COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
APR 26 2012
Wendy F. Jones

THI OF NEW MEXICO AT LAS CRUCES, LLC d/b/a Las Cruces Nursing Center

Petitioner/Appellant,

vs. No. 31,588

NEW MEXICO HUMAN SERVICES DEPARTMENT

Respondent/Appellee.

PETITIONER/APPELLANT'S BRIEF IN CHIEF

On Appeal from the Hon. Barbara J. Vigil, District Court Judge
First Judicial District Court, County of Santa Fe
Case No. D-101-CV-200903533

Marcy Baysinger, Esq.
Attorney No. 7868
PREGENZER BAYSINGER WIDEMAN & SALE
2424 Louisiana Blvd, NE, Ste. 200
Albuquerque, New Mexico 87110
Telephone: (505) 872-0505
Facsimile: (505) 872-1009
Local Counsel for Appellant

Katie Maxwell, Esq.
SCHUTJER BOGAR
100 Highland Park Village, Ste 246
Dallas, TX 75205
Telephone: (214) 295-3363
Facsimile: (214) 723-7537
Attorney for Appellant
Admitted Pro Hac Vice

Oral argument is requested in this matter

TABLE OF CONTENTS

Table of Authorities ii

I. Introduction 1

A. Background 1

B. Summary of Proceedings 3

II. Standard of Review 5

III. Legal Argument 5

A. The District Court Erred in Finding that THI Lacked Standing to Pursue Medicaid Eligibility on behalf of Applicant, Miguel Zuniga 5

i. THI has Standing to Appeal the Denial of Mr. Zuniga's Application for Medicaid Benefits Pursuant to State and Federal Law 6

ii. NMSA Section 27-2-21 Does Not Bar THI from Appealing the Denial of Mr. Zuniga's Medicaid Application 8

B. Failure to Allow THI as the Assignee of Mr. Zuniga's Right to Pursue Medicaid Benefits Violates the Due Process Clause of the Fourteenth Amendment of the Constitution 13

C. The District Court erred in Finding that THI's Standing to Pursue Medicaid Eligibility on behalf of the Applicant, Miguel Zuniga, Was Rendered Moot By His Death 15

D. The District Court Erred in Revising Its May 13, 2011 Order 20

IV. Conclusion 21

V. Request for Oral Argument 22

TABLE OF AUTHORITIES

United States Supreme Court

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1974).........13, 14

Goldberg v. Kelly, 397 U.S. 254 (1970) 11, 14

Grannis v. Ordean, 234 U.S. 385, 394 (1914)..13

United States Court of Appeals

Alessi v. Pennsylvania, Dep't of Public Welfare,
893 F.2d 1444, 1453 (3d Cir. 1990)..14

FDIC v. Blesdoe, 989 F.2d 805, 810 (5th Cir. 1993)..................................10

Hermann Hosp. v. MEBA Medical & Benefits Plan,
845 F. 2d 1286, 1289 (5th Cir. 1988)...11, 12

James v. Richman, 547 F.3d 214 (3d Cir. 2008)...............................16, 17

Kelly v Railroad Retirement Board, 625 F.2d 486 (3d Cir. 1980)...................14

Lankford v. Sherman, 451 F.3d 496, 510 (8th Cir. 2006)........................7, 10

Raper v. Lucey, 488 F.2d 748 (1st Cir. 1973)..14

Ressler v. Pierce, 692 F.2d 1212 (9th Cir. 1982)......................................14

United States District Court

Butland v. Bowen, 673 F. Supp. 638 (D.Mass. 1987)................................14

Lewis v. Alexander, Case No. 2006-3963
(E.D. Pa. Aug. 23, 2011) 7, 9, 10

New Mexico Case Law

Gunaji v. Macias, 130 N.M. 734, 737 (2001)....................................15, 16, 18

Investment Co. of the Southwest v. Reese, 117 N.M. 655 (1994) 10, 11

Mower v. Rusk, 95 N.M. 48, 51 (N.M. 1980)...15

New Energy Econ., Inc. v. Shoobridge, 149 N.M. 42, 48 (2010).....................18

Ponder v. State Farm Mut. Auto. Ins. Co., 129 N.M. 698, 701 (2000)................5

State v. Sergio B., 132 N.M. 375, 378 (2002) 16

Strata Prod. Co. v. Mercury Exploration Co., 121 N.M. 622,627 (1996)...........5

Other State Courts

Bonnetti Health Care Center, Inc. v. Department of Public Welfare,
Pa. Commw. Ct., No. 1339 C.D., Simpson, R. (March 7, 2012).......................12

O'Callaghan v. Commissioner of Social Services,
53 Conn. App. 191, 200 (1999)...17

Stevens v. Ind. Dep't of Pub. Wel., 566 N.E. 2d
544, 550 (Ind. Ct. App. 1991)..17

Constitution

U.S. Const. amend. XIV § 1...13

Federal Statutes/Regulations

42 U.S.C. § 1396...8, 9, 17

42 C.F.R. § 400.203...6

42 C.F.R. § 431.206 ....6, 7, 8, 11

42 C.F.R. § 431.210 11

42 C.F.R. § 431.220 ....11, 13

42 C.F.R. § 435.906 ....11, 13

42 C.F.R. § 435.908 ....6, 7, 8, 11

42 C.F.R. § 435.912 11

New Mexico Statutes/Regulations

NMSA 1978 § 27-2-21 ....8, 9, 10, 13

NMSA § 39-3-1.1 1

NMRA Rule 1-074 1

NMRA Rule 12-505 1

I. Introduction

The issue before this Court is whether the First Judicial District Court for the State of New Mexico, County of Santa Fe (hereinafter the "District Court") erred in granting the New Mexico Human Services Department's *Motion to Dismiss on Grounds of Mootness & Lack of Standing* pursuant to its August 26, 2011 *Order Granting Motion to Dismiss on the Grounds of Mootness and Lack of Standing*, based on its determination that THI of New Mexico at Las Cruces, LLC d/b/a Las Cruces Nursing Center did not have standing to pursue Medicaid benefits on behalf of Miguel Zuniga and that the issues before the District Court were rendered moot by Miguel Zuniga's death.

A. Background

On November 10, 2008, Miguel Zuniga ("Mr. Zuniga"), a quadriplegic who required long-term skilled nursing care, was admitted to THI of New Mexico at Las Cruces, LLC d/b/a Las Cruces Health Care Center ("Appellant" or "THI"). [RP 38] At the time of his admission, Mr. Zuniga executed an Admission Agreement that assigned his right to pursue Medicaid eligibility to THI. [RP 16-27, 38] Mr. Zuniga also executed an Authorization Statement which expressly authorized THI to pursue his right to Medicaid eligibility, including but not limited to, the authority to appeal any adverse determination with respect to his Medicaid application. [RP 29-30, 38] Shortly after Mr. Zuniga's admission to THI, he

submitted an application for Medicaid benefits to the New Mexico Human Services Department ("Appellee" or "HSD"). [RP 38] On July 14, 2009, the East Dona Ana County Income Support Division office denied Mr. Zuniga's application for Medicaid eligibility due to alleged problems with his household status. [RP 38]

On October 12, 2009, THI timely appealed the denial of Mr. Zuniga's application for Medicaid benefits and requested a fair hearing on the same. [RP 38-39] On October 15, 2009, the HSD issued a letter indicating that Mr. Zuniga's case would be dismissed if the HSD did "not receive a request for hearing from Mr. Zuniga or his legal representative." [RP 3, 39] The letter also stated that if THI did not agree with the dismissal of its appeal, a Notice of Appeal could be filed with the District Court within (30) days of the date of the letter. [RP 3, 39] THI timely appealed the HSD's denial to the District Court on October 26, 2009. [RP 1, 39] In its appeal to the District Court, THI specifically contended that the HSD committed an error of law when it dismissed the appeal and fair hearing request filed by THI and that the HSD's decision to dismiss the appeal without a fair hearing was in violation of federal and state law, as well as its own regulations. [RP 37-43] Mr. Zuniga died on September 28, 2010. [RP 73, 75] At the time of his death, the HSD had not held a hearing on the denial of Mr. Zuniga's Medicaid application. [RP 80]

B. Summary of Proceedings

On May 13, 2011, the District Court issued a *Court Order Requesting Clarification of the Record as to New Mexico Human Services Department's Denial of a Fair Hearing* ("May 13, 2011 Order"), finding in favor of THI. [RP 57-58] Specifically, the Court found that if the HSD had not conducted a hearing on the denial of Mr. Zuniga's Medicaid benefits since October 2009, THI's appeal must be considered timely and the HSD's Motion to Dismiss must be denied. [RP 58] Assuming that no hearing had been conducted, the District Court further ordered that THI's appeal be granted, that the HSD's denial of THI's request for a fair hearing be reversed, and that THI be allowed to proceed with its appeal on the merits. [RP 58] The District Court directed THI to prepare an order reflecting its ruling and submit the same to HSD's counsel and then to the District Court for proper entry. [RP 58]

The HSD filed a Response to the District Court's May 13, 2011 Order, wherein it confirmed that it had not conducted a hearing on the denial of Mr. Zuniga's benefits since October 2009. [RP 59-60] The HSD did not file a motion for relief from the May 13, 2011 Order. [RP 107] Accordingly, THI prepared the order requested by the District Court and submitted the same to counsel for the HSD. [RP 64-67] However, counsel for the HSD refused to sign THI's order in violation of the District Court's directive. A presentment hearing on THI's order

was scheduled for August 24, 2011. [RP 76] Prior to the hearing, but more than two (2) months after the entry of the District Court's May 13, 2011 Order, the HSD filed another Motion to Dismiss on the grounds of mootness and standing. [RP 73-74] This Motion to Dismiss did not request review of the entered May 13, 2011 Order. [RP 73-74] Nonetheless, at the August 24, 2011 presentment hearing, the District Court granted the HSD's Motion to Dismiss, overturning its May 13, 2011 Order and dismissing THI's appeal with prejudice. [RP 102-103] A written order reflecting this ruling was subsequently issued on August 26, 2011 ("August 26, 2011 Order"). [RP 102-103]

THI subsequently filed *a Motion for Relief from Order Granting Motion to Dismiss on Grounds of Mootness and Lack of Standing* ("Motion for Relief") from the District Court's August 26, 2011 Order. [RP 104-108] The HSD did not file any objection to THI's Motion for Relief. Therefore, THI submitted a proposed order on its Motion for Relief and a presentment hearing was scheduled for November 14, 2011. [RP 110-111, 115] Nearly two (2) months after the Motion for Relief was filed, the HSD filed a *Motion to Dismiss for Lack of Jurisdiction.* [RP 116-119] Despite the fact that HSD never filed an objection to the Motion for Relief, the District Court denied THI's Motion for Relief at the presentment hearing held on November 14, 2011, and issued an order reflecting the same on November 28, 2011 ("November, 2012 Order"). [RP 120]

II. Standard of Review

Under New Mexico law, the appellate court will give deference to the findings of fact and review the conclusions of law *de novo*. *See, e.g.*, *Strata Prod. Co. v. Mercury Exploration Co.*, 121 N.M. 622, 627 (1996). Additionally, appellate courts are free to review the application of law to facts *de novo*. *Ponder v. State Farm Mut. Auto. Ins. Co.*, 129 N.M. 698, 701 (2000) ("[W]e use the substantial evidence standard for review of the facts and then make a de novo review of the trial court's application of the law to those facts…").

III. Legal Argument

A. The District Court Erred in Finding that THI Lacked Standing to Pursue Medicaid Eligibility on Behalf of the Applicant, Miguel Zuniga.

THI has standing to pursue Medicaid benefits to challenge the denial of said benefits. Mr. Zuniga executed an Admission Agreement wherein he assigned his right to pursue Medicaid eligibility to THI. [RP 16-27, 38] Specifically, the Admission Agreement provides that, "[i]n consideration for services rendered by [THI] to [Mr. Zuniga], [Mr. Zuniga] hereby assigns to [THI], [his] right to reimbursement from Medicaid for services rendered by [THI] and authorizes [THI] to receive payments from Medicaid pursuant to this assignment." [RP 21] Moreover, Mr. Zuniga also executed an Authorization Statement which expressly provides that "[THI], its employees, agents, and/or Schutjer Bogar LLC are irrevocably authorized to take those actions that are required to secure Medicaid

benefits on [Mr. Zuniga's] behalf, including establishing [his] eligibility and filing necessary appeals to secure such benefits…." [RP 29] In light of these facts and for the reasons set forth in greater detail below, the District Court's determination that THI lacked standing to pursue the instant appeal is contrary to state and federal law and must be reversed.

i. THI has Standing to Appeal the Denial of Mr. Zuniga's Application for Medicaid Benefits Pursuant to State and Federal Law.

New Mexico Administrative Code § 8.200.430.12 provides that the right to a fair hearing applies to applicants and recipients of Medicaid programs who believe that the HSD has acted in error. Pursuant to federal law, as the party pursuing Medicaid benefits on Mr. Zuniga's behalf, THI is the applicant for the purposes of pursuing an appeal. The federal regulations define an applicant as an "individual whose written application for Medicaid has been submitted…" and include an individual "whose application is submitted through a representative or a person acting responsibly for the individual." 42 C.F.R. § 400.203. The federal regulations expressly permit an applicant to have anyone of their choice assist them in the Medicaid application process. *See* 42 C.F.R. §§ 431.206(b)(3) and 435.908. Specifically, 42 C.F.R. § 431.206(b)(3) requires that state agencies inform every applicant "[t]hat he may represent himself or use legal counsel, a relative, a friend, or other spokesman." The federal regulations do not limit the

right of an applicant to authorize a third party to pursue Medicaid benefits on his behalf. Any assertion by the HSD or the District Court that Mr. Zuniga is limited in his ability to designate someone to pursue Medicaid benefits on his behalf is preempted by the above-stated federal regulations. *See, e.g., Lewis v. Alexander*, Case No. 2006-3963 (E.D. Pa. August 23, 2011) (holding that where a state Medicaid law conflicts with a federal Medicaid statute or regulation, the state law is unenforceable); *Lankford v. Sherman*, 451 F.3d 496, 510 (8th Cir. 2006) (explaining that "[w]hile Medicaid is a system of cooperative federalism, the same [preemption] analysis applies; once the state voluntarily accepts the conditions imposed by Congress[,] the Supremacy Clause obliges it to comply with federal requirements").

Federal law unequivocally permits an applicant to authorize a third party to pursue Medicaid benefits on his behalf, including any appeals. *See* 42 C.F.R. §§ 431.206(b)(3) and 435.908. As applied to these facts, the Admission Agreement and the Authorization Statement executed by Mr. Zuniga explicitly authorize THI to pursue Medicaid benefits on his behalf, including the ability to participate in the appeals process, and falls squarely within the parameters of the rights of an applicant set forth in 42 C.F.R. §§ 431.206(b)(3) and 435.908. As such, the District Court's decision to disregard the authority expressly bestowed upon THI

by Mr. Zuniga and preclude THI from pursuing the appeal on behalf of Mr. Zuniga is in contravention of federal law.

ii. NMSA Section 27-2-21 Does Not Bar THI from Appealing the Denial of Mr. Zuniga's Medicaid Application.

In the proceedings below, the HSD advanced the position, accepted by the District Court, that NMSA § 27-2-21—which bars the assignment of public benefits—invalidates the authority expressly granted to THI by the applicant, Mr. Zuniga, to appeal the denial of his application for Medicaid benefits. That statute, however, does not apply in the instant case. The primary thrust of NMSA § 27-2-21 is directed at protecting the applicant's right to public benefits from unauthorized recipients. Specifically, NMSA § 27-2-21 provides that "none of the money paid or payable under this act shall be subject to execution, levy, attachment, garnishment, or other legal process or to the operation of any bankruptcy or insolvency law." The plain language of this provision is calculated to ensure that limited state resources intended to pay for medical and other vital care do not fall into the hands of persons such as employers, judgment creditors, or other persons who are not the intended recipients of the funds. However, facilities such as THI that provide care and services to applicants are expressly authorized by federal law to receive such benefits. *See* 42 C.F.R. §§ 431.206(b)(3) and 435.908. Section 1396 of the Social Security Act explicitly provides that a state plan may make payment for medical care or services rendered to "such individual

or the person or institution providing such care or service." 42 U.S.C. § 1396(a)(32).[1] As the undisputed provider of care to Mr. Zuniga, THI is authorized pursuant to federal law to receive payments made by the state for medical care and services rendered to Mr. Zuniga. In light of these federal provisions, facilities that provide care and services to applicants for Medicaid benefits cannot be unintended recipients of said benefits. To the contrary, facilities that provide care and services to applicants are precisely the entities that are supposed to receive said benefits. Thus, NMSA § 27-2-21 has no bearing on the instant matter and the District Court's reliance on the same was improper.

To read NMSA 1978 § 27-2-21 as prohibiting Mr. Zuniga from assigning his ability to pursue Medicaid eligibility would not only constitute an unreasonable and unprecedented extension of the plain language of the statute, but would also cause the statute to run afoul of the Supremacy Clause and would be preempted by the above-cited language of the Social Security Act. It is impermissible for a state to impose any laws, including laws governing Medicaid eligibility, which conflict with federal laws. *See, e.g.*, *Lewis v. Alexander*, Case No. 2006-3963 (E.D. Pa.

---

[1] In its entirety, this section reads "[A] state plan for medical assistance must… provide that no payment under the plan for any care or service provided to an individual shall be made to anyone other than such individual or the person or institution providing such care or service, under an assignment or power of attorney or otherwise." 42 U.S.C. § 1396(a)(32).

August 23, 2011) (holding that Pennsylvania Medicaid rules that imposed greater restrictions than the federal Medicaid laws were preempted); *Lankford v. Sherman*, 451 F.3d 496, 510 (8th Cir. 2006). As set forth above, the federal Medicaid regulations do not restrict an applicant's right to assign his ability to pursue Medicaid eligibility. Consequently, any state law that purports to impose such a restriction is preempted. Thus, the District Court's reliance upon NMSA 1978 § 27-2-21 in finding that THI lacked standing in this matter is misplaced. Mr. Zuniga expressly assigned his right to pursue Medicaid eligibility to THI. As such, THI has the right to stand in Mr. Zuniga's shoes for the purpose of securing said benefits, including but not limited to, appealing a denial of said benefits. This authority was granted by Mr. Zuniga himself and is not prohibited by NMSA 1978 § 27-2-21.

New Mexico case law is clear that the effect of a valid assignment is to place the assignee "in the shoes of the assignor." *See, e.g., Investment Co. of the Southwest v. Reese,* 117 N.M. 655, 660 (1994) (explaining that "the common law speaks a loud and consistent voice: An assignee stands in the shoes of his assignor") (quoting *FDIC v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993)). Indeed, the HSD can point to no legal authority which would circumscribe Mr. Zuniga's authority to assign to a third party his right to pursue Medicaid benefits. In light of the clear presumption of assignability of rights, the HSD's unfounded assertions

carry no weight. *See, e.g.*, *Investment Co. of Southwest*, 117 N.M. at 662 ("[W]e have been able to find no authority to support, even indirectly, the notion that assignment . . . cannot occur without statutory authorization."). Accordingly, as the duly authorized assignee of Mr. Zuniga's right to pursue Medicaid benefits, THI is afforded all of the rights that Mr. Zuniga is or would be entitled to, including but not limited to, the right to appeal a denial of his Medicaid benefits application, in accordance with state and federal law. *See, e.g.*, 42 C.F.R. §§ 431.206, 431.210, 431.220, 435.906, 435.908, and 435.912; *Goldberg v. Kelly*, 397 U.S. 254 (1970).

Moreover, as a policy matter, such assignments should be encouraged because of the benefits to both parties: the resident/applicant would be able to pursue vital public benefits that they need to obtain the skilled care and services that they require, and the long-term care facility would be compensated for the services that it provided to the resident/applicant and ensure that it could continue to provide such services in the future. In fact, a number of courts have specifically noted the desirability of the assignment of medical and health benefits as a policy matter. *See, e.g.*, *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1289 (5th Cir. 1988) (explaining that in the ERISA context "assignment to a health care provider facilitates rather than hampers [] receipt of health benefits").[2]

---

[2] In explaining why this is so, the court reasoned that:

Furthermore, other courts have recently considered the issue before this Court and found that the an authorization statement similar to the one at issue in the instant case confers upon a facility the right to stand the applicant's shoes and pursue Medicaid benefits on their behalf, including but not limited to, any appeals. *See* Memorandum Opinion by Judge Simpson in the unreported case of *Bonnetti Heatlh Care Center, Inc. v. Department of Public Welfare*, Pa. Commw. Ct., No. 1339 C.D., Simpson, R. (March 7, 2012) (In reviewing an authorization statement substantially similar to the one at issue before this Court, the Commonwealth Court of Pennsylvania expressly found that the applicant's agent through a Power of Attorney had authorized the facility in writing to challenge the denial of the

---

> [t]o deny standing to health care providers as assignees of beneficiaries of ERISA plans might undermine Congress' goal of enhancing employees' health and welfare benefit coverage. Many providers seek assignments of benefits to avoid billing the beneficiary directly and upsetting his finances and to reduce the risk of non-payment. If their status as assignees does not entitle them to federal standing against the plan, providers would either have to rely on the beneficiary to maintain an ERISA suit, or they would have to sue the beneficiary. Either alternative, indirect and uncertain as they are, would discourage providers from becoming assignees and possibly from helping beneficiaries who were unable to pay them "up-front." The providers are better situated and financed to pursue an action for benefits owed for their services. Allowing assignees of beneficiaries to sue under § 1132(a) comports with the principle of subrogation generally applied in the law.

Hermann Hosp., 845 F.2d at 1289. This reasoning loses none of its force when applied in the Medicaid context.

applicant's benefits and that as such, the facility was authorized to pursue the appeal.). Accordingly, the District Court's finding that NMSA § 27-2-21 prohibits THI from appealing the denial of Mr. Zuniga's application for Medicaid benefits is erroneous.

B. Failure to Allow THI as the Assignee of Mr. Zuniga's Right to Pursue Medicaid Benefits Violates the Due Process Clause of the Fourteenth Amendment of the Constitution.

Federal regulations require that "the agency must afford an individual wishing to do so the opportunity to apply for Medicaid without delay." 42 C.F.R. §§ 435.906 and 431.220. The right of an applicant to appeal an action/inaction which has adversely affected his application for Medicaid benefits is a fundamental due process right protected by state and federal law. To preclude Mr. Zuniga's authorized assignee from appealing the denial of his application constitutes a violation of the rights and protections afforded to Mr. Zuniga under the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV § 1.

The Supreme Court has explained the right to procedural due process as "the fundamental requisite of due process of law is the opportunity to be heard" before an individual is denied of life, liberty, or property. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). In the instant case, Mr. Zuniga's entitlement to Medicaid benefits is property sufficient to trigger the requirements of due process. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1974) (holding that "a legitimate

claim of entitlement" to a benefit is a property interest sufficient to trigger due process).[3] This includes the due process right to be heard on the HSD's decision to deny Mr. Zuniga's application for Medicaid benefits. *See Goldberg v. Kelly*, 397 U.S. 254 (1970) (explaining that due process requires timely notice of adverse action; an opportunity to be heard, confront adverse witnesses, and present evidence and arguments; representation; and an impartial decision maker). To deny THI, which has been expressly authorized by Mr. Zuniga to pursue Medicaid benefits on his behalf, a hearing that comports with due process is a flagrant violation of Constitutional requirements.

As has been noted above, an assignee assumes all the rights and responsibilities of the assignor—including, in this case, Mr. Zuniga's due process

---

[3] For the purposes of the Due Process analysis, it is actually irrelevant whether Mr. Zuniga is actually entitled to the benefits he has been denied. As the Court explained in *Board of Regents*, "the welfare recipients in *Goldberg* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so." 408 U.S. at 577. The Third Circuit has also noted that it "has accorded procedural due process protection to applicants who did not have present enjoyment of a benefit, as have other federal courts. *See e.g., Kelly v Railroad Retirement Board*, 625 F.2d 486 (3d Cir. 1980) (applicant for disabled child's annuity under Railroad Retirement Act); *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973) (applicant for driver's license); *Ressler v. Pierce*, 692 F.2d 1212 (9th Cir. 1982) (applicants for federal rent subsidies); *Butland v. Bowen*, 673 F. Supp. 638 (D.Mass. 1987) (applicant for Social Security disability benefits); *Alessi v. Pennsylvania, Dep't of Public Welfare*, 893 F.2d 1444, 1453 (3d Cir. 1990).

right to be heard and challenge the HSD's adverse action on his application for Medicaid benefits. As a result of the District Court's dismissal of the appeal, Mr. Zuniga has been denied the right to a fair hearing in contravention of federal law solely because of the third party he authorized to pursue an appeal on his behalf. In light of the District Court's disregard for Mr. Zuniga's right to a fair hearing on the denial of his application for Medicaid benefits, the decision to dismiss the appeal must be must be reversed and the appeal allowed to proceed on the merits.

C. The District Court erred in Finding that THI's Standing to Pursue Medicaid Eligibility on Behalf of the Applicant, Miguel Zuniga, Was Rendered Moot By His Death.

In granting the HSD's motion to dismiss below, the District Court determined that Mr. Zuniga's death during the pendency of the appeal rendered the case moot. This conclusion constitutes clear error and must be reversed. Moreover, was the Court to determine that the death of Mr. Zuniga extinguished an actual controversy and rendered the court unable to grant actual relief, the "capable of repetition yet evading review" exception permits this Court to review the case.

"As a general rule, this Court does not decide moot cases." *Gunaji v. Macias*, 130 N.M. 734, 737 (2001); *see also, Mower v. Rusk*, 95 N.M. 48, 51 (1980) ("[a]s a general rule, an action will be dismissed if the issues therein are or have become moot"). In articulating when a case is moot, the Court has explained, "[a] case is moot when no actual controversy exists and the court cannot grant

actual relief." *Gunaji*, 130 N.M. at 737; *see also State v. Sergio B.*, 132 N.M. 375, 378 (2002) ("[a]n appeal is moot when no actual controversy exists, and an appellate ruling will not grant the appellant any actual relief").

In the instant case, an actual controversy exists as to who is liable for the care rendered to Mr. Zuniga during his stay at THI: Medicaid or Mr. Zuniga's estate. Further, a decision on the merits of that controversy by this Court that Medicaid is liable for the care rendered to Mr. Zuniga will remedy THI's injury and will afford relief to Mr. Zuniga's estate by insulating it from liability as to any claim of payment from THI. Moreover, Mr. Zuniga's death does not moot the fact that he is legally entitled to Medicaid benefits and has been improperly denied the same. Many courts have made clear that, regardless of the death of a Medicaid applicant, when a dispute as to liability for care and services rendered remains, the case is not moot.

In *James v. Richman*, the Third Circuit confronted a case with similar facts. 547 F.3d 214 (3rd Cir. 2008). In that case, the primary issue was "whether the Department had misinterpreted federal law regarding [the applicant's] right to Medicaid benefits." *Id.* The Third Circuit explicitly rejected the suggestion that [the applicant's] death rendered the case moot, determining that "[a]lthough [the applicant] died during the pendency of this appeal, the case is ***not moot***." *Id.* (emphasis added). The Court reasoned this was so because "the question of

'ultimate liability'" remained and "the Department continue[d] to contest its liability." *Id.* Here, similarly, the question of liability for the care and services rendered to Mr. Zuniga remains and the HSD continues to deny its liability.

Other courts across the county have followed the reasoning articulated in *James*. In *O'Callaghan v. Commissioner of Social Services*, a Connecticut Appeals Court ruled that the death of the applicant in a Medicaid eligibility dispute did not render the case moot because the "resolution of the issue raised on appeal will also necessarily determine whether the Medicaid system, pursuant to *42 U.S.C. section 1396a (a)(34)*, or the plaintiff's estate is responsible for certain medical expenses incurred by the plaintiff's husband." 53 Conn. App. 191, 200 (1999). An Indiana Appeals Court reached the same conclusion when it reversed a lower court decision to dismiss plaintiff's litigation on behalf of a Medicaid recipient for want of a case or controversy because it noted "[s]omeone is going to have to pay for the services rendered. . . . There is a controversy to be decided here." *Stevens v. Ind. Dep't of Pub. Wel.*, 566 N.E. 2d 544, 550 (Ind. Ct. App. 1991). The above-cited cases indicate that, based on the facts present in this appeal, the instant case is not moot. An actual controversy remains as to the question of who is liable for the care rendered to Mr. Zuniga. If Medicaid is ultimately adjudged liable for the care rendered to Mr. Zuniga, Mr. Zuniga's estate

will not bear the burden of the cost of his care and THI will be compensated for the care it provided to Mr. Zuniga. For these reasons, the instant case is not moot.

Moreover, even if this Court were to determine that the death of Mr. Zuniga does moot the instant controversy, THI contends that the Court is nonetheless permitted to review the lower court decision under the "capable of repetition, yet evading review" exception. As the New Mexico Supreme Court has noted, the mootness doctrine is merely a prudential limit on the courts' power to hear a case and, in cases satisfying the aforementioned exception, a Court may hear the case regardless of mootness. *See, e.g.*, *New Energy Econ., Inc. v. Shoobridge*, 149 N.M. 42, 48 (2010) (noting that "the New Mexico Constitution does not expressly impose a 'cases or controversies' limitation on state courts like that imposed upon the federal judiciary"). For this reason, the Courts "may review moot cases . . . which are capable of repetition yet evade review." *Gunaji*, 130 N.M. at 737. In contrast to the federal mootness doctrine, "an issue can be capable of repetition . . . even though the parties are unlikely to litigate the same issue again. It is sufficient that the issue be capable of repetition in some future lawsuit." *Id.* The identities of the parties are irrelevant. *Id.*

Even if this Court adjudges the instant controversy moot, it should review the case regardless because the facts are capable of repetition yet evade review. Issues surrounding Medicaid eligibility, by their very nature, often involve the

elderly, infirmed, and those in poor health. It is inevitable that some applicants, such as Mr. Zuniga, will pass away before the resolution of their benefits applications. Nonetheless, the applicants, the applicants' families (who may ultimately be responsible for care rendered if Medicaid benefits are denied), and the medical professionals and facilities that provide care to such applicants during the pendency of their applications deserve resolution of the applicants' eligibility.

As a policy matter, a refusal by the courts to review eligibility determinations for applicants who pass away during the determination process would create a perverse incentive for the State to delay eligibility determinations. If the HSD had conducted a timely hearing as required by state and federal Medicaid regulations, Mr. Zuniga would have been alive and the alleged issue of mootness would not have arisen. The fact that the alleged mootness is a direct result of the HSD's own failure to comply with state and federal directives strongly weighs in favor of review, even if this Court determines the case is moot. It would be a gross miscarriage of justice to allow the HSD to benefit from its improper refusal to afford Mr. Zuniga, and other similarly situated applicants, a timely hearing on the denial of his Medicaid application—filed well over two (2) years ago—and consequently deny THI the opportunity to prove that Mr. Zuniga was entitled to receive Medicaid benefits. Therefore, even if moot, the instant case

presents facts which are capable of repetition, yet evade review, and should be reviewed by this Court under the same exception to the mootness doctrine.

D. The District Court Erred in Reversing Its May 13, 2011 Order.

The District Court erred in reversing the Order it entered on May 13, 2011, wherein the Court weighed the evidence before it and found that in the event that no administrative hearing had been conducted since October 2009, THI's appeal was timely and the HSD's Motion to Dismiss should be denied. This was a final decision on the merits. The HSD did not move for relief from that Order and the evidence before the Court at the August 24, 2011 hearing remained substantially the same as it had when the Court issued its May 13, 2011 Order. Indeed, the HSD conceded that nearly two (2) years after the filing of Mr. Zuniga's appeal, a hearing still had not been held. Despite this, the HSD refused to comply with the District Court's May 13, 2011 Order and in July of 2011—nearly two (2) months later—filed a Motion to Dismiss. Not only was the motion untimely and a ruling already been issued on the merits (thereby barring re-litigation of the issue), the motion also did not request relief from the May 13, 2011 Order. The District Court summarily reversed itself on August 26, 2011, when it granted HSD's Motion to Dismiss and dismissed THI's appeal with prejudice.

The August 26, 2011 Order by the District Court was improper, as the HSD never moved for relief from the May 13, 2011 Order and its Motion to Dismiss

was untimely. Moreover, had the HSD sought timely and procedurally proper review of the May 13, 2011 Order, the evidence before the District Court at the August 24, 2011 hearing remained substantially the same as when the May 13, 2011 Order was issued and did not warrant a complete reversal of the District Court's prior decision on the merits. Thus, it was improper for the District Court to reverse its Order and grant the HSD's Motion to Dismiss where no such relief was requested or supported by the evidence.

IV. Conclusion

THI has been duly and irrevocably authorized in writing by Mr. Zuniga as the assignee of his right to pursue Medicaid benefits. The Authorization Statement expressly includes the right to pursue any appeals necessary to secure Medicaid benefits for Mr. Zuniga. This authorization is consistent with federal and state law and must be honored. The District Court's determination that THI lacks standing to pursue the instant appeal improperly disregarded Mr. Zuniga's right to authorize a third party to pursue Medicaid benefits on his behalf under federal law, as well as his due process right to challenge the denial of Medicaid benefits. The right to a fair hearing is a fundamental right guaranteed by the Fourteenth Amendment and cannot be ignored. As a result of the District Court's dismissal, Mr. Zuniga faces the permanent deprivation of Medicaid benefits to which he may have been, and remains, entitled, his death notwithstanding. Contrary to the District Court's

determination, the issue of Mr. Zuniga's eligibility for Medicaid benefits survives his death, as an actual controversy remains and the Court may provide meaningful relief to the prevailing party. In light of the foregoing facts and circumstances, and in accordance with state and federal law, therefore, the District Court's August 26, 2011 Order reversing its May 13, 2011 Order and dismissing THI's appeal with prejudice was in error and must be reversed and a fair hearing scheduled on the appeal of the denial of Mr. Zuniga's application for Medicaid benefits.

V. **Request for Oral Argument**

Oral argument would be helpful to address the issues in this case.

Respectfully Submitted,

Marcy Baysinger, Esq.
Attorney No.: 7868
PREGENZER BAYSINGER
WIDEMAN & SALE, PC
2424 Lousiana Blvd, NE, Ste 200
Albuquerque, NM 87110
Telephone: (505) 872-0505
Facsimile: (505) 872-1009
Local Counsel for Appellant

by Marcy Baysinger
Katie Maxwell, Esq.
SCHUTJER BOGAR
100 Highland Park Village, Ste 246
Dallas, TX 75205
Telephone: (214) 295-3363
Facsimile: (214) 723-7537
Attorney for Appellant
Admitted Pro Hac Vice

I hereby certify that a copy of the foregoing was mailed to the following counsel of record this 26th day of April, 2012:

Elizabeth Jeffreys, MA, JD
Assistant General Counsel
New Mexico Human Services Department
P.O. Box 2348
Sante Fe, NM 87504-2348
Counsel for Appellee

Marcy Baysinger
Marcy Baysinger