IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
GARY KING, ATTORNEY GENERAL,

Plaintiff-Appellant,

vs. Ct. App. No. 31,782

ADVANTAGEOUS COMMUNITY
SERVICES, LLC, a New Mexico
limited liability company,

Defendant-Appellee.

STATE OF NEW MEXICO'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
VALERIE A. HULING, District Judge

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Oral argument is requested.

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ARGUMENT

I. THE STATE'S BRIEF COMPLIED WITH THE NMRA AND ALL HEARING TRANSCRIPTS ARE PART OF THE APPELLATE RECORD.

The State's *Brief in Chief* (*BIC*) complied with the NMRA 12-213(F)(3) Type-volume limitations by not exceeding 11,000 words. NMRA 12-213(G) Compliance Statement, *BIC* at 51. This Court's October 9, 2012 Order confirmed its April 24, 2012 receipt of all three hearing transcripts as part of the appellate record. Imagine's allegations regarding the State's *BIC* non-compliant length and its failure to designate the transcripts are patently incorrect.

II. THE TRIAL COURT ABUSED ITS DISCRETION BECAUSE SUBSTANTIAL EVIDENCE RELATING TO THE STATE'S REPUDIATED MISTAKE DOES NOT SUPPORT DISMISSAL.

The court admitted the March 3, 2011 DOH TM clearance letter with updated data fields (Exhibit 15) as ACS-Exhibit B, which is also referred to herein as the "mistake." Tr.#1-15:17-16:19. *Cf.* ACS-Ex. A-138 to 146; ACS-Ex. D which includes ACS-Ex. B.

The AG requested an evidentiary hearing on Imagine's *Motion for Sanctions* because the facts surrounding its mistake involved the DOH's electronic storage information (ESI) technology limitations and occurred outside the courtroom. [RP 400-404]. At the hearings, Imagine failed to produce and/or provide any facts, evidence, witnesses and/or testimony disproving the AG's

position that ACS-Ex. B was an inadvertent mistake caused by the AG Investigator's unfamiliarity with the rules of evidence, AAG Landau's inadvertent oversight, and the DOH CCHSP's ESI computer limitations that only permitted printing of the critical TM clearance data with updated fields. Tr.#14:6 to 71:15; Tr.#3-3:16 to 77:25.

The court's *Findings of Fact and Conclusions of Law* (*FFCL*) and *Order* are not supported by substantial evidence or applicable law or logic and reason. [RP 427-440; 497-521; 643-648; 706-711]; NMSA 1978, §§ 30-44-8(A) and (A)(1), (2), (3) and (4) (1997); NMSA 1978, §§ 29-17-2 *et seq.*, (1998, as amended through 1998); 7.1.9 NMAC (08/15/02 as amended through 01/01/2006); Imagine's MAD 335 PPA & DDSD contract. Unbiased review of the facts and circumstances surrounding the mistake reveals that the court abused its discretion and erred when concluding that AG Investigator Workman's conduct was sufficiently egregious to warrant the dismissal of the State's Complaint as a sanction. [RP 655-683; 706-717].

Despite Imagine's hyperbole, ACS-Ex. B's use was limited to a single short incident in which a single page document was marked Exhibit 15 in the March 9, 2011 Kaur deposition. ACS-Ex. A-138:6 to 146:14. At the deposition, Imagine's attorney insisted "that's the kind of garbage my clients have had to put up with for years." Tr.#1-20:4-8. From that single inadvertent mistake,

Imagine "poisoned the well against the State," weaving a confusing and confounding web of outrage and unsupported allegations of misconduct and abuse of power which the court adopted in its *Order* to make the case go away. Tr.#3-69:7 to 77:25.

The updated computer fields in ACS-Ex. B (Ex. 15) generally included only: 1) the "Susana Martinez, Governor" letterhead; 2) "Melissa McCue" as addressee; 3) Imagine's 2011 address; and 4) different clearance wording in the letter body. [RP 131-132]; Tr.#1-46:1 to 56:1. None of the ACS-Ex. B updated fields created by DOH's computer program limitations, which the trial court relied upon for its dismissal sanction contained evidence relevant to the State's claims. Rule 11-402 NMRA. *Cf. Complaint Ex. A* [RP 5 (admitting TM's [#4 and #5] CH clearance occurred 10/23/2006)] to *Uncontroverted Facts* [RP 509 (¶¶ 2.p, 2.q)] to *Contested Issues of Fact* [RP 513 (¶¶ 3.k, 3.l)] to ACS-Ex. B to ACS-Ex. C. [RP 107, 131-132; 225-234]; Tr.#1-52:15 to 53:1; Tr.#3-67:8-17; NM-Exhibits 1, 2, and 3.

AAG Landau "didn't see it [updated fields] until just this minute." AAG Landau stopped her questioning when Imagine's attorney raised objections. Still Mr. Jontz continued to accuse AAG Landau of fraud. ACS-Ex. A-122:1 to 146:14. After March 9, 2011 without any judicial intervention and/or direction, the AG investigated how the ACS-Ex. B mistake occurred. The AG

voluntarily documented the facts within its control and provided copies of the March 1, 2011 DOH CCHSP fax cover sheet and second DOH letter printed with updated fields to Mr. Jontz. [RP 131-137; 204-238]; Tr.#3-45:20 to 50:1; ACS-Ex. D.

Without good grounds or any controverting facts, Imagine untenably insisted that the AG's explanation itself was a misrepresentation and proof of further conspiracy and misconduct. ACS-Ex. D; [RP 104-137; 336-356]. Imagine possessed its own copy of the original 2006 CH letter (ACS-Ex. C). [RP 107; 132]. Imagine still refuses to admit that in **both** ACS-Ex. B (updated) and ASC-Ex. C (original copy) the TM caregiver name, the October 23, 2006 clearance date, and the clearance determination, the only facts relevant to the State's claims are the same and are correct. [RP 107, 132; 104-137; 336-356].

After the mistake arose, the AG did not use ACS-Ex. B in any manner even though under Rule 11-1004(B) NMRA, the relevant contents of ACS-Ex. B which match ACS-Ex. C may still be admissible. The State also investigated without any judicial intervention or direction, why the DOH CCHSP could not provide a "duplicate" of the October 23, 2006 TM clearance letter sent to Imagine. Rule 11-1001(D) NMRA. [RP 204-238].

The AG's Investigator, Marc Workman failed to provide AAG Landau with the DOH CCHSP fax cover sheet explaining the DOH ESI computer

printing limitation because he "didn't know it was important." He was on vacation at the time of the deposition. [RP 215-222]; Tr.#3-47:8-16. Marc Workman was an AG information specialist and his work experience was in computer technology. Mr. Workman had no law office experience, was not a lawyer, and was not familiar with the rules of evidence which would have alerted him to any legal and/or evidentiary issues with ACS-Ex. B's "updated data fields." [RP 205-206; 215-222]; Tr.#3-40:18 to 58:8; ACS-Ex. F.

The AG did not, and does not represent the DOH in this action. [RP 632-653]; Tr.#3-65:7 to 66:19; 71:23 to 72:4; 82:16 to 85:25. After the mistake AAG Landau met with the DOH program developer for the first time in order to determine why ACS-Ex. B was printed with updated data fields and to verify that the critical TM information in ACS-Ex. C was the same in ACS-Ex. B, in the DOH CCHSP computer program, and on the DOH COR web based system accessible by Imagine. [RP-207-208; 225-234]; Tr.#1-36:24 to 56:1; NM-Exhibits 1, 2, and 3; Tr.#3-22:7 to 25:20.

No one at the AG had control or authority over the DOH ESI computer program and/or the DOH printing functions and/or DOH's failure to keep "duplicates" of ACS-Ex. C. Rule 11-1001(D). Tr.#1-55:14-20. The DOH CCHSP computer printing limitations surrounding ACS-Ex. B resulted from the good faith operation of DOH's ESI system. Updated or dynamic data fields are

essential operating features of ESI systems that automatically print updated data fields and that have no "direct counterpart in hard copy documents." Tr.#1-36:24 to 56:1. *Federal 2006 Rule Committee Notes on F.R.C.P. 1-037(e) fka 37(f).*

On August 10, 2012 at the evidentiary hearing on Imagine's *Motion for Sanctions*, the court stated: "[T]he question in this case is whether or not there was some intentional wrongdoing or bad faith." Tr.#1-8:20-22. Without any legal authority, Mr. Jontz stated that in his view "it doesn't have to be intentional in order for sanctions to be granted." Tr.#1-11:10-14; [RP 104-137; 336-356; 690-695].

Imagine's verbalized its outrage at the State's insistence upon enforcing the MFA because "many other parties have had the same problem, and the practice over the years has been to pay the State a small amount, get rid of them, and move on." Tr.#3-62:9-14; 63:19 to 65:5. However Imagine has failed to demonstrate any real prejudice caused by ACS-Ex. B or to provide any other factual or legal authority for its entitlement to dismissal of the State's claims as a sanction based upon the inadvertent ACS-Ex. B printing mistake. [RP 104-137; 336-356].

Without notice and consistent with Imagine's ongoing ad hominem attacks, Mr. Jontz tried to call AAG Landau as a witness. AAG Landau objected

to Imagine's ambush. The court stated that the only thing relevant was "did you [AAG Landau] know that that was not an accurate document at the time?" AAG Landau answered: "No ... It was a completely inadvertent mistake." Mr. Jontz's subsequently admitted that "frankly, I didn't catch it [ACS-Ex. B updated data fields either]," Tr#3-58:12 to 62:20. Imagine requests this Court ignore the district court's opinion that based on the mistake evidence, AAG Landau was NOT "devious." Tr.#3-70:9-13. In rejecting Imagine's request for attorneys' fees, the court stated: "If I thought that Amy Landau, as the attorney for the AG's office intentionally used that document -- I do not believe that she, herself [AAG Landau], knew what she was doing. And I question whether or not you [Mr. Bousliman] actually believe that also." Tr.#3-75:15-22.

The court initially appeared to deny the *Motion for Sanctions* and grant summary judgment. Tr.#3-74:16-24. When questioned whether granting summary judgment "is the sanction," the court answered "yes," and that "it pretty much doesn't matter what the reason is." Tr.#3-75:24 to 76:23. The court admitted "there could be potentially some issues with regard to the summary judgment;" and then stated: "[I]f the State accepts the ruling [dismissal] I do not need to make detailed findings . . . I think the AG's Office recognizes this can't happen again, and this is not the type of case that this [*sic*] needs to go any further." Tr.#3-76:14-15; 77:1-25.

Because of the harshness of dismissal, due process requires that a dismissal based upon a discovery violation be predicated upon "willfulness, bad faith, or [some] fault of petitioner" rather than inability to comply, such as the DOH ESI computer limitations here. *Archibeque v. Atchison, Topeka & Santa Fe Ry. Co.*, 70 F.3d 1172, 1174 (10th Cir.1995). Even when assessing attorney's fees against the State as a sanction under an abuse of discretion standard, the trial court's authority extends "only to conduct occurring before the court or in direct defiance of the court's authority," which did not occur here. *State ex rel. N.M. State Highway & Trans. Dep't v. Baca*, 120 N.M. 1, 9, 896 P.2d 1148, 1156 (1995).

Appellate review of the trial court's abuse of discretion is fact based, requires a determination as to whether the facts are supported by substantial evidence, and should be scrupulous to prevent judgment against a party without the opportunity to be heard on the merits. *Lopez v. Wal-Mart Stores, Inc.*, 108 N.M. 259, 260-61, 771 P.2d 192, 193-94 (Ct. App. 1989), citing to *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 203, 629 P.2d 231, 279 (1980), *cert. denied.*

The wording in the August 4, 2011 *Final Joint Pretrial Order (Jury)* (*PTO*) [RP 497-567] is prescribed by the Second Judicial District Local Rules, LR2-Form L, is considered a court order [RP 497] and states that "[T]his order

shall control the course of the trial." [RP 524]. Therefore the parties' claims, admissions, and stipulations regarding the disputed facts and issues of law were conclusively established and controlled the scope of the three hearings and the court's *FFCL* and *Order*. [RP 52-54; 497-567]; Rule 1-016 NMRA; Rule 1-036(B) NMRA. However the court ignored the *PTO* admissions and failed and/or refused to address the *PTO* stipulations of contested issues of fact and law in its *FFCL* and *Order*. *Cf.* Tr.#2-11:12 to 27:18.

After the hearings the court produced its *FFCL* ignoring the *PTO* undisputed and disputed facts, adopting some of Imagine's unsupported misrepresentations, and failing to justify its sanction dismissal with any legal authority. [RP 706-711; 725]. *Cf.* [RP 655-683 to RP 690-695 to RP 696-705 to RP 706-711 to RP 712-717] to Imagine's *Motions for Protective Orders and to Quash Subpoena* [RP 185-201; 239-241; 280-301; 308-331; 591-609] to misrepresentations regarding Judge Nash's decision in another action [RP 622; 636; 649-650] to improper attempts to enjoin the AG for other DOH actions relating to Imagine. [RP 618-626; 632-652; 688-689]; Tr.#3-65:7 to 66:16; 78:1 to 86:2.

Substantial evidence in the record does not justify any finding of "willfullness, bad faith or [AG] fault" surrounding ACS-Ex. B sufficient to support the dismissal sanctions. [RP 655-668]. Objections to Imagine's

proposed *FFCL*, the *PTO* admitted and disputed facts and the AG's *Motion to Amend The Court's FFCL* were all ignored or denied by the court, without hearing. [RP 696-705; 712-720; 725].

Despite the AG's attempts to distinguish between the DOH CCHSP's jurisdiction over its ESI computer limitations and the AG's prosecutorial authority, the court appropriated Imagine's outrage at the "State," and emphatically admonished AAG Landau that sorry is not enough and "that this can never happen again." Tr.#3-65:7 to 69:4; 74:5-9. The DOH CCHSP computer programmer testified that the printing limitations, e.g. the updated fields of Melissa McCue's name (2011 Imagine contact), was an inherent functional limitation of the DOH computer program unrelated to Imagine or this case or the AG and that the Marc Workman requested the ACS-Ex. B printing. Tr.#1-46:1 to 56:1; 68:6-15. The court acknowledged that Kaur's testimony regarding McCue was Imagine's defense. Tr.#3-71:13-16.

Nonetheless expressing bias against the "State," the court improperly adopted Imagine's unsupported finding that the State was somehow motivated to make the mistake to undermine Kaur's testimony regarding Melissa McCue's criminal history screening involvement, reaching an unsupported conclusion to support its improper dismissal. [RP 669-683; 690-695; 696-705; 708 (FF #21); 709 (CL #3); 712-717].

The State only sued the provider entity and has maintained throughout the proceedings that the defendant entity was strictly liable for Imagine's HCBS CCHSA violations and compliance with the MFA and its provider contracts. Melissa McCue's name in the ACS-Ex. B updated address field was, and is, irrelevant to the State's case. Tr.#1-8:21 to 27:17; Tr.#2-23:17-25; Tr.#3-68:23 to 69:4. Kaur admitted that the entity received the monies which the State seeks to recover from Imagine in this action. [RP 5-18; 506; 508-510; 655-683; 696-705; 712-717]; Tr.#3-15:18 to 16:15; 35:14-20. Consequently the court's FF #5, #7, #8, #19, #21, #23, #25, and #26 are not supported by the record, are disputed and/or do not apply to controlling issues of fact or law in the case; and CL #3 and #4 are not supported by the record, the facts or the law. [RP 706-717].

The court recognized that the conduct upon which it relied for dismissing the State's claims with prejudice as a sanction was inadvertent, not fraudulent. *Cf.* FF #12, #14, #16, and #22 [RP 706-709] to Tr.#3-70:8-13; 73:24-74:2; 75:15-22. The court described ACS-Ex. B as a mistake. Tr.#3-70:5-7. *Cf.* Tr.#2-16:16-23.

Even with Imagine's continual offensive references to the State's and AG's actions as "fabrications," "misrepresentations," "fake," "fraudulent," and "bad faith," reiterated in its *Brief*, the trial court still recognized that "it isn't as though

the regulations **weren't** violated." Tr#3-75:7-12 [Emphasis added]. *Cf.* [RP 490-521].

Described by the court "as good counsel," Mr. Jontz's rhetoric included an offensive doomsday scenario that because the AG "might" have brought a criminal action against him if he had made "that mistake." Imagine should be granted its dismissal sanction. Tr.#3-64:24 to 65:1; 76:21-23. Still none of the facts or circumstances surrounding the mistake occurred before the court and/or in direct defiance of a court order and/or were willful and/or done in bad faith. The AG agreed to a self-imposed sanction by repudiating its mistake without a court order. [RP 339]; Tr.#3-61:12-17. The AG had no control over and/or responsibility for the DOH CCHSP's failure to keep "hard" copies of 2006 clearance letters and/or for DOH's computer limitations which resulted in the printing of the updated fields. [RP 204-238]; Tr.#1-44:17-19; 49:16 to 51:19.

The inadvertent printing of the repudiated ACS-Ex. B did not prejudice Imagine and/or adversely impact its ability to prepare for, and present its case at trial. The court's dismissal of the State's claims as a discovery sanction is not reasonable or logical based upon the evidence and the law. The court's *Order* granting Imagine's *Motion for Sanctions* also fails to harmonize with the policy of giving litigants a chance to be heard on the merits except in extremely egregious situations which is not the case here; and the *Rules of Professional*

Conduct which required the AG's disclosure and correction when its inadvertent mistake relating to the DOH's ESI computer technology limitations arose, such as happened here. *Summit Elec. Supply Co., Inc. v. Rhodes & Salmon, P.C.*, 2010-NMCA-086, 241 P.3d 188, 191, *cert. denied;* Rule 16-303 NMRA, *Candor toward the tribunal*; Rule 16-304 NMRA, *Fairness to opposing party and counsel.*

If the court's Order is allowed to stand, then the federal court's recognition of the need for a safe harbor relating to ESI will not apply in the state courts and every litigant, including all state agencies, whose computer programs use dynamic or updated fields, risks having its case dismissed due to inadvertent ESI related mistakes. F.R.C.P. 1-037 (e) fka 37(f). The court's discretionary illogical decision emulating Imagine's outrage and granting Imagine's *Motion for Sanctions* for an inadvertent mistake rests upon a misapprehension of the facts and the law and is an abuse of discretion which must be reversed as a matter of law. *N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-028, ¶ 7, 127 N.M. 654, 986 P.2d 450.

III. THE COURT IGNORED DISPUTED FACTS WHILE FAILING TO CONSTRUE THE MFA AND CCHSA STATUTORY LANGUAGE AND PROVIDER CONTRACTS, PRECLUDING SUMMARY JUDGMENT.

It is undisputed that: 1) Imagine consented to comply with the MFA, when executing its MAD PPA and DOH PPA (contracts); and, 2) the CCHSA applied to Imagine as a care provider. [RP 22-25; 431 (Art. VIII), 433, 439 (¶ 19); 503-511; 644-645].

The *PTO* conclusively established twenty-three (23) undisputed facts, at least sixteen (16) disputed facts and at least twenty-five disputed issues of law, which the court failed to address in its *FFCL* and *Order* granting summary judgment. [RP 497-521; 655-683; 712-717]. The State raised the *PTO*'s stipulations of undisputed facts at hearing, in its own proposed *FFCL*s, and in its objections to Imagine's *FFCL*. Tr.#2-12:22 to 13:9; [RP 655-683; 696-705]. The court refused to hear the State's *Motion To Amend The Court's FFCL*. [RP 712-717; 725].

CL #4 reflects the court's position that "it pretty much doesn't matter what the reason is, if its granted [summary judgment] for any reason, it should be granted," and that dismissal with a message: "Don't do it again," instead of reliance upon the *PTO* disputed facts or the record or the law or Rule 1-056 NMRA is a sufficient basis for entry of summary judgment. Tr.#3-76:9-21; [RP 706-709]. Failing to consider the parties' stipulated facts and disputed facts and

further refusing to apply those facts to any interpretation of the MFA and CCHSA statutory language and/or to any construction of Imagine's Medicaid contracts, the court's summary judgment cannot be sustained on appeal. *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 16, 49 P.3d 61, 67 (meaning of statutory language is question of law reviewed de novo): *Delfino v. Griffo*, 2011-NMSC-015, ¶ 10, 257 P.3d 917 (appellate review considers evidence); *Mark V, Inc. v. Mellekas*, 114 N.M. 778, 781-782, 845 P.2d 1232, 1235-1236 (1993) (contract ambiguity analysis).

The court's failure to: 1) interpret the MFA statutory civil remedies' and penalties' provisions and their application to the CCHSA statutory language and related regulations; 2) construe Imagine's duties under its Medicaid contracts; and, 3) consider the *PTO*'s stipulated disputed facts when rendering its summary judgment, requires reversal of summary judgment against the State. *Maestas v. Zager*, 2007-NMSC-003 ¶ 8-22, 152 P.3d 141.

Imagine's *Answer Brief* delineates numerous issues of disputed facts and disputed law that remain. The court stated that there was no evidence of fraud [by Imagine] but that:

> We have maybe a violation of one particular requirement under the act. And I think there may be case law to say that that is not enough with regard to the motion for sanctions. And in saying that, therefore, you know motion for summary judgment, even without sanctions, could be granted in this case arguably." Tr.#3-69:15-24.

However the court failed to disclose any reference in the record and/or any facts and/or any specific MFA regulation and/or any specific requirement and/or the definition of "fraud," upon which it based that opinion. Therefore entry of summary judgment is precluded as a matter of law.

There are no New Mexico cases interpreting the MFA civil remedies and penalties provisions and/or their application to Imagine's HCBS CCHSA violations. §§ 30-44-8(A); 30-44-8(A)(1), (2), (3) and (4). *See State of New Mexico ex rel. Gary King v. Behavioral Home Care, Inc.*, NM COA #31,682, dismissed pursuant to Rule 1-012(B)(6) NMRA (Imagine's 12(b)(6) *Motion* was denied) which is the first appeal ever of the MFA civil provisions. [RP 581-582].

Imagine's attempts to impose theories of common law fraud from other cases to construe the MFA are misplaced and fail to inform why a common law fraud definition applies the MFA statutory definition of "Medicaid fraud." NMSA 1978 § 30-44-7 (1989 as amended through 1997). Without any procedural or statutory or regulatory or contractual or case authority on point, ignoring its own conclusive *PTO* admitted and disputed facts, Imagine twists the facts, e.g. FF#29 [RP 693], and the record, untenably concluding that it did not violate § 30-44-8 NMSA 1978 (#5), a conclusion that even the court refused to

adopt in its own *FFCL*. *Cf.* Tr.#3-73:24 to 74:2; 75:15-22; [RP 690-695; 706-711].

Imagine admitted in its Answer [RP 22 at ¶ 2] and in the PTO [RP 506 at ¶ 2.g.] that it agreed its 250 HCBS claims would contain "true, accurate, and complete information." Then misapplying the False Claims Act (31 U.S.C. §§ 3729 *et seq*. (2009)) and related case law, not the MFA language or Medicaid contract language, Imagine insists that the State has no MFA cause of action for Imagine's breaches of its admitted duty to comply with CCHSA when billing for HCBS services because they were "mistakes." Tr.#2-3:12 to 8:19.

Imagine admitted that it contractually agreed to "provide, and submit claims for reimbursement for, Medicaid funded services . . . in accordance with all applicable state and federal laws, and the regulations and standards of the NM Medicaid program. [RP 506, ¶ 2.h]. Imagine stipulated that whether the MFA requires the State to prove Imagine's knowledge of each of its 250 HCBS CCHSA violations was a contested issue of law. [RP 503-511; 515]. *Cf.* Tr.#2-25:14 to 27:17. The court's *FFCL* ignore this disputed question of mixed fact and law. [RP 706-709].

The State's position is consistent with a federal court of appeals decision relating to interpretation of the MAD 335 PPA language, HHS OIG's recent New Mexico provider audits, and the State's duty to assure that necessary

safeguards are taken to protect the health and welfare of DD waiver clients. *New York v. Amgen, Inc.*, 652 F.3d 103, 114 (1st Cir. 2011), *cert denied*; *Review of NM Medicaid PCS Provided by Heritage Home Healthcare*, May 2012, i-iii, 6-10, oig.hhs.gov/oas/reports/region6/60900063.asp; *OIG Quality in HCBS Waiver Programs*, June 2012, at 2 & 10, oig.hhs.gov/oei/reports/oei-02-08-00170.pdf, citing to 42 CFR 441.302.

Imagine disputes the State's position that CCHSA compliance when billing for HCBS caregiver services was a condition of payment and that its billings for "unqualified" HCBS caregiver services vitiated its ability to be paid by Medicaid because they were "invalid" services when billed. The court's *FFCL* and *Order* do not address these disputed facts and issues or the *PTO* disputed issues of fact and law relating to Imagine's 250 HCBS CCHSA claim violations and the State's authority to recover those claims under the MFA (civil remedies and penalties) or Imagine's contracts (sanctions and penalties). *Heritage, supra*; *HCBS Waiver, supra at 10* (CMS noted that verification of provider qualifications before rendering services was critical.)

The State insists, and Imagine disputes, that under the MFA civil remedies and penalties provisions, as well as the PPA sanctions and penalty provisions, the State is entitled to recover the full $361,193.18 paid for Imagine's HCBS CCHSA service violations, without reference to Imagine's

defenses. Imagine insists, and the State disputes, that: 1) actual delivery of HCBS "CCHSA violative" services is a defense; 2) how much money Imagine made is a defense; 3) lack of caregiver criminal convictions is a defense; 4) the State's inability to prove death and/or injury to DD clients is a defense; and, 5) the State's alleged inability to prove common law contract damages is a defense. *Cf.* CCHSA purpose, NMSA 1978 29-17-3 (1998); Tr.#2-18:7-23; 30:9 to 31:19. These disputed facts and related legal issues, preclude summary judgment as a matter of law.

The evidence, the record, the three hearing transcripts, the court's *FFCL* and its *Order* do not contain any findings and/or conclusions that "Imagine never violated the MFA, or any other statutes," and/or that intent was required under the MFA and/or that "no intent [by Imagine] was found." Imagine *Brief* at 24-37.

Summary judgment is "not generally favored and is to be used only with extreme caution." The appellate court looks at the whole record in the light most favorable to the nonmoving party and in support of the right to trial on the issues. On appeal, the burden is on the party who won summary judgment to demonstrate the absence of a genuine issue of material fact. "If the evidence is sufficient to create a reasonable doubt as to the existence of a genuine issue,

summary judgment cannot be granted." *Chevron U.S.A., Inc. v. State of N.M. ex rel. Taxation & Rev. Dept.*, 2006-NMCA-050, ¶ 14, 134 P.3d 785.

Looking at the whole record in the light most favorable to the State, Imagine's *Answer Brief* and its unsupported contentions regarding the factual and legal basis for its entitlement to summary judgment demonstrate on their face that Imagine failed to meet its burden of showing the absence of genuine issues of material fact. Reasonable doubts and genuine issues of disputed material facts require that the summary judgment entered against the State be reversed. *Cooper v. Chevron U.S.A., Inc.*, 2002-NMSC-020, ¶ 14, 49 P.3d 61.

CONCLUSION

For the foregoing reasons, and for the reasons put forward in the State's *Brief-in-Chief*, this Court should: 1) Reverse the trial court's *Orders Granting Defendant's Motions for Sanctions and Summary Judgment*; and, 2) Remand with instructions to restore all of the State's *Complaint* claims to the trial docket.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G) NMRA, I hereby certify that this *Reply Brief* complies with the limitations of Paragraph F of Rule 12-213 NMRA. It was created using Microsoft Word 97-2003 and that the body of this petition using Times New Roman 14 point font consists of 4,353 words as shown on the program word count. Rule 12-213(F)(3) NMRA.

Amy Landau
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed with first-class postage, pre-paid to Defendant-Appellee's counsel of record, Dennis E. Jontz & Jason Bousliman, Lewis & Roca, P.O. Box 1027, Albuquerque, NM 87103-1027, the 8th day of November, 2012.

Amy Landau
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