IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

WRONGFUL DEATH ESTATE
OF NATIVIDAD ARCHULETA, DECEASED,
BY SINFER ARCHULETA, PERSONAL
REPRESENTATIVE,

Plaintiff-Appellant,

vs.

Ct. App. No. 31, 950

THI OF NEW MEXICO, LLC,
THI OF BALTIMORE, INC.,
FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC,
FUNDAMENTAL CLINICAL CONSULTING, LLC,

Defendants-Appellees.

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
LAS VEGAS, NEW MEXICO
THE HONORABLE EUGENIO MATHIS, JUDGE

APPELLANT'S BRIEF IN CHIEF

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TABLE OF CONTENTS

Statement of Compliance with Rule 12-213(G):

This Brief complies with Section F of Rule 12-213. It was prepared using a proportionally-spaced type style, Times New Roman, and contains 10,925 words in the body of the brief. This word count was performed by Microsoft Word 2010.

TABLE OF AUTHORITIES

New Mexico Cases

Cases From Other Jurisdictions

Statutes, Rules and Regulations

Other Authorities

Plaintiff-Appellant, the Wrongful Death Estate of Natividad Archuleta, Deceased, by Sinfer Archuleta, Personal Representative ("Plaintiff"), by counsel, pursuant to Rule 12-208 NMRA, hereby respectfully requests that this Court reverse the district court's orders granting summary judgment to all remaining named defendants except the facility.

INTRODUCTION

This suit concerns the injuries Natividad Archuleta suffered while under the care of Vida Encantada nursing home in Las Vegas, New Mexico, and the multiple inter-related entities involved in the operation, funding and oversight of that nursing home. The district court erred in resolving disputed issues of material fact and ruling that, as a matter of law, these entities owed no duty to Mrs. Archuleta and no joint venture existed between the five defendants.

Plaintiff filed suit against eight defendants—one individual and seven entities—alleging that their improper management and funding of the nursing home harmed, and ultimately contributed to cause the death of, her mother-in-law, Natividad Archuleta, while she was under the care of Defendants' nursing home, Vida Encantada, in 2008.[1] Plaintiff alleged that the defendants jointly and negligently operated Vida Encantada nursing home, yet constructed an elaborate corporate shell to maximize profits and avoid liability for harm to their residents.

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[1] The Court previously dismissed out ABE Briarwood Corporation, Sharon Inoue, and Fundamental Long-Term Care Holdings. These orders are not the subject of Plaintiff's appeal.

Their budgetary decisions—to not hire an adequate number of caregivers, to not train or supervise the staff properly, and to not provide the staff with sufficient supplies—directly led to Mrs. Archuleta developing severe pressure sores, contractures and malnutrition. Eventually, the neglect also contributed to cause her death.

In advance of trial, Plaintiff sought discovery to support her position that these defendants, individually and in concert, were responsible for the budgeting, management, and/or oversight of the nursing home's operations. After the Defendants' refusal to provide these documents, and the Court's denial of discovery, including critical depositions, Plaintiff had no choice but to proceed to trial against five defendants in September, 2011: THI of New Mexico at Vida Encantada; THI of New Mexico, LLC; Fundamental Administrative Services; Fundamental Clinical Consulting; and THI of Baltimore, Inc. However, literally on the eve of trial (late afternoon Friday before the scheduled Monday jury selection), the district court entered summary judgment against four of the five defendants remaining in the case, leaving Plaintiff to try her case against a sole defendant - an uninsured local LLC that had little control over the allocation of resources that led to understaffing and ultimately, Mrs. Archuleta's suffering and death. This left Plaintiff with several critical empty chairs for the entities that set the financial and organizational structure under which Vida Encantada operated.

The remaining Defendant, THI of New Mexico at Vida Encantada, LLC, did not have any control over the facility's cash flow, did not create the facility's policies and procedures, and did not set rates of pay for caregivers or the budget that controlled the amount of staff and supplies. Without the other defendants in the case, Plaintiff was in the untenable position of being forced to try her case against only this defendant without the possibility of relief and the ability to explain to the jury the core reasons why Mrs. Archuleta was neglected.

Plaintiff obtained a continuance of the trial and then sought reconsideration of the court's orders, including the discovery rulings. The district court did not allow Plaintiff's requested discovery or alter its prior rulings granting summary judgment for the four defendants, despite significant issues of material fact existing regarding the duties owed to Mrs. Archuleta and the existence of a joint venture. Plaintiff now seeks reversal of the district court's rulings.

SUMMARY OF PROCEEDINGS AND FACTS RELEVANT TO ISSUES ON APPEAL

A. Plaintiff's Complaint Stated a Cognizable Claim for Joint Venture and Individual Liability.

Plaintiff's complaint named eight entities. The entities at issue here are: THI of New Mexico at Vida Encantada ("THI-VE"); THI of New Mexico, LLC ("THI-NM"); THI of Baltimore, Inc. ("THIB"); Fundamental Administrative Services ("FAS"); and Fundamental Clinical Consulting ("FCC"). [RP 1-25]

Plaintiff alleged that all Defendants were liable for their actions and inactions in running the nursing home. [RP 2-6] Additionally, Plaintiff alleged that Defendants were engaged in a joint venture/enterprise during Mrs. Archuleta's residency, having a shared community of interest in the object and purpose of the undertaking for which the nursing home was being operated and used. [RP 6] She alleged that each Defendant had an equal right to share in the control of the operation of the nursing home during Mrs. Archuleta's residency, and that the Defendants controlled the operation, planning, management, and quality control of the nursing home facility. [Id.] Specifically, Plaintiff alleged that Defendants' authority over the nursing home included control of marketing, human resources management, training, staffing, creation and implementation of policy and procedure manuals used by the nursing home facility, federal and state Medicare and Medicaid reimbursement, quality care assessment and compliance, licensure and certification, legal services, and financial, tax, and accounting control through fiscal policies established by the Defendants. [Id.]

Plaintiff also alleged that the Defendants operated and/or controlled, either directly or through the agency of each other and/or other diverse subalterns, agents, subsidiaries, servants, or employees in the operation of Vida Encantada. [RP 7] Finally, Plaintiff alleged that "[b]ecause the Defendants named herein and others were engaged in a joint venture/enterprise before and throughout Ms. Archuleta's

residency, the acts and omissions of each participant in the joint venture/enterprise are imputable to all other participants. The actions of the Defendants and each of its servants, agents and employees as set forth herein, are imputed to each of the Defendants, jointly and severally." [Id.]

B. The Court Denied Plaintiff Substantive Discovery and Substantially Limited Her Ability to Prepare for Trial.

On March 10, 2011, when it became apparent that Defendants would not produce requested discovery without a court order, Plaintiff filed a Motion to Compel Discovery. [RP 503-44] She sought documents in support of both her direct liability and joint venture claims against all defendants, including corporate structure and financial documents that would further delineate the relationships between the defendants and the role each defendant played in the nursing home. [RP 507-09]

Specifically, the documents Plaintiff sought included the following: evaluations regarding the adequacy of care provided to residents of the nursing home regarding skin care; consultant reports or reports generated by or on behalf of any management company; management agreements; contracts between the nursing home and other entities; articles of incorporation; corporate organizational charts; contracts between the co-defendants; documents containing budgets, budgetary guidelines, expense restrictions or limitations, suggested operational costs, or expense ceilings; bonus or incentive programs; analyses of financial

performance of the nursing home; profit and loss statements; loan applications; bank statements; financial statements; general ledgers; and transactions in any inter-company accounts. [RP 516; 517; 521-24]

The court's March 18, 2011 Scheduling Order neither set forth any deadlines for Motions to Compel, nor addressed any pending motions.[3] [RP 552-54] Under this Scheduling Order, discovery closed on August 5, 2011. [RP 553] Plaintiff's Motion was fully briefed by April 13, 2011. [RP 589-97] However, when the court heard Plaintiff's Motion on July 7, 2011, it wholly denied it due to "lack of timeliness" and refused to consider the substance of Plaintiff's motion. [RP 908-09] Plaintiff then filed a Motion to Reconsider the Order Denying Plaintiff's Motion to Compel Appropriate Discovery. [RP 853-57] Although the court later granted Plaintiff's request for certain employee files, the court did not grant any other relief on her Motion to Compel Discovery. [RP 1439-41; 2804]

In early July, 2011, Plaintiff filed a Motion to Compel the depositions of, amongst others, the Regional Director of Operations/Regional Vice President of FCC (Daniel Mathis); the Senior Vice President of FCC (Scott Hillegass); the CEO of FAS (Bradley Bennett); and Rule 1-030(B)(6) corporate designees for each named defendant. [RP 809-52] Scott Hillegass was scheduled to be deposed in

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[3] The Court's previous Scheduling Order, filed March 4, 2010 for a January 2011 trial setting, was vacated on the agreement of the parties on December 29, 2010, as the parties were attempting to reach a resolution of the case. However, the previous Scheduling Order was similarly silent on Motion to Compel deadlines.

another matter involving some of the same defendants only days later, so Plaintiff requested that the Court allow Plaintiff to cross-notice his deposition for the instant matter. [RP 809] The Court denied this request. [RP 1034-36; 2803] Although the Court initially granted Plaintiff's Motion to Compel the depositions of Mathis and Bennett, upon reconsideration, the Court reversed that ruling. [RP 2803; 2809] Defendants' responses to Plaintiff's Motions to Compel—and their own Motions for Protective Order—only sought to limit *the scope* of the 30(b)(6) depositions. [RP 660-72; 714-23; 896-900; 910-916] Nevertheless, the district court flatly refused to allow **any** 30(b)(6) depositions of THI of Baltimore, FAS or FCC to proceed. [RP 1069-71; 2803] The one 30(b)(6) deposition which did proceed—that of THI of Vida Encantada at New Mexico—involved a witness who was unprepared to testify to the facility's operation and oversight, the relationships between the named defendants, and many other categories noticed.

On July 20, 2011, *sua sponte,* Judge Mathis entered an "Order Implementing Expedited Briefing Schedule," requiring that responses to Motions be submitted and served on the court and counsel via email, within five (5) calendar days, and replies in three (3) calendar days. [RP 890-91] This specifically implicated the summary judgment motions filed on August 12, 2011, giving Plaintiff only five days to respond to Defendants' Motions for Summary Judgment. [Id.]

On September 9, 2011, Defendants filed a Motion to Strike Plaintiff's Financial Expert, Bruce Engstrom, claiming both that they had been denied an opportunity to depose him (making him a "surprise witness"), yet also that his testimony would not assist the jury. [RP 2056-2103] In response, Plaintiff advised the court that she had made Mr. Engstrom available on multiple occasions. [RP 2262-2285] Defendants simply failed to schedule Mr. Engstrom's deposition at the times Plaintiff offered his availability. Nonetheless, the court, on September 20, six days prior to the scheduled trial, granted Defendants' Motion, even while acknowledging Mr. Engstrom's purpose: "[h]e is clearly being put forth as an expert witness on the complex corporate relationship among the Defendants." [RP 2850; 2447-49][4]

C. Defendants' Motions for Summary Judgment Rested on the Claim That They Owed No Duty to Mrs. Archuleta.

In August, 2011, five defendants remained in the case: FAS; FCC; THI-NM; THIB, and THI-VE. In three separate motions—one jointly filed by FAS and FCC; one filed by THI-NM; and one filed by THIB—Defendants sought summary judgment of Plaintiff's claims against them. [RP 1144-1165; 1166-76; 1323-1341]

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[4] Also during this August-September 2011 time frame, Judge Mathis informed the parties that his father-in-law was moving into Vida Encantada nursing home. He denied Plaintiff's Motion to Recuse.

Simultaneously, these defendants also **jointly** filed a Motion for Partial Summary Judgment on Plaintiff's Joint Venture/Enterprise Claim. [RP 1280-1313]

In their joint Motion for Summary Judgment, Defendants FAS and FCC argued that they owed no duty to Mrs. Archuleta, and that FAS and FCC did not own, operate, manage or control the facility. [RP 144-1165] In its Motion for Summary Judgment, Defendant THI- NM argued that it owed no duty to Mrs. Archuleta, and that Plaintiff had no evidence that it controlled the operation of Vida Encantada. [RP 1323-41] Finally, in its Motion for Summary Judgment, Defendant THIB argued that it had no direct connection to Vida Encantada, that it owed no duty to Mrs. Archuleta, and that it did not own, operate, manage or control the facility. [RP 1166-76] Notably, at that time, none of the Defendants argued that Mrs. Archuleta was not harmed; their arguments began and ended with whether or not these defendants owed any duty to Mrs. Archuleta.

D. Plaintiff's Motion for Summary Judgment, Responses to Defendants' Motions and Motions to Reconsider Rebutted Defendants' Statements of Material Fact and Set Forth Evidence in Plaintiff's Support, Giving Rise to Issues of Material Fact.

In her responses to Defendants' individual and joint motions for summary judgment, their joint Motion for Partial Summary Judgment on Plaintiff's Claim of Joint Venture/Enterprise, and her Motion for Summary Judgment on Joint Venture, and in her motions to reconsider, Plaintiff presented evidence that these four entities—THI of New Mexico, THI of Baltimore, FAS and FCC—were

inextricably intertwined with THI of New Mexico at Vida Encantada. [RP 1179-1262; 1527-1586; 1607-1664; 1665-1720; 1806-1861; 2539-2699; 2731-2753;2774-2792] Plaintiff specifically and directly addressed and rebutted Defendants' statements of material facts, as required by Rule 1-056. [Id.] She provided support for her position through the attached exhibits, which were voluminous. These exhibits included deposition testimony, documents obtained in discovery in this and other cases, expert reports and affidavits. [Id.]

Rebutting all Defendants' claims that they were not involved in the ownership, operation, management or control of the facility, Plaintiff demonstrated that each had significant participation in the daily operations and management of the nursing home, as described below. Plaintiff argued that this participation formed the basis for the legal duty Defendants owed Mrs. Archuleta.

This evidence supported Plaintiff's position that these five defendants, individually, as a joint venture, and through their agents, were involved with the budgeting, management and oversight of the nursing home during Mrs. Archuleta's residency. Plaintiff's main argument was that Mrs. Archuleta was harmed by the way the facility was mismanaged and that funds that should have gone to resident care and sufficient staffing were instead diverted to the defendants' pockets. These four Defendants were an indispensable part of this scheme, and their liability was a question for the jury to decide.

E. THIB and THI-NM's Intertwined Operations Regulated the Finances of Vida Encantada.

The CEO of THIB had supervisory authority over FCC employee Scott Hillegass, who had supervisory authority over FCC Regional Vice President/FCC Regional Director of Operations. [RP 2684; 2671] The FCC Regional Vice President/Regional Director of Operations had supervisory authority over the administrator of VE, conducting her annual reviews and having the authority to fire her. [RP 2642]

Under the terms of the THI-Vida Encantada operating agreement, all profits and losses of Vida Encantada were allocated to THI of New Mexico, LLC. [RP 2588] Also under this agreement, THI of New Mexico, LLC appointed officers of Vida Encantada and had the power to remove them at any time with or without cause. [RP 2589]

Vida Encantada did not retain the funds paid to it for resident care. Instead, THIB and THI-NM were amongst those sweeping funds from the nursing home on a regular basis. Money deposited into Vida Encantada's bank account was subsequently transferred to another bank account named "THI Holdings Cash Con." [RP 2550-2586] The revolving Credit and Security Agreement entered into among FLTCH, THI of Baltimore, Inc. and certain subsidiaries, including Vida Encantada ("Borrowers") and Capital Source Finance, LLC ("Lender") evidenced centralized cash management. [RP 2578-86] It made available to Borrower(s),

including THI of Baltimore, Inc., a revolving credit line of up to $50,000,000. [RP 2579]

As collateral, the Borrowers, including THI of Baltimore, pledged all of their accounts, including the money being paid to Vida Encantada for resident care (from Medicare, Medicaid and Private Pay residents). [RP 2580-81] Mark Fulchino (Executive Vice President and CFO of FLTCH and Executive VP of THI of Baltimore, Inc.) and Murray Forman (Owner and President of FLTCH), signed for the Borrowers, with THI of Baltimore, Inc., as the Borrowing agent. [RP 2583-84]

The Revolving Credit and Security Agreemement expressly states, "Each borrower acknowledges that it is jointly and severally liable for all of the obligations under the Loan Documents. Each borrower expressly understands, agrees and acknowledges that (i) **Borrowers are all affiliated entities by common ownership** (ii) each borrower desires to have availability of common credit facility instead of separate credit facilities." [RP 2580] emphasis added.

As the report of Plaintiff's financial expert, Bruce Engstrom, stated, for a three-year period, from May 1, 2005 until May 31, 2008, the total cash flow from Vida Encantada's operations was $634,650. [RP 2570] For this same time period, 85 percent of the cash flow - $539,196 – was funneled back to the owners. [RP 2571]

When comparing New Mexico nursing home subsidiaries of Fundamental/THI to all other nursing homes in New Mexico, Fundamental/THI nursing homes spent less on wages for direct care staff, provided less direct resident care and spent less on dietary. [RP 2572-73] The year Fundamental/THI nursing homes had the widest variance from the state average was 2008, the year Ms. Archuleta was at Vida Encantada. [Id.]

F. FCC and FAS Had Significant Roles in the Day-to-Day Operations of Vida Encantada.

Even though they were under the same ownership umbrella, FAS and FCC had "Support Agreements" with THI-VE. [RP 2602-18; 2619-35] Through these agreements, FAS and FCC were each appointed as the sole and exclusive entity acting on behalf of the nursing home to perform the support services. [RP 2604; 2621] They were given the authority to perform the services in whatever manner they deemed reasonably appropriate to meet the day-to-day requirements of the operations of the nursing home. [Id.] They were able to enter into contracts related to the nursing home. [RP 2605; 2622] For their work, and despite the fact that they had common ownership with the nursing home, they received a certain percentage of the net operating revenue of the facility. [RP 2606; 2622]

Deposition testimony presented to the Court showed that the nursing home did not differentiate between FAS and FCC, but rather considered them to be both merely "Fundamental." [RP 2650] FAS and/or FCC finalized the VE budget and

monitored VE's financial performance on a monthly basis. [RP 2667-68] FAS and/or FCC prepared regular reports on "how much we were spending...our census. How much revenue... any kind of report that had to do with what we were bringing in, what we were spending." [RP 2657] FAS and/or FCC created the Policies and Procedures for VE, and were in charge of ensuring that they were updated in compliance with regulations. [RP 2648] FAS and/or FCC provided VE employees in every department with "What You Need to Know" books on various topics such as survey readiness and abuse and neglect. [RP 2656; 2659] These were also readily accessible on the "Fundamental" website. [Id.]

Mathis, FCC Regional Vice President and VE Administrator supervisor, visited the facility every couple of months and filled out scorecards, evaluating each department to ensure that VE was in compliance with the federal regulations, state regulations and Fundamental Policies and Procedures. [RP 2650-52] These scorecards were used in VE's performance improvement process. [Id.] When VE received citations for deficient care when the nursing home underwent surveys, FCC, through Mathis, participated in preparing plans of correction, which were then submitted to the licensing authority. [RP 2653-54]

Additionally, FAS and/or FCC's purchasing department set up an online, pre-negotiated system for VE that the facility used to purchase everything from

supplies to food, and negotiated contracts with vendors for food, medical supplies and other services. [RP 2656]

Under its written Agreement with THI-VE, FAS could open and maintain bank accounts, including depositing and disbursing all receipts and moneys related to the nursing home. [RP 2612] It was responsible for establishing and administering the books, records and accounts of the nursing home, and provided bookkeeping and accounting administrative support. [RP 2605; 2612]
It provided payroll and personnel services, including employee training and the management and design of employee incentive and bonus plans. [RP 2612] It provided office basics: telephones, computers and all communication systems; as well as billing and collections services, and accounts payable services. [Id.]

Perhaps most critically, it was tasked with doing budgeting, forecasting and financial analysis. [Id.] It was intimately involved with the legal and financial matters of the nursing home: it assisted in securing insurance; provided in-house legal counsel and related support; assisted in preparing and filing tax returns; and provided advice regarding the Health Insurance Portability and Accountability Act ("HIPAA"). [Id.] With regard to the nursing home's compliance with state and federal laws, FAS was responsible for assisting with regulatory reporting and cost report preparation, and assisting in obtaining and maintaining licensure and certification. [Id.] Thus, for all intents and purposes, the general, day-to-day

managerial functions of THI-VE were delegated to FAS: accounts receivable and payable; compliance with state and federal regulations; payroll and personnel; employee training.

Similarly, under its Clinical Support Agreement with THI-VE, FCC agreed to provide clinical support services. [RP 2619-35] These services included compliance with facility policies and procedures, federal and state law; assistance with regulatory surveys; the coordination and maintenance of facility operations improvement data; and maintenance of a comprehensive survey result data base. [RP 2621; 2629] Thus, the oversight of clinical care and compliance with federal regulations—both key elements of Plaintiff's claims—was delegated to FCC.

G. The Court Disregarded Plaintiff's Evidence and Resolved all Disputes of Material Fact in Favor of the Defendants.

In the weeks leading up to trial, the Court had before it multiple summary judgment motions: Plaintiff's Motion for Summary Judgment on Joint Venture; Defendants' Motion for Partial Summary Judgment on Plaintiff's Joint Venture/Enterprise Claim; Defendant THIB's Motion for Summary Judgment; Defendant THI-NM's Motion for Summary Judgment; and Defendants FAS and FCC's Motion for Summary Judgment.

Approximately one week prior to the start of trial, the Court stated "The Motion for Partial Summary Judgment by THI of New Mexico LLC, THI of

Baltimore LLC, FAS, LLC and FCC, LLC on Plaintiff's Joint Venture/Enterprise Claim is granted; 2. In light of my decision on the foregoing motion, I do not find it necessary to rule on Defendant THI of Baltimore LLC's Motion for Partial Summary Judgment or Defendants FAS, LLC and FCC, LLC's motion for Partial Summary Judgment..." [2828]

After this pronouncement, the parties were not certain what the Court's ruling meant. Plaintiff took this ruling to mean that while her joint venture claims against all Defendants could not proceed, she could nonetheless proceed with her claims of individual liability against each. [RP 2831; 2833] Defendants, however, took this ruling to mean that without a joint venture, none of the individual defendants could be held liable. [RP 2831] Plaintiff therefore sought clarification of the Court's ruling, so that she could know for certain against which Defendants the trial would proceed. Ultimately, in an email sent at 3:51 p.m. on Friday, September 23 (the Friday before trial was to begin on Monday, September 26), the district court advised the parties that he was granting summary judgment to all named defendants except the facility. [RP 2854] Defendants had moved to strike Plaintiff's evidence in her support, but the Court denied that request. [RP 2828] Thus, the Court had the entirety of Plaintiff's evidence before it when it ruled.

Despite the visible conflict between Plaintiff's statements of material fact and Defendants' statements of material fact, the district court determined that

"there is no issue of material fact in regard to Defendants' motion," and dismissed these four defendants from the suit. [5] [RP 2450-52; 2529-30] The district court stated only that "[t]he pleadings depositions, affidavits, etc. show that there is no genuine issue as to any material fact on any direct claims against these defendants and they are therefore, entitled to a judgment as a matter of law." [RP 2854] The district court made no findings of fact or conclusions of law, and heard no argument on the motions before rendering its verdict.

Plaintiff filed timely Motions to Reconsider. [RP 2539-2699] Again, the district court denied these motions, without issuing the factual basis for its ruling. [RP 2887-2890] Plaintiff also filed a Motion to Reconsider the Court's discovery rulings, which was also denied.[6]

Plaintiff had previously submitted an affirmative Motion for Summary Judgment on Joint Venture, seeking to affirmatively establish that a joint venture existed between the parties. [RP 1179-1262] Like her responses to Defendants' Motions, this Motion contained significant documentary support and case law in

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[5] This Court determined that these Orders did not contain the required decretal language necessary for appellate review. *See Notice of Proposed Summary Disposition.* Plaintiff then obtained, filed and supplemented the Record Proper with the corrected orders, and this matter was then placed on the General Calendar. *See Appellant's Stipulation to Supplement the Record Proper*, filed May 18, 2012 with this Court; *Second Notice Assignment to the General Calendar*, filed June 22, 2012.

[6] Upon counsel's review, this Motion appears to be missing from the Record Proper. Defendants' Response and the Court's Order on the Motion do appear in the Record Proper, however. [RP 2754-62; 2885-86] Thus, Plaintiff will under separate cover seek to supplement the Record Proper with this Motion.

support of Plaintiff's position. The Court's Order of September 26, 2011 denied this Motion, stating only that "there is no genuine issue of material fact in regard to Defendants' motion." [RP 2514-15]

ARGUMENT

I. SUMMARY JUDGMENT WAS IMPROPER.

Statement of Preservation

Plaintiff preserved this argument in her Responses to Defendants' Motions for Partial Summary Judgment, her Responses to Defendants' Motions for Summary Judgment, her Motion for Summary Judgment on Joint Venture, and her Motions to Reconsider. [RP 1179-1262; 1527-1586; 1607-1664; 1665-1720; 1806-1861; 2539-2699; 2731-2753; 2774-2792]

Standard of Review

The Court reviews the dismissal of these defendants as final appealable judgments under Rule 1-054(B)(2) NMRA. This Court's review is de novo. *See City of Rio Rancho v. Amrep Southwest Inc.,* 2011-NMSC-037, ¶ 14, 260 P.3d 414. This Court will affirm a district court's summary judgment determination only if the Court concludes "that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Id.* (quoting *Romero v. Philip Morris Inc.,* 2010–NMSC–035, ¶ 7, 148 N.M. 713, 242 P.3d 280). "On appeal from the grant of summary judgment, we ordinarily review the whole record in the

light most favorable to the party opposing summary judgment to determine if there is any evidence that places a genuine issue of material fact in dispute." *City of Albuquerque v. BPLW Architects & Eng'rs, Inc.*, 2009–NMCA–081, ¶ 7, 146 N.M. 717, 213 P.3d 1146, quoted in *Thompson v. Potter*, 2012-NMCA-014, ¶ 7, 268 P.3d 57.

Here, the district court first determined that no joint venture existed between the five companies. [RP 2828] That was not a final, appealable determination, as it neither dismissed those four defendants seeking dismissal nor included a statement that "there is no just reason for delay." *See* Rule 1-054 §§ (B)(1) and (B)(2) NMRA. Thus, despite Plaintiff's concerns, she was prepared to proceed to trial using only a theory of Defendants' individual liability. [RP 2831, 2833] However, the court next ruled that in the absence of a joint venture, no claims against the individual defendants could proceed. [RP 2854] Those orders constituted final, appealable orders, and it is from those orders that Plaintiff appealed. [RP 2450-52; 2529-30][7]

This Court has before it the full record to review the dismissal of Defendants THIB, THINM, FAS and FCC. In reviewing the appeal, the Court must "view the facts in a light most favorable to the party opposing summary judgment and draw all reasonable inferences in support of a trial on the merits." *Amrep,* 2011-NMSC-

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[7] *See Appellant's Stipulation to Supplement the Record Proper*, May 18, 2012.

037, ¶ 14 (quoting *Romero,* 2010–NMSC–035, ¶ 7). In reviewing the full record before it, the Court can and should consider both the defendants' individual liability and their liability stemming from their participation in a joint venture.

If this Court finds a genuine issue of material fact exists with regard to the existence of a joint venture between these entities, then reversal of the district court's orders is required. Similarly, if this Court finds that a genuine issue of material fact exists with regard to the individual duties owed by the defendants to Mrs. Archuleta, then it must reverse the district court's orders.

A. A Joint Venture Existed Between These Five Companies and Dismissal of Four of the Five Companies was Improper.

These five companies—FAS, FCC, THI-NM, THI-VE and THIB—operated under a common understanding with the primary purpose of running nursing homes. Rather than file suit against only the nursing home, Plaintiff sued all of these entities because THI/Fundamental has created a multi-layered ownership and operation structure, with the explicit purpose of obfuscating ownership and attempting to shirk liability. Further, it was the actions of the companies, both individually and as part of the joint venture itself—the underfunding, the limitations on budgeting staff and supplies, and the failure to remedy known safety issues—that proximately caused the injury to Mrs. Archuleta.

Judge Browning noted in a pending case involving THI-NM, THI-NM Hobbs, FAS and FCC as Defendants, *Walker v. THI of NM at Hobbs Center, et al.*,

"[i]t appears that the Defendants have organized themselves into a myriad of interconnecting corporate entities, and have used this organizational approach to try to diffuse, limit, and complicate culpability and liability." 2010 WL 552661 (D.N.M.)(unpub.). This observation applies equally to the defendants in this case.

The structure under which the THI/Fundamental joint venture operated is not uncommon in the nursing home industry: "private investment companies have made it very difficult for plaintiffs to succeed in court and for regulators to levy chainwide fines by creating complex corporate structures that obscure who controls their nursing homes." Charles Duhigg, *At Many Homes, More Profit, Less Nursing,* N.Y.TIMES, September 23, 2007.[8]

This complex corporate structure certainly exists here. Duhigg describes a structure where "[e]ach home was operated by a separate company. Other companies helped choose staff, keep the books and negotiate for equipment and supplies. Some companies had no employees or offices, which let executives file regulatory documents without revealing their other corporate affiliations." *Id.* Although Duhigg was not speaking of THI/Fundamental, he clearly could have been.

This obfuscation serves several purposes: it attempts to shield the nursing home's related entities from liability; it makes it more difficult for regulators to

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[8] At http://www.nytimes.com/2007/09/23/business/23nursing.html.

determine if one company is responsible for more than one nursing home; it makes it more difficult to determine when the companies pay themselves from Medicare and Medicaid; and it shields whether or not the homes are paying fair market value for services and supplies because it is not always clear that they are, effectively, paying themselves for those items. *Id.* Also, "even when regulators do issue fines to investor-owned homes, they have found penalties difficult to collect. 'These companies leave the nursing home licensee with no assets, and so there is nothing to take,' said Scott Johnson, special assistant attorney general of Mississippi." *Id.* Here, that is exactly the scheme under which Vida Encantada operated, and why Plaintiff should not be forced to proceed against only the nursing home when clearly several other companies were equally, if not more, involved in the oversight, management and funding of the nursing home.

B. New Mexico Law and the Facts of this Case Allow the Fact-Finder to Determine a Joint Venture Forms the Basis for the Liability of These Five Entities.

When two or more entities come together for a single purpose, they are considered to be a single entity. When a judge or jury finds that a joint venture exists, the venturers are jointly and severally liable for the joint venture's negligent acts. *See* 13-410 NMRA, committee cmt. ("Those engaged in a joint enterprise or a joint venture may incur vicarious liability for the tortious conduct of one participant whose negligence may be imputed to other members of the joint

enterprise or joint venture upon the same principles which apply to partners."); *See* 13-411 NMRA, committee cmt. ("Generally, partners are jointly and severally liable for wrongful acts or omission of one of the partners....").

Under New Mexico law, "[a] joint venture exists when two or more parties (1) enter into an agreement, (2) to combine their money, property or time in the conduct of some particular business deal, (3) agree to share in the profits and losses of the venture jointly, and (4) have the right of mutual control over the subject matter of the enterprise or over the property." *Lightsey v. Marshall*, 1999 -NMCA-147, ¶ 13, 128 N.M. 353, 992 P.2d 904, internal quotation marks omitted. As explained in detail below, all of these elements were met here.

New Mexico courts have found joint ventures in a variety of situations where several companies combine their efforts to run a business, such as in a farming operation (*Quirico v. Lopez*, 106 N.M. 169, 171,740 P.2d 1153, 1155 (1987)) or the construction and operation of a supermarket (*Wilger Enterprises, Inc. v. Broadway Vista Partners*, 2005-NMCA-088, ¶ 10, 137 N.M. 806, 115 P.3d 822).

In *Wilger*, the Court found a joint venture existed, based upon the parties' lease contract to construct the supermarket, and the fact that the Owner agreed to pay the contractor directly, instead of reimbursing Furr's. *Id.* "Intent to create a partnership or joint venture may be implied from the parties' conduct; therefore, it

is immaterial that the parties do not designate their relationship as a partnership or joint venture, or even realize that they are partners or joint venturers." *Nichols Corp. v. Bill Stuckman Constr. Co.*, 105 N.M. 37, 42,728 P.2d 447 (1986) (citing *Anderson Hay and Grain Co. v. Dunn*, 81 N.M. 339, 467 P.2d 5 (1970)). Here, although the parties may not have all explicitly designated their relationship as joint ventures, an examination of the structure and their duties and obligations to each other and the nursing home manifests their intention to run the nursing home as a joint venture.

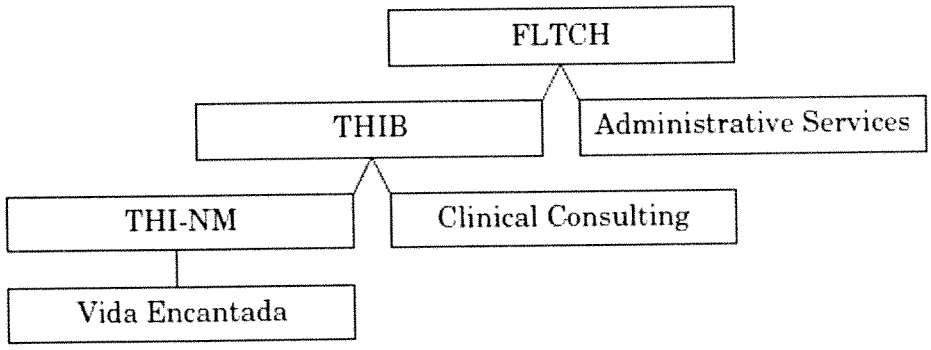
Under New Mexico law, the fact-finder ascertains the intentions of the parties with regard to joint venture as disclosed by their acts in connection with the entire transaction. *Quirico*, 106 N.M. at 171, 740 P.2d at 1155. An actual written agreement is not necessary; imputing its presence from the facts is sufficient. *Id.* Here, several written agreements exist, and the actions of the parties in connection with the operation of the nursing home clearly demonstrate the existence of a joint venture.

In this case, THI-NM, THI-B, FAS and FCC entered into agreements to combine their money, property and time in the conduct of running Vida Encantada nursing home, agreed to share in the profits and losses of the nursing home, and had the right of mutual control over the nursing home. *See Lightsey*, 1999-NMCA-

147, ¶ 13. All of the following facts were presented to the district court in response to Defendants' Motions for Partial Summary Judgment.

In the 1-030(B)(6) deposition of the facility, THI-VE, the facility testified that it did not know what happened to money coming into the facility from residents or Medicare/Medicaid; it did not have access to the money or know who did have access to it. [RP 1690-91] Indeed, all profits and losses from Vida Encantada were allocated to THI of New Mexico. [RP 2588]

In 2007 and 2008, Fundamental Long Term Care Holdings, LLC wholly owned THI of Baltimore, Inc. which wholly owned THI of New Mexico, LLC, which wholly owned THI of New Mexico at Vida Encantada ("THI of NM at VE"). [RP 1193] Fundamental Administrative Services and Fundamental Clinical Consulting were also part of this empire, and managed Vida Encantada during Ms. Archuleta's residency. This empire has been depicted thusly:



They companies entered into agreements to combine their money, property and time in the conduct of running nursing homes. This structure involved

significantly inter-related entities which shared an address in Sparks, Maryland: 930 Ridgebrook Road. [RP 2583, 2584, 2587, 2590, 2608, 2624] The nursing home administrator, Sharon Inoue, attended orientation at the Fundamental campus in Sparks when she began working at Vida Encantada, with other administrators from New Mexico THI/Fundamental nursing homes. [RP 2645-46] While Defendants have attempted to portray Vida Encantada as an isolated, autonomous entity, it was clearly anything but that.

Mr. Hillegass had supervisory authority over the Regional Vice President of FCC, Mr. Mathis, who had supervisory authority over the administrator of Vida Encantada. [RP 2684] Ms. Inoue's predecessor Vida Encantada administrator, William Chaltry, testified that he signed a management contract in 2006 to allow FAS to provide management services to the nursing home, even though FAS was also his direct supervisor. [RP 2642]

C. THI of New Mexico and THIB Were Personally Involved in the Operations of Vida Encantada and Are Liable for their Actions, both Individually and As Part of a Joint Venture.

THI of New Mexico, LLC appointed officers of Vida Encantada and had the power to remove them at any time with or without cause. [RP 2589] Despite the fact that all were part of the same empire, THI-VE had written agreements with THI-NM, FAS and FCC. [2602-39] The companies agreed to share in the profits and losses of the nursing home, and their funds were purposefully co-mingled.

THI of New Mexico, the sole member of THI-VE, contributed only $100 for its initial capital contribution, yet under the terms of the Vida Encantada operating agreement, all profits and losses of Vida Encantada were allocated to THI of New Mexico, LLC. [RP 2588-89] Money deposited into Vida Encantada's bank account was subsequently transferred to another bank account named "THI Holdings Cash Con." [RP 2550-86]

The Revolving Credit and Security Agreement among FLTCH, THI of Baltimore, Inc. and certain subsidiaries, including Vida Encantada ("Borrowers") and Capital Source Finance, LLC ("Lender") further evidence centralized cash management. [RP 2578-86] This agreement made available to Borrower(s), including THI of Baltimore, a revolving credit line of up to $50,000,000. [RP 2579] As collateral, the Borrowers, including THI of Baltimore, pledged all of their accounts, including the money being paid to Vida Encantada for resident care (from Medicare, Medicaid and Private Pay residents). [RP 2580-81] Mark Fulchino (Executive Vice President and CFO of FLTCH and Executive VP of THI of Baltimore, Inc.) and Murray Forman (Owner and President of FLTCH), signed for the Borrowers, with THI of Baltimore, Inc., as the Borrowing agent. [RP 2583-84] Significantly, this empire operated without any respect for corporate separateness between the purportedly separate entities. Together, the companies had the right of mutual control over the nursing home.

D. FAS and FCC Were Involved in the Day-to-Day Operations of Vida Encantada and Are Liable for Their Actions, Both Individually and as Part of a Joint Venture.

Despite their common ownership with the nursing home, FAS and FCC entered into management contracts with the nursing home in 2006, and were intimately involved in the oversight and operation of the nursing home, in matters both clinical and financial. Although FAS and FCC's areas of involvement in the nursing home were ostensibly different, the nursing home testified that it couldn't "distinguish between the two easily." [RP 2650]

FAS and FCC created the Policies and Procedures for VE. [RP 2648] They provided VE employees in every department with "What You Need to Know" books on many topics, including survey readiness and abuse and neglect. [RP 2656; 2659] Their staff, including Daniel Mathis, FCC Regional Vice President and VE Administrator supervisor, visited the nursing home every couple of months and filled out scorecards, evaluating each department to ensure that VE was in compliance with the federal regulations, state regulations and Fundamental Policies and Procedures, and to help prepare for surveys. [RP 2650-51]

FAS was also closely involved in the day-to-day hiring and firing of VE employees. When the VE administrator wanted to suspend an employee or bring disciplinary action against an employee, she would first call the FAS HR consultant, Karen Hood, before doing so. [RP 2647] The FAS HR consultant

would then tell her what the proper paperwork was for doing so. [Id.] The same was true if the VE administrator wanted to fire a nursing home employee. [RP 2648-49] If the nursing home had open positions, it would also discuss that with FCC Regional Vice President Mathis. [RP 2653]

FAS and FCC determined how much VE employees were paid. The FAS HR consultant helped develop the pay scale to pay employees at Vida Encantada. [RP 2649] If the nursing home wanted to give a pay raise, the administrator would first discuss it with either the FAS HR consultant or the FCC Regional Vice President, Daniel Mathis. [Id.] Although the nursing home never gave facility-wide raises, the nursing home was constrained in individual raises by a pre-set 2-3% pay raise guideline. [Id.] In certain years, the nursing home was told by FAS or FCC "accountants" and the Regional Vice President of FCC that there would be no pay raises or promotions that year. [RP 2650]

FAS and FCC employed multiple "consultants" who effectively oversaw every department at the nursing home: nursing; business; accountant; managing; physical plant; dietary; marketing. [Id.; RP 2662] These "consultants"—apparently provided not at the request of the facility, but rather as a matter of course through the operations of this empire—helped ensure that the facility was in compliance with regulations. [RP 2662]

FAS and FCC reviewed and attempted to correct deficiencies in resident care at VE. Nursing homes are required to comply with the requirements at 42 CFR § 483, Subpart B, to receive payment under the Medicare or Medicaid programs. As part of this process, surveyors perform annual compliance surveys, creating reports outlining which state and federal regulations, if any, the nursing home has violated. The nursing home must then submit a "Plan of Correction," setting forth what steps the nursing home is taking to correct any deficient practices or policies. When VE received citations for deficiencies during surveys, FCC, through Mathis, participated in preparing plans of correction, which were then submitted to the licensing authority. [RP 2653-54] FAS and FCC also maintained the 1-800 hotline for concerns and complaints from residents, family members, and employees. [RP 2656; 2662] FAS and FCC were therefore on notice of problems within the facility, including complaints of short-staffing.

FAS and FCC also effectively controlled the purchasing and expenditures at the nursing home. Capital expenditures (expenditures over $500) went through FAS and/or FCC. [RP 2665] FAS and/or FC's purchasing department set up an online, pre-negotiated system for VE for the facility to purchase everything from supplies to food. [RP 2656] They also provided *all* accounting services for VE, including preparation of the facility's Cost Reports. [RP 2657; 2664]

FAS and FCC were also intimately involved in the budgeting process at Vida Encantada. The FAS/FCC accountant and Regional Vice President Daniel Mathis had teleconferences with the nursing home to discuss the budget. [RP 2667] The actual budget was transmitted to the nursing home from FAS/FCC electronically. [RP 2668]

Clearly, these entities meet the standard for a joint venture in New Mexico, and for facing individual liability. These five entities existed for the purpose of running nursing homes, and joined together, in agreements both express and implied, for the purpose of running Vida Encantada nursing home. They shared in the profits and losses of the nursing home, and were deeply involved in its day-to-day operations, including employee training, setting staff pay, receiving complaints, and budgeting. At the very least, the district court usurped the role of the fact finder in ruling that there was no joint venture.

E. These Entities, Individually and as a Joint Venture, Owed Mrs. Archuleta a Duty.

"It is axiomatic that a negligence action requires that there be a duty owed from the defendant to the plaintiff..." *Romero v. Giant Stop–N–Go of N.M., Inc.*, 2009–NMCA–059, ¶ 5, 146 N.M. 520, 212 P.3d 408. Rebutting Defendants' claims, Plaintiff presented evidence showing that the joint venture and individual entities owed a legal duty to Mrs. Archuleta.

"New Mexico recognizes two categories of legal duty: (1) an affirmative duty to conform one's actions to a specific standard of care in relation to a specific individual or group of individuals created by a specific statutory or common-law standard; and (2) a defensive duty that is the general negligence standard, requiring the individual to use reasonable care in his activities and dealings in relation to society as a whole." *Edward C. v. City of Albuquerque,* 2010–NMSC–043, ¶ 15, 148 N.M. 646, 241 P.3d 1086 (internal citations and quotation marks omitted). Here, the individual entities and joint venture owed Mrs. Archuleta not only a general negligence defensive duty, but also a duty created under the specific statutory and regulatory scheme governing the care and treatment of nursing home residents.

When determining whether or not a duty exists, the Court must ask "whether [a] defendant has the ability to exercise control over a premise or an activity such that it is reasonable to impose a duty of ordinary care on it as to the management of the premises or activities." *Smith ex rel. Smith v. Bryco Arms*, 2001–NMCA–090, ¶ 25, 131 N .M. 87, 33 P.3d 638.

Here, as set forth above, these four Defendants had the ability to exercise control over the nursing home, and indeed exercised that control. FAS and FCC exercised considerable control over the physical environment of the nursing home—determining the pay rate for the staff; setting the budget; setting up a

system to obtain supplies; approving capital expenditures; approving any disciplinary action against caregivers; setting and updating the policies and procedures; assessing whether or not the facility was in compliance with those policies and state and federal regulations; training the staff; and hiring and firing the administrator. Similarly, both they and THI-NM and THIB exercised control over the flow of the money to and from the nursing home, handling payroll, accounts receivable and accounts payable, and sweeping all of the funds that came into the nursing home into other accounts, and pledging these funds as collateral for a $50 million revolving credit account.

While generally "[w]hether a duty exists is a question of law for the courts to decide," *Herrera v. Quality Pontiac,* 2003–NMSC–018, ¶ 6, 134 N.M. 43, 73 P.3d 181, New Mexico law is clear that "[w]here the facts and circumstances of the relationship between the parties are at issue, [the] existence of a duty may become a mixed question of law and fact under which the fact issue must be submitted to the jury for resolution." *Eckhardt v. Charter Hosp., Inc.,* 1998-NMCA-017, ¶ 39, 124 N.M. 549, 953 P.2d 722. Here, the facts and circumstances of the relationship between the parties was at issue, and the existence of Defendants' duty to Mrs. Archuleta was a mixed question of law and fact and should have been submitted to the jury.

When Defendants undertook Mrs. Archuleta's care, this created a duty to Mrs. Archuleta. Under New Mexico law, "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if his failure to exercise such care increases the risk of such harm." *Baer v. Regents of the Univ. of Cal.*, 1999-NMCA-005, ¶ 12, 126 N.M. 508, 972 P.2d 9 (1998)(internal citations and quotation marks omitted); *see also Calkins v. Cox Estates,* 110 N.M. 59, 63, 792 P.2d 36, 40 (1990) ("There exists a duty assigned to all individuals requiring them to act reasonably under the circumstances according to the standard of conduct imposed upon them by the circumstances"). Further, directors are liable for their own torts "regardless of whether the corporation is also liable." *Stinson v. Berry*, 1997-NMCA-076, 123 N.M. 482, 943 P.2d 129.

When the nursing home and related entities assumed the care of Mrs. Archuleta, and were paid to provide her care, they undertook to render services to her which were necessary for the protection of her person: feeding, bathing, turning and repositioning; assisting with ambulation. With this undertaking, a duty arose.

New Mexico law is clear that only "[w]here reasonable minds will not differ as to an issue of material fact," may the court properly grant summary judgment. *Romero,* 2010–NMSC–035, ¶ 7 (quoting *Montgomery v. Lomos Altos, Inc.*, 2007–NMSC–002, ¶ 16, 141 N.M. 21, 150 P.3d 971 (filed 2006)). Here, however, the district court disregarded substantial evidence in Plaintiff's favor and improperly resolved all issues of material fact in Defendants' favor.

Summary judgment is "an extreme remedy to be employed with great caution," and "cannot be substituted for a trial on the merits as long as one issue of material fact is still present in the case." *Fischer v. Mascarenas*, 93 N.M. 199, 200, 598 P.2d 1159, 1160 (1979). Here, this remedy was not employed with great caution, and multiple issues of material fact—including the existence of a joint venture, and the individual duties owed to Mrs. Archuleta—were still present in the case.

New Mexico law requires only that in responding to a summary judgment motion, "the nonmoving party need only show a genuine issue of material fact and need not present evidence sufficient to meet the burden at trial...[W]hen considering a summary judgment motion, it is not the trial court's task to determine if all the elements will be met, only that one or more factual issues are in dispute." *Bartlett v. Mirabal*, 2000-NMCA-036, ¶ 7, 128 N.M. 30, 999 P.2d 1062 (internal citations and quotations omitted). Here, however, the district court improperly

determined that there were no factual issues in dispute. This constituted reversible error.

These defendants undertook the funding, operation, and budgeting of the nursing home. They undertook the training of the staff, the inflow and outflow of all funds, and the determination on where those funds would be spent. They determined how much money was available for staff, and the nursing home's hands were tied by these decisions made higher up. Critically, even if no joint venture were found to exist, issues of fact remain as to whether the individual entities owe a duty to Mrs. Archuleta. As set forth below, these entities, individually and in concert, breached the duties they owed to Mrs. Archuleta and other Vida Encantada residents.

F. The Entities, Both Individually and as Members of a Joint Venture, Breached Their Duty.

Here, the nursing home, subject to the limitations imposed on it by the other defendants, undertook the medical care, feeding, bathing, transportation, and total care of Mrs. Archuleta. They failed to exercise reasonable care to perform these tasks, and Mrs. Archuleta was harmed. They are therefore liable for their actions and inactions which harmed Mrs. Archuleta. Further, they failed to follow their obligations set forth in state and federal regulations that govern the care of nursing home residents. *See* 42 USC §§ 1395i, 1396r; 42 CFR § 483; 7 NMAC 9.2. This also created liability. "When a statute imposes a specific requirement, there is an

absolute duty to comply with that requirement, and no inquiry is to be made whether the defendant acted as a reasonably prudent man, or was in the exercise of ordinary care." *Thompson,* 2012-NMCA-014, ¶ 32 (quoting *Heath v. La Mariana Apartments,* 2008-NMSC-017, ¶ 8, 143 N.M. 657, 180 P.3d 664).

Other courts have found that violations of federal and state nursing home regulations can be the basis for negligence per se in nursing home neglect case. *See McCain v. Beverly Health and Rehab. Services Inc.,* 2002 WL 1565526, at *1 (E.D.Pa. July 15, 2002).

Staffing plays a huge role in the day-to-day care provided at the nursing home: "It is often asserted that the quality of care in nursing homes is impaired because staffing is inadequate, staff are insufficiently trained, and turnover is high, especially for certified nurse assistants...Staff also account for the great bulk of nursing home costs, potentially creating a conflict with the incentives of prospective payment systems to keep costs low." Joshua Weiner, Mark Freiman, David Brown, *Nursing Home Care Quality Twenty Years After The Omnibus Budget Reconciliation Act of 1987,* December 2007, P. 16 (internal citations omitted), at http://www.kff.org/medicare/upload/7717.pdf.

Plaintiff presented evidence that compared to all other nursing homes in New Mexico (excluding subsidiaries of Fundamental/THI), VE consistently provided less direct care hours per day than the state average. [RP 2572-73] VE

also paid lower wages to caregivers than the state average (also excluding subsidiaries of Fundamental/THI). [Id.] VE paid only 65% of the state average on dietary spending from 2006 – 2008. [Id.] When comparing THI/Fundamental New Mexico nursing home subsidiaries to all other nursing homes in New Mexico, Fundamental/THI nursing homes spent less on wages for direct care staff, provided less direct resident care and spent less on dietary. [Id.] Their widest variance from the state average was 2008, the year Ms. Archuleta lived at VE. [Id.] These figures are not an accident; they are a direct result of the purposeful actions of the joint venture to maximize profits at the expense of resident care.

In New Mexico, a national organization may be held liable when it controlled a local organization and could have issued a policy ensuring the safety of locally affected entities. *Enriquez v. Cochran*, 1998-NMCA-157, 126 N.M. 196, 967 P.2d 1136. In this case, FAS and FCC were intimately involved in the day-to-day operations of the nursing home. They were involved in the budgeting process, and conducted regular clinical reviews of the facility's performance. They could have changed the facility's policies and procedures, increased employee pay, and implemented any other number of changes at the nursing home. They did not.

Multiple other courts, considering similar questions, have found summary judgment improper in these situations, where cost-minimization tactics result in harm to individual residents. For example, in a suit where Plaintiff alleged that

"defendant negligently imposed an 'overall business strategy' directing the subsidiary to minimize costs and capital investments, which allegedly caused the subsidiary to engage in the dangerous practice of reducing training and maintenance," summary judgment against that defendant was improper. *Forsythe v. Clark USA, Inc.*, 864 N.E.2d 227 (Ill. 2007).

Here, Plaintiff had multiple caregiver witnesses, individuals who worked at the nursing home while Mrs. Archuleta lived there, prepared to testify at trial to the chronic short-staffing of the facility, the lack of training and the lack of supplies. Defendants chose not to depose these individuals prior to trial. The non-availability of enough trained staff meant that Mrs. Archuleta developed preventable pressure sores, and suffered other injuries. Had the nursing home had sufficient, well-trained staff, Mrs. Archuleta would have never developed pressure sores and contractures. However, because they did not, and because the money that should have gone to staffing went elsewhere, Mrs. Archuleta suffered.

G. The Defendants' Breach Caused Mrs. Archuleta Harm.

The basis of Plaintiff's complaint was the injuries and ultimately, death, of Mrs. Archuleta while under the nursing home's care. While she lived at Vida Encantada, Mrs. Archuleta suffered painful pressure sores, contractures, and malnutrition.

Plaintiff presented evidence to the court, and was prepared to present evidence at trial, that the entities, both individually and as part of a joint venture, under-budgeted the facility and left it without enough trained staff, and without enough supplies to properly care for the residents. In her Motion to Reconsider, Plaintiff presented Plaintiff's deposition testimony that she found Mrs. Archuleta soaking in her own urine, with dried feces caked to her skin. [RP 2779] She also presented deposition testimony that the CNAs were not able to attend to all of their patients as needed, and that this related directly to the cleanliness of the residents. [Id.] As Mrs. Archuleta's daughter-in-law testified, short staffing also affected Mrs. Archuleta's nutritional status, because without enough staff to encourage her to eat and to help her eat and drink, she simply did not eat or drink. [RP 2781]

Plaintiff also presented the testimony of her medical expert witness, Dr. Loren Lipson, regarding the shortcomings of the nursing home. [RP 2788-92] Dr. Lipson testified the facility staff did not accurately document the pressure sores, they did not plan to prevent a urinary tract infection, and did not turn and reposition her. [Id.]

Plaintiff also presented expert testimony regarding the relationship between short-staffing and wound prevention and care. Defendants' expert, Dr. James Tryon, testified in his deposition that Mrs. Archuleta's pressure sores were

preventable—meaning that if proper preventative measures had been applied, Mrs. Archuleta would not have developed them: "If those interventions are done, then the sores don't develop." [RP 2780]

Pressure sores can be, and were here, injuries of neglect—the result of a person remaining in a certain position for too long a period of time. To prevent pressure sores, a patient should be frequently turned and repositioned. Without enough staff, however, this turning and repositioning does not happen, and sores can develop. The link between neglect and the development of pressure sores is well known.[11]

In another suit, where Plaintiff alleged that a hospital "injured them and other class members by maintaining inadequate numbers of nurses at its hospitals as a cost-savings strategy," dismissal of Plaintiff's complaint was improper, and the case was remanded for the court to consider the existence of a duty between the parent corporation and the patients. Specifically, there as here, Plaintiff sought damages for the direct liability of the parent corporation, based upon the parent company's "negligence in establishing staffing policies," and not merely its ownership interest in the subsidiary hospital. *Spires v. Hospital Corp. of America*, 289 Fed. Appx. 269, 270 (unpub., 10th Cir. 2008).

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[11] Indeed, this Court recently upheld a conviction for neglect of a health care resident causing death, a second-degree felony, when an incapacitated individual developed pressure sores which were left untreated and ultimately caused his death. *See State v. Greenwood,* 2012-NMCA-017, 271 P.3d 753.

In the nursing home setting specifically, those involved in the budgeting process may be held liable. In *Canavan v. National Healthcare Corp.*, 889 So.2d 825, 826-27 (Fla. Dist. Ct. App. 2004), a directed verdict against the individual who owned the nursing home and was involved in the nursing home's budget was improper. Specifically, this Defendant "was... required by federal mandate to create, approve, and implement the facility's policies and procedures. Because he ignored complaints of inadequate staffing while cutting the operating expenses, and because the problems Canavan suffered, pressure sores, infections, poor hygiene, malnutrition and dehydration, were the direct result of understaffing, the Estate argues that a reasonable jury could have found that Friedbauer's elevation of profit over patient care was negligent." The appellate court concluded "that the trial court erred in granting the directed verdict because there was evidence by which the jury could have found that Friedbauer's negligence in ignoring the documented problems at the facility contributed to the harm suffered by Canavan." The same is true here—there is evidence by which the jury could have found that FAS, FCC, THI-NM and THIB's negligence in ignoring the documented problems at the facility contributed to the harm suffered by Mrs. Archuleta. Summary judgment was therefore improper.

In *Beverly Enterprises-Florida, Inc. v. Spilman*, 661 So.2d 867 (Fla. Ct. App. 1995), the Florida Court of Appeals found the corporation that ran the

nursing home liable for punitive damages because of the resident's death from pressure sores. In so deciding, the Court stated:

> "The business of operating a nursing home facility is a specialized activity. Its residents are in need of special care for many reasons...All must depend upon others to sustain their lives in as dignified and comfortable a manner as possible. They are completely dependent upon the employees of the nursing home, who are supposed to be guided and directed by the nursing home's supervisors...Eastbrooke attempts to evade punitive responsibility for the deplorable treatment of Walter Spilman at its facility by arguing that its managing employees knew nothing of the abuse for which it admitted liability. It says that its managing officers did nothing to inflict the abuses, did not know of them, and were not negligent in any manner. Therefore it argues that it cannot be held responsible under either theory of corporate liability for punitive damages. But Eastbrooke cannot escape responsibility by managing its facility with managers who close their eyes, refuse to hear, and dull their sense of smell. ...."

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFF ESSENTIAL DISCOVERY AND STRUCK PLAINTIFF'S EXPERT.

Statement of Preservation

Plaintiff preserved this argument in her motions to compel discovery and depositions, responses to Defendants' Motions for Protective Order and to Strike Plaintiff's Expert, and motions to reconsider discovery rulings. [RP 503-44; 589-97; 742-64; 765-92; 809-52; 853-57; 1020-27; 1055-59; 1109-1113; 1927-45; 2049-52; 2262-2285]

Standard of Review

The Court reviews discovery rulings under an abuse of discretion standard. *See S.F. Pacific Gold Corp. v. United Nuclear Corp.,* 2007-NMCA-133, ¶ 9, 143 N.M. 215, 175 P.3d 309.

As set forth above, prior to trial, Plaintiff repeatedly sought to obtain additional documents and depositions from the Defendants to support her claims. The Defendants failed to provide these documents and make these individuals available for deposition, so Plaintiff sought the court's intervention.

The court, however, denied the bulk of Plaintiff's requested discovery which would have shed more light on the exact nature of the relationship between the parties, and the precise roles of the individual parties in the oversight, operation and management of Vida Encantada. At a minimum, the 1-030(B)(6) depositions of Defendants THIB, FAS and FCC would have provided Plaintiff and the Court with more evidence regarding the roles and duties of these Defendants with regard to the nursing home. However, after denying Plaintiff the ability to obtain documents and deposition testimony in her support, the Court then summarily granted judgment in favor of these defendants. This was improper. *See Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982) ("The discovery requested ... could lead to the discovery of relevant facts which are in the exclusive control of the defendants...It was error for the trial court to enter

summary judgment for defendants …in light of the fact that Marchiondo had been denied the opportunity to discover [certain facts]").

The New Mexico Supreme Court has clarified that "the purpose of our discovery rules is to allow liberal *pretrial* discovery, such that the trial itself is a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Pincheira v. Allstate,* 2008-NMSC-049, ¶ 21, 144 N.M. 601, 190 P.3d 322. This could not and did not occur here, as the court improperly disallowed Plaintiff full and fair discovery, greatly compromising Plaintiff's ability to respond to Defendants' Motions for Summary Judgment. Further, when the court struck Plaintiff's expert witness, Bruce Engstrom, it recognized the role Mr. Engstrom would play—that he would testify as to the complex relationships between the defendants—yet excluded him anyway. This drastic and unnecessary measure substantially prejudiced Plaintiff. Without Mr. Engstrom's testimony, Plaintiff's claim for joint venture, as well as individual claims against the Defendants, are compromised. Should the Court reverse the summary judgment orders, Plaintiff also requests that the discovery rulings and the Order Striking Mr. Engstrom be reversed.

CONCLUSION

Defendants jointly participated in the operation of Vida Encantada nursing home. They shared in its profits and losses, and underfunded it so that their own

I hereby certify that a true and correct copy of the foregoing was sent to the following on this 30th day of August, 2012:

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coffers could grow. This underfunding led to short-staffing, which in turn led to the neglect of the residents, including Mrs. Archuleta. Mrs. Archuleta suffered neglect injuries at Vida Encantada, and these defendants can and should be held liable for their actions and inactions involving the nursing home.

WHEREFORE, Appellant respectfully requests that this Court enter an order reversing the District Court's Orders on Appellees' Motions for Partial Summary Judgment, its Orders Denying Plaintiff's Motions to Compel, and its Order Granting Defendants' Motion to Strike Plaintiff's Expert, and for such further relief as may be appropriate.

Respectfully submitted,

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