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,

v.

Ct. App. No. 31,950
4th Jud'l Dist. No. D-412-CV-2009-346

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

Defendants/Appellees.

Appeal from the District Court, San Miguel County
Before the Honorable Eugenio Mathis, Fourth Judicial District

ANSWER BRIEF IN CHIEF OF DEFENDANTS/APPELLEES FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC AND FUNDAMENTAL CLINICAL CONSULTING, LLC

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INTRODUCTION

Defendants Fundamental Administrative Services, LLC ("FAS") and Fundamental Clinical Consulting, LLC ("FCC") (collectively, "Defendants") respectfully submit this joint brief in opposition to Plaintiff's Brief in Chief ("BIC") on her appeal from (1) an order of the district court dismissing her direct-liability claims against them on summary judgment ("Summary Judgment Order"), and (2) a subsequent order of the same court denying her motion to alter or amend the Summary Judgment Order ("Reconsideration Order"). For the reasons set forth below, this Court should affirm both Orders in all respects.

NATURE OF THE CASE

Defendants incorporate herein the "Nature of the Case" section set forth in Defendants' Joint Brief in Opposition to Plaintiff's Brief in Chief ("Defts. Joint Brief").

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Defendants incorporate the "Course of Proceedings and Disposition Below" section set forth in Defts. Joint Brief.

SUMMARY OF RELEVANT FACTS

In addition to the facts set forth in Defts. Joint Brief, Defendants state the following:

The Orders should be affirmed because the record confirms that Plaintiff's direct-liability claims against FAS and FCC are based entirely on the speculation of counsel rather than on any admissible evidence.

Both FAS and FCC entered into consulting contracts with the Facility to provide specifically enumerated and limited services. [RP 1350-84.] Beginning in October 2006, FAS provided administrative, accounting, and in-house legal services to the Facility, while FCC provided clinical and operational consulting services to the Facility. [RP 1360; 1378; 1564, at 85:18-23.] FAS and FCC never had any ownership in the Facility [RP 1155 ¶ 8], nor did they ever operate, manage, or control the Facility or have the right to do so [RP 1155 ¶¶ 5, 7]. Moreover, FAS and FCC *never provided any care or treatment to Ms. Archuleta*, and they had no right or authority to direct such care or treatment. [RP 1154 ¶ 6.]

The Facility's staff was employed by Vida Encantada, and the day-to-day operations of the Facility were controlled by an Administrator and Director of Nursing, who were also employees of Vida Encantada. [RP 1154 ¶ 5; 1155 ¶5.] In accordance with federal regulations, the Facility had

a governing body that had authority to hire and fire its Administrator. [RP 1154 ¶ 5.] Neither FAS nor FCC acted as Administrator, served on the governing body of the Facility, or otherwise acted in any capacity to operate, manage, or control the Facility. [RP 1154 ¶ 5.][1] In short, the record evidence, unchallenged by Plaintiff, establishes that FAS and FCC played no role whatsoever in the treatment or care of Ms. Archuleta—which is the basis of Plaintiff's Complaint—much less that they were negligent in any way.

Based on the complete lack of any relationship between FAS and FCC and Ms. Archuleta, Defendants moved for summary judgment to dismiss Plaintiff's direct-liability claims against them. [RP 1144-65.] In the Summary Judgment Order dated and entered September 26, 2011, the district court granted Defendants' motion. [RP 2452.] Subsequently, in the Reconsideration Order dated and entered January 4, 2012, the district court denied Plaintiff's motion to alter or amend the Summary Judgment Order. [RP 2887-88.] In denying Plaintiff's motion to alter or amend, the district court expressly determined that it did not consider any of the additional evidence that Plaintiff had submitted on that motion: "The Court has not

[1] Pursuant to federal regulations, an employee of FCC had supervisory authority over the Administrator, but only in his separate and distinct role as a member of the Facility's governing body, not in his capacity as an employee of FCC. [RP 1345 ¶¶ 6, 11.]

considered any of the additional affidavits or information submitted by Plaintiff with its briefing in support of her Motion to Alter or Amend the Judgment as to [FAS] and [FCC]." [RP 2887.]

Plaintiff's appeals from these Orders ensued. [RP 2891-2901.]

SUMMARY OF ARGUMENT

Plaintiff's appeals from the Summary Judgment Order and the Reconsideration Order are wholly without merit.

First, the record is clear that FAS and FCC had no relationship with Ms. Archuleta that would create a legal duty of care to her. FAS and FCC—independent contractors that provided limited services to the Facility at its discretion and subject to its approval—were complete strangers to Ms. Archuleta and had no involvement in, nor exercised any control over, her day-to-day treatment. Plaintiff points to no evidence—and none exists—that FAS and FCC, in these advisory capacities, had the requisite custody and control over Ms. Archuleta to give rise to any legal duty.

Second, even if FAS and FCC owed Ms. Archuleta a legal duty of care, Plaintiff presented no evidence that they breached that duty, or that their breach caused Ms. Archuleta's alleged injuries. Plaintiff did not identify any acts or omissions by FAS and FCC that actually resulted in harm to Ms. Archuleta, despite ample opportunity to do so, nor is there any

such evidence. Indeed, Plaintiff's entire direct-liability argument rests on bare allegations of wrongdoing by FAS and FCC, which are unsupported by the record, and which the district court correctly determined were insufficient to defeat Defendants' motion for summary judgment.

Accordingly, the Orders should be affirmed.

ARGUMENT

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO FAS AND FCC ON PLAINTIFF'S DIRECT-LIABILITY CLAIMS

To survive summary judgment on her direct-liability claims, Plaintiff was required to adduce competent evidence showing that FAS and FCC each owed a legal duty of care to Ms. Archuleta, that they breached this duty, and that their breach caused her alleged injuries. *Rummel v. Edgemont Realty Partners, Ltd.*, 116 N.M. 23, 26, 859 P.2d 491, 494 (Ct. App. 1993). The district court correctly held that Plaintiff failed to meet this test. As set forth below, Plaintiff's direct-liability claims against FAS and FCC were properly dismissed because FAS and FCC, which were complete strangers to Ms. Archuleta and had no involvement in, nor exercised any control over, her care and treatment, owed her no duty of care. Even if they did, Plaintiff presented no evidence that FAS and FCC breached any such duty, or that

their breach caused Ms. Archuleta's alleged injuries. Accordingly, the district court's Orders should be affirmed.

A. Preservation

The district court expressly declined to consider any of the materials that Plaintiff attached to her motions for reconsideration of the summary judgment rulings. [RP 2887.] Therefore, the materials attached to Plaintiff's motions to alter or amend were not preserved below and are not properly before this Court. *See City of Sunland Park v. NM Public Reg. Comm'n*, 135 N.M. 143, 149, 85 P.2d 267, 273 (Ct. App. 2003) ("[T]his Court considers additional materials attached in support of a motion for reconsideration only when the district court considers or relies on the material it make its final determination"); *cf. In re Estate of Keeney*, 121 N.M. 58, 60, 908 P.2d 751, 753 (Ct. App. 1995) ("Because the trial court in *Schmidt [v. St. Joseph's Hospital*, 105 N.M. 681, 684-85, 736 P.2d 135, 138-39 (Ct. App. 1987)] did not consider the affidavits [submitted after a summary judgment hearing] when making its determination as to summary judgment, this Court could not review them as they were not among the affidavits upon which the trial court's decision was based."), *cert. denied*, 120 N.M. 828, 907 P.2d 1009 (1995).

Every record citation from pages 27 to 44 of Appellant's Brief In

Chief is to unauthenticated, inappropriate, and unreviewable documents that Plaintiff submitted in support of her motions to alter or amend the district court's summary judgment decisions. Specifically, Plaintiff's motion and supporting materials as they related to FAS and FCC are in the record at RP 2591-2699 and RP 2731-2753.[2] *All* of the record citations with respect to FAS and FCC at pages 29-44 of Plaintiff's Brief in Chief are to these parts of the record. Thus, *none* of the materials on which Appellant relies in this appeal were before the district court when it considered the parties' motions for summary judgment, and they should not be considered here.

B. Standard Of Review

Where the district court does not consider additional materials submitted by a party on a motion to alter or amend, appellate review from the denial of that motion is limited to determining whether the court abused its discretion. *See Keeney*, 121 N.M. at 61, 908 P.2d at 754; *see also Nance v. L.J. Dolloff Assocs., Inc.*, 2006-NMCA-012, ¶¶ 23-24, 138 N.M. 851, 856, 126 P.3d 1215, 1220 (Ct. App. 2005) ("We review the denial of a motion for reconsideration for an abuse of discretion."). Thus, with respect to the Reconsideration Order here, an abuse-of-discretion standard of review

[2] In addition to appending materials to her initial motion to alter or amend [RP 2591-2699], Plaintiff also appended materials to her reply brief in support of that motion. [RP 2731-53.]

applies.

With respect to the Summary Judgment Order, a de novo standard of review applies. Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. To determine if there is any admissible evidence placing a genuine material fact at issue, this Court reviews the entire record in the light most favorable to the non-moving party. *ConocoPhillips Co. v. Lyons*, No. 32,624, 2012 WL 3711550, at *3 (N.M. Aug. 24, 2022); *Wellington v. Mortgage Elec. Registration Sys.*, Inc., No. 31,927, 2012 WL 2327671, at *1 (N.M. Ct. App. May 22, 2012). However, the question of whether a legal duty exists is a question of law for the court to decide. *Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 6, 134 N.M. 43, 48, 73 P.3d 181, 186; *Romero v. Giant Stop-N-Go of N.M., Inc.*, 2009-NMCA-059, ¶ 6, 146 N.M. 520, 212 P.3d 408.

Even assuming that all of the evidence Plaintiff relies on in her brief were properly before this Court, she would still fail to make out direct-liability claims against FAS and FCC for the reasons outlined below.

C. FAS And FCC Owed No Legal Duty To Ms. Archuleta

Plaintiff was required to demonstrate as an essential element of her direct-liability claims that FAS and FCC had a legal duty to protect Ms. Archuleta from potential harm at the Facility. *See Herrera*, 2003-NMSC-018, ¶ 6 (negligence claim requires existence of a legal duty); *Calkins v. Cox Estates,* 110 N.M. 59, 792 P.2d 36 (1990) (same as to wrongful-death claim); *Barrington Reinsurance Ltd. v. Fidelity Nat'l Title Ins. Co.*, 2007 NMCA-147, ¶ 17, 143 N.M. 31, 172 P.3d 168 (same as to negligent misrepresentation claim); *Lohman v. Daimler-Chrysler Corp.*, 2007-NMCA-100, ¶ 40, 142 N.M. 437, 166 P.3d 1091 (same as to Unfair Trade Practices Act claim).

As a general rule, there is no legal duty to protect another from harm caused by third parties. *Ciup v. Chevron U.S.A., Inc.*, 1996-NMSC-062, ¶ 5, 122 N.M. 537, 928 P.2d 263; *Rummel*, 116 N.M. at 26, 859 P.2d at 494. However, a duty of care may arise in the course of a "special relationship." *See Estate of Haar v. Ulwelling*, 2007-NMCA-032, ¶¶ 15-25, 141 N.M. 252, 154 P.3d 67; *see also Johnstone v. City of Albuquerque*, 2006-NMCA-119, ¶ 7, 140 N.M. 596, 145 P.3d 76 ("To impose a duty, a relationship must exist that legally obligates [a d]efendant to protect [a p]laintiff's interest;" "[a]bsent such a relationship, there exists no general duty to protect others

from harm"); *Grover v. Stechel*, 2002-NMCA-049, ¶ 2, 132 N.M. 140, 45 P.3d 80 (same). As our Supreme Court recently observed, "[t]he question of the existence and scope of a defendant's duty of care is a legal question that depends on the nature of the . . . activity in question, the parties' general relationship to the activity, and public policy considerations." *Edward C. v. City of Albuquerque*, 2010-NMSC-043, ¶ 14, 148 N.M. 646, 241 P.3d 1086; *accord Rodriguez v. Del Sol Shopping Ctr.*, Nos. 30,421/30,578, slip op. ¶ 10, 2012 N.M. App. LEXIS 110, at *10 (N.M. Ct. App. Oct. 10, 2012). Under New Mexico law, "to create a duty based on a special relationship, the relationship must include the right or ability to control another's conduct." *Estate of Haar*, 2007-NMCA-032, ¶ 23, 141 N.M. 252, 154 P.3d 67 (internal quotation marks and citation omitted).

Here, FAS and FCC owed no legal duty of care to Ms. Archuleta because there was no relationship between them—let alone any "special relationship"—that would give rise to such a duty. Notwithstanding Plaintiff's bald assertions to the contrary, FAS and FCC had no right or ability whatsoever to control any of the Facility's day-to-day operations. [RP 1155 ¶¶ 5, 7.] Nor did they have any ownership interests in the Facility. [RP 1155 ¶ 8.] FAS and FCC did not administer Ms. Archuleta's treatment, nor did they have the right to direct her treatment. [RP 1154 ¶ 6.] FAS and

FCC—as independent contractors—provided discrete consulting services to the Facility that were limited by each of their respective service-provider agreements. [RP 1350-84.] Specifically, FAS provided certain administrative, accounting, and in-house legal services to the Facility, while FCC provided certain clinical and operational consulting services to the Facility. [RP 1360; 1378; 1564, at 85:18-23.] Sharon Inoue, who was the Facility Administrator during Ms. Archuleta's residency, testified repeatedly that although FAS and FCC provided consultation, recommendations, and assistance for a fixed fee, they had no contractual or other right or authority to manage the Facility or direct its day-to-day operations. [RP 1392, at 269:9-20; 1573, at 166:3-23.]

The day-to-day operations of the Facility were managed and operated by its Administrator, Director of Nursing, and other employees, who were directly involved in the Facility's day-to-day work. [RP 1155 ¶ 5.] Moreover, the Facility's staff were all employed by Vida Encantada, the Facility's licensed operator. [RP 1154 ¶ 5.] Plaintiff is correct that FAS and FCC, in accordance with their service-provider agreements, furnished advice to employees at the Facility [BIC 29-30], but the agreements are replete with express provisions that the Facility could at any time disregard or override any of FAS's or FCC's recommendations in these areas. [*See, e.g.*, RP

1352, at § 2.1 (FAS's provision of services is "subject to any reasonable and lawful directives established by the [Facility]," and such services must be rendered "in consultation with the [Facility]"); 1370, at § 2.1 (same with respect to FCC).] Indeed, Ms. Inoue made plain that, as the Administrator of the Facility, she was "ultimately responsible for everything." [RP 1393, at 269:16-20.] In fact, she testified regarding the many decisions she made without any approval from either FAS or FCC. [*See, e.g.*, RP 1575, at 183-84 (Ms. Inoue testifying that she had the final authority to make capital expenditures for the Facility, including the purchase of a $100,000 generator).]

The record evidence illustrates the limited advisory role that FAS and FCC played at the Facility. For example, although FAS and FCC helped to implement the pay scale for Facility employees, Ms. Inoue specifically testified that she was free to deviate from that scale without approval because she was the Administrator in charge of the Facility. [RP 1557, at 60:15-21.] And while FAS assisted with payroll, FAS ultimately took all of its direction from the Facility's human resources coordinator. [RP 1565, at 13-20.] Moreover, while FAS was available to provide accounting services, the Facility was free to manage its income and expenses as it saw fit. [*See, e.g.*, RP 1578, at 213-14 (Ms. Inoue testifying that FAS's proposed budget

was "just a guideline," and that she ultimately "told [the accountants] what I wanted, I told them what I needed, [and] they did the calculations").]

Plaintiff did not present a shred of proof—nor could she—that FAS and FCC, in their capacities as advisors and consultants to the Facility, had the requisite custody and control over Ms. Archuleta to give rise to a special relationship that imposed a legal duty to protect her from harm. *See generally Thompson v. Potter*, 2012-NMCA-014, 268 P.3d 57 (filed 2011) (holding that consulting pharmacist had no duty to nursing facility patient after nurse employed by facility erroneously discontinued patient's medication, when pharmacist was not required to continuously monitor patient and did not know about the error); *Lester ex rel. Mavrogenis v. Hall*, 1998-NMSC-047, ¶ 6, 126 N.M. 404, 970 P.2d 590 (holding that doctor who prescribed medication to patient owed no duty to third parties injured by the patient in car accident when the medication was taken out of the office).

The absence of a relationship between FAS and FCC and Ms. Archuleta thus makes this case materially distinguishable from the typical cases where a special relationship arises due to custody, control, or direction of a resident's treatment relationship. *See, e.g.*, *City of Belen v. Harrell*, 93 N.M. 601, 603, 603 P.2d 711, 713 (1979) (holding that a jailer owed a duty to a prisoner when he had custody and control over him as well as

knowledge of his suicidal intent); *Wilschinsky v. Medina*, 108 N.M. 511, 512-13, 775 P.2d 713, 714-15 (1989) (holding that a doctor owed a duty to third parties when a powerful medication was administered to a patient in his office, who then operated an automobile).

Moreover, 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. Under Plaintiff's theory of the case, a company that supplies food to a nursing home may be liable for a resident's food-related illness when the facility's cafeteria fails to properly prepare the meal. Contractors who provide limited services to nursing homes cannot be held responsible for acts or omissions over which they had no control and never intended to exercise control. For example, in their respective service-provider agreements with the Facility, FAS and FCC each agreed to "merely serve as contract administrator and agent of the [Facility]" with respect to individual or group contracts benefiting the Facility, but "[would] not assume any liability of the [Facility] relating to such contracts." [RP 1202 at § 2.4; RP 1219 at § 2.2.] FAS's and FCC's relationships with the Facility demonstrate that they were subject entirely to the Facility's own discretion and directives and exercised no independent control. [RP 1350-84.] To impose a duty of care upon them

and other consultants in this context would upset the parties' expectations about the limitations on their liability that they bargained for in their agreements.

This Court recently held that a consulting pharmacist who contracted with a nursing facility to provide pharmaceutical services to its patients owed no special duty of care to those patients. In *Thompson*, 2012-NMCA-014, after the plaintiff's wife died in a nursing facility when her medication was improperly discontinued by a nurse, the plaintiff brought an action against a consulting pharmacist hired by the facility. This Court, after examining the nature of the pharmacist's relationship with the resident, held that it did not give rise to a duty of care:

> Plaintiff presented no evidence that Defendant had a duty or ability to control the nurse employed by Casa Arena when she made the transcription error or that Defendant had a duty or opportunity to detect the transcription error when it was made. Plaintiff presented no evidence that Defendant had a duty to monitor patients outside of the monthly review. Defendant was required to be at Casa Arena once a month to do his monthly review, and 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 [the resident]'s prescription as required by the pharmacy services contract, with the result that he was not able to take any appropriate corrective action.

Id. at 2012-NMCA-014, ¶ 23.

The sound reasoning of *Thompson* applies with even greater force here. Although the pharmacist in *Thompson* periodically oversaw the resident's treatment, FAS and FCC played absolutely *no role* in Ms. Archuleta's day-to-day care, and Plaintiff points to no evidence to the contrary. Indeed, Plaintiff had no idea who FAS and FCC were until after she filed suit. [RP 1159-60, at 93:7-97:21.] Lacking any evidence that FAS and FCC were involved in a special relationship with Ms. Archuleta that could give rise to a legal duty of care, Plaintiff's direct-liability claims were properly dismissed.

D. FAS And FCC Did Not Breach A Duty Of Care Or Cause Any Harm To Ms. Archuleta

Even assuming that FAS and FCC owed Ms. Archuleta a legal duty of care, the district court correctly granted summary judgment for the independent reason that Plaintiff presented no evidence that FAS and FCC breached that duty, or that their breach caused Mr. Archuleta's alleged injuries.

Direct liability requires *evidence*—not bare allegations that lack any evidentiary support—that FAS and FCC failed to take reasonable steps which proximately caused the alleged harm. These are essential elements that cannot be presumed simply because an injury occurred. Plaintiff "may not simply argue that such facts might exist, nor may [she] rest upon the

allegations of the complaint." *Dow v. Chilili Cooperative Ass'n*, 105 N.M. 52, 55, 728 P.2d 462, 465 (1986); *see Hymams v. Safeco Ins. Co. of Am.*, No. 29,618, 2009 WL 6593951, at *1 (N.M. Ct. App. Sept. 22, 2009) (to succeed on negligence claim, "Plaintiff would need to show that [Defendant] had not exercised reasonable care in protecting the wires from rodent damage [which caused a fire]. Simply asserting that [Defendant] built the structure himself without a permit does not lead to a conclusion that he was negligent in protecting the wires"). As our Supreme Court has clarified in a related context, "[t]he fact that a poor result is achieved or that an unintended incident transpired, unless exceptional circumstances are present, does not establish liability without a showing that the result or incident occurred because of the [defendant]'s failure to meet the standard [of care] either by his acts, neglect, or inattention." *Cervantes v. Forbis*, 73 N.M. 445, 448, 389 P.2d 210, 213 (1964).

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. After 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. Plaintiff was questioned extensively during her deposition regarding the factual basis for her direct-liability

claims. In her testimony, Plaintiff identified no acts or omissions by FAS or FCC that purportedly injured Ms. Archuleta. [RP 1340-41, at 88-100.] Plaintiff's medical expert likewise expressed no opinion that was critical of either FAS or FCC. [RP 1165, at 63:12-22.] At most, Plaintiff makes vague references to "multiple caregiver witnesses . . . [who were] prepared to testify at trial to the chronic short-staffing of the facility, [and] the lack of training and the lack of supplies" [BIC 40]—unnamed witnesses who were never identified even though they were supposedly critical to Plaintiff's claims, and witnesses whose testimony Plaintiff cannot even now proffer would tie such alleged deficiencies to FAS or FCC.[3]

Having failed to articulate any evidentiary basis for her direct-liability claims against FAS and FCC, Plaintiff resorts to baseless theoretical assumptions. Plaintiff's primary contention boils down to her argument that because Ms. Archuleta sustained injuries, they must have been caused by the Facility's underfunding. [BIC 37-44.] Tellingly, Plaintiff cites no record

[3] Plaintiff also suggests, in passing, that FAS and FCC breached a duty of care based on their failure to comply with certain inapplicable state and federal laws governing *nursing-home facilities*. [BIC 37 (citing 42 U.S.C. §§ 1395i, 1396r; 42 CFR § 483; 7 NMAC 9.2).] Even if these provisions imposed a legal duty on FAS and FCC, rather than on the Facility itself, Plaintiff provides no evidence or analysis regarding how FAS and FCC supposedly failed to meet their obligations thereunder. Plaintiff's failure to do so is fatal to her claim.

evidence to support her claim that FAS and FCC caused the Facility to be underfunded or that such underfunding resulted in harm to Ms. Archuleta. More to the point, Plaintiff failed to demonstrate any underfunding at all. Plaintiff simply posits that FAS and FCC must have underfunded the Facility because it "provided less direct care hours per day than the state average." [BIC 38-39.] This is pure, unadulterated sophistry—not evidence. Indeed, as discussed above, Plaintiff's premise that FAS and FCC controlled the Facility's "funding" is wrong and, naturally, unsupported by any record evidence. Moreover, to the extent that Plaintiff's comparison relies on the average direct-care hours at the Facility overall, it does not even speak to the number of direct-care hours dedicated to Ms. Archuleta's care specifically. But even if the "fact" that the Facility provided fewer direct-care hours to Ms. Archuleta than the state average were true, it would not establish that the Facility's staffing was deficient, or that it caused Ms. Archuleta's injuries. Nor would it show that these deficiencies resulted from any negligent conduct by FAS or FCC in particular. Plaintiff's direct-liability claims, which are based entirely on the *ipse dixit* pronouncements by counsel alone, are insufficient to defeat summary judgment.

"[A] complete failure of proof concerning an essential element of [Plaintiff's] case necessarily renders all other facts immaterial." *Goradia v.*

Hahn Co., 111 N.M. 779, 781, 810 P.2d 798, 800 (1991) (internal quotation marks omitted). Plaintiff's failure to establish that FAS or FCC breached a duty to Ms. Archuleta that led to her injuries demolishes her direct-liability claims against them. The district court's Order granting summary judgment to Defendants was therefore proper and its Order refusing to reconsider that ruling was not an abuse of discretion.

CONCLUSION

Based on the foregoing, FAS and FCC respectfully request that this Court affirm summary judgment in favor of Defendants on Plaintiffs direct-liability claims as well as the district court's refusal to reconsider that ruling.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via U.S. mail, postage prepaid, to the following attorneys of record on November 30, 2012:

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