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

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

Oral Argument Is Requested

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STATEMENT OF COMPLIANCE

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OTHER AUTHORITIES

Defendants THI of Baltimore, Inc. ("THIB"), THI of New Mexico, LLC ("THINM"), 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") addressing (1) her purported appeal from an order of the district court dismissing her joint-venture liability claim ("Joint-Venture Order"), and (2) her appeal from various other orders of that court denying her motions in regard to discovery ("Discovery Orders"). For the reasons set forth below, this Court should dismiss plaintiff's appeal from the Joint-Venture Order or, alternatively, affirm that Order, and affirm the Discovery Orders in all respects.

NATURE OF THE CASE

Without alleging any specifics as to the role (or lack thereof) of each Defendant, Plaintiff sued seven entities and one individual[1] (RP 1)—including holding companies, members of limited liability companies, the Facility Administrator, and the skilled-care Facility itself—alleging that

[1] Plaintiff incorrectly asserts that her "complaint named eight entities" (BIC 3), but fails to note that one of the "entities" was, in fact, the Administrator of the Facility, Sharon Inoue. The Court granted Ms. Inoue's motion for summary judgment (RP 2445-2446), which Plaintiff did not appeal (although her Notice of Appeal improperly states the appeal is taken "against the Defendants," without differentiation) (RP 2891-2901).

Plaintiff's decedent, Natividad Archuleta, received inadequate care (RP 7 ¶ 29) while she was a resident at the Facility from March 14 to July 23, 2008.[2] (RP 7 ¶ 29; *See id.* at 1-23.) Plaintiff purposefully and inappropriately grouped the Defendants together for pleading purposes without differentiation, stating in her Complaint: "Whenever the term 'Defendants' or 'Vida Encantada' is utilized within this suit, such term collectively refers to and includes all named Defendants in this lawsuit." (RP 5 ¶ 19.)

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiff's August 31, 2009 Complaint alleged "Causes of Action Against All Defendants" (RP 8)—without differentiation—for wrongful death (RP 8), negligence (RP 9), negligence *per se* (RP 12), negligent or intentional misrepresentation (RP 19), violation of the Unfair Trade Practices Act (RP 20), and "punitive damages" (RP 21).

In November 2009, two of the Defendants, Fundamental Long Term Care Holdings, LLC ("FLTCH") and Abe Briarwood Corporation, moved to

[2] The Facility is not an appellee herein. Plaintiff waived her right to seek relief against the Facility alone in exchange for taking this appeal as to the non-Facility Defendants. (RP 2764 at (b): "In the event the Summary Judgment Defendants prevail in full on appeal, or if the appellate court finds no reversible error requiring a trial on the merits as to any of the Summary Judgment Defendants, this Court shall enter an Order of Dismissal as to all [D]efendants, including [the Facility]. Plaintiff agrees that she is waiving any right to a jury trial as to [the Facility] in the event that the Court's decision as to the Summary Judgment Defendants is upheld on appeal").

dismiss the Complaint based on lack of personal jurisdiction. (RP 100-114, 117-131.) The court initially denied those motions (RP 441-442), but then later reconsidered and granted them in 2011, based on an intervening and comprehensive decision issued in another case which found that New Mexico courts lacked personal jurisdiction over FLTCH. (RP 1125-1127.)

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

- FAS's and FCC's Motion for Summary Judgment (RP 1144-1165);
- THIB's Motion for Summary Judgment (RP 1166-1178, 1263-1276);
- Plaintiff's Motion for Summary Judgment on Joint Venture (RP 1170-1262);
- Motion For Partial Summary Judgment by Defendants THINM, THIB, FAS, and FCC on Plaintiff's Joint Venture/Enterprise Claim (RP 1280-1313); 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[3] (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 in open court, 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.)

By e-mail dated September 19, 2011, the court announced its decision on various outstanding motions as follows:

> Counsel: I have completed my review of the several outstanding motions in this case. The following is my decision on those that have been fully briefed:
>
> 1. The Motion for Partial Summary Judgment by THI of New Mexico, LLC, THI of Baltimore LLC [sic], FAS, LLC and FCC, LLC on Plaintiff's Joint Venture/Enterprise Claim is granted;
>
> 2. In light of my decision on the foregoing motion, I do not find it necessary to rule on Defendant THI of Baltimore LLC's [sic] Motion for Partial Summary Judgment or Defendants FAS, LLC and FCC, LLC's Motion for Partial Summary Judgment. Similarly, I do not address the Motion to Strike Plaintiff's Expert Bruce Engstrom and to exclude his testimony

[3] 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 to THIB's motion, which the court granted), thus failing to preserve the issue for appeal. *See* Rule 12-213(A)(4) NMRA.

since his testimony goes to the joint venture/enterprise issues. Also, Plaintiff's Motion to Supplement Her Response Brief to THIB's motion for summary judgment is not addressed for the same reason.

3. With reservation, I will deny the Motion To Strike Plaintiff's Summary Judgment Evidence;

4. The Plaintiff's Motion for Summary Judgment on Joint Venture will be denied.

Counsel who prevailed on each motion decided will prepare an appropriate order.

(RP 2828.) The district court then entered the orders on these motions. (RP 2514-2515, 2724-2725.) *Plaintiff did not appeal from any of these orders; none of them were attached to her Notice of Appeal.* (RP 2891-2901; Rule 12-202(C) NMRA: "A copy of the judgment or order appealed from, showing the date of the judgment or order, shall be attached to the notice of appeal").

The district court reasonably read the Complaint as alleging liability against THIB, THINM, FAS, and FCC ("Non-Facility Defendants") based solely upon claims of "joint venture" (RP 6-7), as to which the court granted Defendants' motion for summary judgment in the Joint-Venture Order (RP 2828, 2514-2515.) However, Plaintiff disagreed, averring: "In addition to Plaintiff's Joint Venture/Enterprise Claim, Plaintiff has direct claims of negligence against all of the defendants." (RP 2831.) Therefore, at

Plaintiff's request, the district court considered the other pending summary judgment motions, and granted those motions on "direct liability" via electronic mail on September 24, 2011. (RP 2854.) Based on its prior ruling, the district court entered orders dismissing these Defendants on September 26 and 27, 2011. (RP 2452, 2529-2530, 2450-2451.)

On September 26, 2011, Plaintiff and the remaining Defendant, THI of New Mexico at Vida Encantada, LLC (the Facility), appeared at the trial of this matter. While the jury was being seated, counsel and the court met in chambers. Plaintiff's counsel placed on the record the following account of that discussion:

> I know we talked about this in Chambers; I just have it written out. I'd like to make sure we get it clear on the record. Our proposal basically is that in a concern about the case being tried more than once, the court would grant our continuance to allow the appellate courts to weigh in on the recent rulings in this case. And if the rulings are consistent with this Court's rulings, we will dismiss the remaining Defendant. If we get a ruling in our favor, we will come back and be able to try the case only one time. It's important to note that we are not agreeing to dismiss the remaining Defendant because of lack of merit of our case, or anything dealing with the actual facts of our case, *it's simply a concern about the likely inability to collect any judgment in this case, if we just proceed against the nursing home.*

(9/26/11 Tr. 1-2 (emphasis added).)

Also at the September 26 proceeding, the district court remarked that "the whole idea with regard to the continuance here today was to get orders

entered to get this matter to the Appellate Court. The filing of motions to reconsider is only going to delay that much longer." (09/26/11 Tr. 7.) Plaintiff nonetheless filed two separate Motions to Alter or Amend the summary judgment orders (one motion as to FAS/FCC; another as to THIB/THINM). Both of these motions sought amendment of the summary judgment orders solely on the issues of direct liabilty. (RP 2539-2699.) Plaintiff did not, however, move to alter or amend the district court's order granting summary judgment on Plaintiff's claim of "joint venture." (RP 2514-2515.) Indeed, the motions to alter or amend address a single issue, denominated: "THIB and THINM Are Liable Under New Mexico Law for Their Own Torts." (RP 2544-2548; *see also* RP 2596-2600 (no argument as to joint venture, arguing only direct liability, in the motion to alter or amend directed at FAS and FCC); 12/20/11 Tr. 3-4, 6-7 (Plaintiff's oral argument addressed the same issues raised in her briefing as to direct liability without mention of any claim of joint venture).

As the court noted, while Plaintiff posited her motion as one pursuant to Rule 1-059(e), the motion was actually made pursuant to Rule 1-060(B)(6). (12/20/11 Tr. 2.) After reviewing the parties' briefing and hearing oral argument on these motions to alter or amend, the district court issued orders denying them. Those orders expressly stated that the court did

not consider any of the additional materials attached to Plaintiff's briefs. (RP 2887-2888, 2889-2890.)

The district court's rulings in the Discovery Orders also purport to form a basis for Plaintiff's appeal. Defendants filed the following relevant motions:

- Motion To Strike Plaintiffs Summary Judgment Evidence, filed by the Facility, THINM, THIB, FAS, and FCC. (RP 1434-1438.) As to this motion, the district court stated, "[w]ith reservation, I will deny the Motion To Strike Plaintiff's Summary Judgment Evidence." (RP 2828, 2724-2725.)
- Motion to Strike Plaintiff's Expert, Bruce R. Engstrom and Exclude His Testimony (RP 2056-2153)[4] filed by the Facility, THINM, THIB, FAS, and FCC. The lower court granted this motion on September 26, 2011. (RP 2447-2449.)

[4] Plaintiff's summary judgment briefing included unattributed citations to the report of Plaintiff's purported expert, Bruce Engstrom. (*Compare* RP 1181 [Plaintiff's summary judgment papers] *with* RP 1959, 1965 [Engstrom report]). Therefore, the district court had this unattributed, improper summary judgment evidence before it when it decided the joint-venture motion against Plaintiff.

SUMMARY OF ARGUMENT

Plaintiff's appeals from the Joint-Venture Order and the Discovery Orders are wholly without merit.

First, with respect to the Joint-Venture Order, Plaintiff is procedurally barred from challenging that Order because she did not appeal from it or provide a reasonable excuse for her failure to do so.

Even if Plaintiff's appeal from the Joint-Venture Order were proper, the appeal lacks any basis. Plaintiff's joint-venture claim depends entirely on her ability to establish that *each* Defendant was a participant in the alleged joint venture. Because the Non-Facility Defendants cannot be vicariously liable for the Facility's alleged misdeeds under New Mexico law, Plaintiff's joint-venture theory fails as a matter of law. Moreover, no joint venture existed among Defendants as a matter of undisputed fact. Plaintiff failed to adduce any evidence that Defendants agreed to combine their resources to operate the Facility, intended to share jointly in the Facility's profits and losses, or retained the right of mutual control over the Facility's business. On the contrary, the undisputed evidence established that there was no such relationship among Defendants and that the Facility operated autonomously.

Second, with respect to the Discovery Orders, Plaintiff never properly preserved her claim that she was denied discovery she purportedly needed to respond to Defendants' motions for summary judgment. Indeed, Plaintiff's challenges below were aimed solely at discovery that related to trial evidence, not discovery that related to the summary judgment motions. As Plaintiff appealed only from the summary judgment orders below, any discovery issues related to trial are, therefore, not before this Court. Moreover, the district court properly struck the untimely and incomplete report of Plaintiff's proposed expert, Bruce Engstrom. That report, itself denominated as a draft, was facially inchoate and did not rely on admissible evidence. In addition, because Plaintiff failed to identify the opinions of that expert and present him for a timely deposition, the court properly struck his testimony. The district court was well within its broad discretion to make these rulings as they related to discovery and, accordingly, the Discovery Orders should also be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS ON PLAINTIFF'S JOINT-VENTURE LIABILITY CLAIM

A. Standard Of Review

A *de novo* standard of review applies here. 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, 399, 970 P.2d 582, 585. 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, 2012). Summary judgment still is proper even when some disputed issues remain, "if there are sufficient undisputed facts to support a judgment and the disputed facts relate to immaterial issues." *Oschwald v. Christie*, 95 N.M. 251, 253, 620 P.2d 1276, 1278 (1980). Moreover, where the motion concerns a pure question of law, this Court "will not review a grant of summary judgment in the light most favorable to the party opposing the motion, but rather, [it] will apply a de novo standard of review that favors neither party." *Holguin v. Fulco Oil Servs. L.L.C.*, 2010-NMCA-091, ¶ 7, 149 N.M. 98, 245 P.3d 42 (alteration

omitted); *accord Rutherford v. Chaves County*, 2003-NMSC-010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

B. Preservation

The district court granted Defendants' motions for partial summary judgment on Plaintiff's joint-venture liability claim, and denied Plaintiff's motion for partial summary judgment on that claim, in the Joint-Venture Order dated and entered September 26, 2011. (RP 2514-2515). Plaintiff did not move to alter or amend this Order. More importantly, *Plaintiff did not appeal from this Order*. Accordingly, Plaintiff's joint-venture arguments are not preserved for review, and this Court should not consider them. *See Purifoy v. Group I*, No. 31,714, 2012 WL 1722377, at * 1 (N.M. Ct. App. Apr. 17, 2012).

C. Defendants Did Not Participate In A Joint Venture

Plaintiff contends that Defendants are jointly and severally liable for Ms. Archuleta's alleged injuries because they operated the Facility as a "joint venture." (BIC 21-27.) She argues that the Non-Facility Defendants "jointly" made budgeting, management, and oversight decisions concerning the Facility, and that "each Defendant had an equal right to share in the control" of its operations. (BIC 1-2, 10.) As an alleged joint venture, she

contends, each Defendant is thus vicariously liable for the acts and omissions of every other Defendant.

Plaintiff's joint-venture theory fails for at least three reasons. *First*, Plaintiff is procedurally barred from raising her joint-venture claim in this Court because she failed to appeal from the district court's Order dismissing that claim on summary judgment. As this Court recently reiterated, the filing of a proper notice of appeal is a mandatory precondition to this Court's exercise of jurisdiction. *Lopez v. Alvarado*, No. 31,426, 2012 WL 1252655, at *1 (N.M. Ct. App. Mar. 7, 2012). When a party fails to timely appeal an order by which it claims to be aggrieved, this Court will normally decline to review it. *Purifoy*, 2012 WL 1722377, at **2-3. "Only the most unusual circumstances beyond the control of the parties—such as error on the part of the court—will warrant overlooking procedural defects" in this context. *Trujillo v. Serrano*, 117 N.M. 273, 278, 871 P.2d 369, 374 (1994); *accord Chavez v. U-Haul Co.*, 1997-NMSC-051, ¶¶ 19-22, 124 N.M. 165, 169-170, 947 P.2d 122, 126-127. No such rare circumstances are present in this case.

Here, the district court issued the Joint-Venture Order on September 26, 2011 (RP 2514-2515), pursuant to which it both granted Defendants' motion for partial summary judgment on Plaintiff's joint-venture claim, and denied Plaintiff's motion for partial summary judgment on that claim,

dismissing it from the case. Although partial summary judgment orders are not appealable final orders when other claims are left unresolved, this Order became final and appealable when Plaintiff's remaining direct-liability claims were all dismissed the very same day. (RP 2894-2898.) *See Gates v. N.M. Taxation & Revenue Dep't*, 2008-NMCA-023, ¶ 11, 143 N.M. 446, 176 P.3d 1178 (filed 2007) (holding that the district court's partial summary judgment order became a final and appealable order when the parties filed a stipulation of dismissal regarding the remaining undecided claims).

To obtain appellate review, Plaintiff was required to appeal from the Joint-Venture Order. However, Plaintiff did not appeal from that Order, nor did she request an extension of time to do so. Plaintiff's Notice of Appeal sought review only of the separate Orders dismissing her direct-liability claims (and denying her motion to alter or amend the same); only these Orders were attached to her Notice of Appeal. (RP 2891-2900.) Indeed, the Orders denying Plaintiff's motions to alter or amend leave no doubt that her post-hearing challenge targeted only the district court's direct-liability rulings. (*See, e.g.*, RP 2591 ("The actions of FAS and FCC in their budgeting, management, and oversight of Vida Encantada nursing home (VE) clearly form a basis for liability against them under theories of both

negligence and negligence *per se*."); RP 2544 ("THIB and THINM are liable under New Mexico law for their own torts.")).[5]

Nor do the Orders appealed from, which dispose of Plaintiff's direct-liability claims, encompass Plaintiff's joint-venture claim. The proceedings below make clear that the appealed-from Orders decided Plaintiff's direct-liability claims *alone*. The district court initially notified the parties that, as a result of the dismissal of Plaintiff's joint-venture claim, it would not be required to decide Defendants' motions for partial summary judgment on Plaintiff's direct-liability claims. (RP 2828.) Plaintiff's counsel thereafter advised the court that its ruling "nonetheless maintained those entities as individual defendants on direct liability theories." (RP 2833; *see also* RP 2831.) The district court subsequently granted summary judgment as to the "direct liability" claims involving the Non-Facility Defendants, because

[5] Plaintiff did not reference the Joint-Venture Order in her Brief In Chief or Docketing Statement. And Plaintiff apparently concedes that she appeals only from the Orders dismissing her direct-liability claims, even while she presses the joint-venture claim elsewhere in her brief. (BIC 20 (noting when the court ruled that no direct-liability claims could proceed, "[t]hose orders constituted final, appealable orders, *and it is from those orders that Plaintiff appealed*" (emphasis added)).) That Plaintiff appeals from the dismissal of her direct-liability claims is confirmed by her Docketing Statement, which challenges only those rulings. (RP 2974-97.) Plaintiff cannot claim to be aggrieved by the Joint-Venture Order when she did not appeal from it, has given no excuse for failing to do so, and has represented to this Court that she appeals only from the dismissal of her direct-liability claims.

"[t]he pleadings, depositions, affidavits, etc. show that there is no genuine issue as to any material fact on any direct claims against these defendants and they are therefore, entitled to a judgment as a matter of law." (RP 2854.) Plaintiff then appealed only from the Orders dismissing her direct-liability claims. (RP 2891-2900.)

In short, Plaintiff has never proffered any excuse—let alone a reasonable one—for her failure to preserve her joint-venture claim on appeal. Plaintiff's arguments in support of a joint-venture theory are thus procedurally defective and should not be reviewed by this Court.

Second, even if Plaintiff had preserved the joint-venture claim for appellate review, the district court properly dismissed it as a matter of law. As Plaintiff acknowledges, her joint-venture claim rests on her ability to show that *each* Defendant was a participant in the alleged joint venture. (BIC 21 ("These five companies—FAS, FCC, THINM, [the Facility] and THIB—operated under a common understanding with the primary purpose of running nursing homes."); *id.* at 25 ("THINM, THIB, FAS and FCC entered into agreements to combine their money, property and time . . ., agreed to share in the profits and losses of the nursing home, and had the right of mutual control over the nursing home.").) If any one of these Defendants was not a participant in the joint venture, then Plaintiff's joint-

venture theory collapses. Because neither THIB nor THINM can be vicariously liable for the Facility's alleged misdeeds as a matter of law, Plaintiff's joint-venture claim was properly dismissed.[6]

Ownership in an LLC is held by "members." Carter G. Bishop & Daniel S. Kleinberger, *Limited Liability Companies: Tax and Business Law* § 5.04 (2012) ("LLC law uses the term 'member' to designate a person who is an owner of the LLC."). It is undisputed that THINM was the sole non-managing member of the Facility and held a purely passive membership interest in that LLC. (RP 1296 ¶ 5.) It is also undisputed that THIB was even further removed from the Facility than THINM, because it was the sole member of THINM. (RP 1304 ¶ 5.) As set forth below, under New Mexico law, a member of an LLC cannot be liable for the misdeeds of an LLC based solely on that member status. Accordingly, THINM cannot be liable for the alleged misdeeds of the Facility based solely on its member status, and

[6] Plaintiff did not allege that only FAS, FCC, and the Facility were involved in a joint venture, nor did she raise this argument in the district court. Accordingly, she would be barred from raising this argument for the first time on appeal in her reply. *See Muncey v. Eyeglass World, LLC*, No. 29,813, 2012 WL 3837894, at *21 (N.M. Ct. App. Aug. 29, 2012). In any event, as discussed *infra*, there is no evidence that FAS, FCC, and the Facility were ever involved in a joint venture.

THIB—as a twice-removed indirect owner of the Facility—cannot be liable *a fortiori*.[7]

New Mexico law provides that the law of the state in which a foreign LLC is organized governs the liability of the members of the LLC. NMSA 1978, § 53-19-47(A). Because the Facility is a Delaware LLC (RP 1293 ¶ 5), Delaware law governs the liability of the Facility's members. Delaware law states that a member of an LLC is not liable for the acts or omissions of the LLC solely by virtue of its status as a member: "the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise" belong to the LLC, 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." 6 Del. Code Ann. § 18-303(a); *see also Thomas v. Hobbs*, No. C.A. 04C-02-010, 2005 WL 1653947, at *2 (Del. Super. Apr. 27, 2005) ("[a]s with a corporation, a member of a[n LLC] may not be held liable for the debts, obligations and liabilities of the company"); *see generally* 2 Larry E. Ribstein & Robert R. Keatinge, *Limited Liability Companies* § 12:4, at 26 (2d ed. 2012) (explaining that organizing as an LLC

[7] THINM and THIB, in addition to lacking vicarious liability based on their membership status, also lack any direct liability based on their actual conduct, as set forth in their separate brief filed herewith.

means that "a member or manager is not liable for debts and liabilities of the business solely by virtue of being such a member or manager"). New Mexico law is in accord. *See* 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 . . . ."); NMSA 1978, § 53-19-13 ("[T]he 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.*" (Emphasis added)).

As New Mexico courts have explained in regard to an LLC, "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 directly participate in or direct the tortious conduct. *Brophy v. Ament*, No. Civ. 07-0751, 2009 WL 5206020, at *5 (D.N.M. Nov. 20, 2009) (internal quotation marks omitted). Rather, members of an LLC "enjoy a corporate-like liability shield," which protects them 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, or statutory capital-related obligations. *Id.* at **4-5; *accord* 2 L. Ribstein & R. Keatinge, *Limited Liability Companies* § 12:1, at 1 ("Indeed, the ability to combine limited

liability with partnership features is one of the most important advantages of the LLC."). Stated simply, "[t]he shareholders of a corporation and the members of an LLC generally are not liable for the debts of the entity, and a plaintiff seeking to persuade a Delaware court to disregard the corporate structure faces a difficult task." *NetJets Aviation, Inc. v. LHC Commc'ns*, LLC, 537 F.3d 168, 176 (2d Cir. 2008) (internal quotation marks omitted).

Plaintiff's reliance on partnership principles in this case to assert that "[g]enerally, partners are jointly and severally liable for wrongful acts or omission[s] of one of the partners" (BIC 24) thus misses the mark entirely. Here, Defendants never were involved in a general partnership, in which each partner is personally liable for the obligations of all the other partners. UJI 13-411 NMRA Civ. (Comm. Cmt.). Treating THINM and THIB as general partners would vitiate the very liability shield that an LLC statutorily confers upon its members. Under the clear rule articulated above, THINM, as the sole member of the Facility, cannot be liable to Plaintiff solely as a result of that membership. Nor can THIB be liable because it is even further removed from the Facility than THINM. Because THINM's and THIB's passive direct and indirect ownership interests in the Facility do not subject them to joint and several liability for the Facility's alleged torts as a matter

of law, Plaintiff's joint-venture theory encompassing these Defendants necessarily must fail.

Although New Mexico courts have not yet ruled upon this issue, courts in other jurisdictions uniformly hold that a joint-venture theory cannot be used to hold a member of an LLC liable for the LLC's tortious conduct. In *Leber v. Universal Music & Video Distr., Inc.*, 225 F. Supp. 2d 928 (S.D. Ill. 2002), *aff'd*, 332 F.3d 452 (7th Cir. 2003), the plaintiffs alleged that MUMS, LLC and one of its members, Panasonic, were liable under a collective bargaining agreement between plaintiffs and Universal, another member of the LLC. Although MUMS and Panasonic were not parties to the agreement, the plaintiffs argued that they were "joint venturers with Universal" and therefore were "liable as partners for Universal's liabilities relating to the joint venture." *Id.* at 937. The court emphatically rejected the plaintiffs' joint-venture theory:

> The plaintiffs are wrong. It is true that Universal and Panasonic called MUMS a joint venture before MUMS was formed, and indeed in the planning stage Universal and Panasonic might have been joint venturers. The plaintiffs ignore, however, the clear fact that after its creation MUMS became a *limited liability company* under the Delaware Limited Liability Company Act, a wholly different animal than a joint venture or partnership. Members of a Delaware limited liability company are not governed by partnership principles and are not obligated for the contractual liabilities of the limited liability company.

Id. (applying Delaware law) (emphasis in original).

In *United States v. RG Steel Wheeling, LLC*, No. 5:12-CV-19, 2012 WL 3647717 (N.D.W. Va. 2012), the federal government sued Mountain State Carbon, LLC, which owned a coke-manufacturing plant whose operations allegedly violated various environmental laws. The government also named Mountain State Carbon's two members, SNA Carbon, LLC and RG Steel Wheeling, LLC, which had been involved in a joint venture with Mountain State Carbon before that company organized. SNA Carbon moved to dismiss, arguing that it could not be held liable based solely on the fact that it was a member of Mountain State Carbon. The government contended that SNA Carbon was liable based on its status as a joint-venturer with RG Steel in the ownership of Mount State Carbon. The court rejected the government's argument, despite the pre-existing joint venture among the defendants:

> [T]his Court finds that the pre-organization joint venture does not require that SNA Carbon be held liable to third parties for the environmental violations allegedly committed at a coke facility owned by Mountain State Carbon. Instead, the separateness of a limited liability company from its members must be respected in dealings with third parties, despite the existence of a pre-organization joint venture. The United States does not allege a reason for this Court to disregard the company form in this case. As such, this Court is compelled to conclude that the United States has failed to state a plausible claim against SNA Carbon based upon the company's status as a joint venturer with RG Steel in the ownership of Mountain State Carbon.

Id. at *3 (applying Delaware law).

United States ex rel. Dekort v. Integrated Coast Guard Sys., 705 F. Supp. 2d 519, 544, 557 (N.D. Tex. 2010), underscores the same rule. In *Dekort*, the plaintiff alleged that Northrop Grumman and Lockheed Martin, which were members of ICGS LLC, were liable as part of a joint venture for violating the False Claims Act. Plaintiff alleged that because ICGS, a limited liability company, referred to itself as a "joint venture" between Northrop and Lockheed, Northrop and Lockheed were jointly liable for each other's acts and omissions. The court disagreed, and dismissed plaintiff's joint-venture claims against both Northrop and Lockheed: "ICGS is a registered limited liability company under Delaware law, not a partnership or joint venture, and thus joint and several liability does not apply." *Id.* at 544 (applying Delaware law).

Finally, in *Brew City Redevelopment Group, LLC v. The Ferchill Group*, 714 N.W.2d 582 (Wis. Ct. App.), *aff'd*, 724 N.W.2d 879 (2006), the plaintiff, Brew City, sued Juneau Avenue Partners, LLC and its member, JTMK-Pabst, for interfering with Brew City's contract with another party to purchase property. The court recognized that, under law analogous to Delaware and New Mexico, "neither members of a limited liability company nor its manager may be liable in tort, for their acts or conduct as a member

or manager, to third persons, such as, here, Brew City." *Id.* at 590-91. The court therefore concluded that "JTMK-Pabst is not a proper party to Brew City's tortious-interference claim because no conduct other than as a member or manager of Juneau Avenue Partners is alleged." *Id.* at 591 (applying Wisconsin law).

There can be no doubt that New Mexico law precludes individual liability for members of an LLC if that liability is predicated solely on such membership. Plaintiff's contention to the contrary would saddle members of an LLC with liability based on nothing more than their association with the LLC, when the entire purpose of their organization was to provide limited liability. That is not the law. The above decisions are in accord with a fundamental and long-established legal principle concerning the liability of members of an LLC that should be followed here:

> In the absence of an independent duty, mere participation in the business affairs of an LLC by a member is insufficient, standing alone and without a showing of some additional affirmative conduct, to hold the member independently liable for harm caused by the LLC. This rule applies even if the LLC's operating agreement puts the member solely in charge of the LLC's day-to-day operations. The tort, if any, is solely that of the LLC; the member has not breached any duty of its own.

Carter G. Bishop & Daniel S. Kleinberger, *Limited Liability Companies: Tax and Business Law* § 6.04[2][a] (2d ed. 2012) (internal quotation marks and footnote omitted). Plaintiff has failed to demonstrate any reason for this

Court to disregard THIB's and THINM's corporate forms in this case and, thus, her joint-venture theory must be rejected.

Third, even if Plaintiff's joint-venture claim were both preserved for review and legally cognizable, no joint venture existed among the Defendants as a matter of undisputed fact. "A joint venture is never presumed and the burden to establish it remains with the party who alleges or relies on it." *Roderick v. Lake*, 108 N.M. 696, 700, 778 P.2d 443, 447 (Ct. App. 1989), *abrogated on other grounds by Heath v. La Mariana Apts.*, 2008-NMSC-017, 143 N.M. 657, 180 P.3d 664. To establish a joint venture, Plaintiff was required to adduce admissible evidence showing that the Defendants "agree[d] to combine their money, property or time for conducting a particular business venture and agree[d] to share jointly in profits and losses, with the right of mutual control over the business enterprise or over the property." *Quirico v. Lopez*, 106 N.M. 169, 170, 740 P.2d 1153, 1155 (1987); *accord Wilger Enters., Inc. v. Broadway Vista Partners*, 2005-NMCA-088, ¶ 10, 137 N.M. 806, 808-809, 115 P.3d 822, 824-825; *Lightsey v. Marshall*, 1999-NMCA-147, ¶ 15, 128 N.M. 353, 992 P.2d 904. Where, as here, there is no written agreement—a fact that, by itself, bespeaks the lack of any joint venture—a plaintiff must show specific

conduct of each Defendant demonstrating an intent to form a joint venture. *Quirico*, 106 N.M. at 170, 740 P.2d at 1155.

The elements of a joint venture are absent in the relationship among these Defendants. The record contains no evidence to establish that the Defendants agreed to pool their resources, share in the Facility's profits or losses, jointly control the Facility's operations—or that they ever intended to do any of these things. Accordingly, there is not even a colorable showing of a joint venture in this case. (RP 1308 ¶¶ 4-5.)

It is undisputed that THINM and THIB do not have employees and do not conduct business in New Mexico or elsewhere. (RP 1265 ¶ 9; 1296 ¶ 5; 1304 ¶ 5.) THINM held a purely passive membership interest in the Facility, because the Facility is manager-managed by its internally designated officer and is not member-managed. (RP 1296 ¶ 5.) THIB, in turn, held a purely passive membership interest in THINM. (RP 1304 ¶ 5.) Under these circumstances, there were no resources for these entities to pool.

Plaintiff is wrong to suggest that the fact that the Facility's profits and losses were allocated to THINM in the Facility's Articles of Organization somehow established a joint venture. (BIC 26.) The allocation of profits and losses in these circumstances was a function of THINM's membership in the Facility, not of its joint venture with Defendants, and was arranged for

accounting purposes only. In reality, all Facility income went directly to a "lockbox" controlled by a third-party lender that provided the Facility with a line of credit with which to pay its bills and expenses. (RP 2699.) But even if THINM had expected to profit from its relationship with the Facility, that would not show that THINM intended to *share* those profits with the other Defendants. *Messer Griesheim Indus. v. Cryotech of Kingsport, Inc.*, 45 S.W.3d 588, 607-08 (Tenn. Ct. App. 2001) (holding that a secured lender for construction financing of gas purification facility was not involved in a joint venture with operator of facility or the property lessor, even though all parties expected to profit from their relationships, where rights held by lender merely permitted it to protect its security interest in facility).

THINM and THIB had no authority over, nor did they ever operate, manage, or control the day-to-day operations of the Facility. (RP 1266 ¶ 18; 1296 ¶ 5; 1304 ¶ 5; 1345 ¶ 6.) THINM and THIB had no control over the conduct of any staff or managers at the Facility, and they never authorized, approved, or ratified any conduct of the staff or managers there. (RP 1267 ¶ 18; 1297 ¶ 7; RP 1347 ¶ 10-11.) Moreover, THINM and THIB made no staffing decisions with respect to the Facility. (RP 1268 ¶ 22; 1297 ¶ 9.) These entities never provided any human resources, management, operational, or other services to the Facility, and they did not promulgate

any policies and procedures for its operations. (RP 1267 ¶ 21; 1297 ¶ 8.) Nor did they participate in any decisions of the Facility, including decisions regarding the care and treatment of its residents. (RP 1268 ¶ 22-23; 1297 ¶ 9.)

The same is true of FAS and FCC. They had no right or ability to control the Facility's operations, which included the care of its residents. (RP 1155 ¶¶ 5, 7; 2013-14.) The Facility was managed and operated by its own Administrator, Director of Nursing, and other employees, who were directly involved in the Facility's day-to-day work. (RP 1155 ¶ 5.) Sharon Inoue, the Administrator of the Facility during Ms. Archuleta's residency, testified that although FAS and FCC provided consultants, recommendations, and assistance, management contracts were never in place that would have granted FAS or FCC the contractual right or authority to manage the Facility's affairs. (RP 1392 at 269:9-20; 1573 at 166:3-23; 2017 at 272:10-13.) Rather, FAS and FCC each provided discrete consulting services to the Facility that were defined by their respective written consulting agreements with Vida Encantada. (RP 1350-84.) Specifically, FAS provided certain administrative, accounting, and in-house legal services to the Facility, and FCC provided certain clinical and operational consulting services to the Facility. (RP 1360; 1378; 1564, at 85:18-23.) While FAS

and FCC, in accordance with their service agreements, provided advice to employees at the Facility in various areas (BIC 29-30), the agreements expressly state that the Facility could, at any time, disregard or override any of their recommendations. (*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 Facility Administrator, she was "ultimately responsible for everything." (RP 1393, at 269:16-20.)

Significantly, there was no joint venture because FAS, FCC and the Facility specifically *disclaimed* any intention to form a joint venture. FAS and FCC agreed to be independent contractors of the Facility, not joint venturers with it, and this intent was pellucid in the governing language of their respective agreements, which expressly provide that "[n]othing contained in this Agreement shall constitute or be construed to be or create *a partnership or joint venture* between [the] Contractor, its successors, or assigns on the one part and the Operator, its successors, or assigns, on the other part." (RP 1357, at § 7.10 (emphasis added); 1374, at § 7.10 (emphasis added); *see also* RP 1355, at § 7.1; 1373, at § 7.1 (consulting agreements providing that "no officers, director(s) or equity holder (s) of

[the Facility] . . . shall be deemed personally liable for any judgment, costs or damages incurred by [the Facility.]")).

This Court has previously deferred to the language chosen by the parties in their agreement to determine the nature of their relationship, and it should do the same here. *See S. S. Kresge Co. v. Bureau of Revenue*, 87 N.M. 259, 260, 531 P.2d 1232, 1233 (Ct. App. 1975) (holding that contractual language providing that "[t]he parties do not intend this Agreement to constitute a joint venture, partnership, or lease and nothing herein shall be construed to create such a relationship" indicated that there was "[n]o intention by the parties to the agreements to create anything other than a license"); *see also Hydro Res. Corp. v. Gray*, 2007-NMSC-61, ¶ 41 143 N.M. 142, 173 P.3d 749 (concluding that "the lease expressly disclaims any intent to create a joint venture and the relationship between the parties bears none of the characteristics of such an enterprise").

Plaintiff tries in vain to show the existence of a joint venture by drawing loose and tenuous connections between Defendants and the Facility. For example, Plaintiff alleges that Daniel Mathis, a Regional Vice President of FCC, had supervisory authority over Ms. Inoue. (BIC 27.) Plaintiff also notes that Ms. Inoue, the Facility Administrator, attended an orientation training at the Maryland offices of FAS and FCC. (BIC 27 (citing RP 2645-

46).) Plaintiff, however, fails to mention that Mr. Mathis had such authority only because of his separate and distinct role as a member of the Facility's governing body, not in his capacity as an officer of FCC. (RP 1345 ¶¶ 6, 11.) And while Defendants FAS and FCC were involved in a business relationship with the Facility as independent contractors, including as providers of locations for appropriate training, that relationship did not entail a mutual right of control, even if they were in pursuit of a common interest. *See Messer Griesheim Indus.*, 45 S.W.3d at 607-08 ("The fact that the parties considered themselves obligated to each other may establish that they had some contractual agreement, but it does not establish that there was an agreement to act as partners or joint venturers.").

Even crediting Plaintiff's attempts to show a close connection between FAS and FCC and the Facility, the record plainly shows that FAS and FCC had *no right of mutual control* over the Facility. *See Dominguez v. Northern Mountain Constructors, Inc.*, No. 29,851, 2011 WL 5396346, at *4 (N.M. Ct. App. Oct. 13, 2011) (even viewing the conflicts in a lease in favor of the plaintiff, "the facts and inferences are so strongly and overwhelmingly in favor of [the defendant] . . . that reasonable people could not arrive at a contrary result" (internal quotations and citations omitted)). In light of the foregoing, Plaintiff does not even come close to meeting her burden to

demonstrate a joint venture. *See Heritage Hous. Dev., Inc. v. Carr*, 199 S.W.3d 560 (Tex. Ct. App. 2009) (holding that nursing home's parent company was not vicariously liable for the facility's alleged negligence; although parent company was involved in hiring the nursing-home employees and establishing policies, it did not control the details of employees' conduct relating to care of resident).[8]

Finally, lacking any evidentiary basis for her joint-venture theory, Plaintiff resorts to inflammatory and erroneous hyperbole about their organization. Plaintiff asserts that Defendants "constructed an elaborate corporate shell" by creating "a multi-layered ownership and operation structure, with the explicit purpose of obfuscating ownership and attempting to shirk liability." (BIC 21.) Apart from being irrelevant to the issues in this appeal, Plaintiff's *ad hominens* are simply wrong. Defendants' structure is neither novel nor improper; rather, it is a common industry practice that seeks to provide tax advantages and manage risk in a manner that fully complies with the law. *See* Joseph E. Casson & Julia McMillen, *Protecting Nursing Home Companies: Limiting Liability Through Corporate*

[8] To the extent that Plaintiff draws such groundless connections between FAS and FCC and the Facility based on the draft expert report of Plaintiff's proposed expert, Bruce Engstrom, they should be rejected for the independent reason that such report was stricken by the district court and, thus, is not part of the appellate record. *See infra*, Legal Argument, Point II.

Restructuring, 36 J. Health L. 577, 586 (2003) (noting that structuring nursing-home ownership to minimize risk "is the prevailing method of nursing home ownership in the United States"). Indeed, courts have recognized the growing trend of such a structure in nursing-home cases and the unique advantages that it offers.

> The era of the locally owned, "mom and pop" nursing facility is gone. Increasingly, private investment groups own large chains of nursing homes. . . . These complex structures arise because the owners of multiple nursing homes and similar facilities have adopted the use of the single purpose entity (SPE) to minimize the various risks of their businesses. . . . [T]he benefits of employing these strategies include containing exposure to risk to the facility involved, thereby avoiding the exposure of all of the facilities in the group to liability. The risks to be minimized by these strategies include: ... liability for damages to residents in tort or under other theories.

Schwartzberg v. Knobloch, 98 So. 3d 173, 180-81 (Fla. Dist. Ct. App. 2012). As New Mexico courts have observed, "the law permits the corporate form, and the concomitant separation of ownership and management, in order to facilitate investment and thereby stimulate economic growth." *Jemez Agency, Inc. v. CIGNA Corp.*, 866 F. Supp. 1340, 1347 (D.N.M. 1994).

Nothing in the Defendants' organizational relationship was improper, illegal, or remotely indicative of a joint venture. Accordingly, Plaintiff's joint-venture claim was properly dismissed below.

II. THE DISTRICT COURT'S DISCOVERY RULINGS WERE PROPER[9]

A. Standard Of Review

Trial courts have inherent power to enforce discovery rules and discretion to impose sanctions when litigants disobey them. *Shamalon Bird Farm, Ltd. v. U.S. Fidelity & Guaranty Co.*, 111 N.M. 713, 716, 809 P.2d 627, 630 (1991). "The admission or exclusion of evidence is within the discretion of the trial court. On appeal, the trial court's decision is reviewed for abuse of discretion." *State v. Hughey*, 142 N.M. 83, 86, 163 P.3d 470, 473 (2007). "An abuse of discretion arises when the evidentiary ruling is clearly contrary to logic and the facts and circumstances of the case." *State v. Armendariz*, 140 N.M. 182, 185, 141 P.3d 526, 529 (2006) *overruled on other grounds by State v. Swick*, 2012-NMSC-018, 279 P.3d 747 (N.M. Jun. 1, 2012). As discussed below, the district court was well within its broad power to issue the Discovery Orders here and did not abuse its discretion in doing so.

B. Preservation

1. Any Discovery Related To Trial Issues Is Not Properly Before This Court

In her Brief in Chief, Plaintiff cites various briefs in which she

[9] Responsive to Appellant's BIC Point II, pages 44-46.

allegedly preserved the issues related to the district court's Discovery Orders filed below for appeal. However, a review of those documents demonstrates that *none* of them related to discovery for purposes of Plaintiff's responses to Defendants' motions for summary judgment. The pleadings relied upon by Plaintiff that purport to preserve this issue are listed on page 44 of Plaintiff's Brief in Chief. However, the pleadings she relies upon—at RP 503-544, 589-597, 742-764, 765-792, 809-857, 1020-1027, 1109-1113—predated the summary judgment motions, are silent as to the use of the discovery for summary judgment, and mention only discovery for trial purposes (where any mention is made at all as to the purpose for which discovery was sought). Even the pleadings filed by Plaintiff post-summary judgment (RP 1927-1945, 2049-2052, and 2262-2285) fail to note that the discovery sought was necessary for Plaintiff to respond to those motions. The words "summary judgment" are present only in one page of all these records—RP 2050—in which Plaintiff merely asserts that once she prevails on summary judgment, she will need to take a particular deposition. (*Id.* ("As set forth in more detail in Plaintiff's Motion for Summary Judgment on Joint Venture, once Plaintiff establishes a joint venture amongst the Defendants, the Defendants then share jointly and severally in the liability. Plaintiff's request for Mr. Mathis' deposition is reasonably calculated to lead

to the discovery of admissible evidence regarding Plaintiffs joint venture")).

Any discovery related to trial issues is therefore not before this Court, as the sole orders on appeal are those granting summary judgment to THIB, THINM, FAS, and FCC.

2. Plaintiff's Failure To File An Affidavit Pursuant To Rule 1-056(F) NMRA Bars her Argument

An affidavit pursuant to Rule 1-056(F) NMRA, is the vehicle by which a party informs the district court that it lacks specific discovery needed to respond to a motion for summary judgment. Although Plaintiff now belatedly claims that she was denied discovery that she needed to respond to Defendants' motions for summary judgment, she never brought this issue to the district court's attention via a Rule 1-056(F) affidavit.

Where a party properly informs the district court that a summary judgment motion is "premature," (which Plaintiff never did and therefore failed to preserve this issue),

> [C]ourts . . . consider several critical factors before holding that summary judgment is premature including whether the party sought a continuance at the summary judgment motion hearing to complete its discovery . . .; whether, after the filing of the summary judgment motion until the grant of summary judgment, sufficient time existed for the nonmoving party to use discovery procedures and obtain necessary discovery . . .; whether an affidavit opposing summary judgment contained a statement of the time required to complete the discovery, the particular evidence needed, where the particular evidence was

> located and the methods used to obtain the evidence, . . . and whether the party moving for summary judgment gave an appropriate response to a discovery request from the nonmoving party.

Sun Country Sav. Bank of N.M., F.S.B. v. McDowell, 108 N.M. 528, 534, 775 P.2d 730, 736 (1989) (citations omitted). Plaintiff fails to satisfy or even argue any of these points. It is beyond dispute that summary judgment motions were filed as of the date required by the scheduling order, about six weeks before trial. (RP 553 (dispositive motions due on or before August 12, 2011); RP 1167-1176 (THIB's summary judgment pleadings filed on August 12, 2011); RP 1323-1341 (THINM's summary judgment pleadings served electronically upon the district court and counsel on August 12, 2011 and were mailed to the clerk the same day)). Therefore, the parties were already years into the discovery process before Defendants—and Plaintiff—filed their summary judgment motions. It is also undisputed that Plaintiff did not file the required affidavit pursuant to Rule 1-056(F) seeking additional discovery. Finally, although Plaintiff moved to compel various discovery responses, the lower court ruled on those motions and there is nothing in the record suggesting that the absence of the information that Plaintiff sought prejudiced or even harmed the Plaintiff's ability to file summary judgment pleadings. In short, Plaintiff has no basis from which to appeal from any Discovery Orders, none of which relate to issues on appeal

pertaining to summary judgment. *See Houde v. Ferri*, 2009 N.M. App. Unpub. LEXIS 137, at *2 (Ct. App. June 26, 2009) ("the memorandum does not provide any specific information about why further discovery was needful or how Appellants were actually prejudiced"); *Butler v. Deutsche Morgan Grenfell, Inc.*, 2006-NMCA-084, ¶¶ 38-39, 140 N.M. 111, 140 P.3d 532 (observing that a party seeking to avoid summary judgment on grounds that additional discovery is needful must specify what that party hopes to discover); *Sanchez v. Saylor*, 2000-NMCA-99, ¶ 38, 129 N.M. 742, 13 P.3d 960 ("An assertion of prejudice is not a showing of prejudice.").

C. The District Court Properly Struck The Engstrom Report

Plaintiff also complains that the district court improperly struck the untimely and incomplete "draft" report of Plaintiff's purported expert, Bruce Engstrom. Mr. Engstrom's untimely "draft opinion" should not be considered on appeal because it is facially inchoate and incomplete; does not rely upon relevant, admissible evidence; and was stricken by the district court due to Plaintiff's failure to identify the specific opinions held by the expert and present the expert for a timely deposition. (RP 2447-2449.) *See, e.g., Cunningham v. Adams*, 106 F. App'x 693, 698-99 (10th Cir. 2004) ("The district court struck the summary judgment affidavit of Cunningham's expert witness, Gary Barnes, for three reasons. First, it found that

Cunningham had failed to comply with Fed. R. Civ. P. 26(a)(2) because the information Cunningham disclosed about Barnes's testimony was incomplete, vague, and unrelated to the opinion given in the affidavit. Second, the district court questioned whether Barnes was qualified as an expert . . . . Finally, the court determined that the vast majority of Barnes's affidavit concerned issues that were not properly before the court. The district court concluded that the affidavit was of no assistance to the court in determining the issues, and should therefore be stricken. . . . Having reviewed the district court's decision and the record under this [abuse of discretion] standard, we find no abuse of discretion in the district court's decision to strike Barnes's affidavit").

The Engstrom report was facially incomplete—it has the word "draft" stamped on every page. (RP 2133-2153.) Tellingly, even *after* the trial date had come and gone, Engstrom's report was still in draft form. (RP 2557.) Nor was it based on complete or accurate information. The report cites (but does not attach) numerous documents pre-dating 2008, well before Ms. Archuleta's residency. (*See, e.g.*, RP 2139 (citing to an operating agreement dated July 6, *2006*; RP 2141, referencing a *2004* lease agreement; RP 2142, referencing a *2005* sublease; RP 2143, referencing agreements with FAS and FCC dated 2006)). The draft report also inappropriately relies on materials

not in evidence in this case (e.g., deposition transcripts of Jaime Andujo and William Chaltry, neither of whom testified in this case, and the Center for Medicare Services website), and speculates on incorrect information (e.g., Engstrom incorrectly claims that FLTCH has/had ownership interest in Defendant FCC, and further incorrectly avers that the Defendants have combined their money, property, or time with other Defendants).

A non-final expert opinion based on incomplete and inaccurate information cannot defeat summary judgment. *Ortho Diagnostic Sys., Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455, 471 (S.D.N.Y. 1996) ("In order to defeat a properly supported motion for summary judgment, a party may not rest on economic theories that may or may not apply to the facts of the case *or on conclusory or incomplete expert analyses* any more than it may rest on unsubstantiated allegations of its pleadings" (emphasis added)); *see also Ross v. Univ. of Texas at San Antonio*, 139 F.3d 521, 525 (5th Cir. 1998) ("The expert's statement offers a conclusory opinion on the ultimate issue of discrimination . . . . That statement is expressly based upon incomplete information and does not contain any statistical analysis that would be competent summary judgment testimony from this expert.").

Further, the Engstrom report purportedly opines on whether various entities are inter-related for liability purposes. The "opinion" is thus merely

an inadmissible legal conclusion—an issue that is exclusively within the province of the district court to decide. (RP 2152.) *See Lytle v. Jordan*, 2001-NMSC-016, ¶ 49, 130 N.M. 198, 22 P.3d 666 (the expert witness "essentially placed herself in the role of a judge and attempted to advise the district court about the proper application of the law to the facts and about the proper outcome in this case. We believe it is superfluous for expert witnesses to advise a court, whether it is the district court or an appellate court, about the proper application of existing law to the established historical facts . . . .").

Finally, the district court properly struck the Engstrom report, and Engtrom as a witness, because Plaintiff failed to timely produce Engstrom for deposition and because summary judgment already had been granted on the issue of "joint venture," which was the sole issue as to which Engstrom's proposed testimony related:

> Counsel: I am not totally convinced that Mr. Engstrom is a witness on any direct negligence claims. He was identified as a potential witness "to assist the jury in understanding financial reports and records and to support Plaintiff's joint venture claims" in the Plaintiff's witness disclosure. He is clearly being put forth as an expert witness on the complex corporate relationship among the Defendants.
>
> I find that the Defendants have been deprived of a meaningful opportunity to depose him and to fully explore the basis of his opinions in this matter. Therefore, I will grant Defendants['] motion to strike Mr. Engstrom and to exclude his testimony.

(RP 2850.) The district court was correct. Defendants would have been significantly prejudiced if Engstrom were allowed to testify, both because he never presented a final report as to which he could be examined at deposition, and because Plaintiff refused to produce him for deposition in a timely manner. *See, e.g.*, *Keten v. State Farm Fire & Cas. Co.*, 72 Fed. R. Serv. 3d 452 (N.D. Ind. 2008) ("tardy, incomplete disclosure" of expert would be prejudicial to defendant), *review denied*, 2010 WL 1258198 (N.D. Ind. Mar. 29. 2010); *AT&T Wireless Servs. of California LLC v. City of Carlsbad*, No. 01CV2045-JM(LAB), 2002 WL 34396709, at *8 (S.D. Fla. Nov. 7, 2002) ("the court finds the delay in formulating [the expert's] opinions and presenting them in a Final Report until after his designation, after the deadline for the filing of dispositive motions, after his deposition, and after discovery cutoff, was without substantial justification"); *Zia Trust Co. v. San Juan Reg'l Med. Ctr., Inc.*, No. 29,358, 2012 WL 388813, at *4 (N.M. Ct. App. Jan. 9, 2012) (affirming district court order striking experts based upon Plaintiffs' failure to "meaningfully identify the nature of the experts' testimony or provide CVs for the experts," late disclosures, "repeated failures to respond adequately to or to supplement the answers to the interrogatories regarding the substance of Plaintiffs' experts' opinions and the basis for those opinions").

Specifically, Plaintiff never properly responded to expert interrogatories and failed to timely produce Engstrom for deposition. In their June 2101 interrogatories to Plaintiff, Defendants requested, *inter alia*, "the subject matter of the witness's expected testimony and the substance of the witness's testimony[.]" (RP 2071-2074, 2078-2081.) Plaintiff's response did not include Engstrom, and no supplementation to this interrogatory ever was provided. *Id.*

The March 18, 2011 Scheduling Order required Plaintiff to disclose her expert witnesses by April 1, 2011, closed all discovery on August 5, 2011, and specifically required that all depositions be completed by that date. (RP 552-554.) Plaintiff filed her disclosure on April 1, 2011, identified Engstrom, and stated only that Mr. Engstrom may be called to testify to assist the jury in understanding financial reports and records and to support Plaintiff's joint-venture claim. (RP 581-582.) But Plaintiff gave no expert report or further indication of Engstrom's proposed testimony until September 2, 2011, after Defendants filed their summary judgment motions, nearly a month after the discovery cut-off, and a mere three weeks before trial. (RP 1946-2003, RP 2125-2153.)

In December 2010, Defendants began requesting that Plaintiff provide deposition dates for Mr. Engstrom. (RP 2084.) Plaintiff gave various

excuses for her refusal to provide deposition dates, most notably that "Engstrom's deposition [was] premature" based upon Plaintiff's request to take depositions pursuant to Rule 1-030(B)(6). (RP 2084-2100; RP 2092.) Even after the district court granted Defendants' motion for protective order as to one of the Rule 1-030(B)(6) depositions that Plaintiff had requested (Scott Hillegass), Plaintiff continued to stall. (RP 1779-1780; RP 1034-1036; RP 2102-2115, 2121.) Ultimately, with a September 26, 2011 trial date looming (RP 552), Plaintiff finally provided two dates, September 8 or 9, 2011. (RP 2121.) Thereafter, defense counsel spent a week requesting locations for the Engstrom deposition. By the time a paralegal for Plaintiff's counsel finally responded with a location (Little Rock, Arkansas), counsel for Defendants were not available to travel there on such short notice. (RP 2121, 2106.) On August 30, 2011, Plaintiff's counsel provided alternative dates (September 16, 20, or 21, 2011), but required the Engstrom deposition to take place in Little Rock, rather than New Mexico. (RP 2015.) Those dates were long after discovery had closed and only a week prior to trial. (RP 552-554.) This absurd odyssey was wholly unwarranted and more than demonstrated Plaintiff's failure to produce required discovery as to Engstrom.

In light of the above, the district court did not abuse its discretion in

striking Engstrom as a witness. When the proposed testimony of an expert is complex and that testimony will impact the case, opposing counsel is entitled to "be fully apprised of [the] expert's opinions prior to trial so that both parties may properly prepare." *Shamalon*, 111 N.M. at 715, 809 P.2d at 629 (citing *Annotation, Pretrial Discovery of Facts Known and Opinions Held By Opponent's Experts Under Rule 26(b)(4) of Federal Rules of Civil Procedure*, 33 A.L.R. Fed. 403 (1977)). "'This is needed prior to trial to investigate the credentials of proposed expert witnesses and to discuss the substance of the expert's testimony with one's own expert in order to properly prepare for cross-examination.'" *Id.* (quoting *Fultz v. Peart*, 144 Ill. App. 3d 364, 376, 494 N.E.2d 212, 221 (1986)). It is well within the trial court's discretion to exclude an expert of a party for failing to give the other party a meaningful opportunity to examine the witness. *Shamalon*, 111 N.M. at 714, 809 P.2d at 628. Here, there is no question that the district court did not err—let alone abuse its discretion—in striking Engstrom as an expert witness.

CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court dismiss Plaintiff's purported appeal from the Order granting Defendants summary judgment on her joint-venture claim or, in the

alternative, affirm that Order on the merits. In addition, Defendants respectfully request that this Court affirm the Discovery Orders in all respects.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested and would be of assistance given the number and nature of the issues on appeal.

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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