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,

Ct. App. No. 31, 950

vs.

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 REPLY BRIEF

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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 4,364 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

INTRODUCTION

Plaintiff respectfully requests that this Court reverse the district court's orders granting summary judgment to all remaining named defendants except the facility, disclaiming a joint venture, and denying Plaintiff necessary discovery.

While the Defendants claim no joint enterprise exists amongst them, their joint Answer Briefs rely upon the same arguments, and provide no compelling rationale to uphold the district court's rulings. The district court's rulings were in error, and must be overturned.

ARGUMENT

I. DEFENDANTS' TECHNICAL CHALLENGES FAIL.

The Defendants set forth various technical grounds which they claim support their requested relief. [1] However, none of these grounds justify affirmance of the district court and instead distract from the required substantive analysis.

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[1] The four Defendants in this case filed three Answer Briefs. The brief titled "Answer Brief in Chief of Defendants/Appellees THI of Baltimore, Inc. and THI of New Mexico, LLC" shall be referenced as "THI-AB." "Answer Brief in Chief of Defendants/Appellees Fundamental Administrative Services, LLC, and Fundamental Clinical Consulting, LLC," shall be referenced as "F-AB." Finally, "Joint Answer Brief in Chief of Defendants/Appellees THI of Baltimore, Inc., THI of New Mexico, LLC, Fundamental Administrative Services, LLC, and Fundamental Clinical Consulting, LLC," shall be referenced as "JAB."

First, Defendants repeatedly assert that "none of the materials on which Appellant relies on appeal were before the district court when it considered the parties' motions for summary judgment." [THI-AB 8, 9; F-AB 7] **This is false.**

Plaintiff's Brief-in-Chief citations referred to the materials in support of her Motions to Reconsider, the most comprehensive compilations of the materials presented to the Court previously on several occasions, in Plaintiff's Motion for Partial Summary Judgment, and her responses to Defendants' Motions for Summary Judgment. [RP 1179-1262; 1527-86; 1607-64; 1665-1720; 1806-61] These documents are properly before this court as part of its *de novo* review.[2] Below are the documents Plaintiff referenced in her Brief-in-Chief and the multiple locations where they appear in the record:

- *Bruce Engstrom Affidavit and Report.* [BIC 11,12, 13, 28, 38, 39] [RP 2551-77; 2673-97; 1948-2003][3]
- *Credit & Security Agreement.* [BIC 11-12, 27, 28] [RP 2578-86; 1195-98; 1820-23]
- *Amended & Restated Limited Liability Company Agreement of THI of New Mexico at Vida Encantada.* [BIC 11, 26, 27, 28] [RP 2587-90; 2636-39; 1258-61; 1583-86; 1661-64; 1720; 1861]

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[2] Plaintiff's Motions to Reconsider contained the above documents, as well as several pages from depositions of William Chaltry, Jaime Andujo, and Kenneth Tabler, as well as a one-page bank statement. However, these documents do not form the basis of Plaintiff's arguments in her Brief-in-Chief or here.

[3] Mr. Engstrom's affidavit and report were filed in support of Plaintiff's Motion for Summary Judgment on Joint Venture on September 6, 2011 [RP 1946-2003], before the Court struck Mr. Engstrom as Plaintiff's expert.

- *FAS Administrative Services Agreement.* [BIC 13, 15, 27] [RP 2602-18; 1199-1215; 1546-7; 1625-6; 1824-27]

- *FCC Administrative Services Agreement.* [BIC 13, 16, 27] [RP 2619-35; 1216-32; 1548-9; 1627-8; 1683-6; 1824-27]

- *Sharon Inoue Deposition.* [BIC 11, 13, 14, 15, 27, 29, 30, 31, 32] [RP 2644-69; 1233-1257; 1550-82; 1629-1660; 1687-1719; 1828-60]

Based upon this inaccurate representation of the record, Defendants then argue that Plaintiff only appeals the denial of the reconsideration. [THI-AB 8] This, too, is false. Plaintiff's instant appeal clearly lies not from the reconsideration motions but rather the orders granting summary judgment. *See* Stipulation to Supplement the Record Proper, filed May 18, 2012.

Third, THI-B claims that Plaintiff failed to deny Defendants' statement of material facts in her response to their Motion for Summary Judgment. [THI-AB 13] This is equally false. THI-B set forth 15 material facts in its Motion for Summary Judgment. [RP1166-1176] In response, Plaintiff admitted two of these facts; admitted two but denied their materiality; admitted one in part; and denied the remaining statements. [RP 1807-1808] Attached to her response were the following documents, which Defendants incorrectly continue to assert were

"unauthenticated," despite the fact that the bulk of them were documents produced by **the same parties and counsel in other litigation.** [THI-AB 13-14][4]

Exhibit 1: Nursing Facility Licensure Application. [RP 1817-19]

Exhibit 2: Amended and Restated Revolving Credit and Security Agreement, March 28, 2006, Bates-stamped with "Zuckerman, F...."[5] [RP 1820-23]

Exhibit 3: Excerpts from the Administrative Support Agreements between FAS and THI-NM, and FCC and THI-NM, 9/26/06, Bates-stamped "Lesperance, D."[6] [RP 1824-27]

Exhibits 4 and 5: Excerpts of the deposition transcript of Sharon Inoue, Administrator and Rule 1-030(B)(6) designee. [RP 1828-60]

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[4] Defendants submitted a Motion to Strike Plaintiff's Summary Judgment Evidence, relying upon these same arguments. [RP 1438-1438] Plaintiff responded [RP 2286-2313] and the Court denied this Motion [RP 2724-25].

[5] *See* Rochelle Weiss, as Personal Representative for the Wrongful Death Beneficiaries of Florence Zuckerman, Deceased, vs. THI of New Mexico at Valle Norte, LLC; THI of New Mexico, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical Consulting, LLC; and Jimmy D. Melton, Administrator, D-202-CV-2009-2653, Ct. App. No. 30, 296, *slip op.*, 2013-NMCA---.

[6] *See* Oneida Lesperance, as Personal Representative for the Wrongful Death Beneficiaries of E. Dorothy Lesperance, Deceased, vs. THI of New Mexico at Vida Encantada, LLC; THI of New Mexico, LLC; THI of Baltimore, Inc.; Fundamental Long Term Care Holdings, LLC; Fundamental Administrative Services, LLC; Fundamental Clinical Consulting, LLC; ABE Briarwood Corporation, and William Chaltry, Administrator, D-412-CV-2009-102.

Exhibit 6: Excerpts of the Amended and Restated Limited Liability Company Agreement of THI of New Mexico at Vida Encantada, LLC, Bates-stamped "A.Gonzales," produced by third-party Defendants including THI of Baltimore, Fundamental Clinical Consulting and Fundamental Administrative Services in *Lucero v. Saint Vincent Hospital, et al.*, No. D-412-CV-2008-00116. [RP 1861]

Significantly, Defendants themselves—or related entities—produced the bulk of these documents in prior litigation. Defendants do not and cannot argue that these documents were thereafter altered, as that is simply untrue. Defendants also do not challenge the substance of these documents. These documents are properly before this Court in its de novo review.

Finally, Defendants claim that to preserve the joint venture issue, Plaintiff must have appealed the joint venture order once it was issued. [JAB 12-14] However, this ignores the plain language of Rule 1-054(B)(1) and (B)(2). The joint venture order was explicitly not a final, appealable determination, as it did not dismiss those four defendants. As such, Plaintiff **could not** have appealed it at that point. However, now that the Court has before it the entirety of the case, it may rule as to the propriety of summary judgment as to all defendants, both individually and jointly.

II. THE DISTRICT COURT'S GRANTING OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON DIRECT LIABILITY CLAIMS WAS REVERSIBLE ERROR.

In reviewing the summary judgment appeal, the court "look[s] at the record as a whole to determine if any genuine issues of material fact exist." *Wiste v. Neff & Co.*, 1998–NMCA–165, ¶ 6, 126 N.M. 232, 967 P.2d 1172. The standard remains de novo.

New Mexico law explicitly recognizes that the duty element of negligence can, and should, focus on whether the defendant's conduct "foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 8, 134 N.M. 43, 73 P.3d 181.

In *Herrera*, the New Mexico Supreme Court found that an auto repair shop could owe a duty to an individual hit by a car stolen from their parking lot. There were no allegations that the repair shop knew or was aware of the existence of the injured individual. Instead, the Court correctly determined that the duty arose, in part, because the repair shop knew or should have known about the inherent dangers in leaving a vehicle unlocked, and the relatively high rate of vehicle theft in the area.

Here, given that these defendants were sweeping money from nursing homes intended to provide for resident care, and instead funneling most of the money to the owners, it was foreseeable that their actions—underfunding the nursing homes—would cause harm to the nursing home residents. The law does not

require that the defendants were specifically aware of or specifically involved with Mrs. Archuleta's care. Rather, the question is whether she was within the zone of danger created by their negligent acts. As a resident of one of the nursing homes whose receipts were pledged to THI-NM and THI-B, and whose daily operations and management were overseen and coordinated by FAS and FCC, she was within that zone of danger.

There need not be a direct nexus between Mrs. Archuleta and these Defendants. It is enough that these Defendants were aware of the purpose of the funds generated by the nursing home, and exercised control over those funds. In diverting those funds to enrich their own coffers, rather than leave them to the nursing home to hire and train sufficient staff, these defendants breached the duty owed the nursing home residents, including Mrs. Archuleta.

Defendants THI-B and THI-NM presuppose that they had no duty to those vulnerable adults entrusted to the care of Vida Encantada. In the absence of such a duty, they claim it "impossible" to have committed tortious acts against Vida Encantada residents, including Mrs. Archuleta. [THI-AB 1] Similarly, FAS and FCC claim that because they "never provided any care or treatment to Ms. Archuleta, and they had no right or authority to direct such care or treatment," they cannot be held liable for their actions taken in connection with Vida Encantada.

[F-AB 2] They claim that duty could only attach if these entities had "the requisite custody and control over Ms. Archuleta to give rise to any legal duty." [F-AB 4]

However, the facts established below support a finding that these defendants owed Mrs. Archuleta—and all Vida Encantada residents—a duty of care, a duty which they breached. Duty depends upon the ability to exercise control over a premise or activity. *See Smith v. Bryco Arms*, 2001-NMCA-090, ¶ 25, 131 N.M. 87, 33 P.3d 638.

By participating in the credit revolver scheme, THI-NM and THI-B actively exercised control over the funds that were paid to the nursing home for resident care, funds that acted as collateral for their $50 million revolving credit account. Rather than allow those funds to be retained by the nursing home and used for resident care, the bulk of those funds were instead directed to the owners. Because of this control, THI-B and THI-NM owed a duty to Vida Encantada residents, and can be held liable for breaching that duty.

Similarly, despite their claims to the contrary, FAS and FCC were given the authority to perform services for the nursing home in whatever manner they deemed reasonably appropriate to meet the day-to-day requirements of the operations of the nursing home. [RP 1199-1215 and 1216-32] As Plaintiff established, for all intents and purposes, the general, day-to-day managerial functions of the nursing home were delegated to FAS and FCC: accounts

receivable and payable; compliance with state and federal regulations; payroll and personnel; employee training; oversight of clinical care and compliance with federal regulations.

The crux of Plaintiff's argument is that the budgeting process left insufficient staff and insufficient staff training at Vida Encantada, and that the nursing home and related Defendants were on notice of those problems through the survey process. As FAS and FCC were both involved in the budgeting, staffing, training and survey process, they can be held liable for their roles in those processes, and how those deficient processes harmed residents, including Mrs. Archuleta.

Where, as here, the facts and circumstances of the relationships of the party are at issue, the question of duty is a mixed question of fact and law and should have been submitted to the jury. *Eckhardt v. Charter Hosp., Inc.,* 1998 -NMCA-017, ¶ 39, 124 N.M. 549,953 P.2d 722. Here, given the ample evidence Plaintiff brought forth showing the individual roles of THI-NM, THI-B, FAS and FCC, the question of their duties to Mrs. Archuleta should have been submitted to the jury. The district court committed reversible error when it did not allow Plaintiff to do so.

A. THIB/THI-NM

THI-B characterizes itself as "a holding company, with no employees or business operations, and no management or other responsibilities with regard to the care and treatment of residents at THI of New Mexico at Vida Encantada, LLC." [THI-AB 1]. This is incorrect. Similarly, THI-NM's characterization of itself as "a limited liability company with no employees" and "the sole, non-managing member of the Facility [with] no management or other responsibilities with regard to the care and treatment of residents at Vida Encantada," [Id.], is equally incomplete. The true nature of THI-B and THI-NM's role in Vida Encantada makes clear that questions of material fact, and mixed questions of fact and law, precluded summary judgment as to these Defendants.

THI-B and THI-NM rely on the characterization that these entities had "no responsibilities with regard to the care and treatment of the residents at Vida Encantada." [THI-AB 1] This conclusory assertion, however, lacks evidentiary support, is contrary to the evidence offered by the Plaintiff, and only illustrates why these were questions for the jury to decide.

THI-B and THI-NM argue that they are merely passive corporate entities, completely hands-off from any actions taken with respect to Vida Encantada nursing home. They argue that "there is no factual basis for Plaintiff's bald assertion that THIB or THINM...diverted funds from the Facility and thereby caused harm to Ms. Archuleta," [THI-AB 15] yet provide no other explanation for

the credit revolver and daily sweep of Vida Encantada's revenue. Their defense rests solely upon the predicate that "THIB and THINM cannot be vicariously liable for the entity's alleged misconduct." [THI-AB 18] However, this completely overlooks the fact that their liability stems from their own actions, and not merely those of their subsidiaries or related entities. Moreover, they have provided no evidence to the contrary. THI-B and THI-NM claim that because their representatives never visited Mrs. Archuleta or raised a hand to her, they cannot be held liable for any harm caused to Mrs. Archuleta. This misapprehends the duty analysis required by New Mexico law.

THI-B participated in the credit revolver agreement which swept funds from the nursing home into a centralized cash management system. [RP 1195-98] Indeed, THI-B was the borrowing agent in this scheme in which the parties pledged monies including the accounts receivable of the nursing home, Vida Encantada, and its Executive Vice President signed for THI-B as the borrowing agent. [RP 1195-98]

Similarly, THI of New Mexico appointed officers of Vida Encantada, and had the ability to remove them at any time. [RP 1260] All of the profits and losses of Vida Encantada were allocated to THI of New Mexico. [RP 1259]

B. FAS and FCC

FAS and FCC refer to a "limited advisory role" in the facility. [F-AB 12]

However, this is incomplete and inaccurate. Plaintiff produced evidence that when the VE administrator wanted to fire, suspend or bring disciplinary action against an employee, she first called the FAS HR consultant, Karen Hood, before doing so. [RP 1238-1238] The FAS HR consultant would then tell her what the proper paperwork was for doing so. [Id.] If the nursing home had open positions, it would also discuss that with FCC Regional Vice President Mathis. [RP 1242]

FAS and FCC now claim that FAS and FCC only "helped to implement the pay scale for Facility employees." [F-AB 12] However, the testimony brought forth by Plaintiff established that FAS or FCC "accountants" and the Regional Vice President of FCC determined in at least certain years that there would be no pay raises whatsoever in the facility, a decision Ms. Inoue did not personally make. [RP 1558, 63:5-8] Similarly, while FAS and FCC claim that Ms. Inoue alone made decisions regarding facility purchases [F-AB 12], her testimony makes clear that these purchases would not be through the facility, but rather through "an account that was negotiated by Fundamental." [RP 1575, 184: 10-21] She clarified that it wasn't a local account. [RP 1576, 185:9-12]

FAS and FCC attempt to analogize their role to that of the consulting pharmacy in *Thompson v. Potter*, 2012-NMCA-014, 268 P.3d 57 (2011). [F-AB 13; 14-15] However, that analogy fails.

In *Thompson*, the consulting pharmacy had a very limited role with regard to the facility. Specifically, while the facility was to advise the pharmacy of any medication changes, the only role of the pharmacy was to do a monthly review of the resident's medications. *Thompson*, ¶ 22. This was critical, because "the error was made after Defendant performed his monthly review, and before he returned the following month. Further, Defendant was not informed of the change to Ms. Bennett's prescription as required by the pharmacy services contract, with the result that he was not able to take any appropriate corrective action." *Id.*, ¶ 23. Additionally, the negligence at issue in *Thompson* was a single transcription error made by a facility employee, an issue in which the consulting pharmacy had no involvement. Because it was a single incident, the court made its determination based on the fact that "Defendant had [no] duty or ability to control the nurse employed by Casa Arena when she made the transcription error or...a duty or opportunity to detect the transcription error when it was made." *Id.*

Here, however, the analogy fails. FAS and FCC were not limited consultants with singular roles. Nor were Mrs. Archuleta's injuries and wrongful death isolated incidents. Rather, FAS and FCC were directly and purposefully involved in the budgeting and funding of the nursing home, and the clinical oversight of the facility. They were related entities, with common ownership, not

third parties. These concerted, sustained actions that they took led to an environment at Vida Encantada where neglect occurred.

FAS and/or FCC finalized the VE budget and monitored VE's financial performance on a monthly basis. [RP 1256-57; 1577-78; 1659-60; 1647-48; 1715-16] 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 1239-42; 1559-61; 1639-41; 1695-97] 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. [1242-43; 1562; 1640-41; 1698-99]

FAS and FCC claim that "imposing a legal duty of care on FAS and FCC under the circumstances of this case would represent an unprecedented and improvident expansion of liability for independent contractors." [F-AB 14] However, the record makes clear, and as set forth in more detail below, FAS and FCC were anything *but* independent in their interactions with Vida Encantada. Rather, they were related entities that effectively oversaw every activity which occurred at Vida Encantada, as organizations, and through their employees.

FAS and FCC further claim that "Plaintiff has never pointed to any actions or omissions by FAS or FCC that injured Ms. Archuleta, let alone caused her death-nor could Plaintiff do so." [F-AB 17] This is incorrect. Plaintiff presented significant evidence, in the form of expert and lay witness testimony, that FAS and FCC were significantly involved in the facility's daily operations through consultants—one for each department—and a regional director with authority to hire and fire the administrator. The facility was short-staffed, and that this lack of enough staff left too few staff to meet Mrs. Archuleta's needs. When her needs were not met—when she did not receive adequate food, water, and turning and repositioning—she was injured, with malnutrition, dehydration, pressure sores and contractures. FAS and FCC knew, or should have known, that there were not enough staff, or not enough well-trained staff, to adequately meet the needs of the residents. This is supported by expert and lay witness testimony.

III. THE DISTRICT COURT'S GRANTING OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON JOINT VENTURE CLAIMS WAS REVERSIBLE ERROR.

The Alabama Supreme Court recently addressed a very similar situation in *Hill v. Fairfield Nursing and Rehabilitation,* 2012 WL 5077166, slip op. (Ala. S.Ct. October 19, 2012). There, a resident who was injured during a transfer at a nursing home sued the nursing home itself and several related entities. Prior to trial, the court granted summary judgment to all defendants, save the nursing home. On appeal, the Court analyzed the relationships between these other entities

and the nursing home. While its analysis focused on "piercing the corporate veil," its analysis and conclusions are nevertheless useful here.

There, several of the entities were related, as those are here, like Russian nesting dolls, with the chain of ownership running up from the nursing home to two entities or individuals at the top. As the court explained,

> [Defendant LLCs] D&N and DTD own all of the thirty-plus nursing-home-LLCs, [Defendant] Tara Cares, and [Defendant] Aurora Healthcare. Second, all of these entities not only have common officers and duties, the same people sit on all of the nursing home governing bodies. Third, ... the contract [by which Tara Cares manages the nursing homes] allows the nursing-home-LLCs to not pay Tara Cares if they do not have the funds .... Fourth, [individual Defendants] Denz and Bennett and their LLCs (D&N and DTD) created all of these entities. Fifth, Fairfield's $500,000.00 loss last year shows that it is undercapitalized. Sixth, Tara Cares not only pays the salaries and expenses of the nursing-home-LLCs, it actually controls their finances and their bank accounts. ... Seventh, the officers and administrators of the nursing-home-LLCS definitely do not act independently ....[ ] Finally, and perhaps most important, it is clear from all the evidence before the trial court that all the corporate defendants are controlled, and operate, as a single business enterprise. *Hill*, *11.

Pursuant to an administrative service agreement, Defendant Tara Cares performed numerous tasks for the nursing home: policies and procedures; bookkeeping, ledgering and accounting, including preparing tax returns; services related to accounts receivable, including billing and collections; proposes the annual operating budget; prepares advertising and publicity materials; provides cost reporting services related to Medicare and Medicaid; assists the nursing home

in maintaining licenses and qualifications; authorizes equipment purchases; arranges for hazard insurance for the facility; perform payroll and employee services; coordinating legal services; and supervising the issuance of checks. *Id.* Here, FAS and FCC's functions at Vida Encantada were virtually identical. [RP 1216-32; 1199-1215]

In *Hill,* the Court concluded that summary judgment as to these defendants was improper, as genuine issues of material fact existed as to whether they operated as a single business enterprise for which the nursing home was an alter ego. Indeed, the Court noted that equity prevented "allow[ing] a corporate entity to successfully masquerade through its corporate affiliates so as to defeat the payment of its just obligations." *Id.,* *12.

Similarly, here genuine issues of material fact exist as to whether these Defendants entered into an agreement to combine their money, property or time in the conduct of the nursing home, agreed to share in the profits and losses of the nursing home jointly, and had the right of mutual control over the nursing home. *See Lightsey v. Marshall*, 1999-NMCA-147, ¶ 13, 128 N.M. 353, 992 P.2d 904. As set forth in detail in Plaintiff's Brief-in-Chief, the parties here did undertake such an operation, and summary judgment as to the existence of a joint enterprise was reversible error. Contrary to Defendants' claim that the facility was wholly autonomous [JAB 9], the evidence supports the finding that the parties were

jointly, concertedly and consistently involved in the oversight and operation of the facility.

IV. THE COURT'S DISCOVERY RULINGS WERE IN ERROR.

Defendants posit that because Plaintiff did not include Rule 1-056(F) affidavits in her responses to their summary judgment motions, the court cannot consider the effect of the denial of discovery on Plaintiff. [JAB 36-38] However, this argument fails to take into consideration the timeline of the events in this matter. Specifically, the denial of discovery occurred long before Defendants filed their Motions for Summary Judgment. At this point, the Court had already twice denied Plaintiff discovery.

FAS and FCC claim that "[a]fter a full opportunity for discovery, Plaintiff adduced no evidence that FAS or FCC engaged in any misconduct, or that such misconduct resulted in harm to Ms. Archuleta." [F-AB 17] This is patently untrue, because Plaintiff was clearly **not** given a full opportunity for discovery. She was denied the ability to conduct 1-030(b)(6) depositions of FAS and FCC and their regional vice president; senior vice president, and CEO. Nor were the defendants' responses to discovery complete and comprehensive, as required by Rule 1-026. These defendants willfully and concertedly withheld discoverable information, then claim that Plaintiff lacks evidence that was wholly within their control.

Similarly, the Court's Order striking Mr. Engstrom was in error. Plaintiff had offered him for deposition nearly a year before and Defendants chose to not depose him. Plaintiff indicated in December 2010 that Mr. Engstrom would be produced for deposition if Defendants wished to take his deposition. Defense counsel then agreed that Mr. Engstrom's deposition should be delayed until any discovery he would be relying on could be completed. Defendants did not follow up on requesting his deposition for five months; once they requested it in June, 2011, Plaintiff provided his dates of availability. Again in July, 2011, after Defendants had not made any moves to schedule Mr. Engstrom's deposition, Plaintiff provided Defendants with two more dates of availability.

As this Court has before it the full record, it may review the district court's discovery rulings. As they were in error, this Court may rectify those errors in its review.

CONCLUSION

Defendants jointly participated in the operation of Vida Encantada nursing home, sharing in its profits and losses, and underfunding it to advance their own financial positions. Underfunding predictably led to short-staffing, which led to the neglect of residents, including Mrs. Archuleta. These defendants can and should be held liable for their actions and inactions involving the nursing home.

WHEREFORE, Plaintiff respectfully requests that this Court reverse 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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