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IN THE COURT OF APPEALS FOR 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 , individually and
in his capacity as class representative,

Plaintiffs, Appellants,
and Cross-Respondents

Ct. App. No. 25,510
Dist. Ct. No. CV-99-07830

vs.

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

Defendant, Respondent,
and Cross-Appellant.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

JAN 06 2006

RESPONDENT AND CROSS-APPELLANT GOOD SAMARITAN'S ANSWER BRIEF

On Appeal From the Second Judicial District Court

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

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SUPREME COURT OF NEW MEXICO
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SUMMARY OF PROCEEDINGS

Nature of the Case

The Evangelical Lutheran Good Samaritan Society ("Good Samaritan") is a non-profit corporation that operates senior apartment and nursing home facilities nation-wide. RP 2387, p. 16 ¶ 4-6, Pretrial Order. Plaintiff and Appellant Richard H. Skofield ("Skofield") was a resident at Good Samaritan's Manzano del Sol facility in Albuquerque ("Manzano"). Skofield entered into an Entrance Agreement with Good Samaritan to live in the senior independent living apartments at Manzano in December 1994, and lived there until his death in 2003. RP 2387, p. 16, ¶¶ 7-8 Pre-Trial Order; RP 4213, Suggestion of Death.

This case arises out of Skofield's objection raised years after the fact to modest annual increases to the monthly independent living apartment rental fees at Manzano during the mid-1990s. The fee increases at issue were as follows: January 1, 1994 (2.5%), January 1, 1995 (6.0%), January 1, 1996 (3.0%), January 1, 1997 (4.0%), January 1, 1998 (2.0%), and January 1, 1999 (0%). RP 4715, Amended Findings of Fact and Conclusion of Law ("Amended Findings"), ¶ 12. Skofield contended that these fee increases, though objectively modest in percentage terms, nevertheless violated a provision of the New Mexico Continuing Care Act ("CCA"), which requires fees increases at continuing care communities to be based on "economic necessity, the reasonable cost of operating the community, the cost of care and a *reasonable return on investment.*" *See* NMSA 1978 § 24-17-5(B)(11)(1985)(*emphasis added*).[1]

[1] After judgment was entered in this case, the New Mexico Legislature amended the CCA to require that guidance on the meaning of these requirements be clarified. The statute was amended to state that the fee increase requirements be "defined by rules promulgated by the aging and long term services department no later than January 31, 2006." NMSA 1978 § 24-17-5(11) (2005). The dates shown on the statutory citations in this brief are the pre-2005 dates, as the ones relevant to the Court's consideration of the issues raised herein.

The focus of this case was on the meaning and application of the term "reasonable return on investment." Skofield alleged that Good Samaritan could not legally increase fees during the mid-1990s at all because its financial statements showed "return on equity" that Skofield contended was too high. Manzano's percentage returns on equity during the relevant years were: 1994 (17.17%), 1995 (18.13%), 1996 (21.34%), 1997 (22.42%), 1998 (12.62%), and 1999 (10.18%). RP 4716 ¶ 17, Amended Findings.

Good Samaritan, meanwhile, contended *inter alia* that "return on investment" was meaningless in the context of a non-profit, where no "profits" are ever "returned" to any "investors," but instead are reinvested in the communities themselves for the benefit of their residents; that, in any event, return on equity was not the only possible definition of return on investment, but one of many potential definitions, including more rational definitions of the term as return on assets or "total investment" (the ratio of net income to equity *plus* long-term debt); and that, under any definition Manzano's return on investment was always reasonable. RP 679-680, Motion for Summary Judgment; RP 861-873, Brief in Support of Motion for Summary Judgment.

It was undisputed that the "return on investment" of Manzano during the 1990s, however calculated, was substantially affected by the historically anomalous returns reaped on investments in stock markets during that era. 9/18/02 Tr. 225; 9/19/02 Tr. 157; 9/25/02 Tr. 43-44. Reserve funds at Good Samaritan communities were typically pooled and invested by the national organization in a diversified portfolio of stocks and bonds akin to a private mutual fund. RP 4716, pp. 17-18; *see also* Appellants' Brief in Chief, p. 2. Such reserve funds would be held in trust for the communities for renovating older buildings or other contingencies, such as the payment of debts. 9/24/02 Tr. 166-168; 9/20/02 Tr. 133. Unrealized capital gains on the

investment of such reserve funds, which were never returned to anyone as "dividends" – because Good Samaritan in a non-profit corporation and thus has no stockholders – would necessarily drop to the bottom line of Manzano's balance sheet as an increase in "equity." 9/18/02 Tr. 225; 9/19/02 Tr. 176; 9/24/02 Tr. 81.

The provision of the CCA regarding a continuing care community's "return on investment" had never before been interpreted by a New Mexico court, nor had the Agency on Aging ever promulgated regulations defining its terms, although the CCA required the Agency to do so. Moreover, it was undisputed that Manzano's financial statements had been submitted to the Agency on Aging annually since the creation of the CCA, and that they had been accepted without comment by the Agency. 9/18/02 Tr. 216-217, 221-222.

Summary of Facts, Course of Proceedings, and Disposition Below

Skofield filed this action in July 1999. RP 1. It thereafter followed a protracted course, including class certification and motion practice, bench trial in 2002, objections leading to reopening of evidence in 2004, and finally entry of judgment at the end of 2004.

1. Good Samaritan's Summary Judgment Motion

In May 2001, Good Samaritan filed a motion for summary judgment arguing:

- that the CCA's language "reasonable return on investment" was unconstitutional under the "void for vagueness" doctrine;
- that Manzano's fee increases were, at all relevant times, below inflation and thus could not violate the CCA under any reasonable interpretation of its requirements;
- that Manzano's fees were, at all relevant times, at or below market rates for comparable senior living facilities in Albuquerque; and
- that Skofield's claims had to be limited by the applicable six-year statute of limitations for breach of contract.

RP 679-680, Motion for Summary Judgment; RP 861-873, Brief in Support of Motion for Summary Judgment. The District Court denied Good Samaritan's motion as to the substantive

grounds advanced, and would not declare the statutory language unconstitutionally vague. RP 1429-1430, 12/4/01 Order. The District Court did, however, limit Skofield's claims to rental increases at Manzano after July 30, 1993, six years before the Complaint was filed. *Id.*

2. Class Certification

The case was certified as a class action in September 2001, with Skofield as class representative representing similarly-situated Manzano residents. RP 1033, Order Granting Certification of Class. Specifically, the District Court certified a class of "Residents of Manzano del Sol who were subject to fee increases between July 30, 1993 and July 30, 1999." RP 4714 ¶ 5, Amended Findings.

3. Good Samaritan's Pre-Trial Settlement Offers

Because both Skofield's appeal and Good Samaritan's cross-appeal address the propriety of the District Court's award of prejudgment interest under NMSA 1978 § 56-8-4(B)(2004) based on Good Samaritan's supposed failure to make reasonable pre-trial settlement offers, the facts surrounding pretrial settlement discussions between the parties become important.

The history of Good Samaritan's settlement offers before trial have been documented, and are part of the record. RP 3598-3602, March 11, 2003 Affidavit of Martha Brown. Eighteen months before trial, at a facilitation conducted by Kimball Udall, Good Samaritan outlined an approach that would include making capital improvements to the facility and freezing future rent increases to Manzano residents. *Id.* Four months before trial, at a second facilitation conducted by Bruce Hall, Good Samaritan's opening offer was to spend $1 million for the benefit of residents at the facility on improvements and programs that were negotiable; Good Samaritan then offered to freeze rents for a year and cap rent increases for two subsequent years, construct and staff a wellness center at the facility, and negotiate attorney's fees and costs. *Id.* On the first

day of trial, Good Samaritan offered to spend $2 million at the facility for the benefit of the residents and $50,000 in attorney's fees. *Id.* Finally, at a third facilitation conducted by Wayne Wolf in the middle of the trial, Good Samaritan offered again to freeze apartment rents for a year, to spend $300,000 on a wellness center, and to pay $100,000 in costs and fees. *Id.*

Skofield's claims, meanwhile, were for as much as $18 million after trebling, together with fees, costs and injunctive relief against future increases. RP 1. Meanwhile, Skofield's settlement demands began at $6 million in March 2001, dropped to $2.5 million in damages, fees and costs in May 2002, and were at $1.4 million before fees and costs on the eve of trial. RP 3598-3602.

4. September 2002 Trial to the Court – Skofield's Case

At trial in September 2002, Skofield's central witness was his expert, Bruce Malott, an accountant. Malott's testimony was predicated on his definition of the statutory language "return on investment." Malott defined "return on investment" as return on equity, the ratio of Manzano's net income to its net equity (assets minus liabilities). 9/20/02 Tr. 11. Malott admitted, however, that there is no Generally Accepted Accounting Principle ("GAAP") definition of "return on investment." 9/19/02 Tr. 195, 197, 9/20/02, 29, 30. Moreover, he admitted that there are, in fact, several other definitions of the term that are utilized in financial texts, 9/19 Tr. 211 (direct), 9/20 Tr. 15, 20-28,. 29, including return on assets or "total investment" -- the ratio of net income to the entity's equity *plus* its long-term debt -- a definition that necessarily would have yielded lower calculations of Manzano's returns.

Next, Malott compared Manzano's return on equity to historical returns of the national stock markets over the seventy-four year period from 1926 to 1999, averages known as

"Ibbotson data." Using this Ibbotson data, Malott defined a "reasonable" return on equity to be 12.35%. 9/19/02 Tr. 198-199.

Finally, Malott presented evidence of "damages" to his class consisting of the amounts of fee increases imposed on Manzano residents prior to the beginning of years where, *looking backward* at the end of the year, Manzano's return on equity had ended up exceeding his threshold of reasonableness. 9/19/02 Tr. 198-200; 9/20/02 Tr. 82. Using this methodology, Malott arrived at a damages figure of more than $1.1 million. 9/19/02 Tr. 218-219.

Malott presented these damages in the aggregate, as damages to a class of apartments, without reference to individual residents, 9/19/02 Tr. 74-76, 9/20/02 Tr. 166, 5/4 Tr. 42-43, even though information regarding the identities and residency of individual Manzano residents was available to him. 5/4/04 Tr. 43, 46, 47. Indeed, Skofield in the September 2002 trial never presented any evidence regarding when residents had moved into or out of the facility, and did not provide the District Court any calculations of how such apartment "turnover" would affect his gross damages calculation, although the class certified by the District Court on its face only included individuals who had been "subject to fee increases," RP 4713, Amended Findings, and many Manzano residents had moved into the facility only after fee increases had been imposed. Skofield admits in his own brief-in-chief that "the statutory language... 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 it did not increase the rates." *See* Appellants' Brief-in-Chief, p. 11.

5. September 2002 Trial to the Court - Good Samaritan's Defenses

At trial, Good Samaritan attacked Skofield's damages model on a number of grounds:

Good Samaritan presented evidence that return on equity is not the sole definition for return on investment, and that other definitions such as return on total investment yield significantly lower rates of return. 9/20/02 Tr. 15, 29, 30, 39, 67-68. Good Samaritan established that Malott's use of "Ibbotson" data for 1926-1999 was misleading, and presented evidence that returns on equities in the 1990s were much higher than the historical average returns he had used. 9/20/02 Tr. 43, 45, 46, 53-55. Good Samaritan demonstrated that Malott's analysis should have included a downward adjustment for "turnover," since new residents agreed to higher rates when they moved into the facility mid-year, and the statute only governs rate *increases*. 9/20/02 Tr. 76-77. Good Samaritan pointed out that Mr. Malott's analysis had failed to exclude damages for those Manzano residents who opted out of the class. 9/20/02 Tr. 77-78. Good Samaritan showed that Mr. Malott's analysis had failed to exclude damages relating to fee increases imposed prior to July 30, 1993, based on the six-year limitations period for contract claims. 9/20/02 Tr. 71, 78.

Good Samaritan also showed that it should be entitled to "credits" in 1998-2001, years in which its return on equity, even under Malott's model, had been beneath his threshold. Good Samaritan reasoned that, in those years -- in which Good Samaritan did not raise rates at all or else raised rates only slightly -- Good Samaritan could have theoretically raised its monthly fees significantly, but did not do so, more than offsetting any earlier, supposedly "illegal" fee increases. Malott admitted that, for 2000 and 2001, these credits would have been $1.2-1.4 million a year, thus completely wiping out the damages to the class he had calculated. 9/20/02 Tr. 82-83, 112-116.

In further rebuttal to Malott, Good Samaritan offered the expert testimony of Kathryn Brod, a financial analyst whose entire career has been spent in the continuing care field. 9/24/02

Tr. 149-157. Brod testified that Good Samaritan's fees and fee increases at Manzano in the 1990s had been objectively reasonable when compared with the fees and fee increases at continuing care communities in New Mexico and nationwide, and that annual fee increases were standard in the industry. 9/24/02 Tr. 173-174. Brod also testified that it is important for continuing care communities who must provide long-term services to the elderly and infirm to accumulate capital reserves for future contingencies. 9/24/02 Tr. 202-203. Indeed, because of the security afforded by its capital reserves, Brod concluded that Manzano was the type of community she would want her own elderly relatives to enter. 9/24/02 Tr. 191-192.

Good Samaritan also repeatedly raised the fact that Skofield had rested his case at trial without putting in any evidence of who was in the class, when they moved into Manzano or moved out, and how those individuals were damaged. 9/20/02 Tr. 164, 167, 186-87; Tr. 9/25/02 55, 84; 5/4/04 Tr. 73-75. Finally, Good Samaritan presented undisputed evidence that Manzano's apartment fees were at or below market rates, 9/20/02 p. 64-65, and that fee increases during the class period had been below the rate of inflation. 9/19/02 Tr. 146-148.

6. The District Court's Initial Findings of Fact

In December 2002, the District Court issued its Findings of Fact and Conclusions of Law. RP 3395, 3399-3402, Findings of Fact. The District Court concluded that Good Samaritan had violated the Continuing Care Act by raising its apartment fees, *id.* at ¶ 33-35, and adopted Malott's basic framework for assessing damages, *id.*, at ¶ 58, 59, 66, 68 and Attachment A. The District Court, however, made three significant modifications to Malott's model that greatly reduced Skofield's damages: (1) using 15% as the threshold for a reasonable return on investment, *id.* at ¶¶31-32; (2) giving credits of approximately $600,000 for "virtual" fee increases that Good Samaritan could have imposed in 1998 and 1999, years when Manzano's

return on equity was lower than 15%, *id.* at ¶ 67; and (3) applying a one-time national average apartment "turnover" rate of 29.8% to the gross damages to account for Manzano residents moving into the facility and accepting higher rates. *Id.* at ¶¶ 60-65, 67-68.

With regard to turnover, the District Court specifically concluded that incorporating turnover rates was a necessary component of its damages calculation, because "the initial methodology of Plaintiffs' expert... assumes that the apartments (not the individual residents) suffered damages throughout the class period, regardless of how many times the apartment was turned over to a new resident who had agreed to higher rates." *Id.*, ¶¶ 61-62.

With these modifications, the District Court awarded $360,654 in damages. RP 3389, Conclusions of Law ¶ 3. The District Court directed entry of judgment in Good Samaritan's favor on Skofield's claims for disclosure violations, unjust enrichment, breach of covenant of good faith and fair dealing, unfair trade practices, fraudulent concealment an constructive fraud, and breach of fiduciary duty. RP 3396-3399, Findings of Fact and Conclusions of Law ¶¶ 39, 40, 47, 53, 55, 57.

7. Objections to Findings

In post-trial briefing, Good Samaritan objected to the District Court's Findings of Fact, pointing out a number of problems, including two significant problems with the damages model it had adopted. First, Good Samaritan noted that the turnover rate the District Court had applied was actually an *annual* rate that logically should have been applied six times, once for each year of the class period. RP 3867-3878, Defendant's Supplemental Brief in Support of Its Proposed Amendments to the Court's Findings of Fact. Second, Good Samaritan argued that the District Court had erred in assessing damages for a 1993 fee increase, which was announced in December 1992 and implemented on January 1, 1993, because the increase occurred outside of

the six-year statute of limitations period. *Id.* Good Samaritan showed that these revisions, taken together, produced zero damages using the District Court's own model and argued that, as such, Skofield's remaining claims should be dismissed. *Id.*

8. Reopening the Trial Record on "Turnover"

In February 2004, the District Court acknowledged the problems with its initial damages findings and decided *sua sponte* to reopen the trial record to admit evidence on turnover at Manzano. RP 4181-4183. Good Samaritan objected to reopening the record on the grounds that doing so was granting Skofield a new trial after he had failed to meet his burden of proof on damages. RP 4184-4207, Motion to Reconsider Reopening.

Indeed, in reopening the trial, the District Court openly conceded Skofield's failure to carry his burden of proof on damages at trial, specifically with regard to the effect of turnover on his damages model, *i.e.,* his fundamental failure to prove who was a member of the class, when they moved into Manzano and when they moved out, and when (or whether) they had their fees increased and by how much. RP 3400, Court's Findings of Fact and Conclusions of Law ("Findings"), ¶¶ 60-63; 5/4/04 Tr. 4 ("If the turnover rate is not brought forward, I am faced with the unenviable decision of, very possibly, throwing the verdict out.").

The District Court's decision to reopen the record despite Skofield's failure to meet his burden was based on a conclusion that Skofield was not "at fault for failing to recognize that the turnover rate would become a pivotal issue from the Defendant's point of view. The Defendant has possession of the documents that are relevant for determining turnover rate." RP 4181-4183.

Contrary to the District Court's stated rationale for reopening the record, it is undisputed that Skofield knew that his decision not to account for turnover of apartments was a significant problem with Malott's damages methodology long before the September 2002 trial, and had in

his possession documents that would have permitted him to show turnover. 5/4/04 Tr. 47, 55-61, 62-64, 75-93, 116, Ex. AAAAA-KKKKK. Skofield nevertheless chose not to account for apartment turnover as part of a conscious litigation strategy in order to maximize his damages, as indicated in the testimony of Malott:

> Q. You don't adjust or it doesn't affect your damages calculation at all that there are people who moved in in 1995 or 1996 or 1997 who agreed to the rate as of that time? Does your analysis adjust for that?
>
> A. No. It was my understanding when we performed our analysis that we were to calculate it based upon the time period in the class because of a concept known as unjust enrichment and the fact that there was a violation of the Continuing Care Act when the rates were set. So we don't break that off.
>
> Q. Okay. Very good. Now, in your first deposition with me you did think the residents start fresh when they move in at the time of their entrance agreement, didn't you?
>
> A. Subsequent to that deposition, *Mr. Jeffries explained to me what unjust enrichment was and what I was supposed to do my analysis on.*
>
> Q. In your second deposition I asked you, "Do you recant that?" You said, "Yes, I recant that."?
>
> A. And I explained to you that *Mr. Jeffries explained to me the theory of the law that he has and how to do the calculation.*
>
> Q. Now, because people are already damaged as of the time they move in under that theory, you're able to roll forward every fee increase from the beginning of the class period through the end of the class period; correct?
>
> A. That's what's been done, yes.

See September 20, 2002 Trial Transcript at p. 76, l. 4 – p. 77, l. 4 (*emphasis added*); *see also,* 5/4/04 Tr. 40-43, 45-46.

Indeed, this unjust enrichment/turnover issue was explicitly listed in the Pretrial Order by both Skofield and Good Samaritan as a disputed issue of law. RP 2398-2400. And, in Plaintiffs' Trial Memorandum of Law, Skofield acknowledged that he knew that Good Samaritan intended to point to the absence of a turnover adjustment as a flaw in his damages methodology. RP 2466

at p. 23. Good Samaritan made its intention to raise turnover even more explicit in its own Trial Brief, when it moved to dismiss Skofield's unjust enrichment claim. RP 2476 at p. 18-19. Finally, Good Samaritan explained the turnover problem inherent in Skofield's damages model on the first day of trial, before opening arguments, as well as at the close of its evidence. 9/17/02 Tr. 6; 9/25/02 Tr. 66-67.

9. Disposition in the Trial Court

The District Court ultimately entered judgment December 30, 2004 in the amount of $122,548 for excess fees charged, plus prejudgment interest in an undetermined amount running from the date Skofield filed his Complaint, July 30, 1999. RP 4710, Judgment ¶ 4; RP 4726, ¶ 5.

ARGUMENT

I. SUMMARY OF ARGUMENT.

Skofield has appealed the District Court's judgment on four grounds, all of which are best characterized as attempts to increase his damages award. Notably, the CCA has an attorney fees provision, NMSA 1978 § 24-17-15(B), and Skofield's attorney's fees could vary substantially, depending on the ultimate size of the damages he may be awarded. *See, e.g., Aguilar v. Penasco Independent School Dist. No. 6,* 100 N.M. 625, 630, 674 P.2d 515, 520 (1984)("[t]he fee awarded must be reasonable in relation to the success obtained").

First, Skofield appeals the District Court's decision to award him a limited amount of prejudgment interest under NMSA 1978 § 56-8-4(B) -- as a sanction for Good Samaritan's supposed failure to make reasonable pre-trial settlement offers -- only from the date he filed his Complaint on July 30, 1999, and argues instead that he should get interest from the date of Good Samaritan's supposedly illegal fee increases in earlier years, as compensation for the "lost time value" of his money. But the record in this matter shows beyond rational dispute that the amount

of damages the District Court awarded Skofield could not have been "ascertainable" by Good Samaritan at any point prior to its judgment, so an award of prejudgment interest for lost time value of money is not merited, and the District Court's refusal to make such an award was not an abuse of its discretion. Moreover, as Good Samaritan argues in its own cross-appeal, even the limited prejudgment interest the District Court did award [illegible] an abuse of discretion, since Good Samaritan did, in fact, make reaso[illegible]le settlement offers prior to trial and, indeed, offered more than what Skofield [illegible] was awarded, albeit before any attorney's fees award.

Second, Skofield ap[illegible] the District [illegible] to his damage[illegible]ve more than $600,000 in "credits" to Good S[illegible] based on the fact that it could have increased fees substant[illegible] at Manzano in 1998 and 1999, when its return on equity was lower than the arbitrary threshold of "reasonableness" of 15% adopted by the court. Given the aggregated nature of Skofield's damages model, which did not even attempt to present figures for damages to individual Manzano residents, together with the basic thrust of the District Court's judgment -- to set rates for monthly fees at Manzano *retrospectively* -- it was logical to consider what the supposedly appropriate level of gross fees would have been in *all* of the years of the class period, not just the years cherry-picked by Skofield. In any event, and more importantly for the purposes of assessing the merits of Skofield's appeal, it was the District Court's function as the trier of fact to weigh the evidence on damages using the method of its choice.

Third, Skofield also appeals another modification to his damages model by the District Court to apply "turnover" rates to account for the fact that individual residents moved into Manzano at different points during each year of the class period, often agreeing to previously instituted annual fee increases incorporated in their initial monthly fee rates. As Skofield himself concedes, the CCA provision at issue only applies to fee increases, not to initial rates, so "a

CCA-regulated community could initially charge whatever rates it wanted." Appellants' Brief in Chief, p. 2. In other words, fee increases that were already in place when a particular resident moved into Manzano could not possibly constitute damages to those residents. The District Court did not err in adjusting Skofield's damages to account for this "turnover." (Indeed, as Good Samaritan argues in its cross-appeal, the District Court's error was in reopening the record to permit Skofield to try to cure his failure to carry his burden of proof on damages, including his failure to introduce evidence regarding "turnover.") In any event, for the purposes of Skofield's appeal, it was, again, the District Court's function as trier of fact to weigh the evidence on damages using the method or methods of its choice.

Indeed, both Skofield's second and third issues on appeal are patent attempts to induce this Court to *re-weigh* the evidence on damages, and to substitute its determination of damages for the District Court's determination as the trier of fact. This sort of after-the-fact micro-managing of a trial court's damages determination is something that New Mexico appellate courts simply do not and should not do.

Fourth, Skofield appeals the District Court's application of its decision on the statute of limitations to his claims related to a January 1, 1993 fee increase at Manzano. This appeal is frivolous, as the January 1, 1993 fee increase obviously occurred more than six years before he filed this action, and is hence barred by the six-year statute of limitations on contract actions.

As discussed more fully below, none of these grounds advanced by Skofield in his appeal has any merit or provides any justification for reversing the District Court's judgment to increase Skofield's damages. By contrast, as detailed in Good Samaritan's cross-appeal, there are substantial grounds to reverse the District Court's judgment and to dismiss Skofield's claims entirely.

II. THE DISTRICT COURT ERRED IN AWARDING ANY PREJUDGMENT INTEREST TO SKOFIELD, MUCH LESS INTEREST DATING BACK TO THE DATE OF THE MONTHLY FEE INCREASES AT MANZANO.

Skofield concedes that this Court can only review the District Court's decision on prejudgment interest for an abuse of discretion. *See* Appellant's Brief in Chief, p. 5. Skofield's challenge to the District Court's decision to limit his prejudgment interest to the period after he filed suit on July 30, 1999, is meritless, because there was obviously no abuse of discretion by the District Court in doing so.

Skofield's argument hinges entirely on his notion that he is entitled, apparently under the common law, to the "lost use of capital," the time value of his money from the date of each supposedly illegal fee increase. See Appellants' Brief in Chief, pp. 5-7. Notably, Skofield cites no statutory basis for this rationale for an entitlement to prejudgment interest. The cases Skofield cites in support of this proposition are inapposite. Some say nothing at all about standards for awarding prejudgment interest. *See, e.g., Hood v. Fulkerson*, 102 N.M. 677, 680, 699 P.2d 608, 611 (1985); *Camino Real Mobile Home Park Partnership v. Wolfe*, 119 N.M. 436, 443, 891 P.2d 1190, 1197 (1995). Those cases cited by Skofield that do address prejudgment interest discuss the statutory bases for such an award as they pertain to interest *as a matter of right* under a note or other situations governed by NMSA 1978 § 56-8-3 (1983); or else they discuss prejudgment interest under the common law rule articulated in the Restatement of Contracts § 337(a) (1932), for award of a sum certain. *See, e.g. Grynberg v. Roberts*, 102 N.M. 560, 698 P.2d 430 (1985); *Mascarenas v. Jaramillo*, 111 N.M. 410, 414-15, 806 P.2d 59, 63-64 (1991).

Skofield obviously does not meet the criteria for prejudgment interest as a matter of right under § 56-8-3, which requires prejudgment interest "only when a party has breached a duty to pay a definite sum of money or 'the amount due under the contract can be ascertained with

reasonable certainty by a mathematical standard fixed in the contract or by established market prices.'" *See Smith v. McKee*, 116 N.M. 34, 36, 859 P.2d 1061, 1063 (1993). Good Samaritan plainly did not breach a duty to pay a definite sum of money. Nor were the damages awarded to Skofield under the contorted methodologies of his expert as modified by the District Court an "amount [that] can be ascertained with reasonable certainty by a mathematical standard fixed in the contract or by established market prices." *Id.* The District Court's arbitrary threshold of 15% as a "reasonable" return on investment does not appear in either the CCA or the continuing care contracts between Skofield and his class and Good Samaritan, nor could Good Samaritan have predicted that the District Court would create such a threshold years after the fact.[2] Prejudgment interest obviously was not available here under § 56-8-3 as a matter of right, and Skofield, not surprisingly, does not argue that he is entitled to it.

In *Grynberg*, moreover, the Court explained that prejudgment interest as a matter of right under the common law, like interest under § 56-8-3, is only available "where the amount of indebtedness under the contract is *ascertainable by the breaching party.*" 102 N.M. at 562, 698 P.2d at 432 (*emphasis in original*). The *Grynberg* court concluded that prejudgment interest on an award of damages for breach of contract was appropriate because the plaintiff in that case sustained its burden of proving that the sums due under the contract could be ascertained with reasonable certainty. *Id.* at 562, 698 P.2d at 432. The record in that case included the dates, invoice numbers, exact amounts due per invoice and the total amounts due for each defendant, as well as contracts that set forth the exact percentage of interest and cost each defendants would owe. *Id.* Here there was obviously no similar record that would support a conclusion that Good

[2] The unpredictability of how the statutory language "reasonable return on investment" would be enforced is the centerpiece of Good Samaritan's argument in its cross-appeal that the statute should be held void under the "void for vagueness" doctrine.

Samaritan could have known the amount of its liability to Skofield.

Since Skofield is not entitled to prejudgment interest as a matter of right, his only recourse was a discretionary award of prejudgment interest. The District Court in fact made such an award, albeit limiting it, giving Skofield prejudgment interest only from the date he filed his Complaint, July 30, 1999 under NMSA 1978 § 56-8-4(B)(2004). RP 4590; RP 4726.

As Good Samaritan has argued in its own cross-appeal, this award was an abuse of discretion. Prejudgment interest under § 56-8-4(B) is a "management tool or penalty to foster settlement and prevent delay." *See Lucero v. Aladdin Beauty Colleges, Inc.*, 117 N.M. 269, 272, 871 P.2d 365 (1994). It is in the nature of a sanction "to discourage recalcitrance and unwarranted delays in cases which should be more speedily resolved." *See Weidler v. Big J Enters., Inc.*, 1998-NMCA-021, ¶ 52, 124 N.M. 591, 604, 953 P.2d 1089, 1102. The District Court thus justified its award of prejudgment interest on the grounds that "the Defendants did not make reasonable and timely offers to settle with the Plaintiffs until long after the trial in this matter." RP 4590. But, as shown above, it is undisputed that Good Samaritan *did* make offers to settle with Skofield before the trial, so the only issue on which the District Court's decision on prejudgment interest could have turned is the "reasonableness" of those offers. As described above and in Good Samaritan's own brief-in-chief, Good Samaritan's settlement offers were obviously reasonable, since they were of greater value than the amount Skofield was ultimately awarded in damages (albeit before any attorney's fees); moreover, the elderly Manzano residents who were members of his class would have received that value sooner rather than later.

While Good Samaritan contends that the award that the District Court made of prejudgment interest to Skofield was an abuse of discretion because it was based on a clear factual misunderstanding, there is obviously no case to be made that the District Court abused its

discretion in not awarding Skofield *more.*

III. THE DISTRICT COURT DID NOT ERR IN MODIFYING SKOFIELD'S DAMAGES MODEL.

A. The Standard of Review Of Damages Findings By A Trier Of Fact Is Highly Deferential.

Skofield's second and third arguments on appeal challenge the District Court's methodology for arriving at its findings of fact on damages. Specifically, Skofield challenges (1) the District Court's modification of Skofield's own damages model to provide "credits" to Good Samaritan for fee increases it could have enacted at Manzano under the model in 1998 and 1999 but did not (Finding No. 64); and (2) the District Court's application of "turnover" rates to Skofield's damages model to account for the fact that many Manzano residents moved into the facility in the middle of the class period, accepting earlier fee increases.

The fundamental problem with Skofield's two challenges to the District Court's damages findings -- challenges which essentially claim that the damages award was inadequate -- is that he mischaracterizes these issues as ones that can be reviewed *de novo* by this Court. *See* Appellants' Brief in Chief, pp. 8-9, 20. To the contrary, this Court must and should be highly deferential to the District Court's damages findings as the trier of fact, and should not micro-manage the reasonable methodology the District Court used at arriving at that figure.

Indeed, it is well established in New Mexico that "it is not the appellate function to weigh the evidence of damages." *See Nash v. Higgins*, 75 N.M. 206, 402 P.2d 945 (1965). Instead, "the assessment of damages.... is a function of the trier of facts" and "[a]n inadequate award will not be disturbed on appeal unless it appears to have resulted from passion, prejudice, partiality, undue influence or some corrupt cause or motive, where there has been palpable error or the measure of damage has been mistaken." *See Hammond v. Blackwell*, 77 N.M. 209, 421 P.2d 124 (1966). Thus, "[a]s a general rule, unless it appears that the amount awarded is so grossly

out of proportion to the injury received as to shock the conscience, an appellate court is precluded from substituting its judgment for that of the fact finder." *See Mathis v. Atchison, T. & S.F. Ry.*, 61 N.M. 330, 300 P.2d 482 (1956), *cited in Sheraden v. Black,* 107 N.M. 76, 752 P.2d 791 (Ct. App. 1988). Put differently, appellate courts "will not attempt to second guess the trial court's determination of the proper measure to be applied for damages if that trial court had several alternatives before it supported by substantial evidence." *See Sierra Life Ins. Co. v. First Nat. Life Ins. Co.*, 85 N.M. 409, 512 P.2d 1245 (1973). As long as there is a reasonable method used to arrive at an amount of damages, appellate courts must accept that amount. *See Moody v. Stribling*, 1999-NMCA-094, ¶ 40, 127 N.M. 630, 985 P.2d 1210, *citing Naranjo v. Paull,* 111 N.M. 165, 172, 803 P.2d 254, 261 (Ct. App.1990).

Moreover, when determining whether a finding of fact on damages is supported by substantial evidence, appellate courts review the evidence in the light most favorable to upholding the finding and indulge all reasonable inferences in support of the trial court's decision. *See Robertson v. Carmel Builders Real Estate,* 2004-NMCA-56, ¶ 20, 135 N.M. 641.

As shown below, nothing in the record and nothing in Skofield's arguments on appeal remotely suggests that, under these highly deferential standards of review, the District Court's findings on damages should be reversed.

B. The District Court Did Not Err In Modifying Skofield's Damages Model To Account For "Credits" In Years Within The Class Period When Good Samaritan Could Have Raised Its Monthly Apartment Fees, But Did Not.

With regard to the District Court's modification of Skofield's damages methodology to provide "credits" for 1998 and 1999, it expressly found that Manzano's low return on investment in 1998 and 1999 would have justified substantial fee increases during those years, and thus eliminated from Skofield's gross damage calculations those amounts Good Samaritan could have

charged, but did not. *See* RP 4716, ¶ 64, Amended Findings. Skofield now complains that these adjustments to his damages model somehow deprive his class of damages they actually suffered and allows Good Samaritan to "take advantage" of an "illegal" act, in violation of *Capo v. Century Life Ins. Co.*, 94 N.M. 373, 610 P.2d 1201 (1980).

Good Samaritan frankly does not understand how *Capo* relates to the District Court's use of credits for 1998 and 1999 (or to the adjustments for turnover in calculating damages). *Capo* involved a claim by a policyholder against his insurers related to a policy that the primary insurer had illegally required as security for a loan. *See* 94 N.M. 373. A reinsurer who had been assigned the policy asserted a defense of estoppel, arguing that the plaintiff could not assert the illegality of the insurance because he had failed to give notification that he had rejected the reinsurance. *Id.* The Court held that the defense of estoppel could not lie where the underlying policy was illegal, because "the party at fault under the statute is not entitled to gain an advantage by his own act." *Id.*, at 376.

But the issue of the "credits" here is not a question of Good Samaritan "gaining an advantage" from its "illegal" acts. Rather, the point of the credits was that Good Samaritan could have *legally* raised rents in 1998 and 1999. If it had done so, the District Court found, Skofield's "damages" from earlier fee increases would have been reduced by nearly $600,000.[3]

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[3] Skofield argues more generally that Good Samaritan did nothing at all to comply with the CCA's four-pronged analysis for fee increases, *see* Appellants' Brief in Chief, pg. 10, which includes, not just "reasonable return on investment," but also "economic necessity, the reasonable cost of operating the community, [and] the cost of care." But the testimony of Kayln Johnson, the administrator of Manzano, was undisputed that she did consider these three other factors in her budget process, and did not consider "return on investment" only because, as she said, "we're a not-for-profit corporation. We don't have investors. We don't have stockholders. We don't have shareholders. It really doesn't apply to a not-for-profit." 9/24/02 Tr. 79-81. Meanwhile, Skofield's own Brief in Chief concedes that Manzano's budget process also considered the necessity to consider new construction or future needs by funding the facility's depreciation, as well as comparing the facility's rates to competitors in the marketplace. *See*

This adjustment by the District Court to Skofield's damages model was both rational and fair, and was supported by substantial evidence. It is important in this context to understand that Good Samaritan emphasized at trial the fact that Skofield had *deliberately* chosen not to extend his damages model through the years 2000 or 2001 -- which he certainly could have done at the time of the September 2002 trial. 9/17/02 Tr. 54-55; 9/20/02 Tr. 82. Presumably, this is because doing so would have shown how artificial and even absurd his damages model really was. Indeed, Skofield's expert, Mr. Malott, admitted that, for 2000 and 2001, Good Samaritan could have increased rents at Manzano by $1.2-1.4 million a year, thus completely wiping out the class damages he had calculated. 9/20/02 Tr. 82-83, 112-116. Doing so, of course, would have meant imposing huge fee increases on elderly residents on fixed incomes -- precisely the problem the CCA sought to remedy -- but would have been *legal* under Skofield's model.

Skofield's damages model was thus really sleight of hand – cherry-picking years where Manzano's "return on investment" was high due to the historically anomalous performance by the stock market during the 1990s, 9/25/02 Tr. 42-44,[4] while ignoring the years that followed when Manzano's return on investment plummeted. Indeed, under Skofield's model, had he waited six months or a year to file his case, creating a class running from 1994 to 2000 rather than 1993 to 1999, virtually the same class members would not have suffered any damage.

It was certainly reasonable for the District Court to take into account these anomalies in

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Appellants' Brief in Chief, p. 2. Skofield's notion that Good Samaritan did nothing at all to comply with the CCA is simply wrong.

[4] Ironically, Skofield's own brief-in-chief characterizes the returns Manzano was able to achieve in the stock market in the 1990s as "extraordinary," and even argues that these historically anomalous returns -- which obviously weren't predictable by Good Samaritan, much less within its control -- were the "central reason" for Manzano's high rates of return on equity during the period. *See* Appellant's Brief in Chief, pp. 2, 7.

Skofield's damages model and to try to adjust for them. Providing "credits" for those years in the class period where Good Samaritan could have increased fees under Skofield's model, but did not, served to even out some of the crudeness of his "gotcha" approach to applying the CCA's "reasonable return on investment" criterion to Manzano's modest fee increases.

In any event, there is no basis for this Court to intervene to re-weigh the evidence on damages and substitute its judgment for that of the District Court as the trier of fact with regard to the "credits" it found for 1998 and 1999. There has been no showing that the District Court's finding on damages with regard to these "credits" "resulted from passion, prejudice, partiality, undue influence or some corrupt cause or motive," or that "there has been palpable error or the measure of damage has been mistaken." It is also obvious that the ultimate award to Skofield was not "so grossly out of proportion to the injury received as to shock the conscience." (*See* citations in Section A, *supra*). This Court must and should review the evidence in the light most favorable to the District Court's finding and "indulge all reasonable inferences in support of the trial court's decision." *See Robertson, supra,* ¶ 20. Under the appropriate, highly deferential standard of review for factual findings on damages by a trial court, there simply is no reason to overturn the District Court's finding that "credits" in 1998 and 1999 should offset "damages" from earlier years' fee increases.

Finally, it is passing strange that Skofield now complains that, by assessing these "credits," the District Court was somehow improperly "functioning as a post hoc rate-setter... 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?'" *See* Appellants' Brief in Chief, p. 10. Skofield's entire case and even his appeal is built around its demand that the District Court *retrospectively* set rates at Manzano. *See, e.g., id.*, p. 12 ("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.")(emphasis added). If the District Court was, under Skofield's argument, to set rates for 1994, 1995, 1996 and 1997, setting rates for 1998 and 1999 also would seem fair and reasonable. Skofield apparently contends that the District Court should only consider rate-setting when it helps increase his potential recovery.

It is also strange that Skofield now complains that the District Court's "credits" have the effect of treating residents in 1999 as "fungible" with residents in 1993. *Id.*, p. 10. Again, throughout his entire case, Skofield has refused to present any evidence regarding damages suffered by individual residents at Manzano, and never even put into the record who the members of his class were, when they lived at Manzano, and when and whether they ever were subject to fee increases imposed by Good Samaritan -- it is Skofield himself who has consistently treated his class members as fungible This issue is more fully discussed below in the context of the Good Samaritan's discussion of the District Court's adjustment to Skofield's damages model for apartment "turnover."

C. The District Court Did Not Err In Modifying Skofield's Damages Model To Account For "Turnover" Among Apartment Residents At Manzano.

As noted above, the District Court also modified Skofield's damages model to account for "turnover" in the apartments between Manzano residents during the class period. RP 4726-4727 ¶¶ 60-65, Amended Findings. Skofield complains about this decision on two grounds: (i) because the District Court supposedly shifted the burden of proof on turnover from Good Samaritan (as an affirmative defense) to Skofield (as a necessary aspect of his proof of damages); and (ii) because doing so, again, permitted Good Samaritan to profit from "illegal" contracts. Neither of these arguments has merit.

First, turnover was *not* an affirmative defense by Good Samaritan. Rather, it was simply an argument by Good Samaritan to the District Court -- apparently persuasive -- that the nature of Skofield's claims under the CCA compelled an adjustment for turnover as part of any fair methodology for arriving at a damages figure. As Skofield himself acknowledges in his Brief in Chief, the CCA does not govern the amount continuing care communities can charge as fees to incoming residents, but only the circumstances under which a community can raise those fees to existing residents:

> The statutory language (incorporated into the contracts) is triggered only by increases, not by existing rates. Put differently, a CCA-regulated community could initially charge whatever rates it wanted, and make as much profit as it desired, provided that it did not increase the rates.

See Appellants' Brief in Chief, p. 12. Because the level of existing rates cannot be challenged under the CCA, when new residents moved into Manzano during the class period, prior fee increases were not actionable.

Thus, by way of an example, if Good Samaritan imposed fee increases on Resident Smith of $100 per month as of January 1, 1994 in violation of the CCA, the class, via Resident Smith, would be "damaged" by $100 for each month he lived in the facility thereafter. If he lived in the facility until July 1999, the class would suffer 67 months of such damages related to the 1994 fee increase. If he moved out in July 1996, however, and Resident Jones moved in, the class would have suffered only 29 months of damages related to the 1994 fee increase. Resident Jones would not be damaged at all by the 1994 fee increase at any point thereafter, because Resident Jones would have agreed to the higher rental rate in entering into his continuing care contract with Good Samaritan. In fact, Resident Jones would not be damaged unless and until Good Samaritan again increased his rent in violation of the CCA, and then his damages would be only for that

new increase, not for prior increases like the one in 1994. And, for 1996 at least, there would be six months where there would be no damages whatsoever incurred for that particular apartment, because no class member living in the apartment had incurred a fee increase.

The District Court's conclusion that such turnover within the apartments constituted a necessary aspect of Skofield's proof on damages simply reflects this common sense understanding of the plain language of the statute, namely, that it only applies when fees are increased. RP 4726 ¶¶ 60-62, Amended Findings. It did not shift the burden of proof on damages; that burden of course remains with Skofield as the plaintiff. Rather, the District Court's focus on turnover merely acknowledged that Skofield's attempts to carry *his* burden had been unsatisfactory, because he had ignored the realities of real individuals moving into and out of Manzano and had instead simply assumed that each apartment suffered damages for each fee increase in every month of the class period. *See, e.g.*, RP 4726 ¶ 61, Amended Findings ("The initial methodology of Plaintiffs' expert nonetheless assigns damages to such apartments (not to individual residents), and assumes that the apartments (not the individual residents) suffered damages throughout the class period, regardless of how many times the apartment was turned over to a new resident who had agreed to higher rates.").

Indeed, the issue of turnover is entirely a consequence of Skofield's own damages argument, which attempted to prove damages in the aggregate for his class rather than for individual class members. Had Skofield put on proof of who was in the class (that is, who lived at Manzano and when and for how long, and thus when they received rate increases), and each class member's alleged damages (the amount of fees each resident paid in excess of what Skofield claims the CCA allows) a turnover rate would not be an issue. As shown here and in Good Samaritan's Brief in Chief, Skofield had the necessary information in his possession to

present such an individualized damages calculation, but simply chose not to do so. *See Romero v. Philip Morris Inc.*, 2005-NMCA-035, ¶96, 137 N.M. 229, 109 P.3d 768 ("Certainly, some minimum amount of individualized proof will be at the very least required for class members to receive any amount of damages").

This common sense reading of the CCA's plain language and its necessary application to any damages calculation for fee increases also disposes of Skofield's second argument against the Court's use of turnover rates in modifying his damages methodology. Put bluntly, under Skofield's own reading of the CCA, the contracts that new residents entered into could not have been "illegal," because the only things that can be illegal under the CCA, according to Skofield himself, are fee *increases*, not the "existing rates," and Good Samaritan was within its rights under the CCA to "initially charge whatever rates it wanted." Appellants' Brief in Chief, p. 12. The continuing care contracts Good Samaritan entered into with new residents were not "illegal."

Skofield attempts to get past the plain language of the CCA by positing that some class members may not have known that they were somehow entitled to have their rates reduced when they moved in and thus could not have "waived a known right" to challenge increases that occurred before they agreed to a particular rate. *See* Appellants' Brief in Chief, pp. 22-25. Skofield further argues that the parol evidence rule forbids the inference that such new residents agreed to the rate set forth in their contract. These arguments are frankly difficult to comprehend. Good Samaritan does not contend that new residents during the class period waived a right to contest prior fee increases if they signed new contracts, and instead simply notes that they had no such right under the plain language of the CCA, because Good Samaritan, as Skofield acknowledges, could charge new residents "whatever rates it wanted." Nor does Good Samaritan contend that the Court should look to extrinsic evidence to determine whether

an individual who signed a continuing care contract with Good Samaritan actually agreed to its terms, including any rate of payment it includes. Contracts are, by definition, agreements by parties as to the terms of the contract, including price. Skofield's waiver arguments are nonsensical.

Finally, it bears repeating that Skofield's challenge to the District Court's modification of his damages model to account for turnover asks this Court to re-weigh the evidence on damages that the District Court weighed as the trier of fact. The Court should not indulge in the micro-managing of the District Court's damages methodology that Skofield demands. The District Court had a rational basis for adjusting damages to account for apartment turnover at Manzano, and articulated that rationale in its Findings of Fact. That decision is entitled under New Mexico law to deference by this Court.

IV. THE DISTRICT COURT APPROPRIATELY APPLIED THE SIX-YEAR STATUTE OF LIMITATIONS TO BAR CLAIMS BY SKOFIELD RELATED TO MONTHLY FEE INCREASES AT MANZANO PRIOR TO JULY 30, 1993.

Good Samaritan moved for summary judgment based *inter alia* on the statutes of limitations governing Skofield's claims, the longest of which was the six-year statute of limitations governing contract claims in New Mexico, NMSA 1978 § 37-1-3. In doing so, Good Samaritan submitted that, by operation of this statute, Skofield "could only state breach of contract claims related to increases for January 1, 1994 and thereafter." RP 872, p. 24, Defendant's Brief in Support of Its Motion for Summary Judgment. The District Court granted that part of Good Samaritan's motion.

Skofield now argues essentially that the District Court was wrong to enforce the six-year statute of limitations on contract claims and that its ruling somehow does not bar his claim for damages arising from the January 1, 1993 fee increase. These arguments are meritless and, in

fact, frivolous.

Skofield argues that the fee increase effective on January 1, 1993 was a "continuing course of conduct" throughout that year, and that the statute of limitations should be construed to accrue each month when the higher fee would be paid. Notably, this is not an argument that Skofield ever made in opposing Good Samaritan's summary judgment motion, or at trial. But in any event, it is not an argument that stands up to reason.

Again, the provision of the CCA at issue, NMSA 1978 § 24-17-5(B)(11), plainly governs only the *act* of increasing monthly fees: how the decision is made, what criteria must be evaluated, and how and when the increase must be announced to residents. The statute does not prescribe any particular level for fees. As discussed above, Skofield himself concedes this basic fact:

> 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.

See Appellants' Brief in Chief, p. 11. But that is precisely what Skofield's claim regarding the January 1, 1993 fee increase is – a claim that the level of fees in August 1993, when the class period began, was *already too high* based on an annual decision announced nine months before, in November 1992.

Moreover, the New Mexico cases Skofield cites in support of his "continuing wrong theory" are uniformly inapposite. *Id.*, pp. 3-4. Three deal with the right to recover fixed sums payable on a monthly basis. *See State ex. rel. PERA v. Longacre*, 2002-NMSC-033, 133 N.M. 20, 59 P.3d 500 (retirement benefits); *Plaatje v. Plaatje,* 95 N.M. 789, 626 P.2d 1286 (1981)(same); *City of Carlsbad v. Grace,* 1998-NMCA-144, 126 N.M. 95, 966 P.2d 1178 (royalties). None of these cases deal with the situation here, where the cause of action derives

not from non-payment of a fixed amount to the plaintiff by the defendant, but from the *act* of the defendant in changing the amount of a payment to be made in the future by the plaintiff.[5]

Meanwhile, the fourth New Mexico case cited by Skofield – but not discussed – *Tull v. City of Albuquerque,* 120 N.M. 829, 907 P.2d 1010 (Ct. App. 1995), says the exact opposite of what he needs it to say. In *Tull,* the plaintiffs were city employees who were entitled to, but did not receive, raises in 1987 when they assumed expanded duties, but who did not sue for additional compensation until almost seven years later. The trial court dismissed their claims based on the three-year statute of limitations applicable to contract actions against cities, NMSA 1978 § 37-1-24. Affirming, the Court of Appeals explicitly rejected the plaintiffs' "continuing wrong theory," in which each paycheck to the employees would have constituted a new wrong for statute of limitations purposes:

> The only actionable wrong alleged by Plaintiffs in this case is the City's initial refusal to increase Plaintiffs' salaries. Although that wrong has continuing consequences in the form of lower paychecks, the continuing effects do not extend the life of Plaintiffs' breach of contract cause of action, which is based solely on that initial refusal. Because the actual breach of contract in this case occurred in November 1987, Plaintiffs had only until November 1990 to file their complaint. They failed to meet that deadline.

Tull, 120 N.M. at 830, 832. The same reasoning should apply here. The "only actionable wrong" regarding the January 1, 1993 fee increase would have been Good Samaritan's initial decision to increase the fees, announced in November 1992. Although that increase had

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[5] The out-of-state cases cited by Plaintiffs are equally inapposite, and thus require little comment. *Hart v. ITT Corp.*, 546 S.W.2d 660 (Tex. Civ. App. 1977), involves, again, fixed payments, not a change in an amount payable. *Berry v. Board of Supervisors*, 715 F.2d 971 (5th Cir. 1983), and *Baker v. F&F Invs.*, 420 F.2d 1191 (7th Cir. 1970), both involve "continuing wrongs" of racial discrimination under the civil rights laws, and thus are wholly inapposite here. In any event, *Berry* notes that a plaintiff "may not employ the continuing violation theory 'to resurrect claims about discrimination concluded in the past, even though its effects persist.'" 715 F.2d at 979, *quoting Delaware St. College v. Ricks*, 449 U.S. 250, 257 (1980).

"continuing consequences" in the form of higher fees payable in the last five months of 1993, "the continuing effects do not extend the life of Plaintiffs' breach of contract cause of action," which was based solely on the initial increase.

Followed to its logical conclusion, Skofield's position on the statute of limitations would mean that any fee increase by Manzano since the enactment of the CCA in 1985 could be actionable. Notably, Skofield himself does not advance this position, since it would logically render the statute of limitations meaningless in this and any other case.

The District Court was correct in applying the six-year statute of limitations for contract actions to bar Skofield's claim related to the January 1, 1993 fee increase at Manzano, which obviously occurred more than six years before he filed the Complaint in this action.

CONCLUSION

For the foregoing reasons, Good Samaritan respectfully requests that this Court vacate the judgment and direct entry of judgment in Good Samaritan's favor.

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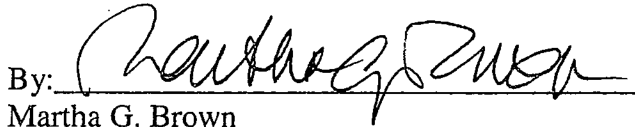
By: 
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WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was mailed to all counsel of record this 6 day of January, 2006.

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By:
Martha G. Brown
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