IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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.

RESPONDENT/APPELLEE'S ANSWER BRIEF

On Appeal from Hon. Barbara J. Vigil, District Court Judge
First Judicial District Court, County of Santa Fe
Case No. D-101-CV-2009-03533

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I. SUMMARY OF PROCEEDINGS

Appellant ("THI") submitted its Brief in Chief containing an Introduction with a Background and Summary of Proceedings. *BIC 1-4.* Appellee, the Human Services Department ("HSD") takes exception to a few of THI's statements contained therein. First, as a point of clarification, HSD denied Mr. Zuniga's eligibility for Medicaid, not his application, which was accepted and considered. *BIC 2, Line 3 (HSD "denied Mr. Zuniga's application for Medicaid eligibility"), RP 9 ("Mr. Zuniga was denied coverage ... for Category 081 Medicaid").*

Second, the District Court did not take a position on the legality of contractually assigning the "right to pursue Medicaid benefits". The Court opined: "If the Court considered Mr. Zuniga to have intended to transfer his rights to THI ... under contract law," then the Admission Agreement and Authorization Statement failed to effectuate the assignment. *RP 103 (F 5).* Although the District Court recognized that Medicaid "assistance" is not transferable or assignable under NMSA 1978, § 27-2-21, the District Court did not reach the specific issue of whether Medicaid appeals are assignable by contract. *Id.* Instead, the *Dismissal Order* disposed of the standing issue on the grounds that documents did not evidence Mr. Zuniga's authorization or intent, so the purported contractual assignment – even if legally permissible – was defective and invalid. *RP 102-103.*

Third, it is imperative to note that the THI Admission Agreement (11/15/08) was not executed by Mr. Zuniga, but instead was "signed by a family member" (Susana Granada) who "did not legally or properly assign his rights to pursue Medicaid benefits to THI." *RP 103(F 5), and see RP 16-26.* The District Court was adamant that this family member lacked authorization by Mr. Zuniga:

> I think the question in this case is, based on the record and the documents upon which you say THI has the right to step into the shoes of Mr. Zuniga and pursue this, seem to be lacking. Because on one hand you're saying this agreement - he's paraplegic, he cannot write – so he has this family member there. But having a family member there, that person must have specific authorization to agree on his behalf. There can be an attestation clause to say "I cannot sign and I've authorized my daughter or family member to sign this agreement and I understand the full …" – as you would in a Will, for example, when people cannot sign legal documents, there's usually some sort of attestation provision in there that they say, "I'm not signing, that's not my signature, but I'm authorizing so-and-so to do it for me" - Number 1. Number 2, they have a power of attorney to sign documents. That doesn't appear to be the case. It was: she was there, he can't write, she signed for him.

Hon. Barbara Vigil, Motion Hearing
[CD 7, 8-24-11,10:00:21 to 10:01:43]

Decidedly, the District Court did not recognize a legal or valid assignment by Mr. Zuniga in the Admission Agreement. *RP 103(F 5) and CD 10, 10:35:17 to :27 ("this Court finds that the admissions agreement which was signed by a family member did not legally assign his rights to pursue Medicaid benefits to THI").* THI's statement that "Mr. Zuniga executed an Admission Agreement that assigned his right to pursue Medicaid eligibility to THI" is factually incorrect. *BIC 1 ¶2.*

Fourth, the THI Authorization Statement (7/27/09) that contains a mark ('X') in place of a signature was reviewed and found deficient. *RP 103 (F 5), RP 29-30.* Specifically, the District Court found, "the authorization statement allegedly signed by Mr. Zuniga … is even more egregious and impermissible under state law." *CD 10, 10:35:28 to :41.* Note that no notary certified that the mark was affixed by Mr. Zuniga. *RP 29.* THI's position that "Mr. Zuniga also executed an Authorization Statement" is inconsistent with the District Court's finding, which is not challenged on appeal. *Id., BIC 1 ¶2.*

Fifth, the *Court Order Requesting Clarification of the Record* (5/13/2011) ("*Request Order*") did not "find in favor of THI". *BIC 3 ¶1.* As evidenced even by its title, the *Request Order* asked for clarification of the record to assist the District Court in deciding on the ultimate decree. *RP 57-58.* The *Request Order* was explicitly undecided: contemplating either an order of dismissal favoring HSD or an order of reversal favoring THI, depending on facts not presented. *Id.* There was no related "violation of the District Court's directive" by HSD where there was no directive to sign THI's proposed order. *Id., BIC 3 ¶2.* THI presumes, absent any supporting arguments, that the *Request Order* constitutes a 'final order' and that a Rule 1-060(B) NMRA "motion for relief" applies to administrative appeals subject to Rule 1-074 NMRA. Thus, THI's description of the *Request Order* is both contentious and misleading. *BIC 3, RP 57-58.*

II. ARGUMENT

A. Applicable Standard Of Review

The substantial evidence standard is not at issue: THI does not contend that the verdict, judgment or findings of fact of the District Court's *Order Granting Motion to Dismiss* ("*Dismissal Order*") are unsupported by substantial evidence. *BIC 1-22.* The term 'substantial evidence' is mentioned once in THI's Standard of Review section, but not at all in the Legal Argument section. *BIC 5-21.* Accordingly, all substantial evidence arguments are waived, and all findings of fact below are deemed conclusive. *Rule 12-213A NMRA, Nosker v. Trinity Land Co., 107 N.M. 333, 337, 757 P.2d 803, 807 (Ct. App. 1988), Durham v. Guest, 2007-NMCA-144, ¶9, 142 N.M. 817, 171 P.3d 756 (issues not argued on appeal will not be reviewed on appeal), overruled on other grounds by 2009-NMSC-007, 145 N.M. 694, 204 P.3d 19; and See RP 102-103.*

THI raises five contentions as a matter of law, that: THI has standing pursuant to state and federal law *[BIC 6-7]*; NMSA 1978, § 27-2-21 does not bar THI from appealing Mr. Zuniga's Medicaid denial *[BIC 8-13]*; the District Court's failure to allow THI as the assignee of Mr. Zuniga's right to pursue Medicaid benefits violates due process *[BIC 13-15]*; THI's standing is not rendered moot by the death of Mr. Zuniga *[BIC 15-20]*; and that the District Court erred in "reversing" its *Request Order [RP 57-58]. BIC 20-21.*

THI's Arguments fail to specify which of the *Dismissal Order's* findings are now challenged on appeal. *BIC 5-21.* Absent a "specific attack on any finding ... such finding shall be deemed conclusive." *Rule 12-213A(4).* In addition, THI failed to state how a single issue was preserved below. *Id., BIC 5-21.* Accordingly, the Court is not obligated to consider any of the issues raised on appeal. *Rule 12-213A(4), and see Gillingham v. Reliable Chevrolet, 1998-NMCA-143, 126 N.M. 30, 966 P.2d 197 (overruled in part on other grounds), State v. Gonzales, 111 N.M. 590, 808 P.2d 40 (Ct. App. 1991) (parties are expected to comply fully with the appellate rules with respect to briefs), and Murken v. Solv-Ex Corp., 2005- NMCA-137, 138 N.M. 653, 124 P.3d 1192 (the court will not search the record to find evidence to support an appellant's claim).*

Should the arguments be considered nonetheless, the Court of Appeals "conduct[s] the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal." *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n, 2003 NMSC 5, ¶16, 133 N.M. 97, 61 P.3d 806.* On appeal, the reviewing court will determine if the agency acted fraudulently, arbitrarily or capriciously, outside the scope of its authority or otherwise not in accordance with law. *Rule 1-074(R); NMSA 1978, § 39-3-1.1(D); Hyden v. NM HSD, 2000-NMCA-107, ¶3, 130 N.M. 19, 16 P.3d 444.* Questions of law are reviewed de novo. *State*

v. Roswell, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). However, considerable deference is generally given to interpretations of an agency charged with administering the laws, especially where the matter implicates the agency's specialized expertise. *Rio Grande Chapter of Sierra Club, 2003-NMSC-5, ¶17.*

THI's new claim on appeal that "the District Court erred in reversing its May 13, 2011 Order" (*Request Order*) questions the District Court's jurisdiction to issue the *Dismissal Order* on August 26, 2011, months after its *Request Order,* filed May 13, 2011; although, THI fails to identify the issue as jurisdictional and offers no legal citations or citations to the record. *BIC 20-21.* Jurisdictional questions are questions of law that are reviewed de novo, even if not preserved below. *Smith v. City of Santa Fe, 2007-NMSC-55, ¶10, 142 N.M. 786, 171 P.3d 300 (citing Ottino v. Ottino, 2001-NMCA-12, ¶6, 130 N.M. 168, 21 P.3d 37).*

B. The District Court Properly Determined That THI Lacked Standing Where An Assignment Was Never Properly Effectuated

THI argues that state and federal laws permit standing on Medicaid appeals by third parties pursuant to an authorization, but ignores the District Court's finding that an authorization was never properly effectuated by Mr. Zuniga. The District Court never reached the legal issue of whether Medicaid statutory rights are transferable or assignable by contract. *RP 73-74, 102-103.* The issue was not reached because the District Court found that the Admission Agreement and Authorization Statement were defective and therefore did not effectuate an

assignment or authorization. *RP 103 (F 5).* Consequently, Mr. Zuniga's Medicaid rights were never extinguished by an assignment. *See 6 Am. Jur. 2d Assignments § 1 ("...the assignor's right to performance by the obligor is extinguished ... and the assignee acquires a right to such performance.") & BIC 11 ("THI is afforded all of the rights that Mr.Zuniga is or would be entitled to ...").* Accordingly, this Court need not consider issues not reached or decided by the District Court. *Atma v. Munoz, 48 N.M. 114, 121, 146 P.2d 631, 635 (1944)("questions not reached or decided by the trial court are not reviewable on appeal").*

The Admission Agreement is defective because it was signed by an unauthorized family member. *Id.* Unlike the *Bonnetti*[1] case, Mr. Zuniga's family member was not his power of attorney and was not otherwise authorized. *CD 7, 10:02:14 - :31 (Hon. Vigil: "but there's nothing authorizing her to sign on his behalf ..."; THI: "There is no power of attorney at that point ....").* Therefore, the family member "did not legally or properly assign his rights to pursue Medicaid benefits to THI". *RP 103 (F 5).* Similarly, the Authorization Statement was only "allegedly signed by Mr. Zuniga" where a mark (absent a notary certification) is evidenced in lieu of a signature and furthermore, an 'irrevocable' authorization would not extend beyond death. *Id.* THI does not challenge these dispositive findings on appeal.

[1] *Bonnetti Health Care Ctr, Inc. v. Dept. of Public Welfare, Pa. Commw. Ct., No. 1339 C.D. Simpson, R. (3/ 7/12); BIC 12.*

Merely stating the contrary, that "the Admission Agreement and the Authorization Statement executed by Mr. Zuniga explicitly authorize THI to pursue Medicaid benefits on his behalf" does not serve to raise any specific contentions. *BIC 7 ¶2.* Findings not specifically attacked on appeal must be accepted as 'true' and binding by the reviewing court. *Nosker, 107 N.M. at 337, 757 P.2d at 807.* Thus, without reaching the issue of whether Medicaid statutory rights are legally assignable, this Court may affirm the decision of the District Court that the purported assignment and authorization failed in execution.

Alternatively, this Court may find it is without jurisdiction. The issue of THI's standing is a jurisdictional matter where the Medicaid applicant's cause of action was created by the Public Assistance Appeals Act. *See NMSA 1978, § 27-3-4, RP 1-3 and ACLU of N.M. v. City of Albuquerque, 2008 NMSC 45, ¶9 (FN 1), 144 N.M. 471, 188 P.3d 1222 (Quoting In re Adoption of W.C.K., 2000 PA Super 68, 748 A.2d 223, 228 (Pa. Super. Ct. 2000)("When a statute creates a cause of action and designates who may sue, the issue of standing becomes interwoven with that of subject matter jurisdiction. Standing then becomes a jurisdictional prerequisite to an action.").* The Court of Appeals lacks jurisdiction to hear appeals that arise from courts that lacked subject matter jurisdiction. *State Human Rights Comm'n v. Accurate Mach. & Tool Co., 2010-NMCA-107, ¶4, 149 N.M. 119, 245 P.3d 63, cert. denied, 2010-NMCERT-010, 149 N.M. 64, 243 P.3d 1146.*

THI lacks standing under the Public Assistance Appeals Act so the District Court lacked subject matter jurisdiction and, therefore, this Court is without jurisdiction.

C. THI Is Not Independently Authorized Pursuant To State Or Federal Law To Appeal The Denial Of Mr. Zuniga's Medicaid Eligibility

Absent an express authorization by Mr. Zuniga, THI is not independently authorized by law to appeal HSD's denial of Mr. Zuniga's Medicaid eligibility. In the request for an administrative hearing below, THI solely claimed "independent standing … pursuant to the Admission Agreement signed by Susana Granada" with the additional Authorization Statement submitted "[i]n furtherance of this assignment." *RP 11.* THI now argues that it is simultaneously a Medicaid applicant, recipient and provider and therefore entitled to all associated statutory rights. *BIC 6 ("THI is the applicant") & 9 ("As the undisputed provider... "), ([nursing] "facilities ... are precisely the entities that are supposed to receive [Medicaid] benefits").* THI is a provider entitled to Medicaid provider hearings, not an applicant's eligibility hearing. *RP 9, 8.353.2 NMAC (Provider Hearings).* THI is certainly not a Medicaid applicant or recipient, nor the personal representative of Mr. Zuniga's estate and is not otherwise authorized by law to appeal the denial of Mr. Zuniga's Medicaid eligibility.

Oddly, THI now seeks "relief to Mr. Zuniga's estate by insulating it from liability as to any claim of payment from THI." *BIC 16, 20-22.*[2] In other words, THI asks this Court to relieve Mr. Zuniga's estate of liability for its own claim. It is not known if a timely creditor's claim was filed, but numerous conflicts of interest exist where THI purports to stand in the shoes of the late Mr. Zuniga while seeking to enforce its creditor's claim against his estate and simultaneously requesting relief from liability on behalf of his estate. In any event, THI is clearly not the legally authorized representative of Mr. Zuniga's estate.

i. THI Is Not A Medicaid Applicant Entitled To A Fair Hearing

On appeal, a new argument is raised that THI is the applicant "[p]ursuant to federal law, as the party pursing Medicaid benefits on Mr. Zuniga's behalf." *BIC 6.* This argument was not preserved, and therefore need not be considered on appeal. *BIC, Rule 12-213A(4).* Even so, simply because a Medicaid applicant submits an application 'with the assistance of a spokesperson' does not justify THI's conclusion that the spokesperson *becomes* the applicant, thus usurping all the applicant's statutory rights. *Id.* The law does not provide a spokesperson with an independent right to pursue Medicaid benefits on behalf of an applicant absent an

[2]"Resident and/or Representative will be responsible for immediate payment of all charges incurred …6. Any amounts due and owing for services rendered subsequent to Resident's death shall be the responsibility of Resident's Estate."; "3. Assignment … to the extent Medicaid refuses to pay for any services … Resident and/or Representative will remain liable for payment of those services …." and "5. Application/Appeals … Resident/Representative remains responsible for and will continue to pay for services rendered during the pendency of any eligibility or benefit application." *Admissions Agreement (signed by Susana Granada).*

express authorization. The right to request a hearing belongs to the applicant, not the spokesperson. *8.200.430.12 NMAC (Cites 42 C.F.R. § 431.220(a)(1)(2)).*

Furthermore, the question of whether an individual is an applicant is a matter of fact, not law. The applicant, by definition, is the "individual whose application for Medicaid has been submitted...." *42 C.F.R. § 400.203.* The unchallenged fact that Mr. Zuniga was the Medicaid applicant must be accepted by the reviewing court as true and binding. *RP 102 (F 1), Nosker, 107 N.M. at 337, 757 P.2d at 807.* Consequently, THI is not independently entitled to a Medicaid applicant's fair hearing where THI was not the 'individual whose application was submitted'.

ii. Neither THI Nor Mr. Zuniga Was An Eligible Medicaid Recipient

Similarly, neither THI nor Mr. Zuniga was the recipient, defined as the "individual who has been determined eligible for Medicaid." *42 C.F.R. § 400.203.* THI never submitted an application and so was never determined eligible. More importantly, Mr. Zuniga's eligibility was denied, so he clearly was not an "eligible recipient" "legally entitled to Medicaid benefits." *RP 38, BIC 16.* Therefore, Medicaid is not financially liable for any services furnished to Mr. Zuniga.

Nevertheless, THI insists it is "authorized pursuant to federal law to receive payments made by the state for medical care and services rendered to Mr. Zuniga." *BIC 9.* THI mistakenly believes that the 'Medicaid benefits' are payments (not medically necessary services), and that Applicant Zuniga assigned a future right to

receive Medicaid funds to THI. In fact, Medicaid payments "are made directly to service providers, not to the eligible medicaid recipient." *8.200.400.9 NMAC (7/1/01).* Thus, even eligible recipients are not legally entitled to Medicaid payments and so cannot assign what will never potentially belong to them. *6 Am. Jur. 2d, Assignment § 12 ("in order for a right ... to be assignable, it must have, at the time of the purported assignment, either an actual or potential existence").* Furthermore, the issue of whether THI is an intended beneficiary of Medicaid funds is not instructive to resolving the underlying legal issue of what constitutes non-assignable 'assistance' under the Public Assistance Act. *NMSA 1978, § 27-2-21, RP 103 (F 4).*

iii. The Issue Of What Constitutes Non-Assignable 'Assistance' Under The Public Assistance Act Was Not Reached

"'[P]ublic assistance' means any aid or relief granted to or on behalf of an eligible person under the Public Assistance Act [27-2-1 NMSA 1978] and regulations issued pursuant to that act." *NMSA 1978, § 27-2-2E.* The 'assistance' granted under the Act "shall not be transferable or assignable ...." *NMSA 1978, § 27-1-21, RP 103 (F 4).* HSD construes the definition of 'assistance' broadly in accordance with the phrase "any aid or relief" to include fair hearings and appeals. THI construes the definition narrowly to mean that the "applicant's right to public benefits from unauthorized recipients" is protected. *BIC 8.* This issue was not fully briefed below, but the Act is noted in the *Dismissal Order. RP 103 (F 4).*

The District Court did not attempt to interpret Section 27-2-21 ('assistance not assignable'). Nor did the District Court cite the Act as the basis for finding that no legal or proper assignment was executed by Mr. Zuniga. *RP 103 (F 5).* Consequently, HSD agrees with THI that Section 27-2-21 "does not apply in the instant case", but solely on the basis that there was no valid assignment by to trigger its application. *Id., BIC 8.* Alternatively, HSD's reasonable definition should be given considerable deference where HSD is charged with administering the Public Assistance Act. *Rio Grande Chapter of Sierra Club, 2003-NMSC-5, ¶17 and see NMSA 1978, § 27-2-2A.* In any event, an interpretation of the Act will neither cure the deficiencies of the assignment contracts nor establish an independent legal right for THI to pursue Applicant Zuniga's Medicaid rights. The District Court did not 'invalidate the authority expressly granted to THI by Mr. Zuniga' but instead found that the evidence did not support any grant of authority by Mr. Zuniga. *BIC 8, RP 103 (F 5).* THI was properly determined to lack standing where THI has no legally protected interest as a Medicaid provider, applicant, recipient, assignee or personal representative in HSD's denial or the related appeal of the late Mr. Zuniga's Medicaid eligibility.

D. Mr. Zuniga's Constitutional Due Process Rights Were Preserved Where THI Was Properly Denied Standing To Usurp His Fair Hearing Rights

THI claims that the District Court violated federal law by denying and disregarding Mr. Zuniga's right to a fair hearing. *BIC 13-15.* Consistent with his

due process rights, HSD provided Mr. Zuniga with an opportunity for a fair hearing even as THI was denied standing. *RP 9.* Furthermore, HSD undisputedly offered an unprecedented two-week extension of the 90-day time limit (until October 26, 2009) so that a request for hearing by Mr. Zuniga or his legal representative would still be considered timely submitted. *Id., BIC 2.*

THI's contention that the District Court violated Mr. Zuniga's rights by denying a fair hearing "solely because of the third party he authorized to pursue an appeal on his behalf" is factually unsupported. *BIC 15.* THI was not authorized by Mr. Zuniga, so THI was not legally entitled to usurp his fair hearing rights. *RP 103 (F 5).* HSD properly denied THI a fair hearing below where THI was a provider and not Mr. Zuniga's assignee, power of attorney or otherwise legally authorized as his representative. *Id., RP 9.* Similarly, the District Court's dismissal of THI's appeal for lack of standing was substantially based on the lack of evidence to support any authorization of THI by Mr. Zuniga. *RP 103.* The District Court's dismissal of THI's appeal was proper and did not violate Mr. Zuniga's due process rights where evidence does not support that he authorized an appeal by THI.

E. The District Court Properly Determined That Mr. Zuniga's Death Rendered Moot The Underlying Medicaid Eligibility Issue As Well As THI's Standing To Appeal The Medicaid Denial

An "appeal is moot when no actual controversy exists, and an appellate ruling will not grant the appellant any actual relief." *State v. Sergio B., 2002-*

NMCA-70, ¶9, 132 N.M. 375, 48 P.3d 764. There is no actual controversy as to THI because THI lacks standing to enforce the Medicaid applicant's rights, and there is no actual relief that can be granted where THI is unable to secure a valid social security number on behalf of the late Mr. Zuniga so as to permit a determination of Medicaid eligibility. Moreover, there is no actual controversy as to the late Mr. Zuniga or his estate where, in life, he never requested a fair hearing of the denial of his Medicaid eligibility.

i. The Issue Of THI's Independent Standing Is Moot Where THI Was Not Authorized To Represent Mr. Zuniga Or His Estate And Was Not A Named Party In The District Court Appeal

The issue of standing is moot where THI was not the "appellant" of the controversy and so cannot be granted actual relief. In the fair hearing request below, THI claimed "independent standing to request this appeal pursuant to the Admission Agreement" and offered the subsequent Authorization Statement "in furtherance of this assignment." *RP 11.* However, THI subsequently filed the District Court appeal in the name of Mr. Zuniga as his "authorized spokesperson" and did not file independently in its own name pursuant to an assignment. *RP 1-3.* The attorneys were clearly representing THI, and not Mr. Zuniga. *Id. ("THI ... by and through its attorneys Schutjer Bogar LLC, and local counsel, Pregenzer Baysinger Wideman, & Sale, P.C."), RP 31-35.*

Mr. Zuniga and his estate were not represented, by counsel or otherwise. *Id., CD 2 (9:34:49 to :57) (HSD: "It's important to note that nobody here is claiming to represent Mr. Zuniga or his interests.").* THI confuses the scope of legal authority provided to an assignee versus that of a "spokesperson". If the assignment is valid, it then extinguished Mr. Zuniga's personal right to appeal. *See Restatement (Second) of Contracts: Assignment and Delegation § 317(1)(1981) and 6 Am. Jur. 2d Assignments § 1 ("...the assignor's right to performance by the obligor is extinguished ... and the assignee acquires a right to such performance.").* Alternatively, THI was not the named appellant. *RP 1-3.*

When Mr. Zuniga died, THI failed to notify both the District Court and HSD. *CD 1, 9:33:03, RP 73 (#1).* Not until July 2011 did HSD happen to learn of Mr. Zuniga's death (on September 28, 2010), and that information triggered the same-day filing of HSD's Motion to Dismiss. *Id.* THI did not move for a substitution of the parties within 90-days of death (December 28, 2010), pursuant to Rule 1-025A(1) NMRA. In accordance with the Rule's provisions, the appeal brought solely in the name of Mr. Zuniga should have been dismissed. THI does not represent Mr. Zuniga's estate and was not a party to the appeal following Mr. Zuniga's death.

In none of the cases cited by THI is the appellant a nursing facility seeking reimbursement for services rendered to a Medicaid applicant. In *James,* Mr. James

appealed the Medicaid denial with the assistance of counsel and, upon his death, his spouse was legally authorized to pursue his appeal. *James v. Richman, 547 F.3d 214 (3rd Cir. 2008).* In the *O'Callaghan* case, the spouse of the Medicaid applicant/recipient appealed and, when she died, the executrix of her estate was substituted as the party plaintiff. *O'Callaghan v. Commissioner of Soc. Servs., 53 Conn. App. 191, 192, 729 A.2d 800, 803 (1999).* In *Stevens,* the appeal was submitted by the Medicaid recipient's legal guardian. *Stevens v. Indiana Dep't of Public Welfare, 566 N.E.2d 544 (Ind. Ct. App. 1991).* These cases do not support THI's position that THI is the proper appellant or that compensatory relief can be provided to THI.

THI nonetheless assumes it was a party and seeks relief in the form of an appellate ruling "that Medicaid is liable for the care rendered to Mr. Zuniga [to] remedy THI's injury and ... afford relief to Mr. Zuniga's estate." *BIC 16.* Yet THI's alleged "injury" (the payment of medical care rendered to Mr. Zuniga) as a nursing facility was never the controversy: The original issue below was whether Mr. Zuniga was eligible for Medicaid; and the secondary issue was whether THI was independently entitled pursuant to a contractual assignment to assert Mr. Zuniga's right to appeal the denial. *RP 1-121.* At best, THI may seek relief in the form of the applicant's fair hearing, but only if THI is found to have standing pursuant to an assignment that somehow survived Mr. Zuniga's death.

ii. The Late Mr. Zuniga's Medicaid Eligibility Is Not Resolvable

Even if THI is provided a fair hearing pursuant to the alleged assignment, the primary issue of Medicaid eligibility remains moot where THI is unable to obtain a valid social security number on behalf of the late Mr. Zuniga. *RP 103 (F 6).* Mr. Zuniga did not submit a valid social security number, which is a requirement of Medicaid eligibility, and THI is unable to secure one on his behalf:

> THI tried repeatedly to obtain a social security number. That's not something that we have done away with, but there is a federal regulation that requires an in-person interview for adults to obtain a new social security number. Since he is no longer living ... that is another burden that we are trying to overcome.

Erin Mitchell, Esq., Motion Hearing
[CD 8, 8-24-11,10:06:47 to 10:07:14]

Apparently, the Social Security Administration (SSA) also rejects THI's purported assignment by Mr. Zuniga. Medicaid eligibility is dependent on securing a valid social security number. *8.281.400.12 NMAC (7/1/06) ("A Medicaid applicant/ recipient must furnish his/her social security account number.").* Thus, the District Court was correct in determining that the primary underlying issue of the late Mr. Zuniga's Medicaid eligibility is not resolvable. *RP 103 (F 6).*

If Mr. Zuniga were alive, he could attempt to secure a valid social security number to support a finding of Medicaid eligibility and he could clarify his intent, if any, to have THI usurp or otherwise act upon his Medicaid rights. Perhaps then the courts could reach the issue of whether or not his statutory Medicaid rights are

legally assignable. To this end, it is worth noting that Mr. Zuniga was alive for approximately a year after HSD extended the deadline to permit him or his legal representative to request a hearing on the denial of his Medicaid eligibility. *RP 9, 102 (F 1).* In fact, he did not request an administrative hearing, nor did he act to secure a valid social security number, nor did he clarify his intent to extinguish his rights or to designate a legal representative. Therefore, the case was properly determined moot where THI is not the appellant and there is no controversy for which an appellate ruling could provide the late Mr. Zuniga any actual relief.

F. The District Court Exercised Proper Jurisdiction When It Issued The Dismissal Order Months After It Issued The Request Order

The *Request Order* (5/13/2011) was not a final order and did not "find in favor of THI". *BIC 3 ¶1.* THI offers no legal basis to support its position that the *Request Order* was a final appealable order. *BIC 20-21.* As evidenced by its title, the *Request Order* asked for clarification of the record to assist the Court in deciding the ultimate decree. *RP 57-58.* The Order contemplated the submission of either a draft order of dismissal by HSD, or a draft order reversing HSD's underlying decision. *Id.* Consequently, the Order was not a final judgment. *See High Ridge Hinkle Joint Venture v. City of Albuquerque, 119 N.M. 29, 37, 888 P.2d 475, 483 (Ct. App. 1994) (the filed announcement of a decision does not constitute a final order or judgment, because "[t]o construe such a document as an order or judgment would destroy common expectations of the legal community and*

generate substantial confusion"). HSD submitted the Motion to Dismiss on Grounds of Mootness and Lack of Standing prior to the issuance of the final order. *RP 102-103.* Thus, the Motion was timely submitted and properly considered. *Rule 1-074P.* Accordingly, the issuance of the final *Dismissal Order* (8/26/11) was proper and within the jurisdiction of the District Court.

III. CONCLUSION

THI was not authorized pursuant to a contractual assignment to usurp Mr. Zuniga's right as a Medicaid applicant to appeal the denial of Medicaid eligibility. *NMSA 1978, §§ 27-3-1 to 27-3-4 (Public Assistance Appeals Act).* Consequently, the District Court lacked subject matter jurisdiction where THI was not the Medicaid applicant and otherwise lacked standing to bring the appeal. *RP 102-103, ACLU of N.M., 2008 NMSC 45, ¶9 (FN 1).* This Court should therefore find that it is without jurisdiction to hear THI's appeal. *State Human Rights Comm'n, 2010-NMCA-107, ¶4.* Alternatively, HSD respectfully requests that the final *Dismissal Order* be determined as issued within the District Court's jurisdiction and be upheld in all other respects. In addition, this Court should find that the late Mr. Zuniga's Constitutional due process rights were properly preserved by HSD.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent/Appellee's Answer Brief was mailed by U.S.P.S. on June 8, 2012, to the opposing counsel of record:

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