of premiums, precisely because the law prohibited any gain from an otherwise illegal act. Here, the Defendant did not issue insurance, it raised rates again and again, at each turn, it made no explicit reference to the Continuing Care Act in setting rates.[1] By imposing offsets, credits (or whatever else they might be called) against overcharges in prior years, the District Court failed to fully satisfy the damages that it found.

Here, not only did the defendant not plead a counterclaim or tender proposed findings suggesting an offset of damages, but it introduced no evidence supporting the conclusion that it now advocates. The Defendant's ratesetting process did not include recouping historic undercharges; the CCA does not appear to permit recouping undercharges; any alleged undercharge in 1998 or 1999 is not fungible with overcharges from prior years. Cf. *Mountain States Tel. & Tel. Co. v. N.M. Corp. Comm'n*, 90 N.M. 325, 341, 563 P.2d 588, 604 (1977) ("(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."). Compounding the problem, the District Court failed to account for the nature of the Continuing Care Act.

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[1] The Defendant's citation to Kayln Johnson's testimony misses the point. She and other administrative staff admitted that they never explicitly considered the Continuing Care Act. That she and Manzano del Sol may have accidentally considered similar issues falls far short of complying with the contracts with the residents of Manzano del Sol. *See, e.g.*, TR Vol. 6 at 38, Vol. 9 at 80-81.

While the Defendant complains that it cannot understand the application of *Capo* to this case, *Capo*, as with numerous other opinions, holds simply that where one party has entered into an illegal action, the party will not be allowed to benefit from that action. *Dacy v. Village of Ruidoso*, 114 N.M. 699, 845 P.2d 793 (1992) (bilateral illegality of a contract); *Lenning v. New Mexico State Bd. of Educ*., 82 N.M. 608, 485 P.2d 364 (Ct. App. 1971) (equitable estoppel is grounded in the maximum that a party should not profit by his or her own wrongdoing). The Court evidently understood the factual basis for the argument, as she determined the exact amount of the illegal activity to be $1.113 million, RP 4723 ¶ 59. By not awarding the full damages for 1993-1997, the Defendant has been allowed to profit from its wrongdoing.

The Defendant's sense that it is "passing strange" that the Plaintiffs should complain that they are bound by the unreasonable increases they suffered, but that the Defendant should be free to reconsider the rates they chose speaks for itself. When read in context of the argument regarding turnover, the Defendant's argument has the effect of equitably estopping the Plaintiffs from arguing that they did not know the rates being imposed were illegal, while the Defendants are not likewise equitably estopped. It indeed is passing strange that a Defendant would argue something so plainly uneven in its application and so wholly divorced from the causes of action proven by the evidence.

The Plaintiffs argued that the central purpose of compensatory damages in the event of a breach of contract was not served by the District Court's spontaneous offsetting or "credit" theory. As a matter of law, the Plaintiffs are entitled to recover their full damages for the breaches in the years 1993, 1994, 1995, 1996 and 1997. *See Lovelace Medical Center v. Mendez*, 111 N.M. 336, 805 P.2d 603 (1991); *Allen v. Allen Title Co.,* 77 N.M. 796, 798, 427 P.2d 673, 675 (1967). By allowing for damages less than were found, the District Court strayed

from the applicable standard for damages, *see Torrance County Mental Health Program, Inc. v. N.M. Health and Env't Dept.*, 113 N.M. 593, 830 P.2d 145 (1992).

The Defendant apparently agrees that the contractual promises did not include a promise from residents to the Defendant that the Defendant would be paid all that it might have charged. As is apparent from the contract terms, the Defendant covenanted in the negative, guaranteeing that its rates (and associated increases) would only be imposed if those rates complied with the four contractual conditions. The Defendant offhandedly suggests that they complied with the four-pronged test, but even now, does not articulate how the Defendant purportedly complied with the four prongs in setting its rates between 1993 and 1999. Nor did the contracts have a balancing mechanism allowing Manzano del Sol to recoup historic undercharges in the future. The Defendant does nothing to disturb the factual findings of the District Court on the issue.

Put differently, under the CCA and the contracts, Manzano del Sol was not guaranteed a reasonable rate of return: it was prohibited from receiving an unreasonable one. By doing what it did in granting "credits," or "offsets" or whatever other terminology might be used, the District Court wrote provisions into the contract that did not exist, and then enforced them against the Plaintiffs; and in doing so, the District Court violated central, and long-standing tenets of contract law. *CC Housing Corp. v. Ryder Truck Rental, Inc.*, 106 N.M. 577, 579, 746 P.2d 1109, 1111 (1987) ("When discerning the purpose, meaning, and intent of the parties to a contract, the court's duty is confined to interpreting the contract that the parties made for themselves, and absent any ambiguity, the court may not alter or fabricate a new agreement for the parties.").

The Defendant apparently makes no response to the Plaintiff's argument that the District Court erred in creating an implied right of restitution to the benefit of the Defendant, and that the District Court violated core tenets of rate-setting by permitting the Defendant, in effect, to collect

rates retroactively. The Defendant appears to concede that the Restatement of Restitution precludes recovery of the benefit from the Plaintiffs; by not responding to the argument, the Defendant seems to agree that, under *Cheesecake Factory*, the Defendant cannot assert the credits against the Plaintiffs. *See Cheesecake Factory, Inc. v. Baines*, 1998-NMCA-120, 125 N.M. 622, 964 P.2d 183; *see also* Restatement (First) of Restitution § 2. This Court should remand the matter, with instructions to restore the full damages, reflecting the full measure of the Plaintiffs' damages.

C. The Imposition of a Reduction of Damages on the Basis of Turnover Failed to Adequately Compensate the Plaintiffs for their Damages.

The Defendant takes the position that turnover was a necessary component of the Plaintiff's burden of proof, and in support of the argument, cites no authority. The only citation to authority, for any proposition, on the point is to *Romero*, a case involving a price-fixing class action, and which recognizes that classwide or aggregate damages are perfectly appropriate in a class action. *Romero v. Phillip Morris*, 2005-NMCA-035, 137 N.M. 229, 109 P.3d 768. By imposing reductions for turnover, the District Court both disregarded the precedent discussed in *Romero*, and perversely obliged the Plaintiffs to prove the Defendant's propositions, compounding the error.

While the Defendant disparages the Plaintiff's approach to proving damages, not only is proof of aggregated damages entirely consistent with federal, national and state precedent, but it had the signal benefit of fitting the Defendant's own approach to imposing rate increases. In other words, the Plaintiff's proof of aggregated damages was both a recognized and accepted approach to such issues, but a reasonable one under the facts as well.

The Plaintiffs are not, whether in a class action or an individualized claim, obliged to prove their damages with heightened specificity. *See Story Parchment Co. v. Paterson*

Parchment Paper Co., 282 U.S. 555, 565 (1931); *see also Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574 (1946) ("juries are allowed to act on probable and inferential as well as (upon) direct and positive proof. Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim…."). New Mexico law on damages is indistinguishable, *see Mascarenas v. Jaramillo*, 111 N.M. 410, 414-15, 806 P.2d 59, 63-64 (1991); *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.").

The recovery and payment to individuals – the individualized proof intimated in *Romero* – was considered, approved of, and awaits implementation at the conclusion of this appeal. The Plaintiffs' class-wide damages, however, are measured by the breadth of the facility, precisely in the same manner as the damages were suffered. That they may be allocated individually, does not mean that they must be, even at trial, specific; a class action is not an amalgam of 300 individual claims for breach of contract, each with every burden of proof. *See generally, Romero*, 2005-NMCA-035, and cases cited therein.

The only "factual" basis for asserting that turnover existed was the Defendant's presumption that new residents incoming to the facility "agreed" to the rates that permitted the illegal rates of return on investment at Manzano del Sol. The Defendant offers no clear argument as to why it should be entitled to assume that residents knowingly waived their rights to be free from the consequences of illegal overcharges.

As well-settled legal propositions, the Plaintiffs moving into apartments cannot be presumed to have agreed to rates that were illegal for several reasons. First, the Defendants failed their burden of proof. It is uncontested by the Defendant that there was no evidence

whatsoever that any of the Plaintiffs knowingly entered into contracts, understanding at the time that the rates of return accrued by the Defendant were illegal.

Second, the Defendant failed to tender evidence sufficient to prove a knowing, intelligent waiver of a known right. *State ex rel. Dept. of Human Services v. Perlman*, 96 N.M. 779, 635 P.2d 588 (Ct. App. 1981). As this argument ostensibly benefited the Defendant, it had the burden of proof. *Kuchan v. Strong*, 39 N.M. 281, 46 P.2d 55, 56 (1935). In failing to tender such evidence, especially given the Defendant's argument that all proof of damages must be individualized, the Defendant waived it.

The most profound irony is that the Defendant asserts that the Plaintiffs knowingly accepted those rates – notwithstanding the illegality – but also argues that it could not possibly have understood the terms of its own contracts because they were unconstitutionally vague. At minimum, this conflict must be construed against the Defendant, *Heye v. American Golf Corp., Inc.*, 2003-NMCA-138, ¶ 14, 134 N.M. 558, 80 P.3d 495 ("We construe ambiguities in a contract against the drafter to protect the rights of the party who did not draft it."), but this Court also should also preclude the Defendant from offering the argument on the grounds of judicial estoppel, *see Citizens Bank v. C & H Constr. & Paving Co.*, 89 N.M. 360, 366, 552 P.2d 796, 802 (Ct. App. 1976) ("a party is not permitted to maintain inconsistent positions in judicial proceedings.").

Third, the Defendant apparently agrees that incoming residents are harmed by a prior illegal increase if they are forced to pay it. The Continuing Care Act works to provide disclosure, consistency amongst facilities and "to provide protection for residents and communities." NMSA § 24-17-2. In superficial compliance with the Act, the Defendant's forms of contracts purported to limit increases to only those that satisfied the listed elements.

However, none of the documents disclosed that the rates being charged were illegal, nor did they disclose that the Defendant did not attempt compliance with the four perquisites before raising rates prior or subsequent to any new contract.

The findings of fact of the District Court establish that the rate increases in 1993-1997 violated the Continuing Care Act, and breached the Defendant's contracts with residents. The Act does not preclude the Plaintiffs from arguing that an illegal increase, even if it preceded their contract, harmed them: the Act permits recovery for "actual and punitive damages for injury resulting from a violation of the Continuing Care Act." NMSA § 24-17-15(A). Here, the increase imposed for 1993 evidently harmed the Plaintiffs within the statutory period.

Especially where, as here, the rates are imposed across the facility and not individually negotiated, a rate that is illegal to one resident and charged to all residents, must be illegal as to every resident. To permit the Defendant to raise the false and unproven claim that residents knowingly agreed to a rate that otherwise was illegal erroneously permits the Defendant to raise its illegal contract as a defense to liability on the contract. *Southern States Life Ins. Co. v. McCauley*, 81 N.M. 114, 116, 464 P.2d 404, 406 (1970) ("The party at fault under the statute cannot gain an advantage by his own act."); *Chavez v. Myer*, 13 N.M. 368, 85 P.2d 233, 237 (1906); *see also Capo*, 94 N.M. at 376, 610 P.2d at 1205 ("The illegality inhering at the inception of such contracts taints them throughout and effectually bars enforcement.").

III. The Plaintiffs Were Entitled to Recover for All Damages Suffered Within the Six Year Statute of Limitations.

The Defendant's response to the argument regarding the applicable statute of limitations misses the mark.[2] Both inside and out of New Mexico, courts have recognized that the statute of limitations, for installment payments, allows a separate statute for each installment, because the

[2] The Defendant quite incorrectly asserts that *Tull* is not discussed; the Plaintiffs can only assume that the briefing on this issue by the Defendant was an artifact from a pleading presented to the District Court.

installments themselves cause the harm. *See State ex rel. PERA v. Longacre*, 2002-NMSC-033, 133 N.M. 20, 59 P.3d 500

Under the facts of the case, there can be no other reasoned interpretation of the statute of limitations. The installment payments of the residents, paid month by month, are nothing more than installment payments, and their name suffices to prove the point: the Defendant refers to them as "monthly service fees." The Defendant's notion that the "damage was done" with the announcement of the increase is simply not true: at any point before all twelve monthly payments were made, the Defendant could have lessened the damages, or eliminated them altogether, had it done the calculation required by the contracts it had with its residents and announced a reduction of rent.

This is the fundamental difference, as a matter of law, between *Grace*, *Longacre*, and *Plaatje*, on one hand, and *Tull*, on the other. *Longacre* is perhaps the strongest parallel in the facts – where PERA overpaid monthly, each overpayment triggered a separate statute of limitations. Just as PERA overpaid, so did the Plaintiffs; unlike PERA, the Plaintiffs here did not have the tools at hand to know that Manzano del Sol had disregarded its contractual obligations and imposed rates that were illegal. *Plaatje*, and in dicta, *Grace*, credited the argument, and recognized its applicability.

Our courts have described the failure to pay (or the overpayment) as a "continuing wrong," *see State ex rel. PERA v. Longacre*, 2002-NMSC-033, 133 N.M. 20, 59 P.3d 500. The phrase "continuing wrong," is an apt description where an initial decision has periodic effects. Although the Defendant appears to attempt to distinguish *Longacre* on its facts, *Longacre* is squarely applicable because, there as here, the "decision" or "act" triggering the erroneous payments was made outside the applicable statute of limitations.

New Mexico's rule of law on installment payments is hardly novel, and appears to be entirely consistent with national precedent. *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.*, 116 Cal.App.4th 1375, 11 Cal.Rptr.3d 412, 422 (Cal. Ct. App. 2004) ("Thus, where performance of contractual obligations is severed into intervals, as in installment contracts, the courts have found that an action attacking the performance for any particular interval must be brought within the period of limitations after the particular performance was due" and commenting that the rule of law applies in rental contracts and to pension-like payments); *Keefe Co. v. Americable Intern., Inc.*,755 A.2d 469 (D.C. 2000) ("This rule was relied upon by the district court in this case and has been established in the jurisprudence of the District of Columbia, as in most of the nation, for at least a century."). While the majority of such opinions arise from affirmative obligations to make installment payments, *Longacre* is nothing more than the logical application of the same legal principles under facts evidencing overpayment.

While the Defendant declares out-of-state precedent inapplicable and suggests that they "require little comment," this, too, misses the point. Other courts have recognized the policy served by limiting the application of statutes of limitation. In *Baker*, the Seventh Circuit recognized that the only equitable application of the statutes of limitations when an illegality was perpetrated well prior to the apparent statute of limitations period, but consequent to which installment payments were imposed within the statutory period. The *Baker* Court unequivocally approved of setting the triggering point at the end, not the beginning, of the payment of installments:

> After careful consideration, the district court concluded that the three statutes of limitations commenced running only upon the termination of the individual contracts. The court stated that the defendants "are alleged to have been reaping the unlawful benefit through continuing enforcement of their unlawful scheme." ... Because of the continuing nature of the overt acts alleged, the statutes of limitations do not commence to run when the contracts were executed but when they terminate.

Baker v. F & F Invest., Inc., 420 F.2d 1191, 1200 (7th Cir. 1970) (citations omitted). Especially where the imposition or wrongdoing is perpetrated against a party protected by statute, the Court should construe the statute of limitations to fully enforce the purposes of the Continuing Care Act. *See Miller v. Beneficial Management Corp.*, 977 F.2d 834, 843 (3rd Cir. 1992) ("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."); *Michaels v. Anglo-American Auto Auctions, Inc.*, 117 N.M. 91, 94, 869 P.2d 279, 282 (1994).

The Defendant's final argument is that were the logic of this argument applied to its fullest, no statute of limitations would ever apply. The Plaintiffs have not advocated this argument on appeal, nor have they advocated it in the context of argument regarding the statute of limitations. *Longacre*, *Plaatje* and *Grace* make it amply clear that the statute of limitations applies, but in a manner different that found by the District Court. In applying the statute of limitations beyond its means, and in failing to recognize that installment payments within the statutory period are actionable, the District Court failed to pay due regard to the salutary purposes of the Continuing Care Act, and to New Mexico's recognized public policy in favor of a right of action. *Gaston v. Hartzell*, 89 N.M. 217, 549 P.2d 632 (Ct. App. 1976) ("We have long held that the law favors the right of action rather than the right of limitation.").

CONCLUSION

For the reasons stated above, and for those in the Plaintiffs Brief in Chief, 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 other proceedings as are necessary and appropriate to bring this matter to a final conclusion. The Plaintiffs also request their attorneys fees and costs in prosecuting this appeal

Respectfully submitted,

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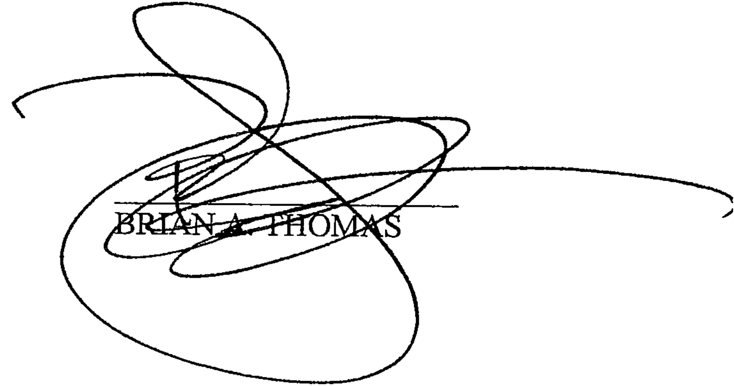
CERTIFICATE OF SERVICE

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 27th day of February, 2006.



BRIAN A. THOMAS