IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Plaintiff-Appellant,

v. Ct. App. No. 31,782

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

Defendant-Appellee.

ADVANTAGEOUS COMMUNITY SERVICES, LLC'S RESPONSE TO STATE OF NEW MEXICO'S BRIEF IN CHIEF

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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STATEMENT OF COMPLIANCE

The body of this brief in chief does not exceed the 35-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G), we certify that this brief is proportionally spaced and the body of the brief contains 9,717 words. This brief was prepared and the word count was determined using Microsoft Word Windows XP Professional 2003.

ARGUMENT

I. The State's Brief in Chief fails to comply with the New Mexico Rules of Appellate Procedure and should be stricken.

NMRA, 12-213(F)(2) limits the body of a brief in chief to 35 pages. The body of the State's brief in chief is fifty (50) pages. No order has been entered to allow the State to circumvent the rules of appellate procedure. As such, the State's brief in chief should be stricken. At a minimum, this Court should disregard pages 36-50.

II. The trial Court properly dismissed the State's complaint as a sanction for the State's fraudulent creation of the October 23, 2006 letter from the Department of Health to Imagine, LLC.

A. Standard of Review.

Appellant courts review dismissal of a plaintiff's case for abuse of discretion. *Reed v. Furr's Supermarkets*, 2000-NMCA-091 ¶ 10, 129 N.M. 639, 643, 11 P.3d 603, 607; *Medina v. Foundation Reserve Insurance Company, Inc.*, 117 N.M. 163, 166, 870 P.2d 125, 128 (1994), *rehearing denied; United Nuclear Corp. v. General Atomic Co., 96* N.M. 155, 239, 629 p.2d 231, 315 (1980), *cert. denied.* There was no abuse of discretion in the trial court.

B. A dismissal was warranted where the October 23, 2006 letter was fraudulently recreated by Plaintiff at the request of the Attorney General's Office.

The State's Brief in Chief correctly acknowledges that dismissal is an available sanction to a trial court for a discovery abuse. The fraudulent creation of

Exhibit 15 was such egregious conduct that the dismissal was warranted. The findings of fact and conclusions of law entered by Judge Huling on October 28, 2011, show that the October 23, 2006 letter was recreated by the Plaintiff for this litigation and was known to be false. Its creation and use warranted dismissal.

1. Background of case and Exhibit 15.

In this case, the State sought penalties for alleged technical paperwork errors relating to submissions of background checks for caregivers. When the paperwork was eventually completed, no caregiver was denied by the State and no claim was ever made that the services provided were in any way unearned. In other words, this was not a case of fraudulent billing etc. The State sued Advantageous Community Services, LLC (hereinafter referred to as "Imagine" or "Imagine, LLC") because they alleged Imagine was tardy in getting the caregivers screened.

In the course of the litigation, the State took Dr. Arminder Kaur's ("Dr. Kaur" hereinafter) deposition on March 9, 2011. Dr. Kaur is the owner of Imagine and was being deposed individually and as corporate representative. At the deposition, Dr. Kaur testified that her former partner Karan Sangha and her former employee Diane Nunn, were responsible for compliance with the Caregivers Criminal History Screening Program ("CCHSP") screenings during the relevant time periods, and that those individuals represented to her that they were at all

times in full compliance with applicable regulations. Kaur Depo. at 22:8-23:6, 25:3-13, 51:23-52:5, 58:2-3, 125-132, Record Proper (hereinafter "RP") 0116-130.

The State sought to undermine Dr. Kaur's testimony on these issues by establishing that another employee, Melissa McCue, was involved in criminal history screenings for caregivers during the time period relevant to this lawsuit. At the deposition, the State asked numerous questions about Melissa McCue's responsibilities and involvement with criminal history screening and sought to establish that there are personal ties between Melissa McCue's family and Dr. Kaur. (Kaur Depo. at 24:3-25:16, 47:10-49:2, 50:13-14, 57:24-58:23, 65:19-24, 112:13-18, 131:20-133:2, 137:5-138:5, RP 0116-130.) Thus, one of the State's primary aims at the deposition was to show that Melissa McCue, an alleged friend of Dr. Kaur's with no motive to undermine the company, was responsible for criminal history screenings and any deficiencies that might exist with respect to that screening.

In this way, the State sought to undermine one of Dr. Kaur's primary defenses -- *i.e.*, that her former partners are responsible for any irregularities that might exist in the paperwork, that those individuals have actively sought to put Dr. Kaur out of business, and that those former employees have been using Diane Nunn's contacts in the Department of Health to perpetuate long-term harassment of Advantageous.

2. State intentionally chose to create a fake clearance letter rather than create a report that would have shown the date of clearance.

A central issue in this case was the date of clearance for the specific care givers in question. In order to prevail at trial, the State had to prove that the services rendered were done so before clearance was given.[1] The State chose to give the date of clearance by the recreation of the clearance letters. However, the State could have proved the date of clearance from the information contained in the COR system. As testified to on August 10, 2011, Orlando Sanchez admitted that the COR system can print out the date a letter was actually sent without printing out the specific letter in question. In cross examination for counsel for Imagine, Mr. Sanchez testified as follows:

> Q. Is there another printout that you can create, similar to Exhibit 2, that shows the date of clearance?
>
> A. One could be created in a report by me.
>
> Q. Okay. And that would be created in the same way you created Exhibit No. 2?
>
> A. This is a pre-canned report.
>
> Q. But you could get from the COR system, the date the clearance certificate was issued?
>
> A. That is correct.

[1] Imagine maintains its objection that this "services before clearance" is not a cause of action under the applicable Medicaid Fraud Laws.

Q. Any you wouldn't necessarily have to print out a letter that has an addressee and a signature line on it?

A. That is determined by the CCHSP program people, not by me.

Q. Okay, but you are aware that the COR system can print out the date that the letter went out, without printing out a letter; is that correct?

A. That's correct.

Transcript of Proceedings dated August 10, 2011, page 59, lines 6-22.

Therefore, instead of producing a report that could have been created by the COR system to prove the date the clearance certificate was issued, the State of New Mexico shows instead to recreate a clearance letter without any explanation that the letter had been recreated. Again, this is the exact conduct that Judge Huling found egregious enough to dismiss the case as sanctionable conduct. -

3. Counsel for the State, Amy Landau, instructed that Exhibit 15 be created.

At the August 10, 2011 hearing by Dennis E. Jontz to be witness for the State, Orlando Sanchez. Mr. Sanchez was called by the State to explain the creation of Exhibit 15, which was attached to Dr. Kaur's deposition dated March 9, 2011. Upon cross examination by Dennis Jontz, Mr. Sanchez testified as follows[2]:

[2] Advantageous notes that the August 10, 2011 and September 14, 2011 Transcript of Proceedings were not made part of the original Record Proper. Advantageous has filed a motion under Rule 12-209(C) to correct the Record Proper to add these transcripts.

Q. Who asked you to recreate that information?

A. It was request by, I believe -- it's been awhile -- the Attorney General's Office, Ms. Landau.

Q. And what did they tell you that they wanted you to create?

A. The needed a copy of a clearance letter.

Q. And to your knowledge, that's the first time you were aware that the Attorney General's Office made a request for that kin of reproduction of the letter?

A. That's correct.

Additionally, Mr. Sanchez was asked by the Court itself about the contents of the re-created letter. In direct questioning from the Court, Mr. Sanchez testified as follows relating to how the document was recreated:

THE WITNESS: On that, what I would do is, to generate -- to show the critical elements that are available, which are the date the letter was sent, the individual name, control number. What I could do is I could create an almost identical copy of the original template.

But this field over here where the letter was sent, that would not be changed. It shows the date that it was generated, not only generated and sent, but originally sent. Does that make any sense, or am I confusing you?

THE COURT: So if I wanted to know the letter that was sent on October 23, 2006, and you had to produce that exact letter, what would you do?

THE WITNESS: In that case, I would --

THE COURT: The exact latter that was sent, what would you do?

THE WITNESS: The exact letter? There's no way to recreate the exact letter, except for the critical elements.

THE COURT: So the only thing that you could produce is the date?

THE WITNESS: The date it was sent, name, control number, and whatever is in the system at the time, provided the facility provider name hasn't changed or the address hasn't changed. If these have changed ownership, the new ownership would be in the system.

THE COURT: So you couldn't even reproduce that?

THE WITNESS: No.

THE COURT: And then, the body of the letter, you couldn't reproduce if it's been changed?

THE WITNESS: No.

THE COURT: And then even the signature line could not be reproduced?

THE WITNESS: If it was a different department manager assigned, it would be a different signature.

THE COURT: And I'm a little confused because the body of the letters are different, but you referred to something that remained the same. I'm not understanding what you're saying.

THE WITNESS: It's still a clearance letter. It still explains that this is a letter of clearance for employment.

THE COURT: The person has a letter of clearance?

THE WITNESS: Yes.

THE COURT: So that will always be the same?

THE WITNESS: Yes.

THE COURT: But the wording could be --

THE WITNESS: Yes, that's correct. The wording can be different, bit it's to let them know the clearance for employment, even though some of verbiage could change slightly. They'd still know it's a letter for clearance.

These excepts from the August 10, 2011 transcript show three things. First, that the document in question was recreated. Second, that it was recreated at the request of Amy Landau, from the Office of the Attorney General. Third, that the information as to the date of clearance could have been shown by another report the Department failed to produce.

4. **The State introduced a fraudulent document at the deposition.**

The State's strategy at the deposition was clear. The problem for the State was that there was simply no evidence that Melissa McCue was responsible for submitting screening applications or otherwise dealing with the Department of Health to complete those screenings. The State realized this going into the deposition, but saw an opportunity to work around the problem by introducing a

fabricated document (Exhibit 15) and attempting to force Dr. Kaur to answer questions about it.

After the State had elicited numerous statements from Dr. Kaur regarding Melissa McCue, the State introduced an exhibit marked Exhibit 15. RP 0131. Exhibit 15 purported to be a letter sent from the Department of Health to Melissa McCue in October 2006 advising that Theresa Muth, one of Imagine's former caregivers, did not have any disqualifying convictions. The deposition transcript makes clear what this document what supposed to prove: that Melissa McCue was involved with criminal history screenings during the relevant time period, and that Ken Sangha and Diane Nunn were not exclusively responsible. Consistent with its general approach to the deposition, in the minutes leading up to the introduction of Exhibit 15, the State asked Dr. Kaur several questions about what Melissa McCue's role was in criminal history screenings, including why McCue's signature was on certain documents relating to CCHSP screenings that were provided to the AG's office, and whether McCue had the authority to sign those documents. (Kaur Depo. at 130, 132-133, 137, RP 0127-128.) After showing Dr. Kaur Exhibit 15, the only substantive question the State was able to ask before Counsel for Imagine ascertained that fraud was being committed was: "But my question is, why was this being addressed to Melissa McCue in October of '06, if you know?" (*Id.* at 139:3-5, RP 0129.)

The State's goal, which would have been very effective, was to allow Dr. Kaur to deny Melissa McCue's involvement in criminal history screenings throughout the deposition, and then to spring a smoking gun document upon Dr. Kaur to tear down her credibility. The problem is, the document was a fake. Dr. Kaur's reaction when presented with the document was surprise. (Kaur Depo. at 139:9-11, RP 0129.)

The document contained various irregularities that were immediately apparent. First, and most obviously, although the letter was dated October 23, 2006, its letterhead listed Susanna Martinez as Governor. As most people know, Bill Richardson was Governor in 2006. Second, the recipient address was one that Imagine did not acquire until around 2010. When these irregularities became apparent, Imagine's Counsel forcefully objected to the document. (Kaur Depo. at 139:12 to 140:25, RP 0129.) Despite the highly offensive nature of the State's conduct, however, Imagine's Counsel invited the State to finish its deposition. (*Id.* 145:8, RP 0130.) The State, however, quickly concluded the deposition.

5. The State's failed attempt to explain the fabricated document

After the deposition, Imagine was able to locate a copy of the actual letter that the State represented Exhibit 15 to be. (Exhibit 4 to Dr. Kaur's Depo., RP 0132) A direct comparison of the fabricated letter and the actual letter shows that they have only two things in common - the date, and the name of the caregiver.

Not only are the letterhead, the address, and signatures different, the body of the letter is completely different. Moreover, consistent with Dr. Kaur's testimony, the recipient of the actual letter was Karan Sangha, not Melissa McCue. The differences between the two letters show that there is no conceivable legitimate use for Exhibit 15. The original letter directly contradicts the State's attempt to lay alleged CCHSP failures at the feet of Melissa McCue, and Dr. Kaur's testimony is vindicated by this copy of the genuine letter.

Shortly after the Kaur deposition, one of the Assistant Attorneys General sent a letter to Imagine's Counsel attempting to explain the irregularities with Exhibit 15. This letter is dated March 14, 2011 and is attached to Imagine's Motion for Sanctions Against Plaintiff The State of New Mexico as Exhibit 5, RP 0133-134. Enclosed with the letter is what purports to be a fax cover sheet under which the fraudulent document was transmitted to the Attorney General's Office from the Department of Health. RP 0135-137. As troubling as the fraudulent document is, the State's letter and enclosure seeking to minimize misrepresentation aside are even more egregious.

First, the Assistant Attorney General misrepresented the reason for which the document was proffered. In his letter he states that it was marked as an exhibit:

> "for the purpose of establishing the date (October 23, 2006) Theresa Muth was shown as cleared for employment by the Caregivers Criminal History Screening Program (CCHSP) on the original letter sent to

> Imagine, which Imagine should have received in 2006. This is relevant because this individual began working for your client about May 1, 2005, but was not cleared until approximately sixteen and a half months later."

March 14, 2011 Letter at 1, RP 0133-134.

The intended purpose of the exhibit was to show that Melissa McCue was directly involved in CCHSP screening as far back as 2006, when Sangha and Nunn were still working at Imagine. This is reinforced by the Assistant Attorney General's question regarding the document: "[W]hy was this being addressed to Melissa McCue in October of '06, if you know?" RP 0129. Moreover, the questions leading up to the introduction of Exhibit 15 related to Melissa McCue's involvement in screening. RP 0129. As explained above, a substantial portion of the State's deposition questioning was dedicated to this topic. The exhibits leading up to the introduction of Exhibit 15 were organized to culminate in a proof that Melissa McCue was responsible. Conversely, the State spent very little time trying to establish the dates upon which individual Caregivers received their clearance letters. Thus, when evaluated against the deposition transcript, the representation made in the March 14, 2011 Letter (RP 0133-134) regarding the document's purpose is nothing more than self serving damage control.

Second, the March 14 Letter RP 0133-134) states that the false letter was transmitted from the Department of Health and that the fax coversheet explains the irregularities. That fax coversheet, written by a certain Walter Rodas from

CCHSP's Legal Department, as represented by the March 14, 2011 Letter, reads, in part, as follows: "In addition to the discrepancies I mentioned to you already over the phone, our letter template pulls information current on our system. That is why the letters are issued and addressed to Melissa McCue, but she may have not been the contact person at Imagine back then." RP 0133-134.

As argued during the hearing on Imagine's Motion to Dismiss, the coversheet establishes knowledge on the part of the Attorney General's Office that the exhibit was not and could not have been authentic. This was not an oversight, and the CCHSP Legal Department apparently advised them of the document's lack of authenticity. Yet the State apparently never intended to inform the witness or Imagine's counsel that the exhibit was not an accurate representation of the original, and instead represented that it was authentic. The following exchange during the deposition illustrates this point:

> **Q. I'm going to ask you to look at what has been marked as Exhibit 15. Have you ever seen this document before?**
>
> MR. JONTZ: Do you mean this specific one, or one like it?
>
> [ASSISTANT ATTORNEY GENERAL]: ***This specific document***, dated October 23, in reference to Ms. Theresa L. Muth.

(Kaur Depo. at 138:7-13 (emphasis added), RP 0129.)

Even though the Assistant Attorney Generals were advised that the document was not authentic and that Melissa McCue was not the intended recipient, they chose to include the document in their exhibit list to prove that Melissa McCue received clearance letters in 2006. Rather than offering Exhibit 15 as an exemplar of the original letter that Imagine would have received, the Assistant Attorney General, upon inquiry of Imagine's Counsel, specified that she was asking about "[t]his specific document, dated October 23rd." (Kaur Depo. at 138:12-13, RP 0129) This directly contradicts the statement in the March 14, 2011 Letter (RP 0133-134) that Exhibit 15 (RP 0131) was merely offered to establish the clearance date that would have been on "the original letter sent to Imagine, which Imagine should have received in 2006." (March 14 Letter at 1, RP 00133-135)

The following are a summary of the facts concerning Exhibit 15 (RP 0131):

1) Exhibit 15 to Dr. Kaur's deposition was created by the New Mexico Department of Health at the request of the Attorney General's Office.
2) The October 23, 2006 letter produced as Exhibit 15 is not an original document.
3) The October 23, 2006 letter was recreated by the Plaintiff for this litigation.

4) Marc Workman is an information specialist and investigator for the New Mexico Attorney General's Office in the Medicaid, Fraud and Elder Abuse Division.

5) Amy Landau, Assistant Attorney General, asked Marc Workman to prepare document packages for Arminder Kaur's deposition on March 9th.

6) Mr. Workman contacted Walter Rodas at the Department of Health when he was not able to find clearance letters for Ms. Chavez and Ms. Muth.

7) Mr. Workman was advised that the Department of Health did not keep exact copies of the letters and was advised of discrepancies.

8) Mr. Workman received copies of clearance letters for Theresa Muth and Diana Chavez with a cover letter from Walter Rodas clarifying that the letters were not copies of the original letters.

9) Although Mr. Rodas disclosed to Mr. Workman that the letters were not true and correct copies, Mr. Workman failed to disclose the information to Amy Landau.

10) The cover sheet specifically stated that although the letter was addressed to Melissa McCue, she may not have been the contact person at Imagine when the letters were issued.

11) Although Marc Workman had this critical information, he failed to provide the information to Amy Landau.

12) Marc Workman knew that the information that he was gathering was to be used at the deposition of Arminder Kaur.

13) Mr. Workman left the cover letter on his desk, failed to provide the information to the Assistant Attorney General, and allowed the Assistant Attorney General to utilize the false information at the deposition.

14) Considering his position as an investigator for the Attorney General's Office, Mr. Workman's testimony that he did not believe the information was important is not credible.

15) All actions taken by Marc Workman in preparing the documents for the deposition of Arminder Kaur were done in the course and scope of his employment with the State of New Mexico, Attorney General's Office.

16) The false letter marked as "Exhibit 15" at the deposition was utilized by the State in an attempt to impeach Arminder Kaur's testimony regarding Karen Sangha and Diane Nunn.

17) The October 23, 2006 letter is printed on incorrect letterhead, noting that the Governor is Susana Martinez.

18) The Assistant Attorney General failed to observe this discrepancy, which should have alerted her that the letter was not a true and correct copy.

19) The text of the letter, the addressee and the signature line were inaccurate.

20) The Attorney General's Office through its Assistant Attorney General admits there are issues as to whether the Medicaid Fraud Act can be enforced under these circumstances for a failure to follow regulations applicable to Medicaid providers such as the Defendant.

See Record Proper 706-709.

This chain of events warranted dismissal of the case.

6. Dismissal was the appropriate sanction

The Supreme Court has recognized that "courts must have inherent power to impose a variety of sanctions on both litigants and attorneys in order to regulate their docket, promote judicial efficiency, and deter frivolous filings." *State ex rel. N.M. State Highway & Transp. Dep't v. Baca*, 120 N.M. 1, 4, 896 P.2d 1148, 1151 (1995) (internal quotation marks and citation omitted); *Security Pacific Fin. Serv. v. Signfilled Corp.*, 1998-NMCA-046, ¶ 20, 125 N.M. 38, 45, 956 P.2d 837, 844 (explaining that New Mexico Courts may award sanctions in "instances where the other party engages in bad faith, or frivolous litigation practices before the trial court in direct defiance of its authority").

New Mexico Courts have found it appropriate to dismiss a Plaintiff's case if Plaintiff's litigation conduct was sufficiently egregious. *See, e.g., Beverly v. Conquistadores, Inc.*, 88 N.M. 119, 122, 537 P.2d 1015, 1017 (Ct. App. 1975). In *Beverly*, the New Mexico Court of Appeals affirmed a district court's *sua sponte*

dismissal of a plaintiff's complaint where plaintiff's attorney refused in a pre-trial scheduling conference to reveal the name of a proposed witness despite an impending discovery deadline and despite the Court's verbal order that counsel disclose the identity of the witness. The district court judge in *Beverly* warned plaintiff's counsel that he would dismiss the complaint if counsel refused to comply with the order to disclose the witness. Counsel continued to refuse in what the district court described as an "arrogant" fashion. Consequently, the district court dismissed Plaintiff's lawsuit with prejudice. *Id.* at 122, 537 P.2d at 1020.

In upholding the dismissal, the Court of Appeals reasoned:

> [C]ounsel did not wish to reveal the name of the witness until it would have been almost impossible for opposing counsel to depose the witness within the time remaining for discovery. When directed to disclose the name he refused. He was warned of the consequences of his refusal, but still refused to disclose the name of the witness. The trial court considered this to be extreme conduct justifying dismissal. We cannot say the trial court abused its discretion in so ruling unless we can characterize the ruling as clearly untenable or not justified by reason . . . . In the circumstances of this case we cannot say the trial court's dismissal was untenable or unreasonable.

Id. at 122, 537 P.2d at 1020. The Court of Appeals also noted that a single instance of bad conduct may justify dismissal as a sanction where that conduct is sufficiently extreme to warrant dismissal. *See id.* at 122, 537 P.2d at 1020.

Judge Huling explained her reasoning for dismissing the case at the September 14, 2012 hearing whereby she stated[3]:

> THE COURT: Thank you for your presentations today and August 10th. Also August 15th. I told you I would defer on the motion for summary judgment until I had heard all the evidence with regard to the motion for sanctions, and there are several matters that need to be addressed.
>
> First of all, I'm glad that you did admit that there is some question as to whether or not this action can proceed, and that is one of the reasons the Court deferred on the motion for summary judgment. Because, as I indicated at the time of the motion for summary judgment hearing, there is really no evidence here of fraud, which is usually what the act is intended to prohibit, fraud. We don't have that here. 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 sancti°ns. And in saying that, therefore, you know motion for summary judgment, even without sanctions, could be granted in this case arguably.
>
> With regard to the motion for sanctions, why I stopped you earlier, ms. Landau, with regard to your examination of Dr. Kaur is because in your tone in examining her with regard to these two letters, it was almost as though you didn't recognize just how bad this is. This is not her mistake. This is, if it is a mistake, it's the state's mistake; it's the Department of Health's mistake; it's the AG office's mistake; and because it is clear, this letter should have never been produced in this litigation. Never. And I understand,

[3] Advantageous reiterates that the September 14, 2011 hearing transcript is being requested to be added to the Record Proper.

Ms. Landau. Do I think you are this devious attorney who knew that this was a letter that had been falsely created, and that you were going to use this evidence of Melissa McCue against the defendant, and that you were so cold and calculating that that is what you did? No. okay?

And it seems when you were trying to defend this case, part of it was -- I felt that you were trying to defend yourself. But it goes further than you. It goes to the Department of Health. It goes to the AG's office. It goes to whether or not the court can trust documents from the Department of Health. It is not as though this is the only case pending for the Department of Health. What concerns me is that the AG's Office has to understand, and you have indicated that first, I think today, this is a serious matter. The AG's office has power. I mean power. And we have to be able to trust that the AG's office, in defending cases or prosecuting cases against individuals, that the documents they produce are legitimate documents.

And I understand. That's why I stopped you. There is testimony here as to how this document was created. It's clear this document is a false document. I saw you object to the word "fake," but it doesn't matter. It's a false document. It created all these problems. And I'm looking at it, and I know you said, "I never saw Susana Martinez." I'm sorry, Susana Martinez's name is clearer than Bill Richardson's name on the real letter. Bill Richardson's name on the exhibit is smaller than Susana Martinez's name. It's right there above Melissa McCue.

You tried to point out, well, this doesn't matter, the fact that this letter is not accurate. But the fact that this letter went to Melissa McCue as opposed to Karan Sangha goes to the defense in this case. It is the issue in the case. It is not some matter that is not important. And it's clear, even though the argument from the state

is, Well, essentially the critical information is there, that is not -- we all know that is why you asked about Rules of Evidence. We all know that that letter could never be introduced in the case without agreement of both counsel, without total explanation as to what it is.

It is important that the Department of Health and also the AG's Office knows all the way to the top that this can never happen again. Because if the Court has to question, is this really a legitimate document or is it one that is created, everyone that you represent -- the state should know: Do not create these documents. Do not ever again create the document. If you get an IPRA request that says, "Produce the document," if they do not exist, you don't create them. You don't create them with a changed template. what you create came out, I guess in Exhibit 1, in the other case. If all you have is the computer printout that says, "This is the information," that is the information that is produced. That is the information that is produced in litigation. You cannot produce documents that are questionable. There is no question that this never should have happened. And everyone who has anything to do with producing documents should be advised immediately: Do not do this.

So do I think you have learned a valuable lesson? Yes, think you have learned a valuable lesson. But everyone -- the state needs to learn a valuable lesson, Department of Health needs to learn a valuable lesson, and the AG's office needs not to just say, "I'm sorry for this." This is major for the AG's office. we have to be able to rely on the documents created by the AG's office.

And there is case law that says even one single instance of bad conduct can be sanctioned, if it's sufficiently egregious. And it's clear, from listening to testimony, they did create a document. They even had a document that says, this is a phony document, and they don't even bother giving it to the attorney to let the

attorney know, By the way, this is a phony document we just created.

And I realize you may object to the term "phony," but that is what it is. And it has to be clear, it can never happen again. And I think the way this court can make it clear that it should never happen again is to grant summary judgment in this case. And the AG's office should be thankful that is the only sanction in this case.

But this conduct, it goes further than this particular case. People in this state have to rely on the documents created and produced by the AG's Office. And so this court is granting the motion for summary judgment and dismissing the case with prejudice. And if you want findings, send them to me. I'm happy to do findings in the case. or you can just accept this ruling of the Court. It is up to you. But I think the message -- that is the best way for this court to send the message that this just can't happen again.

And in this particular case, what concerns me is it's not even a strong case. It's not one of those cases that involve some serious wrongdoing on the other side. so it's not even necessary for this type of document to be produced in this case. So I know, Ms. Landau, you are concerned with regard to whether or not this court believes that this was created on your part. Personally, no, I don't think you created it. But I think you shouldn't have missed the words "Susana Martinez, Governor," right above the name of the person you are focusing on.

And I think that Mr. Workman, may be sorry, and everyone else may be sorry, but this can never happen again. I hope I never, ever hear again any state agency involving the AG's Office or that documents have been recreated that were not the actual documents. And I certainly hope I haven't had any

> cases where those types of documents have been part of the case.
>
> So my message is let everybody know: Don't let this happen again. This case is dismissed. Summary judgment is granted.

In this case, the State engaged in bad faith litigation tactics that were dishonest. When a litigant is using its access to State departments to manufacture the proof it needs to win its case, a serious break down of the adversary system and of due process occurs. The problem is compounded when the litigant engaging in the abuse is the State itself. For these reasons, the dismissal of the case was warranted and should be upheld by this Court.

III. The trial court properly granted the summary judgment motion.

A. Standard of Review.

Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, 720, 242 P.3d 280, 287, citing *Montgomery v. Lomas Altos, Inc.*, 207-NMSC-002, ¶ 16, 141 N.M. 121, 150 P.3d 971. An appeal from the grant of a motion for summary judgment presents a question of law and is reviewed de novo. *Id.*

B. The District Court properly granted Defendants Motion for Summary Judgment filed on June 1, 2011.

1. Imagine complied with its statutory and regulatory responsibilities.

As Dr. Kaur testified, during the relevant time period, she relied on the certification of Karan Sangha that Imagine was in compliance with CCHSP. (Kaur Depo. 110-113, RP 0124). The State argues that the caregivers in question provided and were paid for some services before they received clearances from CCHSP. Under the plain language of the governing regulations, however, that is not a violation of CCHSP.

The Medicaid Fraud Act (hereinafter "MFA") requires a showing of "intent" and/or knowledge for each of the prohibited acts. NMSA §§ 30-44-7 through 30-44-7 (setting forth prohibited acts). In order to prove fraud, the state must have demonstrated that Imagine made a "misrepresentation of fact, known to be untrue by [Imagine], and made with an intent to deceive and to induce [The State] to act upon it with [The State] relying on it to [its] injury or detriment." *Wilde v. Westland Development Co. Inc.*, 2010-NMCA-085, ¶ 50, 241 P.3d 628, 641. *See also Saylor v. Valles*, 2003-NMCA-037, 63 P.2d 1152; and *Delgado v. Costello*, 91 N.M. 732, 580 P.2d 500 (N.M. Ct. App. 1978). The State was never able to do that.

There are no acts even alleged that meet this basic definition of fraud. The records contain no knowingly false statements made by Imagine upon which the State could have relied. Rather, the State wanted the Court to imply fraud from the late submission of paperwork. Specifically, it was attempting to look to boilerplate language in a contract executed before the claims were even submitted to support its theory that Imagine submitted fraudulent claims. The State appeared to be alleging a cause of action known in the federal courts as "implied certification," which has been routinely rejected under circumstances like those involved here. The State further argues that Imagine was required under 42 CFR 455.18 to certify "that the information was 'true, accurate, and complete,' and that 'any falsification, or concealment of a material fact, may be prosecuted under Federal and State laws.'" (State's Response to Defendant's Motion to Dismiss at 4-5, RP 0087-88.) The only court to address 42 CFR 455.18 has concluded that there is no cause of action under that regulation or the Federal False Claims Act ("FFCA"),[4] 31 U.S.C. § 3729, for "a health care provider's disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe." *See United States ex. rel. Bonin v. Cmty. Care Ctr. of St. Martinville, LLC*, 2008 WL 2113055, at *11-*12

[4] The FFCA differs from the MFA, but covers similar activities - particularly, the "knowing[]" presentment of a "false or fraudulent claim for payment or approval." *See* 31 U.S.C. § 3729(a)(1).

(W.D. La. May 16, 2008). Here, the State owed Imagine for services, and cannot have them for free.

Federal courts have limited the scope of the FFCA in the health care context because the FFCA "was not designed for use as a blunt instrument to enforce compliance with all medical regulations." *Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001). The MFA was not intended to be used as a cudgel to punish provider agencies who submit a late form or who commit some other ministerial error. On the contrary, Caregivers Criminal History Screening Act (hereinafter "CCHSA") contains its own enforcement mechanism. The CCHSA gives authority to the Department of Health to promulgate regulations to "provide [] sanctions for noncompliance" with the CCHSA, and states that "failure to comply with the requirements of this section are grounds for the state agency having enforcement authority with respect to the care provider to impose appropriate administrative sanctions and penalties." NMSA §§ 29-17-5(B), 29-17-5(L). The regulations state that the department of health may "impose appropriate administrative sanctions and penalties." N.M.A.C § 7.1.9.8. Accordingly, violations of the CCHSA may be remedied under the CCHSA through administrative mechanisms, not through the MFA.

The second problem with the State's case was that, even assuming such a radical brand of fraud is recognized in New Mexico, the State never established

knowing violations of CCHSP. The State relies on the following facts, as applied to its incorrect interpretation of the law, to prop up its fraud case: (i) caregiver time was billed for services rendered during a given period of time; (ii) the caregiver's CCHS clearance was not issued until after those services were billed (or clearance was not issued before the caregiver left Imagine). *Ergo*, says the State, Imagine engaged in fraud. The State's summary of its fraud case is set forth in a spreadsheet attached as Exhibit A to its Complaint (RP 0005-18). That spreadsheet lists six caregivers and gives purported dates of clearance as follows:

1) AC ("5/18/2005")
2) RD ("No criminal history screening was completed for this caregiver")
3) AO ("No criminal history screening was completed for this caregiver")
4) TM ("10/23/2006")
5) SS ("No criminal history screening was completed for this caregiver")
6) DC ("2/10/2006")

(Exhibit A to Complaint, RP 0005-18) The State continues to rely on Exhibit A and has cited to it continually throughout this lawsuit. The spreadsheet, however, ignores key provisions of the law. The CCHSA and its associated regulations do not require "completion" of criminal history screenings before a caregiver begins work. Rather, they require that caregivers "submit" applications within 20 days from the first day of employment. *See* NMAC 7.1.9.8(F). The regulations implementing CCHSA expressly permit caregivers who have submitted criminal history screening applications to work under "conditional supervised employment pending receipt of written notice given by the department as to whether the

applicant, caregiver or hospital caregiver has a disqualifying conviction." NMAC 7.1.9.8(C).

As much as the State wishes it were different, the State must concede that these regulations are phrased it terms of submission to screening. The only competent evidentiary statements on this topic in the record are those of Dr. Arminder Kaur stating that Imagine was in compliance with CCHS. (Kaur Depo. 111-113, RP 0124.) Karan Sangha was responsible for CCHSP compliance and certified to Dr. Kaur that Imagine was in compliance at all times. (Kaur Depo. 111-113, RP 0124.) The State offers nothing to rebut this, although it appears to rely on the Consolidated Online Registry ("COR")[5] for an inference that the State did not receive timely applications. Such an inference is not warranted because the COR only contains information when the State agency in charge processes and enters that information. (Exhibit F to Defendant's Motion for Summary Judgment, M. Workman Depo. 15:16-23, RP 0386.)

Imagine also had multiple experiences in which the Department of Health has lost applications. In some instances, Imagine had to make multiple submissions before any data will appear in the COR. (Exhibit A to Defendant's Motion for Summary Judgment, RP 0369-371.) Imagine had to resubmit screening applications because the Department of Health misplaced them. (*Id.*) Ultimately,

[5] The COR is a database in which an individual caregiver's clearance history can be searched online.

the COR cannot give dates of submission. Moreover, it does not reliably reflect dates close to the first submission, given the instances of loss and delay in processing.

Realizing it had a problem with the submission/completion distinction, the State sought discovery directed at submission dates. Essentially, the State sought to shift the burden of proof in this lawsuit to Imagine. Imagine has produce all the documents it can locate, but proving a date of submission for caregivers who applied five or six years ago and who have not been affiliated with Imagine for several years is not feasible, given that the individual responsible for CCHSP compliance during the relevant time period left Imagine and took clients, caregivers, and documents with him Understandably, date of submission can be difficult to verify given the passage of so much time. The difficulty in confirming such dates is another reason why the severe penalties the State seeks here are unwarranted and unjust. The State wants business-ending penalties for alleged administrative errors that occurred half a decade ago and which are impossible to prove or disprove.

This is why the MFA is a poor fit for the facts of this case, as alleged by the State. If the State felt that Imagine has ever been lax in its CCHSP compliance, it could pursue administrative penalties and other measures to bring Imagine into compliance, as the CCHSA provides. The reality here is that Imagine has an

outstanding record of CCHSP compliance and the State is trying to put it out of business for specious, unproven CCHSP violations that are alleged to have occurred years ago while a former partner and now competitor to Imagine was in charge of CCHSP compliance.

As it is, even if the COR receipt date is taken to approximate date of submission, the State has not relied on that COR date. At his deposition, in contradiction to the actual text of the spread sheet he created, the State's investigator testified that he drew up Exhibit A to the Complaint (RP 0005-18) based on information he got from the COR for dates upon which applications were received. (Workman Depo. 12:9-22, RP 0385.) His testimony cannot be squared with the actual document. They show dates of receipt as follows:

1) AC (4/27/2005)
2) RD (2/13/2006)
3) AO (None listed for Imagine)
4) TM (9/19/2006)
5) SS (9/19/2006)
6) DC (2/10/2006)

(Exhibit G to Imagines' Motion for Summary Judgment, containing CORs for six caregivers, RP 0388-393) By comparing the information from these COR reports to the information in the State's spreadsheet, one can see that the State obviously did not rely on submission or receipt dates as reflected in the COR. If the State had relied on the COR, its spreadsheet would look much different. Workman's testimony that he created the spreadsheet from the COR therefore is not congruent

with the information actually in the spread sheet. The State is relying on "completion" despite the plain language of the regulations.

Applying the actual language of the regulations, using the date listed in the COR as a proxy for submission, as the State seeks to do, and applying the twelve-month safe harbor discussed more fully in Imagines' Motion to Dismiss filed on March 9, 2011,[6] all have a large impact on the State's spreadsheet.

First, TM would have the benefit of the 12-month safe harbor because, although she signed a contract with Imagine on May 1, 2005 (according to the State's spreadsheet), the COR shows that she was previously cleared with another care provider May 4, 2004. (TM COR) Because she was cleared within the previous 12 months, she was not required to submit to a nationwide criminal history screening. None of the amounts sought for her are recoverable, even if Imagine did not submit an application. The same goes for RD. The State's spreadsheet shows him signing a contract with Imagine on March 29, 2005. The COR shows that RD was cleared with LLCP on March 31, 2004, again within the 12 months previous to signing his contract with Imagine. (RD COR) These two

[6] At the time these caregivers at issue in this case signed their contracts, the applicable regulation, NMAC § 7.1.9.8(C) excepted from the requirement for a nationwide criminal history screening "applicants for whom a determination was made under the requirements of the [CCHSA] within the previous 12 months that the applicant's criminal history record did not reflect a disqualifying conviction . . . "

caregivers account for $143,530.04 of the amount the State sought. This amount, at a minimum, must be eliminated from the calculation.

Second, even for caregivers that would not, under the evidence in the record thus far, benefit from the safe harbor, application of COR dates would eliminate thousands of dollars from the State's calculus. For caregiver SS, the COR shows that an application was received on September 19, 2006. That date triggers conditional employment. Thus, all amounts billed after that date should be off the table, even according to the State. If the safe harbor provision is ignored, the amounts for RD and TM would still have to be reduced substantially to account for submission (more accurately here, processing into the COR) date rather than "completion." It is astonishing that the State has refused to recognize this, particularly given that the State's own investigator testified that the operative date should be submission, not completion, and that conditional employment should last the until the criminal history screening is complete (Workman Depo. 43:12 through 44:4, RP 0387.) The State's investigator also recognized that applications can take "a long time," including "up to a year." (Workman Depo. 42:18 through 43:4, RP 0387.) This admission means that the State knows the Department of Health can cause extensive delay, but still insists on seeking recovery based on "completion." The perverse incentive such a regime, if real, would create is obvious.

2. There Was No Implied Certification

As was also argued in Imagine's Motion for Summary Judgment, the State appeared to be relying on an "implied certification" theory of liability that has been routinely rejected by the federal courts in the context of the FFCA. Under those cases, liability may only be established if the "underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid." *See Mikes*, 274 F.3d at 700; *see also U.S. ex. Rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 2007 WL 2713913, at *2 (D. Utah Sept. 12, 2007) ("Both the implied and the express theories of false certification require that the duty to certify be express in the statute alleged to have been violated."). Courts have also rejected attempts to use an alleged breach of contract to impose liability under the FFCA. *See U.S. ex rel. Coppock v. Northrup Grunman Corp.*, 2003 WL 21730668, at *11-*13 (N.D. Tex. July 22, 2003). The reason courts have substantially restricted the ability of plaintiffs to bring implied certification claims is that there are "administrative and other remedies for regulatory violations." *See U.S. ex rel. Connor*, 543 F.3d 1211, 1222 (10th Cir. 2008) (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996)). Statutes like the MFA are "not designed for use as a blunt instrument to enforce compliance with all medical regulations." *See Mikes*, 274 F.3d at 699. Plaintiffs cannot bootstrap

statutes like the MFA to other claims they might have, thus subjecting defendants to unlimited liability for statements and representations that they never made.

The State identified no statute or regulation that expressly states that Imagine must certify compliance with the CCHSA, or that Imagine must comply with the CCHSA in order to be paid, and its claims therefore must fail. *See Connor*, 543 F.3d at 1222 (holding that defendant did not violate the FFCA even when it made a report pursuant to 42 CFR § 405.1803(c) stating that "the services identified in this cost report were provided in compliance with [applicable] laws and regulations" because 42 CFR § 405.1803(c) did not contain language stating that payment was conditioned on compliance with a particular statute or regulation). The only thing that the State identifies as justifying its claim is the timeliness of the CCHSA applications. That was found to be not enough by the trial court. There are administrative procedures in place to deal with violations of the CCHSA; the MFA is not intended to address the State's claims. *See Hopper*, 91 F.3d at 1267 (no claim under the FFCA when "[t]here are administrative and other remedies for regulatory violations."); Imagines' Motion for Summary Judgment at 7, RP 0365.

The bottom line in this case was that the State did owe Imagine for the services it provided. Imagine's caregivers had no criminal convictions, and

provided quality care for Imagine's clients. The State cannot have those services for free.

The fact that the State has never identified any damages that it has suffered highlights why this is not an MFA case. Imagine received no financial benefit from any applications that may have been submitted late. Because there is no financial motive for Imagine to have submitted applications late, this Court would have to make an unwarranted "inferential leap" that Imagine's management orchestrated a campaign to deceive the State. *See U.S. ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999). Thus, even if there were violations of the CCHSA, they were merely technical, and cannot give rise to a claim under the MFA. *See id.*

The State also argues that Imagine violated 31 USC § 3729, which is part of the FFCA. First, 31 U.S.C. § 3729 was not alleged in the complaint. Second, the FFCA only permits recovery by "the United States Government." *See* 31 U.S.C. § 3729(a). Additionally, the State also says that each claim that Imagine submitted had to comply with 42 CFR §§ 455.18 and 455.19. However, those regulations impose duties on the State, not on Imagine, so Imagine is incapable of violating the regulations. 42 CFR § 455.18 requires the State to include certain language on claims forms:

> Except as provided in § 455.19, the agency must provide that all provider claims forms be imprinted in boldface type with the

> following statements, or with alternate wording that is approved by the Regional CMS Administrator:
>
> (1) "This is to certify that the foregoing information is true, accurate, and complete."
>
> (2) "I understand that payment of this claim will be from Federal and State funds, and that any falsification, or concealment of a material fact, may be prosecuted under Federal and State laws."

42 CFR § 455.18.

The State claims that by virtue of CFR § 455.18, Imagine certified that the claim information for each of the claims it submitted was "true, accurate, and complete," and acknowledged that "any falsification, or concealment of a material fact, may be prosecuted under Federal and State laws." But the State produced no evidence that any of the claims Imagine submitted to the State contained this language.[7]

Because no statute or regulation requires Imagine to certify compliance with the CCHSA in order to be paid, the trial Court properly found that the State's claims failed.

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[7] The State also says that Imagine was required to comply with 42 CFR § 455.19, but that regulation merely says that as an alternative to 42 CFR § 455.18, the State "may print the following wording above the claimant's endorsement on the reverse of checks or warrants payable to each provider: "I understand in endorsing or depositing this check that payment will be from Federal and State funds and that any falsification, or concealment of a material fact, may be prosecuted under Federal and State laws." It is impossible to see how Imagine could have violated this regulation.

3. Imagine Never Violated the MFA, or Any Other Statute.

No intent was found. The MFA expressly uses the word "intent":

"Medicaid Fraud consists of . . . presenting or causing to be presented for allowance or payment *with intent* that a claim be relied upon for the expenditure of public money any false, fraudulent, excessive, multiple or incomplete claim." NMSA § 30-44-7(A)(3) (emphasis added).

The New Mexico MFA is not unique in this regard. Under state Medicaid fraud acts, "[i]ntent is the most litigated issue." *See* Robert Fabrikant, et al., *Health Care Fraud: Criminal, Civil and Administrative Law* § 3.03 (2011). The FFCA does not use the word "intent," and even that statute requires proof of mens rea. *See U.S. ex rel. Gross v. AIDS Research Alliance-Chicago*, 415 F.3d 601 (7th Cir. 2005) (noting that plaintiff must prove "(1) the defendant made a statement in order to receive money from the government, (2) the statement was false, and (3) the defendant knew it was false."); Joel Androphy, 6 *White Collar Crime* § 42.21 (2d ed. 2011) (noting that there is a mens rea requirement in the FFCA, even though there is no requirement of specific intent).

Thus, it is plain that the State must establish that Imagine intended to present a false claim. But in this case, there were no false claims. The State produced no competent evidence that Imagine violated either the CCHSA or the MFA. Imagine was therefore entitled to summary judgment in its favor.

CONCLUSION

For the foregoing reasons, Advantageous Community Services, LLC d/b/a Imagine, LLC respectfully requests that this Court uphold the finding of fact and conclusions of law and final judgment rendered by Judge Huling in the trial court.

STATEMENT REGARDING ORAL ARGUMENT

Defendant/Appellee requests oral argument. Oral argument may assist the Court in understanding the record and facts, assessing the positions of the parties and disposing of the merits of this appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2012, a true and correct copy of the foregoing was e-mailed to below listed counsel.

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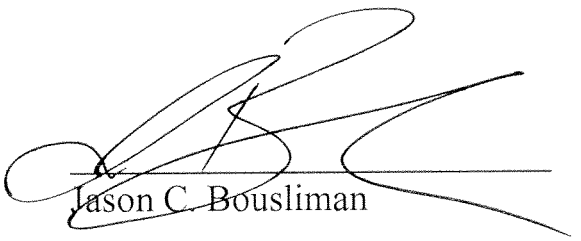

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