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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 THI OF BALTIMORE, INC. AND THI OF NEW MEXICO, LLC

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INTRODUCTION

The district court properly granted the Motions for Summary Judgment filed by Defendant/Appellees THI of Baltimore, Inc. ("THIB") and THI of New Mexico, LLC ("THINM"). Plaintiff/Appellant Archuleta's ("Plaintiff") Brief-in-Chief ("BIC") makes clear why summary judgment was appropriate as to both motions: Plaintiff utterly failed, both below and on appeal, to differentiate any wrongful conduct attributable to *these particular defendants* that could create liability.

THIB is 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 ("Vida Encantada" or "Facility"). Similarly, THINM is a limited liability company with no employees. It is the sole, non-managing member of the Facility, and has no management or other responsibilities with regard to the care and treatment of residents at Vida Encantada. As the district court properly concluded in granting THIB's and THINM's motions for summary judgment, it is impossible that THIB or THINM committed any tortious act against Plaintiff. The district court was correct and its summary judgment orders should be affirmed.

SUMMARY OF PROCEEDINGS

The Court should ignore Plaintiff's "Introduction," which purports to include various "facts" without a single record citation. Nor are the purportedly supported "facts" in Plaintiff's Summary of Proceedings accurate representations of the record.

NATURE OF THE CASE

THIB and THINM 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

THIB and THINM incorporate the "Course of Proceedings and Disposition Below" section set forth in Defts. Joint Brief. In addition, THIB and THINM state the following:

In August and September 2011, the parties filed the following motions relevant to this brief:

- THIB's Motion for Summary Judgment (RP 1166-1178, 1263-1276); and
- THINM's Motion For Partial Summary Judgment (RP 1323-1341).

While Plaintiff appears to complain about the Court's order shortening the

time for response and reply briefs[1] (BIC 7 (citing RP 890-891)), Plaintiff failed to note that the order applied equally to all parties and to all motions, including both Plaintiff's and Defendants' motions for summary judgment. When the court suggested this briefing schedule, Plaintiff did not object. (7/11/2011 Tr. 32). In fact, at the court's request and without objection, Plaintiff drafted the order implementing the briefing schedule. (RP 890-891). Further, Plaintiff did not comply with this briefing schedule as to THIB's Motion. THIB filed and served (via email, as the parties agreed and the district court required) its Motion for Summary Judgment and supporting materials on August 12, 2011. (RP 1166). When Plaintiffs failed to respond, THIB submitted a proposed form of order granting the motion. (RP 2812-2817). On August 22, 2011, Plaintiff served her motion for leave to belatedly respond to THIB's Motion (RP 1803-1861). THIB responded to Plaintiff's request on August 23, 2011 (RP 1782-1798), and Plaintiff submitted her reply on August 30, 2011 (RP 1894-1897). On September 8, 2011 (after announcing the result via e-mail on August 29, 2011 (RP 2819)), the district court granted Plaintiff's motion to belatedly file her response to THIB's Motion. (RP 2018-2020). Therefore, Plaintiff had, in total, more than 15 days (from August 12 to September 8) to fully brief her response to THIB's Motion for

[1] Plaintiff did not complain about the expedited briefing schedule to the district court, nor did she ever seek an enlargement of time to file a response brief (other than THIB's Motion, which the court granted), thus failing to preserve the issue for appeal. *See* Rule 12-213(A)(4) NMRA.

Summary Judgment.

After dismissing Plaintiff's joint-venture claims, and at Plaintiff's request, the district court considered these pending summary judgment motions on direct liability. Shortly thereafter, in a September 24, 2011 e-mail, the court informed the parties:

> I have determined that motions for summary judgment filed by Fundamental Administrative Services, Fundamental Clinical Consulting, THI of New Mexico LLC and THI of Baltimore should be granted. The 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 judgment as a matter of law.

(RP 2854). Based on its September 24 ruling, the district court entered orders dismissing these Defendants on September 26 and 27, 2011. (RP 2452, 2529-2530, 2450-2451).

SUMMARY OF RELEVANT FACTS

THIB is a holding company that has passive investment interests in companies. It has no business activities or employees. THIB is the sole, non-managing member of THI of New Mexico, LLC. THI of New Mexico, LLC is the sole, non-managing member of the Facility. Vida Encantada is the sole licensed operator of the Facility. The Facility's staff was hired and controlled by the Facility's Administrator, who also ran the Facility's day-to-day operations. Pursuant to federal regulations, the Facility had a governing body which had the

authority to hire and fire the Facility Administrator. (RP 1168-1169).

THIB exercised no control, either centralized or decentralized, over the Facility or any of the other Defendants. THIB has never been the Facility's licensee and did not own, operate, or control the Facility. No individual acting in his or her capacity as an officer of THIB had any contact with any resident, family member, employee, or manager of the Facility where Plaintiff's decedent, Navitidad Archuleta, resided or received services from March 14 to July 23, 2008. (RP 7, ¶ 29, 1169-1170).

THIB had no control over the conduct or actions of any staff or managers at Vida Encantada and never authorized, approved, or ratified any conduct or directions of the Facility's staff or managers with regard to Ms. Archuleta. THIB never had any communications or interactions with Ms. Archuleta or any member of her family. (RP 1169-1170).

THIB and THINM never participated in any decisions of any kind related to Ms. Archuleta. THIB and THINM were not aware of Ms. Archuleta's residency, and neither THIB nor THINM directed or supervised her care, treatment, or anything else related to Ms. Archuleta or the Facility. (RP 1170-1171; 1325-1326). Neither Plaintiff nor the Facility's Administrator was aware of THIB's or THINM's existence prior to this litigation. (RP 1171, 1326).

LEGAL ARGUMENT

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO PLAINTIFF'S "DIRECT LIABILITY" CLAIMS[2]

A. Preservation: Plaintiff's Materials In Support of her Motion to Alter or Amend are Not Before this Court

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 2889-2890 ("The Court has not 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 THI of New Mexico, LLC and THI of Baltimore, Inc.")). Therefore, the materials attached to Plaintiff's Motions to Alter or Amend were not preserved below and are not properly before this Court. *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.

[2] THIB, THINM, and their Co-Appellees submitted one brief on the issue of joint venture, as the same argument applies to all Appellees. This brief is therefore limited to the issue of the absence of THIB's and THINM's direct liability to Plaintiff, which is more fact-specific as to each Appellee.

828, 907 P.2d 1009 (1995).

B. Standard of Review from Motion to Alter or Amend Judgment: Plaintiff Failed to Cite the Proper Standard of Review from the Denial of Motion to Alter or Amend Pursuant to Rule 1-056(E) NMRA

The district court did not consider the exhibits to Plaintiff's Motion to Alter or Amend the Judgment as to THINM and THIB. Had the district court considered those materials, the standard of review would have been *de novo*. *See Keeney*, 121 N.M. at 61, 908 P.2d at 754 (where plaintiff filed a motion for summary judgment and then a motion for leave to alter or amend the summary judgment decision, this Court found: "There is no abuse of discretion for the trial court to consider new material as part of a motion for reconsideration under Rule 59 as long as the delay in presenting the new material is not just for strategic reasons, and its relevance outweighs any prejudice . . . . *If the trial court does consider the new material and still grants summary judgment, 'the appellate court may review all of the materials de novo.*'") (citation omitted) (emphasis added).

However, because the district court did not consider these new materials, the standard of review is abuse of discretion. *Id.*; *see also Nance v. L.J. Dolloff Assocs., Inc.*, 2006-NMCA-012, ¶ 23, 138 N.M. 851, 856, 126 P.3d 1215, 1220 ("We review the denial of a motion for reconsideration for an abuse of discretion.").

C. Standard of Review from Motion for Summary Judgment

All of the materials on which Plaintiff relies in the Argument section of her Brief in Chief were part of the record related to her Motions to Alter or Amend, not her responses to Defendants' Motions for Summary Judgment. Plaintiff nonetheless asserts that her appeal is one from the district court's orders granting summary judgment. (BIC 19). This is simply incorrect; based on Plaintiff's own record citations, her appeal lies from the denial of the Motions to Alter or Amend.

As to summary judgment, Appellant properly states the applicable standard of review.

D. This Court Cannot Consider Materials that Were Not Considered by the District Court in Denying Plaintiff's Motions to Alter or Amend (Applicable to Appellant's Points C-G, pages 27-44)

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 courts' summary judgment decisions. Specifically, Plaintiff's Motion to Alter or Amend the Judgment Regarding Defendants THI of New Mexico, LLC and THI of Baltimore, Inc. and the allegedly supporting materials are in the record at RP 2539-2590 and RP 2774-2792. Plaintiff's Motion to Alter or Amend the Judgment Regarding Defendants Fundamental Administrative Services, LLC and Fundamental Clinical Consulting, LLC and supporting materials are in the record

at RP 2591-2699 and RP 2731-2753.[3] *All* of the record citations at pages 27-44 of Appellant's Brief-in-Chief are to these parts of the record. Thus, *none* of the materials on which Appellant relies on appeal were before the district court when it considered the parties' motions for summary judgment.

As the Court stated in *City of Sunland Park v. New Mexico Pub. Regulation Comm'n*, 2004-NMCA-024, ¶ 17, 135 N.M. 143, 85 P.3d 267 (filed 2003):

> [I]t is irrelevant that the district court "considered" the motion [for reconsideration] under these facts. Generally, this Court considers additional material attached in support of a motion for reconsideration *only when the district court considers or relies on the material to make its final determination. In re Estate of Keeney,* 121 N.M. 58, 60, 908 P.2d 751, 753 (Ct. App. 1995). Normally, an appellate court may not consider the documents if the district court's decision is not based on that material. *Selby v. Roggow*, 1999-NMCA-044, ¶¶ 10-11, 126 N.M. 766, 975 P.2d 379 (declining to consider additional information in motion for rehearing because trial court did not consider it in ruling it was without jurisdiction to rule on motion); *In re Estate of Keeney,* 121 N.M. at 60, 908 P.2d at 753 ("Because the trial court in *Schmidt [v. St. Joseph's Hosp.,* 105 N.M. 681, 684-85, 736 P.2d 135, 138-39 (Ct. App. 1987)] did not consider the affidavits 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."). In this case, the affidavit and other material had no impact on the district court's decision to deny the motion. *Because the district court did not consider or rely on the material in reaching its decision, we find that it is not properly before this Court on appeal. As such, we will not consider the material.*

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[3] In addition to appending materials to her initial Motions to Alter or Amend, Plaintiff also appended materials to her Reply brief in support of her Motion to Alter or Amend. (RP 2741-2753).

Id. (first emphasis and brackets in original, second emphasis added); *see also Selby v. Roggow*, 1999-NMCA-044, ¶ 10, 126 N.M. 766, 975 P.2d 379 ("When attachments to the motion for rehearing are properly before this Court for review, we will consider the documents in determining whether Plaintiffs have controverted Defendants' claim . . . . Conversely, however, if the trial court did not consider the additional information, the reviewing court will generally decline to review such matters as not properly before it."); *Deaton v. Gutierrez*, 2004-NMCA-043, ¶ 9, 135 N.M. 423, 89 P.3d 672 ("As we have determined that the trial court was acting within its discretion in refusing to consider the materials, we will not consider the additional materials submitted with the motion for reconsideration"). Thus, as set forth *supra*, because the district court did not consider these materials in ruling on Plaintiff's Motions to Alter or Amend, they are not properly before this Court.

As THIB and THINM argued to the district court, it could not consider the supplemental materials submitted with Plaintiff's Motion to Alter or Amend because they were not properly authenticated, nor were they "new" materials unavailable to Plaintiff at the time she filed her summary judgment briefs. (RP 2715-2718). Rule 1-056(E) requires that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Thus, documents must be authenticated in an affidavit to be

admissible. Plaintiff's failure to authenticate the documents she inappropriately attached to her brief precludes any court from considering them. In *Mealand v. Eastern N.M. Med. Ctr.*, this court stated:

> The copies of federal and state court pleadings submitted by Plaintiff were not certified . . . . Plaintiff did not provide the trial court with an affidavit authenticating the documents attached to her response . . . .
>
> In its reply, ENMMC argued that the documents submitted by Plaintiff were not properly authenticated, and therefore, did not satisfy the requirement of Rule 1-056(E) NMRA 2001, that evidence tendered in support of or in opposition to a motion for summary judgment "set forth facts as would be admissible in evidence." ENMMC requested that the trial court strike the documents. We agree with ENMMC that *the trial court was required to disregard the documents submitted by Plaintiff. Where the opponent of evidence has raised a timely objection, the requirement that a party set forth facts as would be admissible in evidence is "mandatory in nature." Chavez v. Ronquillo*, 94 N.M. 442, 445, 612 P.2d 234, 237 (Ct. App. 1980).

2001-NMCA-89, ¶¶ 22-23, 131 N.M. 65, 33 P.3d 285 (emphasis added); *see also Rivera v. Trujillo*, 1999-NMCA-129, ¶ 14, 128 N.M. 106, 990 P.2d 219 ("Plaintiffs offered no affidavit or sworn testimony authenticating the accident report. Moreover, none of the statements reported were given under oath, and the officer who made the report was not present at the time of the accident. Thus, the accident report, standing alone, fails to meet either the form or substantive requirements of Rule 1-056 . . . . We therefore find no abuse of discretion in the district court's refusal to admit the report").

Even if Plaintiff properly had authenticated the documents, all except one of them related to the year 2006, *two years prior to Ms. Archuleta's residency at the Facility*. (RP 1820-1823 [document dated March 28, 2006]; RP 1824-1825 [document dated September 26, 2006]; RP 1826-1827 [document dated September 29, 2006]; 1861 [undated, unknown document]); *see also* (RP 1, Complaint ¶ 1, alleging that Ms. Archuleta resided at the Facility from March 14 to July 23, 2008). These exhibits from 2006 are irrelevant to any claims related to Ms. Archuleta's stay at the Facility for a short time in 2008.

Finally, all of the materials Plaintiff attached to her reconsideration pleadings were all available to her when she responded to Defendants' motions for summary judgment. Plaintiff did not explain to the district court why she failed to include those attachments to her summary judgment pleadings, or argue that there was any excusable neglect or other reason for their earlier omission. In *Nance*, 2006-NMCA-012, ¶ 24, this Court observed:

> In prior cases we have affirmed a trial court's refusal to consider new material presented for the first time in a motion to reconsider. In *Rivera v. Trujillo*, 1999-NMCA-129, 128 N.M. 106, 990 P.2d 219, the trial court excluded an accident report submitted by the plaintiffs in response to the defendants' motion for summary judgment . . . . When the trial court granted the motion, the plaintiffs filed a motion to reconsider and attached a portion of a deposition covering the same ground as the accident report in the hope that the deposition would present an issue of fact. The court refused to consider the deposition, which had been available to the plaintiffs before the defendants filed their motion for summary judgment. We stated that "[t]he only apparent reason for the untimely filing was counsel's failure to do so.

> Simply, we do not construe rejection of such an untimely argument to have been an abuse of discretion." *Id.* ¶ 19. *See also Deaton*, 2004-NMCA-043, ¶ 9, 135 N.M. 423, 89 P.3d 672 (affirming trial court's refusal to consider documents, which were not previously submitted, filed in connection with a motion for reconsideration where there was no evidence of excusable neglect).

Id. (citations omitted). There was thus no basis for Plaintiff's failure to append the materials (had they been admissible) to her summary judgment response, rather than attempting to smuggle them into the record as part of a motion for reconsideration.

E. The Defects in Plaintiff's Summary Judgment Response Rendered all of the Facts Asserted By THIB Admitted

In her belated response to THIB's Motion for Summary Judgment, Plaintiff failed to cite specific record evidence with regard to any facts she sought to deny. (RP 1807-1808). Admissible evidence was similarly absent from Plaintiff's Response to THINM's Motion for Summary Judgment. As a result, under Rule 1-056(D) NMRA, each of Defendants' facts was deemed admitted:

> A memorandum in opposition to the motion shall contain a concise statement of the material facts as to which the party contends a genuine issue does exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and shall state the number of the moving party's fact that is disputed. *All material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted.*

1-056(D) NMRA (emphasis added).

Even if Plaintiff had denied THIB's and THINM's facts with record

citations, the materials that Plaintiff attached to her summary judgment response were not authenticated and, thus, inadmissible. *See* Section D, *supra*; *see also* Rule 1-056(E) NMRA ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.").

F. Appellant Failed to Establish Direct Liability by THIB or THINM Because Their Passive Ownership Interests in the Facility Cannot Provide a Basis for Liability (Responsive to Appellant's Point C, pages 27-28).

To survive summary judgment, Appellant was required to adduce competent evidence showing there was "a duty owed from the defendant to the plaintiff; that based on a standard of reasonable care under the circumstances, the defendant breached that duty; and that the breach was a cause in fact and proximate cause of the plaintiff's damages." *Romero v. Giant Stop-N-Go of N.M., Inc.*, 2009-NMCA-059, ¶ 5, 146 N.M. 520, 212 P.3d 408. The district court correctly held that Appellant failed to meet this test. In fact, there is no basis upon which Appellant could demonstrate any relationship or contact between Ms. Archuleta and THIB, a holding company with no employees, or with THINM, which also has no employees.

Plaintiff's Complaint is maddeningly vague with regard to which

contentions she states against which named parties, electing instead to lump the allegations of wrongdoing together against parties she identifies simply as "Defendants." But THIB is not the Facility's licensee (RP 1266-1267, ¶ 15), it has no employees (RP 1264, ¶ 2), and it had no connection at all with Ms. Archuleta (RP 1267, ¶¶ 17, 19, 20); it is evident that THIB's liability is, in reality, premised on its twice-removed indirect ownership interest in the Facility. Such a passive ownership interest in the Facility is not, however, a basis upon which Plaintiff can premise a duty owed by THIB to Ms. Archuleta, or any claim for direct liability.

Similarly, THINM does not manage, operate, or control the Facility, and it did not provide care to Ms. Archuleta. (RP 1325-1326, ¶¶ 4-9). Its passive membership interest in Vida Encantada (the sole entity licensed to run the Facility) cannot subject THINM to direct liability to Plaintiff.

There is no factual basis for Plaintiff's bald assertion that THIB or THINM (which Plaintiff fails to distinguish in her Brief in Chief) diverted funds from the Facility and thereby caused harm to Ms. Archuleta, other than the arguments of counsel in her brief, which is not evidence. *See V.P. Clarence Co. v. Colgate*, 115 N.M. 471, 472, 853 P.2d 722, 723 (1993) ("the briefs and arguments of counsel are not evidence upon which a trial court can rely in a summary judgment proceeding"); *Archuleta v. Goldman*, 107 N.M. 547, 551, 761 P.2d 425, 429 (Ct. App. 1987), *cert. denied*, 105 N.M. 689, 736 P.2d 494 (1987) (statements in

unsworn briefs are not evidence and cannot establish a dispute of material fact in summary judgment proceedings).

Although these two entities are in the Facility's chain of ownership (RP 1264-1265, ¶ 2; RP 1336, ¶ 5), this fact does not create a legal duty. Under NMSA 1978, § 53-19-47, THIB's and THINM's liability is determined by Delaware law (RP 1264, ¶ 2; RP 1336, ¶ 5), which provides: "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *Blair v. Infineon Techs. AG*, 720 F. Supp. 2d 462, 469 (D. Del. 2010) (internal quotation marks omitted). New Mexico law is in accord:

> [A] bedrock principle of corporate law is that shareholders are not held personally responsible for the acts of a corporation . . . . Incorporation is intended by law to protect shareholders from personal liability (that is, from liability beyond the extent of each shareholder's investment). Presumably, the law permits the corporate form, and the concomitant separation of ownership and management, in order to facilitate investment and thereby stimulate economic growth . . . . Individuals who adopt the corporate form of business, and carefully maintain corporate separateness in accordance with alter ego principles, are entitled to and expect to have the corporation treated as a separate entity . . . .

Jemez Agency, Inc. v. CIGNA Corp., 866 F. Supp. 1340, 1347 (D.N.M. 1994). The same principles apply to members of a limited liability company. *See* Del. Code Ann. tit. 6, § 18-303(a) ("the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise" belong to the limited

liability company and "no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability . . . solely by reason of being a member or acting as manager of the limited liability company"); NMSA 1978, § 53-19-13 ("the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company"); NMSA 1978, § 53-19-14 ("A member of a limited liability company is not a proper party to a proceeding by or against the limited liability company solely by reason of being a member of the limited liability company").

Therefore, THIB and THINM "enjoy a corporate-like liability shield," which protects members from liability for actions other than those related to the formation of the LLC itself, the member's own wrongful conduct; abuse of the shield; and statutory capital-related obligations. *Brophy v. Ament*, No. CIV 07-0751 JB\KBM, 2009 WL 5206020, at **4-5 (D.N.M. Nov. 20, 2009). Indeed, "merely being an officer or agent of a corporation does not render one personally liable for a tortious act of the corporation," where the officer or agent did not actively participate or direct the tortious conduct. *Id.* at *5 (quoting *Lobato v. Pay Less Drug Stores, Inc.*, 261 F.2d 406, 408-09 (10th Cir. 1958)); *see also Jemez*, 866 F. Supp. at 1343 ("Enterprises may incorporate in order to limit shareholder liability.").

The bottom line is that, as a matter of law, as a member of a limited liability company, THIB and THINM cannot be vicariously liable for the entity's alleged misconduct; liability attaches only if the member actually engages in its own actionable conduct. The Complaint does not allege that THIB or THINM committed any wrongful act and Plaintiff did not demonstrate direct liability in response to THIB's or THINM's motions for summary judgment. Accordingly, Plaintiff may not impute liability to THIB or THINM based on the alleged conduct of other Defendants in which THIB or THINM merely has a direct or indirect ownership interest.[4]

G. Neither THIB nor THINM Owed Any Duty to Ms. Archuleta

(Responsive to Appellant's Points C, E at pages 27-28, 32-37)

Summary judgment is particularly appropriate on the question of duty, because the issue of whether a legal duty exists is a question of law for the court to decide. *Romero v. Giant Stop-N-Go of N.M., Inc.*, 2009-NMCA-059, ¶ 6, 146 N.M. 520, 212 P.3d 408; *Rodriguez v. Del Sol Shopping Ctr. Assocs., LP*, No. 30,421/30,578, slip op. ¶ 10, 2012 N.M. App. LEXIS 110, at ¶ 10 (Ct. App. Oct. 10, 2012) ("The question of the existence and scope of a defendant's duty of care

[4] Plaintiff finally stated her true motive for suing THIB, THINM, FAS, and FCC at the hearing on September 26, 2011, when she admitted that the sole reason for pursuing the claims against these Defendants was her alleged and unsubstantiated fear "about the likely inability to collect any judgment" from the Facility. Plaintiff has cited no evidence to substatiate her purported fear on this issue.

is a legal question . . . ." (emphasis added) (internal quotation and citation omitted)). "'To impose a duty, a relationship must exist that legally obligates a defendant to protect a plaintiff's interest, and in the absence of such a relationship, there exists no general duty to protect others from harm.'" *Thompson v. Potter*, 2012-NMCA-014, ¶ 19, 268 P.3d 57 (filed 2011) (quoting *Estate of Haar v. Ulwelling*, 2007-NMCA-032, ¶ 15, 141 N.M. 252, 154 P.3d 67).

A duty of care is an essential element of the claims that Plaintiff asserted against THIB and THINM. *See Herrera* v. *Quality Pontiac,* 2003-NMSC-018, ¶ 6, 134 N.M. 43, 73 P.3d 181 (negligence requires existence of legal duty); *Calkins* v. *Cox Estates,* 110 N.M. 59, 792 P.2d 36 (1990) (same as to wrongful death action); *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 claim for negligent misrepresentation); *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, a person does not have a legal duty to protect another from harm caused by third parties. *See Ciup v. Chevron U.S.A., Inc.*, 1996-NMSC-062, ¶ 5, 122 N.M. 537, 928 P.2d 263; *Rummel v. Edgemont Realty Partners, Ltd.*, 116 N.M. 23, 26, 859 P.2d 491, 494 (Ct. App. 1993). Instead, a duty of care is predicated upon 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," and "[a]bsent such a relationship, there exists no general duty to protect others from harm"); *Grover v. Stechel*, 2002-NMCA-049, ¶ 11, 132 N.M. 140, 45 P.3d 80 ("[A]n individual has no duty to protect another from harm," and "for [the p]laintiff to prevail, there must be a special relationship that places on [the d]efendant a legal duty to protect [the p]laintiff.").

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." *Haar*, 2007-NMCA-032, ¶ 23 (internal quotations and citation omitted). As the New Mexico 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. In the context of a claimed relationship between a defendant and a nursing-home patient, a plaintiff must also set forth facts "demonstrating sufficient contact with a patient on a regular basis to establish custody or control over the patient." *Thompson,* 2012-NMCA-14, ¶ 28.

Here, neither THIB nor THINM owed any legal duty to Ms. Archuleta because they had *no relationship* with her—let alone a "special relationship"—

giving rise to a duty of care. Neither Ms. Archuleta nor Plaintiff had any relationship with, or knowledge of, THIB or THINM—they were complete strangers to Ms. Archuleta. Nor did THIB or THINM have any contact with Ms. Archuleta, let alone contact sufficient to give rise to a duty. Plaintiff implicitly acknowledged the lack of any relationship between THIB/THINM and Ms. Archuleta by avoiding specifics, and instead generally alleging that each of the Non-Facility Defendants (THINM, THIB, FAS, and FCC) operated, managed, and/or controlled the Facility, despite the lack of any evidence or proof in this regard. (RP 2-6, Compl. ¶¶ 6, 8, 10, 12, 14, 24). The Complaint thus draws no distinction between Defendants, but instead makes blanket allegations against all of them together. *See* RP 5 (Compl. ¶ 19 ("Whenever the term 'Defendants' or 'Vida Encantada' is utilized within this suit, such term collectively refers to and includes all named Defendants . . . .")). But at the summary judgment stage, Plaintiff's allegations do not control; she must present *evidence* in support of these bare contentions. *See Cain v. Champion Window Co.*, 2007-NMCA-85, ¶ 7, 142 N.M. 209, 164 P.3d 90 ("The non-movant cannot rely on the allegations in its complaint or on the argument of counsel to defeat summary judgment").

The Facility was operated and managed by its own Administrator, Director of Nursing, and other employees, not by THIB or THINM. (RP 1169 ¶¶ 2-13, 1154, 1266-1268, 1324 ¶¶ 3-9, 1336-1337). Below, THIB and THINM presented

admissible evidence, unrefuted by Plaintiff, demonstrating that they exercised no control whatsoever over Vida Encantada; were never the licensee of, and did not own, operate, or control Vida Encantada; no one from THIB/THINM had any contact with any resident, family member, employee, or manager of Vida Encantada; and neither THIB nor THINM had any control over the conduct or actions of any staff or managers at Vida Encantada and they never authorized, approved, or ratified any conduct or directions of the Facility's staff or managers with regard to Ms. Archuleta. *Id.* Because THIB and THINM had no control over, and no relationship with, Ms. Archuleta's stay at the Facility, no duty existed. *See generally Thompson*, 2012-NMCA-014 (holding that consulting pharmacist had no duty to nursing facility patient after nurse employed by facility erroneously discontinued patient's medication, absent evidence that pharmacist had a duty to continuously monitor patient or knew about the error). In short, THIB and THINM simply had no relationship with Ms. Archuleta that could trigger a legal duty of care. The district court properly granted summary judgment for THIB and THINM for this reason alone.

H. Even if THIB/THINM Owed a Duty to Ms. Archuleta, There is No Evidence that Either THIB or THINM Breached a Duty or Caused Injury to Ms. Archuleta (Responsive to Appellant's Points F, G at pages 37-43)

Summary judgment was also proper for the independent reason that THIB and THINM did not commit (nor could have committed) any of the purported

misconduct which allegedly injured Ms. Archuleta. The only admissible evidence demonstrates that:

- Ms. Archuleta had no knowledge or relationship with THIB or THINM (RP 1169-1170,1154, 1267, 1268, 1326, 1333, 1340-1341);
- The Facility had no interactions with THIB or THINM at all, much less interactions regarding Ms. Archuleta's care and treatment (RP 1169-1170, 1154, 1267-1268, 1274-1276, 1325-1326, 1333, 1336-1337);
- THIB has never directly owned, operated, controlled, or otherwise had anything to do with the Facility, other than to maintain a twice-removed passive investment in it (RP 1169-1170, 1154, 1266-1268);
- THINM never has operated, controlled, or otherwise had anything to do with the Facility, other maintain than a passive membership in it (RP 1324-1326, 1333, 1336-1337);
- THIB and THINM have no employees and therefore could not have taken any actions to harm Ms. Archuleta (RP 1168-1169, 1264-1265, 1324-1325, 1336-1337); and
- Neither THIB nor THIM could have caused harm to Ms. Archuleta because neither had any involvement in her care or residency at Vida Encantada (RP 1169-1170, 1154, 1266-1268, 1324-1326, 1333, 1336-1337, 1340-1341).

In sum, the record is bereft of any evidence that THIB/THIM did anything or even had the ability to do anything—wrongful or otherwise—with respect to the Facility's treatment and care of Ms. Archuleta that purportedly forms the basis of Plaintiff's claims. Lacking such evidence, Plaintiff's claims against THIB and THINM fail. Accordingly, the district court's rulings that THIB and THINM were properly entitled to summary judgment as a matter of law were correct.

Plaintiff also failed to demonstrate the existence of a disputed issue on the essential element of causation. Ms. Archuleta's death certificate makes clear that she died of respiratory failure, cardiac arrest, and Parkinson's disease *at her physician's office*. (RP 1459). Plaintiff has not presented an iota of evidence that THIB or THINM caused these diseases or medical problems, or that anything they did with regard to alleged budgetary considerations actually caused Ms. Archuleta's death. The district court thus properly rejected Plaintiff's attempt to manufacture blatantly false and unsupported claims against THIB and THINM based on allegations that Plaintiff concocted out of thin air.

CONCLUSION

Based upon the foregoing and the related briefing, the trial court's summary judgment orders dismissing THINM and THIB should be affirmed in full.

Respectfully submitted by,

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CERTIFICATE OF SERVICE

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