30,899
COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SUSAN BISHOP and MARK SKOFIELD,
as class representatives in their capacities as
Personal Representatives of the Estate of
RICHARD H. SKOFIELD , individually and
in his capacity as class representative,

Plaintiffs, Appellants,
and Cross-Respondents,

Ct. App. No. 25,510

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
Patricia R. Wallace

RESPONDENT AND CROSS-APPELLANT GOOD SAMARITAN'S BRIEF IN CHIEF

On Appeal From the Second Judicial District Court

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

QUARLES & BRADY LLP
Dan Conley
Paul D. Bauer
411 East Wisconsin Avenue
Milwaukee, WI 53202
Telephone: (414) 277-5000

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
Martha G. Brown
P.O. Box 2168
Albuquerque, NM 87103-2168
Telephone: (505) 848-1800

Attorneys for Defendant,
The Evangelical Lutheran Good Samaritan Society

SUPREME COURT OF NEW MEXICO
FILED
MAR - 7 2008

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF PROCEEDINGS 1
Nature of the Case 1
Course of Proceedings and Summary of Facts 3
1. **Good Samaritan's Summary Judgment Motion** 3
2. **Class Certification** 4
3. **Good Samaritan's Pre-Trial Settlement Offers** 5
4. **September 2002 Trial to the Court – Skofield's Case** 6
5. **September 2002 Trial to the Court - Good Samaritan's Defenses** 7
6. **The District Court's Initial Findings of Fact** 9
7. **Objections to Findings and Conclusions** 10
8. **Reopening the Trial Record** 11
9. **Disposition in the Trial Court** 13

ARGUMENT 13

I. THE LANGUAGE CONTAINED IN THE CONTINUING CARE ACT, NMSA 1978 § 24-17-5(B)(11), REQUIRING FEE INCREASES AT CONTINUING CARE COMMUNITIES TO BE BASED, *INTER ALIA*, ON A "REASONABLE RETURN ON INVESTMENT," IS UNCONSTITUTIONALLY VAGUE 13

II. IF THE CCA IS INTERPRETED CORRECTLY, FEE INCREASES AT MANZANO DURING THE CLASS PERIOD WERE "REASONABLE." 18

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY REOPENING THE TRIAL TO PERMIT SKOFIELD A SECOND CHANCE TO MEET HIS BURDEN OF PROOF ON DAMAGES 24

IV. THE DISTRICT COURT'S AWARD OF PREJUDGMENT INTEREST WAS AN ABUSE OF DISCRETION 27

V. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT DECERTIFYING SKOFIELD'S CLASS, AND ERRED IN ENTERING A JUDGMENT THAT FAILS TO IDENTIFY THE CLASS MEMBERS WHO ARE BOUND 29

CONCLUSION 34

TABLE OF AUTHORITIES

Page

Cases

American Civil Liberties Union of New Mexico v. City of Albuquerque, 1999-NMSC-044........ 14
Andrews v. Saylor, 2003-NMCA-132........ 23
Aybar v. Crispin-Reyes, 118 F.3d 10........ 25
Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n, 262 U.S. 679........ 20
City of Albuquerque v. Sanchez, 113 N.M. 721........ 14
Enfield v. Old Line Life Ins. Co. of America, 2004-NMCA-115........ 29
Esposito v. United States, 368 F.3d 1271........ 29
Grayned v. City of Rockford, 408 U.S. 104........ 14
Idaho Power Co. v. Cogeneration, Inc., 9 P.3d 1204........ 25
In re NASDAQ Market-Makers Antitrust Litigation, 184 F.R.D. 506........ 31
In re: Rates and Changes of Mountain States Tel. and Tel. Co., 99 N.M. 1........ 20
In the Matter of the Petition of PNM Gas Serv. v. New Mexico Public Utility Comm'n, 2000-NMSC-012........ 16, 21
Leon, Ltd. v. Carver, 104 N.M. 29........ 24
Lopez v. Lopez, 55 S.W.3d 194........ 25
Lucero v. Aladdin Beauty Colleges, Inc., 117 N.M. 269........ 27
Mountain States Tel. and Tel. Co. v. New Mexico State Corporation Comm'n, 102 N.M. 409.. 20, 22
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306........ 33
Neumont v. Monroe County, Florida, 198 F.R.D. 554........ 31
Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83........ 14
Phoenix Newspapers, Inc. v. Keegan, 35 P.3d 105........ 25
Ridinger v. General Motors Corp., 474 F.2d 949........ 31
Sandoval v. Sandoval, 61 N.M. 38........ 25
State v. Clifford, 117 N.M. 508........ 23
State v. Harrison, 2000-NMSC-022........ 24
State v. James M., 111 N.M. 473........ 14
State v. Laguna, 1999-NMCA-152........ 14, 18
State v. Rowell, 121 N.M. 111........ 18
Weidler v. Big J Enters., Inc., 1998-NMCA-021........ 27

Statutes

NMSA 1978 § 24-17-11(A) (1985)........ 22
NMSA 1978 § 24-17-17 (1991)........ 15
NMSA 1978 § 24-17-2(A) (1985)........ 22
NMSA 1978 § 24-17-4(B)(10) (1991)........ 22
NMSA 1978 § 24-17-5(11) (2005)........ 1
NMSA 1978 § 24-17-5(B)(11) (1985)........ 1, 15
NMSA 1978 § 56-8-4(B)(2004)........ 5
NMSA 1978 24-17-5(B)(3) (1985)........ 22

Other Authorities

Federal Judicial Center, Manual For Complex Litigation, 4th, Ch. 15.2........ 31

TABLE OF AUTHORITIES

Page

Roger J. Magnuson, Shareholder Litigation, § 12:11 31
WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1789 .... 30, 33

Rules

Rule 1-023 32
Rule 1-023(B)(3) 4, 30
Rule 1-023(C)(3) 30, 32, 33, 34
Rule 23 .... 30, 33
Rule 23(B)(3) 31
Rule 23(C)(3) 30, 33

Regulations

Cal. Health and Safety § 1788(a)(22)(B) 20
Conn.St. § 17B-340(a) 20
New York Public Health § 4604 (2000) 20

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 nationwide. RP 2387, p. 16 ¶¶ 4-6, Pretrial Order. Plaintiff Richard H. Skofield ("Skofield") was a resident at Good Samaritan's Manzano del Sol Good Samaritan Village 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 Conclusions of Law ("Amended Findings"), ¶ 12. Skofield contended that these fee increases, though objectively modest in percentage terms, nevertheless violated a provision on the New Mexico Continuing Care Act ("CCA"), which requires fee 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] It is undisputed that this provision in New Mexico's Continuing Care Act is the only one of its type

---

[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.

in the United States. *See* Appellants' Brief in Chief, p. 10 (CCA provision is a "novel statute nationally").

The focus of the 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 because its financial statements showed "return on equity" (the ratio of net income to assets *minus* liabilities) 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, Amended Findings, ¶ 17.

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. 9/24/02 Tr. 166-167; 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 is 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.

Course of Proceedings and Summary of Facts

Skofield filed this action on July 30, 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. 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.*

Good Samaritan received permission from the District Court to pursue an interlocutory appeal on the substantive issues raised by its summary judgment motion, in particular whether the CCA provision regarding "reasonable return on investment" was unconstitutionally vague, *id.*, but this Court denied leave for a permissive appeal. RP 1842, Mandate.

2. Class Certification

Skofield sought certification of a Rule 1-023(B)(3) class. RP 551, 554, Memorandum in Support of Plaintiff's Motion for Class Certification, pp. 6, 9. 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. 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, Amended Findings of Fact. The District Court ordered that class members be notified and granted an opportunity to opt out. RP 2135-2136, Order Approving Form of Notice.

Notice was ostensibly provided to the class in July 2002, but the mailed notice, according to Skofield's own Report on Class Notice, reached only approximately 100 of the 300 potential class members, because it was mailed to *all* class members in care of Manzano. RP 2795-2796. Skofield knew that the bulk of the notices would be returned as undeliverable, because Good

Samaritan's counsel had already informed Skofield's counsel that only 111 members of the class still lived at Manzano. RP 3966, Brief in Support of Amendment to Findings of Fact, Exhibit C.

Of the only approximately 100 class members who received the mailed class notice at Manzano, 59 opted out. RP 4708-4710, Judgment.

The District Court denied Good Samaritan's pre- and post-trial requests to enter judgment in favor of Good Samaritan or to decertify the class based on the deficient class notice. RP 2493, Defendant's Trial Brief; 9/17/02 Tr. 64; 9/20/02 Tr. 167; 12/15/04 Tr. 21.

3. Good Samaritan's Pre-Trial Settlement Offers

Because Good Samaritan's cross-appeal addresses 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 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 "total investment" -- the entity's equity *plus* its long-term debt. This is 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. Malott's model thus did *not* compare Manzano's returns to the

returns of other similar enterprises in its geographical area in the 1990s as a measure of their "reasonableness." 9/20 Tr. 63, 66.

Finally, Malott presented evidence of "damages" to the class consisting of the amounts of fee increases imposed on Manzano residents prior to the beginning of years in which, *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, for a class of apartments, without reference to individual residents of these apartments, 9/19 Tr. 74-76; 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 appellate 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 significantly 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 addition, 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 it was industry practice to increase fees annually. 9/24/02 Tr. 173-174. Brod also testified that it is important and appropriate for continuing care communities which 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, backward-looking framework for assessing damages, *id.*, at ¶ 58, 59, 66, 68 and Attachment A. The District Court, however, made three significant modifications to Malott's analysis 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 nearly $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) the Court independently located and

applied 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 and 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 and Conclusions

Good Samaritan objected to the District Court's Findings of Fact, pointing out a number of problems, including two significant problems with the damages analysis it had conducted. First, Good Samaritan noted that the turnover rate the District Court had applied was actually an *annual* rate that logically would have to have been applied six times, once for each year of the class period. RP 3867, Defendant's Supplemental Brief in Support of Its Proposed Amendments to the Court's Findings of Fact. Second, Good Samaritan demonstrated 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 approach, and argued that, as such, Skofield's remaining claims should be dismissed. *Id.*

8. Reopening the Trial Record

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. RP 4184-4185, 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 were members 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 of proof 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 in the September, 2002 trial for apartment turnover as part of a conscious litigation strategy in order to maximize his damages calculation, 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 9/20/02 Tr. 76, l. 4 -- 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 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 2492-2493 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.

Ultimately, Malott conceded at the reopened trial on turnover in May 2004, two years after the original trial, that the evidence he was submitting was still only based on a hasty preliminary review of only some of the documents. 5/4/04 Tr. 24. Further, Malott's testimony did not address new admissions or transfers to new apartments. 5/04 Tr. 40-41. Indeed, the turnover rates the District Court ultimately adopted were not even part of the reopened trial record, but instead were recalculated by Malott after the conclusion of the May, 2004 reopened trial, in still more post-trial briefing, and adopted by the District Court over Good Samaritan's objections. 5/04 Tr. 68; RP 4723-4724, Amended Findings ¶¶ 60-63, 65.

9. Disposition in the Trial Court

The District Court ultimately entered judgment in favor of Skofield on December 30, 2004 in the amount of $122,548 for excess fees charged, plus prejudgment interest in an undetermined amount. RP 4710, Judgment ¶ 4. The judgment did not name the members of the class who are bound by the judgment -- members of the class who received notice and did not opt out.

ARGUMENT

I. THE LANGUAGE CONTAINED IN THE CONTINUING CARE ACT, NMSA 1978 § 24-17-5(B)(11), REQUIRING FEE INCREASES AT CONTINUING CARE COMMUNITIES TO BE BASED, *INTER ALIA*, ON A "REASONABLE RETURN ON INVESTMENT," IS UNCONSTITUTIONALLY VAGUE.

The threshold contention in this appeal is that the CCA's "reasonable return on investment" provision is unconstitutional under the "void for vagueness" doctrine in the absence

of any statutory or regulatory definition of "return on investment" and in the absence of any statutory or regulatory parameters guiding what level of return on investment is "reasonable."

Whether a statute is void for vagueness presents an issue of law that must be reviewed *de novo*. *State v. Laguna,* 1999-NMCA-152, ¶ 24, 128 N.M. 345, 992 P.2d 896.

This issue was preserved for appeal in Good Samaritan's summary judgment motion, in its petition for interlocutory appeal, in its trial brief, in its motion for judgment at the close of plaintiff's case and at the close of evidence. RP 679-680, 850, 1511-1514, 2484-2487; 9/20/02 Tr. 163; 9/25/02 Tr. 55.

The "void for vagueness" doctrine implicates due process:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Old Abe Co. v. New Mexico Mining Comm'n, 121 N.M. 83, 91, 908 P.2d 776 (Ct. App. 1995), *quoting Grayned v. City of Rockford,* 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *see also, American Civil Liberties Union of New Mexico v. City of Albuquerque*, 1999-NMSC-044 ¶ 36, 128 N.M. 315, 327, 992 P.2d 866, 878; *City of Albuquerque v. Sanchez,* 113 N.M. 721, 727, 832 P.2d 412, 418 (Ct. App. 1992)("A regulation is unconstitutional if it is so vague that persons of common intelligence must guess at its meaning and would differ in its application."); *State v. James M.,* 111 N.M. 473, 477, 806 P.2d 1063, 1067 (Ct. App. 1990), *cert.*

denied, 111 N.M. 529, 807 P.2d 227(1991)("statute must provide adequate warning to a person of ordinary intelligence that his conduct is prohibited.").

The questions posed by the application of the "void for vagueness" doctrine to the CCA's "reasonable return on investment" provision are quite simple. First, could Good Samaritan have known *in advance* what fee increases at its Manzano facility would be prohibited, so that it could adjust its conduct accordingly? Put differently, was Good Samaritan given "fair warning" that its fee increases, though objectively modest and below the rate of inflation, would subject it to liability? Second, were there explicit standards in the law governing its enforcement so as to avoid the "dangers" of "arbitrary and discriminatory application"?

Resolution of these questions under the "void for vagueness" doctrine adopted by this Court in *Old Abe Co. v. New Mexico Mining Comm'n* is not difficult. As noted above, the meaning of "reasonable return on investment" is not defined in the relevant provision of the CCA, NMSA 1978 § 24-17-5(B)(11) (1985). To date, the term has not been defined in regulations promulgated by the New Mexico Agency on Aging, though the Agency had been generally directed to develop such regulations. *See* NMSA 1978 § 24-17-17 (1991).[2] It is also undisputed that this provision in New Mexico's Continuing Care Act is the only one of its type in the United States. Prior to this case, no New Mexico court had interpreted the provision. Thus, New Mexico continuing care providers are without the benefit of the guidance those looking to similar provisions have, such as in the public utility ratemaking context, where detailed legislation, decades of agency practice and rulemaking and thousands of agency and judicial

---

[2] As noted above, the New Mexico Legislature amended this provision of the CCA in 2005 to require that the Agency define "reasonable return on investment" on or before January 31, 2006. Good Samaritan, of course, concedes that any such newly enacted definitions likely could not be applied retroactively to a pending case. However, the mere fact that the Legislature felt the need to amend the statute to require rulemaking strongly suggests the statute was vague to begin with.

decisions provide the guideposts needed to conform conduct to the law. *See, e.g., In the Matter of the Petition of PNM Gas Serv. v. New Mexico Public Utility Comm'n*, 2000-NMSC-012, 129 N.M. 1, 1 P.3d 383 (2000). Finally, as Skofield's own expert, Mr. Malott, was forced to admit, this is not an instance where there are generally accepted practices even among accountants as to the meaning of "return on investment," let alone among continuing care providers.

In short, nothing in the CCA, then-existing regulations, prior case law or commercial practice could have possibly provided guidance to New Mexico continuing care providers such as Good Samaritan on how to interpret "reasonable return on investment" and apply it to their operations when enacting fee increases, much less the "explicit standards" required by New Mexico's "void for vagueness" doctrine.

Consider the difficult position of a continuing care provider trying to apply the "reasonable return on investment" requirement in the 1990s. The cost of health care is going up steeply; the costs of other necessary goods and services for the continuing care community's operations are rising with inflation; the prices for comparable housing in Albuquerque are rising as well. On the other hand, the value of the community's reserve funds are (happily) growing, as the stock market of the 1990s rockets upward, but will that technology-driven market continue forever? And the community still has large long-term debt from its initial construction.

What should a continuing care community in this situation do? How would it even begin to make the supposedly required analysis? Should it use total net income (including unrealized capital gains) or net operating income as the numerator of the return calculation? Equity or assets (including long-term debt) as the denominator? (Malott admitted that Manzano's return on assets in the 1990s was reasonable.) If assets, should it be at book value or at market value? Should the administrator of the community look at quarterly "returns"? Annual "returns"? Or

"return" over a number of years, reflecting the long-term nature of a provider's investments and the continuing care contracts? And, once it arrives at a figure for the facility's return on investment, against what standard should the return be judged? Historical returns? Or returns during the period in question, the 1990s? (Again, Malott admitted that Manzano's return on equity was reasonable when judged against returns in the stock market in the "go-go" 1990s.) And, finally, when all this is sorted out and the administrator of the continuing care community has arrived at a formula to calculated a figure for return on investment, she must ask the ultimate question: how high is too high?

Clearly, the ill-defined nature of the CCA's "reasonable return on investment" requirement did not give Good Samaritan any inkling of how to apply it to fee increases at Manzano, much less provide Good Samaritan "fair warning" of how a court might penalize it, years later, for a fee increase that violated the provision. There simply was no frame of reference that would have permitted a continuing care provider like Good Samaritan to "steer between lawful and unlawful conduct." Instead, Good Samaritan was subjected to an arbitrary, subjective and *ad hoc* application of the provision by the District Court, precisely what the "void for vagueness" doctrine prohibits.

Indeed, nothing demonstrates the unconstitutionality of the CCA provision on "reasonable return on investment" more clearly than the contortions of the District Court in arriving at its judgment. To enforce the statute, the District Court had to, first, select one among many quite different definitions of return on investment (return on equity, as opposed to return on assets or return on total investment); *then* select what percentage return on equity would be deemed unreasonable (15%); *then* decide that return on equity would be analyzed annually rather than as an average of a number of years (although continuing care to elderly residents is

obviously a long-term proposition); *then* decide that the annual return on equity that would matter would be the return in the year *following* a fee increase (which, of course, Good Samaritan could not have known when setting its increase), *i.e.*, via what Skofield himself calls variously "post hoc rate-setting" or a "retrospective assessment of increases." *See* Appellant's Brief-in-Chief, pp. 10, 12. Good Samaritan obviously would have had no way to predict the way the CCA would be enforced by the District Court.

This Court should hold that the CCA's provision requiring fee increases at continuing care communities to be based, *inter alia*, on a "reasonable return on investment" was, at the time of the 1993-1999 fee increases at Manzano challenged in this case, unconstitutionally vague.

II. IF THE CCA IS INTERPRETED CORRECTLY, FEE INCREASES AT MANZANO DURING THE CLASS PERIOD WERE "REASONABLE."

Good Samaritan's second issue on appeal concerns the interpretation and application of the CCA "reasonable return on investment" requirement to Manzano's fee increases by the District Court. Simply put, even if the CCA's provision on "reasonable return on investment" is not deemed unconstitutionally vague, several significant problems remain with the interpretation and application of the provision to Manzano's fee increases by the District Court and its finding that those fee increases were "unreasonable." Taken together or apart, these problems require reversing the judgment.

Again, issues of interpretation regarding a statute are issues of law this Court reviews *de novo*. *State v. Laguna,* 1999-NMCA-152, ¶ 24, 128 N.M. 345, 992 P.2d 896; *State v. Rowell,* 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995).

This issue was preserved in Good Samaritan's trial brief, objections to the District Court's Findings of Fact and in its post-trial briefing. RP 2484-487, 3451, 3878.

The first and most important problem with the District Court's interpretation and application of the CCA's requirements for fee increases at continuing care communities arises from the undisputed fact that Manzano's fee increases were, at all relevant times, less than the rate of inflation and less than the rate of increase in the community's operating costs. 9/19/02 Tr. 146-148.

Under such circumstances, there is no rational interpretation of the CCA that can yield any liability on the part of Good Samaritan for the fee increases at Manzano, because in constant dollar terms, *the fees did not increase at all.* Put differently, the CCA cannot rationally be interpreted to require continuing care providers to give residents in real terms a *rebate* in fees -- by not increasing them to keep up with inflation -- simply because its return on investment in a given year exceeds some arbitrary limit. To do so would nullify the other factors in the CCA's standard, "economic necessity, the reasonable cost of operating the community, [and] the cost of care," all of which support fee increases (revenue) to track costs.

Concurrently, the evidence was also undisputed that Manzano's fees themselves were, at all relevant times, at or below market rates for comparable senior living housing in the Albuquerque area. 9/20/02 Tr. 64-65. Again, any rational interpretation of the CCA's provision on fee increases at continuing care communities must consider the obvious purpose of the statute -- to prevent price gouging aimed at vulnerable elderly retirees on fixed incomes -- and conclude that, if Manzano's prices were below market rates, by definition they cannot represent price gouging.

A rational interpretation of the CCA would have to account for these basic concepts of economics and must yield the conclusion that Manzano's fees and fee increases were reasonable. Other states expressly tie the reasonableness of fee increases in continuing care communities to

published cost indices. *See* New York Public Health § 4604 (2000)("monthly care fees may be increased or decreased without specific approval as long as such increase or decrease does not exceed a relevant cost index or indices which reflect all components of continuing care including the cost associated with provision of health care"); *see also* Conn.St. § 17B-340(a) (tying rates for licensed residential care homes to annual increases in consumer price index for healthcare); Cal. Health and Safety § 1788(a)(22)(B) (tying monthly fee increases to "economic indicators"). This common sense should be the rule in New Mexico as well.

The second problem with the District Court's interpretation and application of the CCA's "reasonable return on investment" language hinged on its rejection of the *only* body of law remotely analogous to the issues presented by the fee increases at Manzano -- namely, the law surrounding utility ratemaking. In the utility context, the appropriate comparison in determining the reasonableness of a particular return on investment is to "similar investments at the same time and in the same part of the country," *Mountain States Tel. and Tel. Co. v. New Mexico State Corporation Comm'n,* 102 N.M. 409, 410, 696 P.2d 1002, 1003 (1985), "which are attended by corresponding risks and uncertainties," *In re: Rates and Changes of Mountain States Tel. and Tel. Co.,* 99 N.M. 1, 8, 653 P.2d 501, 508 (1982), *both citing Bluefield Water Works & Improvement Co. v. Public Serv. Comm'n,* 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923). Good Samaritan repeatedly suggested the potential applicability of this standard prior to trial. RP 2487-2489; 9/17/02 Tr. 17.

Under this standard for "reasonableness" based on utility ratemaking cases, it is clear that Skofield did not come close to carrying his burden of proof in showing that Manzano's fee increases were based on unreasonable returns on investment. Skofield's expert accountant, Mr. Malott, did not even attempt to present comparisons of Manzano's return on investment to

"similar investments" (retirement communities) "at the same time" (the mid-1990s) "in the same part of the country" (urban centers in the Southwest). Instead, Malott compared Manzano's return on equity to "Ibbotson data," using returns on broad national market indices over the period 1926-99, which are obviously neither "similar investments" in "the same part of the country" nor investments "at the same time." Moreover, by using broad market indices -- the equivalent of the mutual funds known as index funds -- Malott also chose a model of investment that would be attended by much less risk than the investment Good Samaritan made in Manzano, a stand-alone investment in a single retirement community/health care center.

In addition, Malott's damages model -- and, ultimately, the District Court's modification of that model -- presumed a particular, specific threshold figure for an "unreasonable" return on investment. For Malott, the startlingly precise figure he posited was 12.35%, and every return on equity over that, in his view, violated the CCA. For the District Court, the threshold figure for an "unreasonable" return on equity became 15%. In each case, the analysis deviated from the guidance provided by the New Mexico Supreme Court in utility rate-making cases that rates may be set within a "significant zone of reasonableness." *See In the Matter of the Petition of PNM Gas Serv.* 2000-NMSC-012, ¶ 8, 129 N.M. 1, 9, 1 P.3d 383, 391 (2000).

Correctly applying the relevant utility ratemaking law to the circumstances surrounding Manzano's fee increases thus should have yielded two dispositive conclusions: not just that Skofield had failed to carry his burden of proof regarding the unreasonableness of Manzano's returns by not providing comparisons to "similar investments at the same time and in the same part of the country"; but also that Manzano's returns, when judged against the high returns generally available in the investments markets "at the same time" -- the 1990s -- were, at the very least, within a "zone of reasonableness." Moreover, even this application of utility

ratemaking precedents could only be undertaken *prospectively*, not retrospectively, as the District Court erroneously did here. *See Mountain State 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").

A third problem with the District Court's application of the CCA's provision on "return on investment" stemmed from the fact that Good Samaritan is a non-profit corporation. To be sure, the CCA does apply equally to for-profit and non-profit providers. *See* NMSA 1978 § 24-17-11(A) (1985). As a non-profit, however, Good Samaritan simply has no stockholders or "investors" to whom anything is ever "returned." Instead, funds in excess of a community's operating expenses are simply retained as reserves for the future benefit of residents. Presumably, this is a good thing, not a bad thing. Indeed, the CCA expressly encourages providers to maintain "reserves to assure payment of debt obligations and the ability to provide services to residents," including subsidized services when a resident experiences "financial difficulties." *See* NMSA 1978 §§ 24-17-4(B)(10) (1991), 24-17-5(B)(3) (1985). After all, the general purpose of the CCA is to protect residents against the insolvency of continuing care providers. *See* NMSA 1978 § 24-17-2(A) (1985) ("the legislature also finds that severe consequences to residents may result when a provider becomes insolvent"). Again, there is no rational reading of the CCA that should yield a conclusion that a non-profit entity such as Good Samaritan violated the Act by accumulating reserves, in part by charging monthly fees, that *increase* the long-term security of its elderly residents.

A fourth problem with the District Court's application of the CCA provision regarding "return on investment" arises from its dependence on Malott's approach. As noted above, Malott

admitted that there is no GAAP definition of "return on investment." Based on this admission, Malott's supposedly "expert" testimony as an accountant on the meaning of "return on investment" should have been excluded, because he was essentially admitting that the accounting profession does not have any greater expertise on the meaning of the term than anyone else. There is, in fact, nothing in the record to suggest that Malott has *any* experience or expertise in providing financial analysis to continuing care communities. (By contrast, Good Samaritan's expert, Kathryn Brod, who has spent her career dealing with finances of continuing care communities, testified that "return on investment" is not a term used in the industry in evaluating non-profit continuing care communities. 9/24/02 Tr. 168). Moreover, because Malott's damages methodology and calculations depended entirely on his threshold definition of return on investment as return on equity, his damages testimony as a whole was unreliable and should have been excluded. *Andrews v. Saylor,* 2003-NMCA-132, n. 13, 134 N.M. 545, 80 P.3d 482 (trial courts have the responsibility to insure that proffered expert testimony "has a reliable basis in the knowledge and experience of [the relevant] discipline," so that the testimony of such experts fairly can be said to "assist the tier of fact")(*internal citations omitted*).

Malott's testimony as to the meaning of the statutory language "return on investment" should also have been excluded as an improper legal conclusion. *State v. Clifford,* 117 N.M. 508, 513, 873 P.2d 254, 259 (1994)("opinion testimony that seeks to state a legal conclusion is inadmissible"). Good Samaritan moved on these grounds to exclude Malott's testimony prior to trial. RP 2301-2337, Motion in Limine to Exclude Testimony from Plaintiff's Expert Witness, Bruce Malott. The District Court's failure to exclude Malott's testimony on the meaning of "return on investment," based on his admissions and the clear standard for excluding legal

opinion testimony, was an abuse of discretion. *See Leon, Ltd. v. Carver,* 104 N.M. 29, 35, 715 P.2d 1080, (1986)(admitting or excluding expert testimony is within discretion of trial court).

Finally, it was undisputed that throughout the class period, Good Samaritan had routinely submitted annual financial statements for Manzano to the New Mexico Agency on Aging, and the Agency had never once pointed to any deficiencies in Good Samaritan's compliance with the CCA. Again, the only reasonable application of the CCA would yield the conclusion that Good Samaritan's conduct was reasonable and complied with the statute's requirements.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY REOPENING THE TRIAL TO PERMIT SKOFIELD A SECOND CHANCE TO MEET HIS BURDEN OF PROOF ON DAMAGES.

Good Samaritan next challenges the judgment in this matter on the grounds that the District Court abused its discretion by reopening the record eighteen months after the September 2002 trial to permit Skofield a second chance to meet his burden of proof on damages by submitting evidence on apartment "turnover" at Manzano. Instead of abusing its discretion by reopening the evidence, the District Court should have simply entered judgment in favor of Good Samaritan based on Skofield's failure to meet his burden.

Appellate courts review a district court's decision to reopen the record for an abuse of discretion. *State v. Harrison*, 2000-NMSC-022, ¶56, 129 N.M. 328, 342, 7 P.3d 478, 492.

Good Samaritan preserved this issue in its objections to the District Court's *sua sponte* decision to reopen the record, at the May 4, 2004 hearing on turnover that resulted, as well as in the post-judgment motion to amend. RP 4184-4207, 4757; 5/4/04 Tr. 7-8.

The law on when and for what reason trial courts may reopen the record after the parties have rested is straightforward. The trial court's decision to reopen the record to admit supplementary evidence is considered in light of the extent to which the proponent used due diligence to obtain the evidence and the probable value of the evidence. *Harrison, supra,* ¶ 56.

Thus, granting a new trial to allow new evidence to be submitted is only permissible upon a showing by the moving party that its failure to produce such evidence at the original trial was not due to a lack of diligence. *See, e.g., Sandoval v. Sandoval*, 61 N.M. 38, 294 P.2d 278 (1956); *see also Aybar v. Crispin-Reyes*, 118 F.3d 10, 16 (1st Cir. 1997)("Rule 59... enables the court to correct its own errors and thus avoid unnecessary appellate procedures. The rule does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment."). Indeed, many courts have required a showing that the failure to offer evidence was the result of inadvertence or mistake, and not a lack of diligence. *See, e.g., Lopez v. Lopez*, 55 S.W.3d 194 (Tex. Civ. App. 2001); *Idaho Power Co. v. Cogeneration, Inc.*, 9 P.3d 1204 (Idaho 2000)(party seeking to reopen must show some reasonable excuse, such inability to produce the evidence or ignorance of the evidence). As the Arizona Court of Appeals has stated, "no party is entitled to a second chance, by way of reopening to hear additional evidence, merely because hindsight suggests that other or additional evidence could have led to that party's success." *See Phoenix Newspapers, Inc. v. Keegan*, 35 P.3d 105 (Ariz. App. 2001).

Under these standards, the District Court's decision to reopen the record in this matter eighteen months after the September 2002 trial was a clear abuse of discretion, as a simple recitation of the sequence of events shows.

In its initial Findings of Fact, the District Court determined that turnover at Manzano was a necessary component of any appropriate damages model, because many residents had moved into the facility during the class period and had agreed to earlier fee increases. RP 3399-3402, ¶¶ 61-62. The District Court nonetheless conceded that Skofield had not submitted any evidence

regarding turnover at the September 2002 trial. This deficiency resulted from Skofield's tactical decision to treat the case as if the CCA governed rates, rather than permissible increases in rates, and as if the class consisted of apartments, as opposed to real individuals who were subject to impermissible increases in rates beyond the rates they voluntarily agreed to when they moved in. *Id.*

The District Court attempted in its initial Findings to save Skofield from this failure of proof by applying on a one-time basis to the entire class period an average rate of apartment turnover at assisted living facilities nationwide. *Id.* This attempt was unavailing, however, because the only turnover rate in the record was an *annual* rate of 29.8%, which Good Samaritan demonstrated in post-trial briefing would yield no damages whatsoever if applied in each of the six years of the class period.

The District Court thus reopened the trial record for the express purpose of permitting Skofield to cure this deficiency. Whether this decision was an abuse of discretion depends on whether Skofield's failure to submit evidence on turnover at the September 2002 trial was *not* due to a lack of due diligence on his part, *i.e.*, on whether the new evidence Skofield purportedly would submit at the reopened trial in May 2004 was evidence he literally could not have submitted at the original trial.

As shown above, however, it is undisputed that Skofield *knew* that turnover at Manzano was an issue that Good Samaritan intended to raise at trial as a problem with Malott's damages model that had been revealed in discovery, and that he had in his possession, long before trial, documents that would have permitted him to show turnover. Skofield nevertheless *chose* not to account for apartment turnover at the September 2002 trial as part of a conscious litigation strategy, in order to maximize his damages calculation. Skofield thus cannot plausibly claim that

he could not have submitted evidence on turnover at the original trial. Indeed, given a class of at most 300 residents and former residents of Manzano, calculating each resident's individualized damages, based on when a particular resident moved into Manzano, what fees they agreed to, what fee increases were imposed during the span of their residency, and when they moved out, should have been a fairly straightforward exercise. There was thus no legal justification to reopen the trial record. Skofield simply failed to carry his burden of proof on damages, and the District Court should have entered judgment for Good Samaritan accordingly.

IV. THE DISTRICT COURT'S AWARD OF PREJUDGMENT INTEREST WAS AN ABUSE OF DISCRETION

Good Samaritan's fourth issue on appeal concerns the District Court's award of prejudgment interest. Under the highly unusual circumstances of this case, where the liability ultimately imposed on Good Samaritan for its objectively modest fee increases at Manzano was so unpredictable, and so much less than what Skofield demanded in damages, awarding prejudgment interest was an abuse of discretion.

Good Samaritan preserved this issue in its repeated objections to the District Court's decision to award prejudgment interest to Skofield. RP 4484-4490; 12/15/04 Tr. 18-21.

The District Court initially refused to award prejudgment interest. RP 3404. In its July 8, 2004 letter decision, however, the District Court reversed course and awarded prejudgment interest under NMSA 1978 § 56-8-4(B). RP 4590-4591. 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 4591.

It is undisputed, as shown above, 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, which included ultimately an offer on the eve of trial to spend $2 million at the facility for the benefit of the residents and $50,000 in attorney's fees. RP 3598-3602, Affidavit of Martha Brown. The objective reasonableness of these settlement offers by Good Samaritan should not present a difficult question. Good Samaritan's offers were clearly substantial and reasonable, particularly in relation to the relatively small amount of damages ultimately awarded to the class, $122,548. RP 4710-4711. Indeed, Good Samaritan's offers were worth much *more* than what Skofield would get in the present judgment, albeit before a potential award of a larger sum in attorney's fees to Skofield's counsel; moreover, the elderly Manzano residents who were members of his class, to whom the recovery of attorney's fees is irrelevant, would have received the offered improvements to their facility sooner rather than later.

The reasonableness of Good Samaritan's settlement offers should also be judged in the context of Skofield's claims and his own settlement demands. Skofield's claims 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. The District Court's judgment of $122,548 thus awarded much less than 1/100th of the damages Skofield originally alleged, and

approximately 1/10th of his lowest settlement offer before trial. *Id.* Given Skofield's own intransigence and unreasonable demands, there is, in fact, no reasonable basis for concluding that Skofield would have settled at *any* rational offer Good Samaritan might have made so as to justify a sanction against Good Samaritan for not making it.

In summary, where a defendant's settlement offers prior to trial were substantially more valuable than the amount of damages a plaintiff ultimately obtained at trial, granting prejudgment interest on a theory that the defendant "did not make reasonable and timely offers to settle," as the District Court posited here, is illogical, and a clear abuse of discretion.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT DECERTIFYING SKOFIELD'S CLASS, AND ERRED IN ENTERING A JUDGMENT THAT FAILS TO IDENTIFY THE CLASS MEMBERS WHO ARE BOUND.

Good Samaritan's final issue on appeal addresses the form of the judgment itself. The judgment is defective as a matter of law because it fails to identify the class members who are bound by the judgment. Moreover, because the reason for this defect was Skofield's own failure to put into the record evidence showing the identities of his class members -- though with only approximately 300 members doing so would have been easy -- the District Court also abused its discretion in refusing to decertify Skofield's class.

With regard to the District Court's failure to decertify the class, this standard of review is clear: class certification decisions are reviewable only for abuse of discretion. *Enfield v. Old Line Life Ins. Co. of America*, 2004-NMCA-115, ¶ 16, 136 N.M. 398, 98 P.3d 1048, 1051. With regard to defects in a class action judgment, although there do not appear to be any cases on point, generally a trial court's failure to interpret correctly the requirements of the rules of civil procedure would be reviewable *de novo*. *See Esposito v. United States*, 368 F.3d 1271, 1275 (10th Cir. 2004)("We review *de novo* the district court's interpretation of the Federal Rules of Civil Procedure.")

This issue was preserved for appeal by Good Samaritan at trial, 9/20/02 Tr. 166, and in subsequent post-trial briefing. *E.g.*, RP 3879-3882, 8/8/03 Supplemental Brief on Court Findings of Fact; RP 4535-4536, 5/21/04 Post-Trial Brief.

The information that must be included in the judgment in a class action is governed by New Mexico Rules of Civil Procedure Rule 1-023(C)(3), which reads as follows:

> The judgment in an action maintained as a class action under Subparagraph (1) or (2) of Paragraph B of this rule, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Subparagraph (3) of Paragraph B of this rule, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Subparagraph (2) of Paragraph C of this rule was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

See Rule 1-023(C)(3) NMRA 2005 (emphasis added). It is undisputed that this class action was certified and prosecuted as a Rule 1-023(B)(3) class action. By its plain language, this provision thus requires the Court to specify identifiable members of the class in the judgment in a (B)(3) class action.[3]

Where possible, a class action judgment should thus *name* class members. This reading of the statute follows the reading of the parallel provision in Fed.R.Civ.P. Rule 23(C)(3) by the leading commentators and the notes of the drafters of the rule. *See* 7 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1789 ("anyone properly *listed* in the judgment should be bound by it")(emphasis added); Fed.R.Civ.P. Rule 23, Advisory Committee Notes at ¶ (c)(3) ("In a (b)(1) or (b)(2) action the judgment 'describes' the members of the class, but need not

[3] *See* Fed.R.Civ.P. Rule 23, Advisory Committee Notes at § (c)(3) ("In a (b)(1) or (b)(2) action the judgment 'describes' the members of the class, but need not specify the individual members; in a (b)(3) action the judgment 'specifies' the individual members who have been identified and describes the others.").

specify the individual members; in a (b)(3) action the judgment 'specifies' the individual members who have been identified and describes the others."); *see also*, Roger J. Magnuson, Shareholder Litigation, § 12:11 ("a *listing* of class members will tend to chill later motions for determining the res judicata impact of the judgment")(emphasis added). Indeed, the federal Manual for Complex Litigation states that "[i]n actions maintained under Rule 23(b)(3), the court should compile – and refer in the judgment to – a list that identifies the persons who were sent individual notice and did not timely elect to be excluded from the class." *See* Federal Judicial Center, Manual For Complex Litigation, 4th, Ch. 15.2, "Entry of Final Judgment."

Although this issue presents a case of first impression in New Mexico, the few cases from other jurisdictions that address class action judgments appear to require naming specific class members in the judgment in a Rule 23(B)(3) class action. These cases have usually occurred in the context of certification, and involve courts permitting certification with the caveat that class members will ultimately be identified later in the proceedings. *See, e.g., Neumont v. Monroe County, Florida*, 198 F.R.D. 554, 559 (S.D. Fla. 2000); *Gregg v. Michigan Nat'l Bank*, 405 Mich. 148, 274 N.W.2d 752 (1979)("[i]f the members of the group can be identified at the time of judgment, the requirement that the group be identifiable is satisfied."). In at least one other case, an appellate court remanded a case where the judgment "d[id] not 'include and describe those whom the court finds to be members of the class.'" *See Ridinger v. General Motors Corp.*, 474 F.2d 949 (6th Cir. 1972).

Good Samaritan has located only one published case where a court held that the requirement to "specify" class members in a class action judgment did *not* mean that the judgment had to list the class members by name, *In re NASDAQ Market-Makers Antitrust Litigation,* 184 F.R.D. 506 (S.D.N.Y. 1999). But *NASDAQ Market-Makers* involved a class of

more than a million plaintiffs. Here, there was a class of at most a few hundred Manzano residents, a number which should have presented no impediment to listing their names in the judgment. As shown above, it is undisputed that Skofield had in his possession documents that would have permitted him to submit evidence identifying by name each of the members of his class, but simply failed to do so. 5/4/04 Tr. 85, 86, 116.

Moreover, Rule 1-023(C)(3) also requires not just that class members be named, but that the judgment identify those class members who were *properly noticed* and did not opt out. The question of who opted out is straightforward here: the opt out forms are in the record and, indeed, the parties stipulated to inclusion of the identities of the opt outs in the form of judgment. RP 4708-4710, ¶ 3. As noted above, nearly 60 of the residents who did receive a notice opted out of the class. *Id.*

The question of who among the class received proper notice is not straightforward, however, and presents another insoluble defect in the judgment. Rule 1-023, like the identical federal rule, requires "individual notice to all members who can be identified through reasonable efforts." Skofield's "Report" on class notice, offered on the first day of trial, stated that 193 of the 287 notices they initially mailed to class members at the address for Manzano in July 2002 were returned as undeliverable. RP 2796, Report to the Court on Class Notice. But, as shown above, Skofield *knew* that these mailings would be returned as undeliverable, because Good Samaritan, through its counsel, told them beforehand that only 111 members of the class still lived at Manzano. RP 3888, Supplemental Brief in Support of Proposed Amendments, Exhibit C. Mailing notices to addresses Skofield knew were incorrect cannot be called "reasonable efforts" to comply with the notice requirements of Rule 1-023. Class notice is a requirement of due process, "[b]ut when notice is a person's due, process which is a mere gesture is not due

process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 657 (1950). Close to 200 of the putative class members would thus likely not be bound by any judgment in this matter.

Finally, the requirement that the judgment in a class action identify class members who received proper notice and did not opt out is not a technical matter, not just a question of Good Samaritan crying "gotcha." The requirements of Rule 23(C)(3) were specifically drafted to address the uncertainties surrounding the res judicata implications of the previous Rule 23. *See* Fed.R.Civ.P. Rule 23, Advisory Committee Notes at ¶ (b)(3); *see also*, WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1789 ("The court in framing the judgment in any suit brought as a class action, must decide what its extent and coverage shall be, and if the matter is carefully considered, questions of res judicata are less likely to be raised at a later time.") Good Samaritan was entitled to know, at the conclusion of this lawsuit, that it would not be threatened with additional lawsuits when absent members of Skofield's class claim the right to bring new actions based on the same allegations because they were not provided proper class notice or were not specifically identified in the judgment entered in this action.

In summary, Skofield failed to create a record that would have allowed the District Court to enter a judgment that would comply with Rule 1-023(C)(3), *i.e.*, a judgment that would "specify" class members to whom class notice was provided. Skofield did not put *any* evidence into the record that would show which individual Manzano residents were in his class, when they lived at Manzano, or when their fees were increased, much less any evidence showing which putative class members received notice of the action and which members chose to opt out. None of this individual information is contained in the judgment entered by the District Court. The

result is a defective judgment that does not meet Rule 1-023(c)'s requirement that judgments specify who is in the class – a requirement essential to Good Samaritan's due process rights. Skofield simply failed to carry his burden of putting evidence of class membership and proper notice in the record. Accordingly, judgment should have been entered for Good Samaritan.

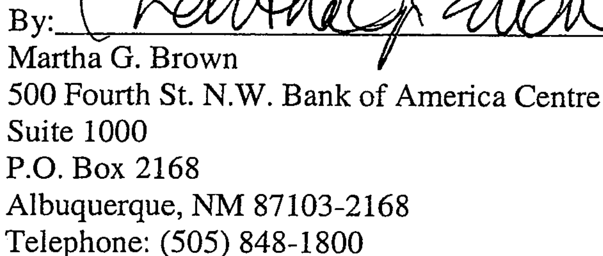
Alternatively, the District Court should have decertified Skofield's class when it became clear that there was insufficient evidence in the record to support a judgment that would fulfill the requirements of Rule 1-023(C)(3), and its failure to do so was an abuse of discretion.

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.

QUARLES & BRADY LLP
Dan Conley
Paul D. Bauer
411 East Wisconsin Avenue
Milwaukee, WI 53202
Telephone: (414) 277-5000

MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.

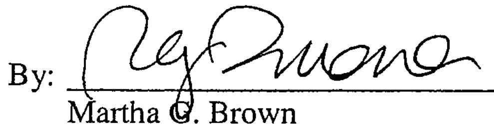


By:__________
Martha G. Brown
500 Fourth St. N.W. Bank of America Centre
Suite 1000
P.O. Box 2168
Albuquerque, NM 87103-2168
Telephone: (505) 848-1800

Attorneys for Defendant,
The Evangelical Lutheran Good Samaritan Society

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.

MODRALL, SPERLING, ROEHL, HARRIS
& SISK, P.A.

By: 
Martha G. Brown

K:\dox\client\31982\114\W0552975.DOC