2004 WL 3729015 (N.M.) (Appellate Brief)
Supreme Court of New Mexico.

James SPENCER, Personal Representative Of the Estate of Hope Rigolosi, Petitioner/Appellant,
v.
UNIVERSITY OF NEW MEXICO HOSPITAL, University of New Mexico Board of Regents, Health Force, Inc., A New York Corporation doing business In the State of New Mexico, Respondents/ Appellees.

No. 28,532.
July 8, 2004.

Appeal from the Second Judicial District Court County of Bernalillo, State of New Mexico The Hon. William F. Lang, District Judge Cause No. CV 99-00921 Court of Appeals No. 22,702

Petitioner/Appellant's Brief in Chief

Vigil & Vigil, P.A., Jacob G. Vigil, Esq., Lisa K. Vigil, Esq., Amalia S. Lucero, Esq., 2014 Central Ave. SW, Albuquerque, NM 87104, (505) 243-1706, Attorneys for Appellant.

L. Helen Bennett, Esq., 400 Gold SW #1300w, Albuquerque, NM 87102-3274, (505) 243-5755.

***i** *TABLE OF CONTENTS*

I. *SUMMARY OF PROCEEDINGS*	2
A. *NATURE OF THE CASE*	2
B. *DISPOSITION IN THE LOWER COURTS*	2-3
C. *UNDERLYING FACTS*	4-8
II. *SUMMARY OF ARGUMENT*	8-10
ISSUE I. HEALTH FORCE OWED A STATUTORY DUTY TO PERFORM A CRIMINAL BACKGROUND CHECK AND THE LOWER COURTS ERRED IN ASSIGNING NO STATUTORY DUTY OF CARE THROUGH MISAPPLICATION OF THE DOCTRINE OF EXCUSABLE NEGLECT	10-16
A. *Standard of Review*	10-11
B. *The Public Policy Expressed in the Act is to Provide Special Protection to Care-DEPENDENT, DEFENSELESS, VULNERABLE MEMBERS OF THE COMMUNITY*	11-14
C. *Health Force Failed to Show it was Entitled to Application of the Doctrine of Excuse*	14-15
D. *The 100-Day Window Does Not Apply to Health* Force	16
ISSUE II. THE TRIAL COURT AND THE COURT OF APPEALS ERRED IN HOLDING THAT THE GENERAL NEGLIGENCE STANDARD OF REASONABLE CARE DID NOT APPLY TO HEALTH FORCE	16-25
A. *Public Policy Supports the Imposition of a Common Law Duty.*	18-22
B. *A Special Relationship Existed Between Health Force, Inc. and Ms. Rigolosi Giving Rise to a Duty to Protect Ms. Rigolosi from Preventable Harm Caused by the Hiring & Retention of Williams*	22-23
C. *Health Force Inc., Owed Plaintiff a Common Law Duty.*	23-25
ISSUE III. THE TRIAL COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT HEALTH FORCE'S FAILURE TO CONDUCT A CRIMINAL BACKGROUND CHECK WAS NOT A PROXIMATE CAUSE OF MS. RIGOLOSI'S DEATH.	25-26
***ii** ISSUE IV. THE LOWER COURTS ERRED IN DETERMINING AS A MATTER OF LAW THAT HEALTH FORCE'S FAILURE TO INVESTIGATE OR SUPERVISE WILLIAMS AFTER LEARNING HE HAD STOLEN PRESCRIPTION NARCOTICS FROM MS. RIGOLOSI WAS NOT A PROXIMATE CAUSE OF MS. RIGOLOSI'S DEATH	26-29

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ISSUE V. GENUINE ISSUES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT TO HEALTH FORCE	29-34
CONCLUSION	34

***2** *I. SUMMARY OF PROCEEDINGS*

A. NATURE OF THE CASE

Plaintiff, James Spencer, as Personal Representative for the Estate of Hope Rigolosi, Deceased, filed an action for wrongful death based on the negligent hiring, supervision, training, and retention of Defendant Health Force, Inc. ["Health Force"] home health care employee Ben Williams, a long-time violent felon. It is undisputed that Ben Williams caused the death of 36 year old, quadriplegic patient Hope Rigolosi, on April 23, 1998.[1] [RP 1-13]

B. Disposition in the Lower Courts

Health Force filed a motion for partial summary judgment on Plaintiff's claims for negligent hiring, training, supervision, and retention a month before trial. [RP 2588-2596, RP 2533] Plaintiff's response showed employment of Ben Williams and the elements of their claims contrary to Health Force's showing. [RP 2821-2885; 3409-3425] After full briefing and following oral argument, the district court entered an Order on September 4, 2001, granting summary judgment to Health Force on all Plaintiff's claims [RP 3433; 3471] On September 21, 2001, Plaintiff filed a Motion for Reconsideration of the district court's decision granting summary judgment to Health Force on Plaintiff's claims. [RP 3521-3558] Following additional briefing and argument, the district court denied the Motion for Reconsideration on November 1, 2001. [RP 3626-3629]

Plaintiff appealed the trial court's Order to the New Mexico Court of Appeals. [RP 3618] The court of appeal's authored a twelve page decision explaining its proposed summary reversal of the district court's order. *See* Notice of Proposed Summary Disposition dated February 1, 2002; Rule 12-210(D) NMRA 2004. [Court of Appeals file] Subsequently, however, the Court of Appeals ***3** placed the matter on the general calendar for full briefing by the parties. [Court of Appeals file; Rule 12-210 NMRA 2004] There is a statute in effect in effect at the time Ben Williams was hired requiring home healthcare agencies perform criminal background checks on all employees. NMSA 1978 § 29-17-1 (1997) *f f.* Following standard briefing (*see* Rule 12-210(B)(2)), the Court Ordered supplemental briefing on the issue of whether a duty to perform a criminal background check on healthcare providers could be imposed based on a statute requiring a specific process that lacked guidance for implementation. *Spencer v. University of New Mexico Hospital,* 2004-NMCA-047, P. 15, N.M. Bar. Bull. Vol. 43, No. 22. On February 4, 2004, the court of appeals affirmed the decision of the district court, holding:

1. No statutory duty would be applied to Health Force and no breach would be found for its failure to perform a background check as required by the 1987 statute in force when Williams was hired in March 1998, because strict compliance with the statute was not possible, although Health Force had never attempted to comply. *Id.* at P. 16.

2. Health Force's violation of the statute was excusable under the "justifiable violation doctrine", even though Health Force made no effort to comply with the Act. *Id.* at P. 21.

3. No common law duty of reasonable care would be applied (or even analyzed in the court's opinion) where the legislature had "spoken" as to the way it wanted background checks performed. *Id.* at P. 23.

4. As a matter of law, Health Force's retention of Williams as an employee after he had stolen three narcotic pills from Ms. Rigolosi was not the proximate cause of her death. *Id.* at P. 25.

Plaintiff petitioned this Court for certiorari of the Court of Appeals' decision according to Rule 12-502 NMRA 2004 and NMSA 1978, § 34-5-14(B)(4). [Supreme Court file] This Court granted the Petition on May 18, 2004. [Supreme Court file]

C. Underlying Facts

The following facts and inferences are set forth in the light most favorable to Plaintiff, as the party opposing summary judgment. *Los Ranchitos v. Tierra Grande, Inc.,* 116 N.M. 222, 227, 861 P.2d 263, 268 (Ct. App. 1983):

***4** Hope Rigolosi was a ventilator dependent, 36-year-old quadriplegic. Ms. Rigolosi required 24-hour long-term care services. [RP 3392] She was the mother of a 12 year-old daughter, Erica, who lives with her grandparents, Mr. & Mrs. James Spencer, and James Spencer serves as the Personal Representative of Ms. Rigolosi's Estate, of which Erica is the sole beneficiary. [RP 1024-28]

Health Force, a national corporation, was in the business of providing safe long-term home healthcare to the disabled. [RP 00021] Health Force provided these services pursuant to a contract with the State of New Mexico. [RP 3247, 2912] Long-term care services are defined by NMSA 1978, § 24-17A-1 (1995) and required Health Force to provide Ms. Rigolosi with care designed to maintain her “independence and autonomy while residing in her own residence and receiving support services.” Health Force has a duty to provide safe individuals to care for the very personal needs of Ms. Rigolosi, who is part of this vulnerable disabled population. Health Force contracted to provide this level of care to Ms. Rigolosi, which specified providing staff who were qualified, professional, and reputable individuals, competent and skilled to meet the totality of Ms. Rigolosi's physical needs on a daily basis. [RP 2831-2832]

In 1997 and 1998, all health care agencies, including Health Force, were required by the Caregivers Criminal History Screening Act, (“the Act”), NMSA 1978, § 29-17-1 (1997) *f f,* to institute and perform a national and statewide criminal background check on all applicants prior to employing any caregiver within the State of New Mexico. [RP 3341-43] Under the Act, a caregiver cannot be employed if they have prior convictions, including simple or aggravated assault or battery, homicide, kidnapping, larceny, robbery, burglary, aggravated burglary, distribution or possession of controlled substances, or any crime involving **financial exploitation** (such as embezzlement). [RP 3341-43] The Act recognized that patients like Hope Rigolosi “are extremely vulnerable to dishonest,” violent, or evil people. *See* Proposed Summary Disposition at pg. 5, ¶ 2.

***5** Health Force admitted that, to comply with the Act, a care provider applicant should not be employed if his or her employment poses a risk of harm to the recipient. [RP 3399, 3341-43] Health Force admitted it hired Williams as a caregiver on March 20, 1998 [RP 3390] and assigned Williams to provide care for Ms. Rigolosi in her home. [RP 3390] Health Force provided 24-hour care for Ms. Rigolosi, pursuant to a contract with the State of New Mexico under the Disabled & Elderly Waiver Program. [RP 2912, 3247] Health Force admitted it did not fingerprint Williams for a criminal background check as required by the Act. [RP 3394-97] Health Force admitted it did not test Williams to determine his competency to care for a ventilator dependent quadriplegic. [RP 3395-96] Health Force admitted it did not take any steps to perform a local or national criminal background check of Williams prior to hiring him. [RP 3390, 3395-96] Health Force admitted it failed to screen Williams for drug or alcohol use prior to hiring him as a caregiver. [RP 3397] Health Force said it lost Ben Williams' entire personnel file and every piece of documentation concerning Ben Williams and it's New Mexico operation. [RP 3388-91] Health Force's owner said they checked possibly one or two references, but do not know who they spoke to. [RP 2662] Health Force has no documentation supporting any alleged reference check. [RP 2661; 3389; 3543-44] The facts and reasonable inferences establish that Health Force failed to take even minimal steps to perform a background check, character verification, or competency evaluation of Williams, before hiring him to provide unsupervised care for Ms. Rigolosi in her home. [RP 3393-98; 3543-44]

In fact, Williams had a thirty-year criminal history in New Mexico and California as a violent offender, including convictions for burglary, aggravated assault, armed robbery with a deadly weapon, fraudulent use of a credit card, embezzlement, shoplifting, and drug offenses and had a warrant out for his arrest at the time of his hiring for failing to appear for sentencing before Judge Dal Santo as an habitual criminal. [RP 3386; 3545-58] Health Force admitted when it hired Williams, he had been either

convicted or indicted on numerous violent felonies, including theft, ***6** aggravated assault, and aggravated battery charges. [RP 3402-03] On March 31, 1998, eleven days after Health Force hired Williams to provide unsupervised care to Ms. Rigolosi, Williams stole three of her narcotic prescription pills. [RP 2901-02; 2918; 3542] Upon learning of this theft, Kasey Whitely, a Health Force co-worker of Williams, informed Health Force's Vice President of the theft. [RP 2839-40; 2918] Health Force took no measures to investigate this theft, restrain, supervise, or discipline Williams [RP 2835-36, 2839-40; 2918; 3542]

Ms. Rigolosi was admitted to University of New Mexico Hospital (UNMH) with pneumonia on April 1, 1998. [RP 2730; 3086] Ms. Rigolosi was set to be discharged home shortly after April 23, where she would be cared for by her Health Force healthcare workers, Ben Williams, Kasey Whitely and Joyce who saw her regularly in the hospital as known to by Health Force. [RP 2839] UNMH employees knew the three as Ms. Rigolosi's Health Force caregivers. [RP 2825-26, 2838-2848] At about midnight on April 23, 1998, Williams took Ms. Rigolosi out of her room at UNMH and injected her with a fatal dose of heroin, killing her. [RP 2846] At no time prior to Ms. Rigolosi's death did Health Force seek to terminate Williams' employment, nor did Health Force seek to warn her or any of the other healthcare workers of Williams' dangerous criminal background. [RP 3403] On the contrary on April 23, 1998, approximately eight hours after Williams killed Ms. Rigolosi, Health Force called Williams to verify his upcoming work schedule. [RP 2922] The time-dated voice recording seized by the Albuquerque Police Department at Williams' house as evidence stated:

Hey Ben, this is Rachel. I just wanted to go over your schedule for this coming weekend. Give me a call when you get a chance, 883-4900. Thanks. Bye-bye.

[RP 2922] Health Force published its number, 883-4900, in the Yellow Pages. [RP 2854] Health Force because they have no personnel file, or any other documentation from their operation in New Mexico, had no documentation of Williams' alleged resignation. [RP 3389; 3403]

***7** The Caregiver's Criminal Background Screening Act was first enacted in 1997 and became effective April 10, 1997. The Act required all prospective caregivers such as Williams to undergo criminal background checks, and specified a process for conducting the checks, including fingerprinting on FBI approved fingerprint cards, submitting the cards to the department of public safety, and obtaining the statewide conviction and felony arrest history of an applicant. Section 29-17-1(A)(7) (1997 Repl.). The 1997 statute was in force until May 20, 1998, when it was repealed and a new version enacted. Laws 1998, Chap. 68. [RP 2630] Health Force hired Williams during the time period that the Act was undisputedly in force. The plain public policy behind the Act was to protect the public by ensuring only people who had first been screened to determine any criminal or inappropriate background would be hired to provide care. *See Narney v. Daniels,* 115 N.M. 41, 50-51, 846 P.2d 347, 356-357 (Ct. App. 1992).

The 1997 version of the Act lacked identification of the agency to receive the FBI information. [RP 2630-31] Health Force's home healthcare expert, Roselyn Dufour [2], testified there was some confusion among caregivers about the process and procedure for obtaining the background checks. [RP 3535] However, she accomplished these criminal background checks for her agency through the local police department. [Id.] A reasonable inference from this evidence is that other home healthcare agencies made good faith attempts to comply with the provisions of the Act and were successful. Dufour testified the purpose of conducting background checks is to "determine work habits, general abilities ...were they able to do the job and to verify the information on the application". [RP 3533] Dufour also testified criminal background checks are the standard of practice [RP 3536], done to protect the client and the employer. [Id.]

***8** The court of appeals never looked at the intent of the legislature in enacting the Act, or at the public policy expressed in the Act. While the local procedure for implementation of the background checks was faulty, the public policy expressed was plain. Other local agencies made efforts to comply. Health Force--a national company--never adduced evidence that it endeavored to comply or that minimal compliance was impossible. The court of appeals disregarded any evidence that some measure of compliance, or substantial compliance was, in fact, possible. The court of appeals applied a mechanistic, narrow

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view of "impossibility", assigned all benefits of legal or factual doubt to Health Force, and suspended the common law duty of reasonable care to provide safe caregivers for this vulnerable population.

II. SUMMARY OF ARGUMENT

The court of appeals' decision states an individual or entity has no duty of care--statutory or common law--where specific statutory provisions directed to implementation can be shown to be strictly unworkable. Regardless of the stakes in terms of health and safety to the public, despite clear pronouncements of public policy, and with no showing of a good faith attempt to comply, a defendant will be absolved of *any duty whatsoever* to an injured person if the specific mechanism set forth in a statute can be declared unworkable to implement. *Compare Draper v. Mountain States Mut.,* 116 N.M. 775, 777, 867 P.2d 1157, 1159 (1994) (holding the language of a clear and unambiguous statute is to be given legal effect). It was undisputed in the case *sub judice* that Health Force made no meaningful effort whatsoever to comply with the statutory provisions. Yet the court of appeals held, that because Health Force could not have obtained a criminal background check by utilitizing the exact process in the statute, it was absolved of any legal duty to ensure care for Ms. Rigolosi by an appropriate Health Force employee with no criminal history in accordance with the public policy expressed in the statute. This decision was rendered, even though the Act ***9** requires that for the first thirty days, if no criminal background check is accomplished the unscreened caregiver must be supervised, not left alone with the patient.

The court of appeals excused Health Force from complying with the statute or with all common law duties without any showing that a reasonable person of ordinary prudence, acting under similar circumstances, would not have conducted any criminal, referential, or employment background check at all, or supervised the caregiver until safety could be established. Neither *Jackson* nor *Hayes* nor *Alarid* stands for the proposition that the duty of reasonable care under the circumstances is excused without inquiry when a statute cannot be followed to the letter. Health Force's own expert testified that other home health care agencies obtained criminal background information [RP 3535], and acknowledged that "private investigators exist to do criminal background checks all the time; that people do them all the time and it doesn't require the Department of Public Safety's help". [Id.] As this Court may well infer from the facts, it is a matter of public knowledge that background checks are conducted nationally by innumerable industries every day.

Even where a process imposed by a statutory scheme is determined to be unworkable for whatever reason, a court should then proceed to analyze the matter in terms of the standard of the general duty of reasonable care. *See Lerma ex rel. Lerma v. State Highway Dep't,* 117 N.M. 782, 784, 877 P.2d 1085, 1087 (1994) (holding Highway Department had no statutory duty to pedestrians, but did have a common-law duty to exercise ordinary care for protection of public). Instead, the court of appeals adopted a default position that Health Force had no duty, *even of reasonable care under the circumstances,* because the legislature had attempted to regulate the area, but had not provided a process that could be implemented according to its strict terms. *Compare Herrera v. Quality Pontiac,* 2000-NMSC-018, P.7, 73 P.3d 181(public policy supported imposition of duty to exercise reasonable care). If this rationale was correct, there would literally be no bad ***10** faith insurance cause of action in New Mexico because of the New Mexico Insurance Code and clearly both actions exist. (See recent Supreme Court case, *Sloan v. State Farm,* 2004-NMSC-004.)

Thus, Health Force benefited, first, from processing issues in the statute-- though it indisputably never attempted to comply with the statute at all--and second, from the court of appeals' refusal to require Health Force could have a duty of ordinary care to hire safe (non-violent felon) caregivers in light of expressed public policy and apply a standard of reasonable care under the circumstances. *Compare Narney,* 115 N.M. at 50-51, 846 P.2d at 356-357 (holding duty is to be determined by reference to statutes, legal precedent, and other principles). The court of appeals thus adopted and declared as the law that, when a statute is "unworkable", rather than impose the general duty of reasonable care under the circumstances, and in support of the expressed public policy, their will be no duty at all, even under traditional tort law.

The court of appeals' analysis took away the responsibility and accountability from all home health care agencies (who are paid) for placing safe caregivers with these vulnerable, care-dependent New Mexico citizens. Health Force's failures to conduct

any minimal criminal background check, or properly train, or supervise its employee, such that the employee kills the patient is without recourse. Such a result cannot be justified on any legal, equitable, or public policy ground, and should be reversed. A miniscule process error in a statute should not result as a matter of law to vitiate basic tort concepts or destroy the intent of necessary statutory protections.

ISSUE I. HEALTH FORCE OWED A STATUTORY DUTY TO PERFORM A CRIMINAL BACKGROUND CHECK AND THE LOWER COURTS ERRED IN MISAPPLYING THE DOCTRINE OF EXCUSABLE NEGLECT TO FIND NO STATUTORY DUTY OF CARE.

A. Standard of Review

This Court reviews the grant of summary judgment *de novo* and construes reasonable inferences from the record in favor of the party opposing the motion. ***11** *Celaya v. Hall,* 135 N.M. 115, 2004-NMSC-005, P. 7. The Court views the pleadings, affidavits, and depositions presented for and against a motion for summary judgment in a light most favorable to the nonmoving party. *Gardner-Zemke Co. v. State,* 109 N.M. 729, 732, 790 P.2d 1010, 1013 (1990). Summary judgment is improper when the record discloses the existence of a genuine controversy concerning a material issue of fact or when the trial court granted summary judgment based upon an error of law. *See id.*

Duty can be established by statute or common law, or by the general negligence standard, which requires an individual to use reasonable care. *Narney,* 115 N.M. at 50-51, 846 P.2d at 356-357. The existence of a duty is a question of policy to be determined by statutes, legal precedent, and other principles comprising the law. *Id.*

B. The Public Policy Expressed in the Act is to Provide Special Protection to Care-Dependent, Defenseless, Vulnerable Members of the Community.

A statute should be interpreted as the legislature intended to accomplish the ends it sought to accomplish. *TWIW v. Rhudy,* 96 N.M. 354, 630 P.2d 753 (1981). The public policy expressed in Caregiver's Criminal Background Screening Act is that care-dependent, defenseless, vulnerable members of the community need, deserve, and are entitled to special protection. They are peculiarly unable to protect their own interests, and vulnerable to predatory and base elements that would exploit weakness for personal gain. They are uniquely unable to look out for their own safety and security. Such individuals - consistent with their human dignity - are entitled to and deserving of even more than the usual measure of care, concern, and justice that can be meted out in modern society. If nothing else was clear from the Act at issue, it was that the Legislature had chosen to single out for special consideration the needs and concerns of a defenseless minority, among whom were included Ms. Rigolosi.

This Court's analysis of *Reese v. Dempsey,* 48 N.M. 417, 152 P.2d 157, set forth in *Hayes v. Hagemeier,* 75 N.M. 70, 400 P.2d 945 (1963) is instructive. In *Hayes,* the defendants let off a child ***12** from a school bus at an intersection controlled by traffic signals, but did not operate warning devices on the bus, as required by statute. This Court held whether the defendants sustained their burden of showing they did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, with a desire to comply with applicable statutes, was a jury question. *Id. Hayes* quoted *Reese:*

> The evils which the legislature intended to correct and the purpose of the legislation must be considered in construing a statute. It cannot be assumed that the legislature would do a futile thing.

Haves at 73, 400 P.2d at 947 (citations omitted). *Hayes* noted:

> In the construction of a statute, in order to determine the true intention of the legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts....All parts of an act relating

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> to the same subject should be considered together, and not each by itself .... All legislation is to be construed in connection with the general body of the law....

Id. In this case, in contrast, the court of appeals never looked at the intent of the legislature in passing the Act. The court of appeals did not examine the purpose of the Act or the underlying evil of unqualified, dangerous caregivers that the legislature sought to prevent. The court of appeals construed the provisions outlined for conducting the background checks as detached and isolated expressions, ignored the general body of law regarding the respective duties of reasonable care, and rendered futile the Act's effort to protect vulnerable people like Ms. Rigolosi. *See id.*

Despite the undisputed fact that Health Force made *no* attempt to comply with the Act, the court of appeals determined that--if Health Force had attempted to comply with the Act--the attempt would have failed. The specific process for conducting a background check envisioned and codified by the legislature in Section 29-17-1 was allegedly unworkable. Indeed, the Act was repealed and a new version enacted in 1998 to address the procedural problems. However, doing a criminal background check was easily accomplished.

***13** The court of appeals appears to have tried to harmonize its excuse of Health Force on its interpretation of *Jackson v. Southwestern Public Service Co.,* 66 N.M. 458, 349 P.2d 1029 (1960) which held that violation of an ordinance may be excused or justified in certain cases. Citing *Alarid v. Vanier,* 327 P.2d 897, 898 (Cal. 1958), this Court in *Jackson* noted:

> The presumption of negligence which arises from the violation of a statute is rebuttable and may be overcome by evidence of justification or excuse.... In our opinion the correct test [of justification or excuse] is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

66 N.M. at 472, 349 P.2d at 1038; *and see Hayes,* 75 N.M. at 76, 400 P.2d at 949.

Health Force did not sustain its burden under *Jackson* of showing it acted reasonably in utterly disregarding all requirements of the statute. The court of appeals' analysis nevertheless absolved Health Force of *any* statutory duty to Ms. Rigolosi, despite the clear public policy of the Act, establishing a duty to conduct a background check into the criminal history of caregivers to protect people like Ms. Rigolosi. Nothing in Health Force's conduct justified such an interpretation of law and public policy. Particularly where the health, welfare, and safety of a care-dependent, vulnerable citizen is at stake, the courts must be vigilant in holding those responsible for their care to a high standard- whether expressed statutorily or through legal analogy and precedent-consistent with clear expressions of public concern and policy. The court of appeals refused to draw reasonable inferences in the record in favor of Plaintiff's right to rely upon these plain expressions, and in favor of Plaintiff's right to a trial on these matters.

The difficulty of conducting the federal criminal background check precisely in the way the 1997 Act specified does not render the public policy expressed in the Act meaningless and void, or negate the duty imposed by the Act. Health Force's own home healthcare expert testified that when the Act was enacted, members of the home healthcare industry were aware of the statute requiring ***14** criminal background checks, and to comply with the Act, the expert's own home health care agency sent employees to the local police department to secure a criminal background check. [RP 3535]. A reasonable inference from this evidence is that compliance with the Act, was not only substantially possible, but was accomplished by other home healthcare agencies in New Mexico. *Id.* The industry standard in the community was to perform a criminal background check through police agencies to comply with the Act and ensure the protection of vulnerable disabled patients. [RP 3535-37] Health Force Expert DuFour testified that when Health Force hired Williams, the law in effect required completion of criminal background checks for the purpose of protecting the client, the patient, and the employer. Health Force had a legal duty imposed by the Act to perform a criminal background check on Williams. They failed to even make an attempt. Health Force is not entitled to the excuse of impossibility under these circumstances as meeting their duty was certainly not impossible.

The Act expressed the public policy of New Mexico regarding caregivers. It imposed a duty on Health Force to perform criminal background checks on all employees. [RP 3341-43; 2830-32] It set a standard, with which Health Force made no attempt to comply. The unwarranted application of principles of leniency and excusal to Health Force result in a manifest injustice.

C. Health Force Failed to Show it was Entitled to Application of the Doctrine of Excuse.

Health Force insisted - and the court of appeals accepted - that, had Health Force attempted to follow the precise process of background checks outlined in the statute, the effort would have failed. Therefore, Health Force argues it should not be held liable under the Act. If Health Force had endeavored to comply with the act and get a background check, at all, then we would not be here. If they had tried, a jury could have considered that as evidence of mitigation, but there was no good faith attempt even and application of the doctrine of excuse is inappropriate.

To determine whether a violation or noncompliance with the law "may be excused or justified in certain cases," New Mexico adheres to the following rule of law:

> ***15** the correct test is whether the person who has violated the statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

Jackson, 66 N.M. at 471, 349 P.2d at 1038. The record is clear Health Force made *no attempt* to comply with the Act. [RP 3395-96] Health Force demands the benefit of an equitable defense with no showing that Health Force acted equitably. *Williams v. Williams,* 109 N.M. 92, 781 P.2d 1170 (Ct.App. 1989) (one who would have equity must do equity); *see also Otero v. Zouhar,* 102 N.M. 493, 498, 697 P.2d 493, 498 (Ct. App. 1984) (holding plaintiff's noncompliance with the Medical Malpractice Act because of misinformation failed to establish justification or excuse for noncompliance), *rev'd in part* 102 N.M. 482, 697 P.2d 482 (1985). There was no evidence that it was practically impossible or burdensome to comply with the Act. *See generally, City of Lawton,* Oklahoma v. N.S. Chapman, 257 F.2d 601, 605 (10th Cir. 1958)(ordinance not set aside because compliance may be burdensome). Health Force was not ignorant of the Act, but even if they had been it would not have been excused. *See Jaramillo v. Fisher Controls Co., Inc.,* 102 N.M. 614, 620, 698 P.2d 887, 894 (Ct.App.1985) (noncompliance is not excused by ignorance of the standard.)

Health Force had a duty at least to make a good-faith attempt to comply with the dictates of the Act before resting on impossibility as an excuse for non-compliance. *See Draper,* 116 N.M. at 777, 867 P.2d at 1159 ("If the language of the statute is clear and unambiguous, it is to be given effect"). There was evidence that other healthcare agencies subject to the Act's requirements found ways to achieve substantial compliance, but Health Force did not even make an attempt. Health Force is not equitably or legally entitled to a defense of excuse where it never attempted to comply. Health Force in addition failed to initiate even the most minimal inquiry regarding education, training, or prior work history for Williams. Excusal of Health Force's failure to comply with the Act by claiming that strict compliance was impossible is incorrect. The district court and the court of appeals erred in excusing Health Force's violation.

***16** *D. The 100-Day Window Does Not Apply to Health Force.*

Health Force argued below--and may continue to insist--that even if the Act was binding, nevertheless Health Force had "a safe harbor of 100 days of employment during which they were not required to have received or reviewed any background check" for Williams [RP 2997; Vol. 1 TR-28, 1.13-1.23] Section 29-17-1(B)(1997) provided that an offer of temporary employment could be extended if the employer had initiated the criminal background check within five days of the date of hire of the employee in question but the employee had to be supervised and Ben Williams was not. *See id.* [RP 3341-43] The court of appeals noted the undisputed evidence that Health Force never initiated any form of a criminal background check on Williams during

his employment [RP 2884-85; 3390, 3395-96; Vol. 1 TR-35, 1.13-TR-36, 1.11] Defendant Health Force's reliance on Section 29-17-1(B) as a fallback to avoid any duty to conduct a background check on Williams as a caregiver should be rejected.

ISSUE II. THE TRIAL COURT AND THE COURT OF APPEALS ERRED IN HOLDING THAT GENERAL NEGLIGENCE DUTIES OF REASONABLE CARE DO NOT APPLY TO HEALTH FORCE.

The standard of review for this issue is the same as for Issue I, *supra.* A duty can be based on the general duty to exercise reasonable care, as well as any duty imposed by statute. *Narney,* 115 N.M. at 50-51, 846 P.2d at 356-57. It is well settled in New Mexico that the term "negligence" may relate either to an act or a failure to act. UJI 13-1601 NMRA 2004. An act, to be "negligence", must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to another, and which such a person, in the exercise of ordinary care, would not do. *Id.* A failure to act, to be "negligence", must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to herself or to another. *Id.*

***17** Recent cases in New Mexico stand for the general proposition that every person has a duty to exercise ordinary care for the safety of others. *Lerma,* 117 N.M. at 784, 877 P.2d at 1087 (Highway Department had common-law duty to exercise ordinary care for protection of public, and whether Department had duty to erect or maintain fences along urban freeway was fact question); *Davis v. Bd. of County Comm'rs of Dona Ana County,* 1999-NMCA-010, ¶ 14-18, 987 P.2d 1172, 1177-78 (Ct. App. 1999) (holding when county gave employment reference, it owed a duty not to make negligent misrepresentations to the psychiatric hospital that hired former county employee, and duty extended to patient, if a substantial risk of physical harm to third parties was foreseeable); *Knapp v. Fraternal Order of Eagles,* 106 N.M. 11, 13, 738 P.2d 129, 131 (Ct. App. 1987) (holding material issue of fact as to whether organization breached duty to invitee, resulting in ladder slipping, precluded summary judgment, regardless of whether ladder itself was defective); *see also* UJI 13-1604 NMRA 2004 ("Every person has a duty to exercise ordinary care for the safety of the person and the property of others."). It is thus settled that the question whether or not a defendant breached a duty is a question of the reasonableness of its conduct, and is thus a fact question. *Lerma,* 117 N.M. at 784, 877 P.2d at 1087; 808 P.2d at 621; *Davis,* 1999-NMCA-110, ¶ 38, 987 P.2d 1172; *Knapp,* 106 N.M. at 13, 738 P.2d at 131.

New Mexico law provides:

> "Ordinary care" is that care which a reasonably prudent person would use in the conduct of the person's own affairs. What constitutes "ordinary care" varies with the nature of what is being done. ... As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases. In deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances.

UJI 13-1603 NMRA 2004. As the risk of danger that should reasonably be foreseen increases, the amount of care required also increases. *Id.* In deciding whether ordinary care has been used, the conduct in question must be considered in the light of all the surrounding circumstances. *Id.* ***18** Whether a defendant breached the duty to exercise ordinary care is a question of the reasonableness of its conduct, and thus a fact question. *Knapp,* 106 N.M. at 13, 738 P.2d at 131.

Assuming *arguendo* that Health Force did not have a duty arising under the Act or that the statutory duty was excused, by any application of New Mexico precedent, Health Force had a general duty recognized by the general negligence standard to exercise reasonable care when hiring anyone as a caregiver. *Id.* It defies concepts of justice, fairness and common sense to determine--as the lower courts did here--that if a statutory duty is unworkable, even where no attempt was made to comply with the statute, no duty under traditional tort concepts whatsoever will be imposed.

A. Public Policy Requires the Imposition of a Common Law Duty

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Based on considerations of public policy, a court must determine whether a defendant owed a duty of care to a class of persons with respect to a particular type of risk of harm. *Solon v. WEK Drilling Co.,* 113 N.M. 566, 570, 829 P.2d 645, 649 (1992). For guidance on questions of policy, New Mexico courts look to general legal propositions inferred from legal precedent in New Mexico and other jurisdictions, and also looks to relevant statutes, learned articles, or other reliable indicators of "community moral norms and policy views". *Sanchez v. San Juan Concrete Co.,* 1997-NMCA-068, ¶ 12, 123 N.M. 537, 943 P.2d 571.

Health Force's function and purpose was to provide home healthcare for those who are unable, because of physical or mental impairments, to care for themselves. Patients in the population serviced by Health Force are, by definition, incapable of protecting themselves and rely on the agency caregiver employees in their home for their personal welfare and safety. Health Force was the only actor that could exercise reasonable care in its selection of safe employees to protect its disabled clients. Health Force unabashedly and undisputedly failed in its duty.

In creating the Act, the New Mexico Legislature recognized defenseless citizens, like Ms. Rigolosi, who was quadriplegic, are vulnerable to dishonest or violent people and must be ***19** protected. *See* Section 29-17-1; *see generally Davis,* at ¶ 14-18, 987 P.2d at 1172 (holding duty extended to psychiatric hospital patient, if substantial risk of physical harm to third parties was foreseeable.) Other states have recognized the vulnerability of the profoundly disabled, and the need to safeguard this class of citizens. *See Niece v. Elmview Group Home,* 929 P.2d 420, 425 (Wash. App. 1996) ("Profoundly disabled persons are totally unable to protect themselves and are thus completely dependent on their caregivers for their personal safety" and "a nursing home's function is to provide care for those who are unable because of physical or mental impairment to provide care for themselves"); *Shepard v. Mielke,* 877 P.2d 220, 223 (Wash.App. 1994) (recognizing a nursing home "holds itself out to the public as willing and able to provide care services, for a fee. Its knowledge of the condition of its residents creates a concomitant duty ... to safeguard residents against reasonably foreseeable risk of harm"). Health Force's placement of a long-term violent felon in a position of trust creates a foreseeable risk of harm.

In *Herrera* the Court recognized that the relatively simple act of removing a key from an unoccupied and unattended vehicle, locking the vehicle, or not leaving the vehicle unattended, is not an onerous burden to place on a defendant. 2003-NMSC-018, ¶ 30. Health Force only had to perform a simple criminal background check through local law enforcement or some other method reasonably calculated to indicate if the applicant would make a suitable home health care worker. This is a simple task recognized as necessary by the common law and mandated by statute. Health Force's expert testified it is necessary to ensure patient safety and benefits the general public, the disabled and elderly, a vulnerable population, as well as the owners of businesses who are paid and entrusted with the care of these individuals. [RP 3535-38]

The court of appeals never considered Health Force's general duty to exercise reasonable care for Ms. Rigolosi as a substantive issue. Instead, the court of appeals refused "to speak on the matter of background checks at a time when the legislature had already spoken,.. consistently and ***20** definitively expressing the manner in which it wanted background checks performed". 2004-NMCA-047, ¶ 23. The court announced it was "not a legislative body" and simply refused to engage in any inquiry other than whether strict compliance with the Act was possible. *Id.* The court disregarded the manifest injustice of allowing a corporation like Health Force, which was compensated to provide services to care-dependent individuals, to escape scrutiny from a jury for its practices in hiring, supervising, and retaining employees under traditional tort law concepts.

Health Force profited by placing people as caregivers in the private homes of severely disabled individuals. Reasonable care and common sense require investigation of the background of all applicants by performing some criminal, educational, referential or other minimum background check. The manifest purpose of a criminal background check on home healthcare workers is to protect the patient, and the employer. [RP 3523] This is because of the obvious danger an unsuitable, incompetent, unscrupulous, or violent person can pose to a vulnerable, disabled patient in an unsupervised environment. Whether the actions taken were reasonable under the particular circumstances of a given case is a question of fact, to be resolved by a fact finder. *Marquez v. Gomez,* 116 N.M. 626, 630, 866 P.2d 354, 358 (Ct.App. 1991).

Health Force's own expert admitted it failed to take any action to investigate any aspect of Williams' character, competency, qualifications, propensities, or work history prior to hiring him and assigning him as the caregiver to Ms. Rigolosi in her home. [RP 3539, 3543] Health Force insisted it inquired into Williams' by possibly calling one or two references. Undisputedly, there is no personnel file to support or refute this contention. Health Force does not even know who or when it supposedly called the reference [Id.; RP 2661; 3389] The inference is that Health Force never made the most minimal effort to ascertain the suitability of Williams as an employee.

Health Force owed Ms. Rigolosi a duty under principles of "reasonable care under the circumstances" to ensure that Williams did not pose a threat to Hope Rigolosi. Health Force elected ***21** not to engage in even the most minimal background check, and as a result, a manifestly unsuitable and dangerous person was given unsupervised access to one of the most vulnerable, defenseless persons in our society. *Compare Narney,* 115 N.M. at 50-51, 846 P.2d at 356-57 (holding defendant city had a duty to exercise due care to appoint and retain only mentally stable police officers); *Calkins v. Cox Estates,* 110 N.M. 59, 64, 792 P.2d 36, 41 (1990) (holding that a landlord could be liable for harm caused by the landlord's breach of duty even though the injury occurred outside the landlord's property). Whether Ms. Rigolosi would have been killed had Health Force conducted a minimal background check is a question of fact, to be resolved by a jury, not the district court or the court of appeals. *Marquez,* 116 N.M. at 630, 866 P.2d at 358.

Despite expressed public policy in favor of protecting vulnerable, care-dependent persons, and despite Health Force's indisputable failure to make any attempt to comply, the court of appeals assigned to Health Force the benefit of a narrow and strained legal analysis. Under traditional concepts of the general duty to exercise reasonable care under the circumstances, Health Force's surpassingly inadequate efforts to ascertain the suitability of its employees prior to hire should result in a finding of a duty. *See Herrera,* 2003-NMSC-018, ¶ 14; *Narney,* 115 N.M. at 51, 846 P.2d at 357. The circumstances of Ms. Rigolosi's dependence cannot be overstated. Ms. Rigolosi could not breathe without ventilator assistance. She could only move her head. She was utterly and completely dependent upon the care of others for her every physical need. Indisputably--and unconscionably, given Ms. Rigolosi's level of incapacity-- Health Force failed to undertake a reasonable check of Williams' background before assigning him as one of her caregivers.

In *Herrera,* 2000-NMSC-018, this Court found a common law duty existed despite the lack of a special relationship between the plaintiff and defendant. *Id.* ¶ 21 The common law duty exists as an exception to the general rule that "a person does not have a duty to protect another from harm caused by the criminal acts of third persons unless the person has a special relationship with the ***22** other giving rise to a duty." *Id.* This exception allows imposition of a common law duty on a defendant for the criminal acts of a third person "if the defendant should have recognized that his or her actions were likely to lead to that criminal activity." *Id.* (internal citations omitted; emphasis added). Applying this exception, the Court found public policy existed supporting the imposition of a common law duty in the context of "[d]efendant's actions in directing the owner to leave the keys in the vehicle and leaving the vehicle unlocked and unattended." ¶ 32.

The analytical construct of *Herrera* applies in the case *sub judice.* Health Force owed Ms. Rigolosi a common law duty to exercise ordinary care by performing a criminal background check when it hired Williams, to protect her from the possibility that Health Force might otherwise hire an individual with a criminal history. Health Force knew or should have known that a crime against one of its patients was foreseeable if a violent criminal offender was hired to care for a disabled, vulnerable patient. Health Force failed to exercise reasonable care to investigate Williams, who indisputably had a long criminal background. Because Williams was given unsupervised access to Ms. Rigolosi, Williams was able to kill Ms. Rigolosi.

B. A Special Relationship Existed Between Health Force, Inc. and Ms. Rigolosi Giving Rise to a Duty to Protect Ms. Rigolosi from Preventable Harm Caused by the Hiring and Retention of Williams.

Special relationships give rise to a duty to prevent harm caused by the intentional or criminal conduct of third parties. *See Sarracino v. Martinez,* 117 N.M. 193, 194-95, 870 P.2d 155, 156-57 (Ct.App.1994) (taking charge of an intoxicated passenger created obligation of reasonable care for passenger's safety); *see also Niece,* 929 P.2d at 425 (holding special relationship creates

a duty on the part of "a group home for developmentally disabled person ... to protect its residents from the harm against which they are least able to protect themselves-abuse at the hands of staff"). In order to create a duty based on a special relationship, the relationship must include the right or ability to control another's conduct. *See Restatement (2d) of Torts* §§ 315-319. A special relationship can ***23** arise as a commercial connection between parties, or be more or less voluntarily undertaken. *Sarracino,* 117 N.M. at 194-95, 870 P.2d at 156-57. New Mexico also recognizes a special relationship in the context of an attorney-client relationship, physician-patient, or landowner.

Health Force assumed the responsibility for the safety and care of Ms. Rigolosi, and was compensated for its provision of services. This relationship included provisions by Health Force of staff to serve Ms. Rigolosi in her home on a 24-hour basis. Ms. Rigolosi justifiably relied upon Health Force to provide her with caregivers who would perform all her basic physical needs. Health Force had the ability to control its employee's conduct and to dictate the details of its employee's work. Ms. Rigolosi necessarily relied on Health Force to ensure that the employees it sent to Ms. Rigolosi were appropriate individuals to care for her in her home. *Niece,* 929 P.2d at 425 ("Profoundly disabled persons are totally unable to protect themselves and are thus completely dependent on their caregivers for their personal safety.") A special relationship clearly existed between Health Force and Ms. Rigolosi. This compels the finding that Health Force had a duty to prevent harm to Ms. Rigolosi caused by the foreseeable criminal conduct of its employee, Williams.

C. Health Force Inc., Owed Plaintiff a Common Law Duty

As obtained in *Herrera,* the instant case presents an exception to the general rule that "a person does not have a duty to protect another from harm caused by the criminal acts of third persons unless the person has a special relationship with the other giving rise to a duty." *Id.* ¶ 21. A common law duty to exercise ordinary care exists because Health Force knew or should have known that if it failed to screen its employees for criminal history, it might inadvertently hire an individual with a violent history. Because of the nature of in-home health care, such an employee with a violent history would be placed in an unsupervised setting with a vulnerable patient. By failing adequately to screen its employee, Health Force created or increased a risk of harm to Ms. Rigolosi through the criminal conduct of its employee, Williams. *See Herrera,* ¶ 21.

***24** Health Force's duty of ordinary care included "taking reasonable precautions to protect those who are unable to protect themselves." *Shepard,* 877 P.2d at 223. Health Force hired Williams without performing any type of local or national criminal background check, [RP 3395-96] without screening Williams for drug or alcohol use, [RP 3387] or conducting any proper pre-employment screening or investigation into his competency to provide care to a ventilator dependent quadriplegic. [RP 2661; 3389] At the time Williams was hired by Health Force, he had a long criminal history of violent and financial offenses dating back more than thirty years. [RP 3545-46]

Health Force took no action even after it was notified by another caregiver employee that Williams had stolen Ms. Rigolosi's narcotic medication. [RP 2918, 2835-36] Thus, Health Force had actual notice of a problem concerning Williams before Williams killed Ms. Rigolosi. The theft of Ms. Rigolosi's medication was precisely the type of action by an employee the Act foresaw and sought to prevent. Health Force failed to investigate and supervise Williams after being notified of the theft, left Williams in a position to victimize Ms. Rigolosi, and is therefore responsible for Ms. Rigolosi's death. The analysis that imposed a common law duty on the defendants in *Herrera* should have operated to impose a duty of ordinary care on Health Force. *Herrera* at ¶ 22. ("Defendant's alleged conduct of leaving the keys in the ignition of an unlocked and unattended vehicle arguably increased the likelihood that criminal acts would occur, which ultimately led to the accident in which Plaintiff's were injured, so that we impose a duty of ordinary care.")

The imposition of a duty involves considerations of foreseeability. *Herrera* concluded "[t]he risk of harm to the class of persons typified by Plaintiff's was not unforeseeable ... leaving an ignition key in an unlocked and unattended vehicle creates a foreseeable zone of danger which supports a duty." *Id.* Here, Health Force's failure to exercise reasonable care by performing a criminal background check on Williams created a foreseeable zone of danger to Ms. Rigolosi, because an unscreened employee with a criminal background increased the likelihood of danger to Ms. ***25** Rigolosi. Williams' murder of Ms. Rigolosi was

an event that could have been foreseen by Health Force. *Herrera* ¶ 24. Health Force created a foreseeable zone of danger surrounding Ms. Rigolosi by placing her care in the hands of a person with a violent criminal history. *Id.*

ISSUE III. THE TRIAL COURT ERRED IN DETERMINING THAT HEALTH FORCE'S FAILURE TO CONDUCT A CRIMINAL BACKGROUND CHECK WAS NOT A PROXIMATE CAUSE OF MS. RIGOLOSI'S DEATH.

"With few exceptions, proximate cause is a question of fact to be determined by the factfinder." *Lerma,* 117 N.M. at 784-85, 877 P.2d at 1087-88. This Court reviews the grant of summary judgment *de novo* and construes reasonable inferences from the record in favor of the party opposing the motion. *Celaya,* 2004-NMSC-005, ¶ 7.

Health Force had a duty imposed by both statute and common law principles to exercise reasonable care when hiring anyone as a caregiver. Health Force breached its duty to investigate Williams' background, criminal history, competency, prior experience, or character prior to hiring him and giving him complete, unsupervised access as a caregiver to Ms. Rigolosi in her home. The evidence supports a jury determination that Health Force's negligent hiring and retention of Williams proximately caused Ms. Rigolosi's death. If Williams had been investigated properly, it must be assumed that his extensive criminal history would have prevented him from being hired by Health Force. If he had not been hired, he would not have been in a position to kill Ms. Rigolosi.

F&T Co. v. Woods, 92 N.M. 697, 594 P.2d 745 (1979), is inapposite. In *F&T Co.,* the legislature was silent as to the requirements of delivery personnel. This Court held that, as a matter of law, the *F&T Co.* employer could not have foreseen that his employee would, while off duty, rape one of his customers. However, the Court emphasized that "[w]hether the hiring or retention of an employee constitutes negligence depends upon the facts and circumstances of each case." *Id.* at 701, 594 P.2d at 749. In the instant case, the legislature has declared the public policy of New Mexico that a vulnerable population must be provided care by qualified, safe employees, whose ***26** backgrounds had been subjected to scrutiny prior to hire. The legislature placed the burden upon home health care employers like Health Force, which is compensated for its care, to ensure its employees are safe. A criminal background check is required to be done prior to employment, though, in the exercise of reasonable care, the inquiry by the employer need not stop there.

Health Force insisted it could not have foreseen or controlled what Williams would do while off duty and not providing care to Ms. Rigolosi. Health Force created William's position of trust with both the patient and UNMH. Health Force argued below that the legislature's imposition of this duty "would [] make Health Force the guarantor of the acts of all former employees in regard to any dealings with former customers of Health Force." This position fails because the evidence is that Williams was a *current* employee (See APD tapes.); that Health Force knew Williams was attending to Ms. Rigolosi in the hospital as she was preparing for discharge home; and that Williams was identifying himself to the UNMH staff as Ms. Rigolosi's home healthcare aid. Mr. Williams was undisputedly a violent, predator who was now Ms. Rigolosi's caregiver. The trust created by Williams' employment is what allowed him access to Ms. Rigolosi to kill her. His employment, and Health Force's numerous failures in hiring, supervising and retaining Williams is clearly a proximate cause of Ms. Rigolosi's death.

ISSUE IV. THE LOWER COURTS ERRED IN DETERMINING AS A MATTER OF LAW THAT HEALTH FORCE'S FAILURE TO INVESTIGATE OR SUPERVISE WILLIAMS AFTER LEARNING HE HAD STOLEN PRESCRIPTION NARCOTICS FROM MS. RIGOLOSI WAS NOT A PROXIMATE CAUSE OF MS. RIGOLOSI'S DEATH.

Laying aside the negligent hiring issue, Plaintiff has a separate claim regarding Health Force's negligent retention of Williams and failure to warn Ms. Rigolosi of his dangerousness after they were informed Williams had stolen Ms. Rigolosi's narcotic pain medication. The court of appeals found as a matter of law that proximate cause could not be shown finding reasonable minds could not find that Health Force's retention of Williams after receiving notice that he had stolen the ***27** narcotic pills

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from Ms. Rigolosi, proximately caused her death three weeks later. This holding -- in which the court of appeals imposed its judgment on a disputed factual matter -- is not supported by the cases that the court of appeals cited in its Opinion. *See Spencer v. Health Force, et al.,* 2004-NMCA-047, ¶ 13-14.

The proximate cause of an injury is that which in a natural and continuous sequence produces the injury and without which the injury would not have occurred. *F&T Co.,* 92 N.M. at 700, 549 P.2d at 748. " With few exceptions, proximate cause is a question of fact to be determined by the factfinder." *Lerma,* 117 N.M. at 784-85, 877 P.2d at 1087-88. The court of appeals relied on the precedent set by *F&T Co.,* 92 N.M. at 701, 594 P.2d at 749, in which the Court held that the rape of the plaintiff by defendant's employee could not be considered to have been foreseeable by defendant or to be a natural and probable result of defendant's retention of its employee. In *F&T Co.,* the court noted that proximate cause depends on the facts of each case. *Id.* at 701, 594 P.2d at 749. The Court held based on the facts of that case that proximate cause could not be shown.

In this case, Health Force knew or should have known William was unstable because of his violent and drug riddled history, and (viewing the facts most favorably to Plaintiff) had actual notice that Williams stole narcotics from Ms. Rigolosi. Death of a patient is a foreseeable, proximate result of hiring an unstable caregiver with a long and violent history, especially one that has committed a crime (stealing narcotics) within the first 11 days of caring specifically for the patient at issue. *See id.* Indeed, this is the very concern the Legislature expressed and addressed when it passed the Act. Health Force was on notice of Williams' dangerous, unstable and criminal behavior and had three weeks to do a criminal background check before he killed Hope Rigolosi.

In *Narney,* the court held the hiring and retention of a police officer who displayed "unstable behavior" *was* the proximate cause of injury to plaintiff's who were stopped and terrorized by the off-duty officer. 115 N.M. at 51, 846 P.2d at 357. This is exactly the situation here. The officer was ***28** in a position of trust because of his employment, as was Williams. The officer was unstable and it was foreseeable that he was cause injury. Williams had a long, violent criminal and drug history and it is foreseeable he would cause harm to Ms. Rigolosi. Again, had Health Force engaged in even the most minimal background check of Williams, it must be assumed he would not have been hired. The analysis of *Narney* readily applies to the instant case, and should have mandated denial of the motion for summary judgment.

Similarly, the court of appeals acknowledged *Pittard v. Four Season's Motor Inn, Inc.,* 101 N.M. 723, 730-31, 688 P.2d 333, 340-41 (Ct. App. 1984), but dismissed the case without critical analysis. In *Pittard,* the hotel was found liable on the theory of negligent hiring and retention when a hotel employee displayed symptoms of alcohol abuse and a tendency toward violent behavior, and the employee later sexually assaulted a child at the hotel. Again, the facts of the instant case fit squarely within the factual construct in *Pittard* and support reversal.

The court of appeals noted, but did not distinguish *Gonzales v. Southwest Sec. & Prot. Agency,* Inc., 100 N.M. 54, 56-57, 665 P.2d 810, 812-13 (Ct.App. 1983). The *Gonzales* court held a security business liable for a beating by its guards when, among other things, the business failed to perform background checks on employees, and failed to take appropriate action after one of the guards was involved in a previous beating.

Regarding both *Pittard* and *Gonzales,* the court of appeals merely made the conclusory statement that "the connection between the alleged theft of three pills and [Ms.] Rigolosi's death is too tenuous to establish proximate cause." *Spencer,* 2004-NMCA-047, ¶ 25. Comparing the facts of the instant case with the analysis of Gonzales and *Pittard,* there simply is no conceptual distinction between the foreseeable harms articulated in those cases, and the foreseeability of future harm by Williams given the trust imputed to his job, when Health Force knew virtually nothing of his background, and had actual notice of his theft of narcotic medication from Ms. Rigolosi.

***29** The court of appeals and the district court ignored the disputed factual matters regarding the negligent retention claim and instead decided them. The negligent retention claim cannot be viewed in isolation from the facts underlying the negligent hiring claim. *See Narney, Pittard, Gonzales, supra.* The reasonable inferences--which should have been drawn in favor of Plaintiff

on summary judgment--are that Health Force breached its duty, whether statutory or based on general standards of care, and that breach proximately led to Williams being and remaining in a position to kill Ms. Rigolosi. It would not be manifestly unreasonable for a jury to make this determination regarding probable cause. The lower courts intruded upon the province of the jury, and should be reversed.

ISSUE V. GENUINE ISSUES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT TO HEALTH FORCE.

In its motion for summary judgment, Health Force asserted the following facts were undisputed:
(1) Health Force provided caretakers for Hope Rigolosi up to the time of her admission to UNMH on or about April 1, 1998;

(2) Health Force was not providing any services to Hope Rigolosi at the time of her death;

(3) Ben Williams was not assigned nor authorized by Health Force to care for Hope Rigolosi on the date of her death;

(4) Ben Williams had not received permission from Health Force to visit Hope Rigolosi in the hospital;

(5) Ben Williams was not an employee of Health Force at the time of Hope Rigolosi's death; and

(6) No legal duty to perform a criminal background check on Ben Williams existed at the time he was hired or employed by Health Force.

[RP 2591-92] In response and opposition to these allegedly "undisputed facts", Plaintiff adduced evidence showing that there were genuine disputes of material fact about each of the facts alleged by Health Force. [RP 2821-2885] The following facts and evidence presented to the district court by Plaintiff should have been viewed in the light most favorable to Plaintiff on summary judgment. *Los Ranchitos v. Tierra Grande,* 116 N.M. 222, 227, 861 P.2d 263, 268 (Ct.App. 1993).

Regarding Health Force's allegations of undisputed fact Nos. 1 and 2, Plaintiff adduced evidence that at least two Health Force employees--Kasey Whitley and Ben Williams--continued to provide ***30** care and hold themselves out to UNMH personnel as Ms. Rigolosi's caretakers while she was hospitalized at UNMH, up until the time she was killed by Williams on April 23, 1998. [RP 2946-49; 2983-85] These Health Force employees visited Ms. Rigolosi daily at the hospital, and performed various care tasks, such as feeding, providing companionship, assisting with telephone calls, and taking Ms. Rigolosi out to smoke when a physician's order required a nurse to escort her to the smoking area. [RP 2945; 2955] Plaintiff adduced nurses' notes from UNMH that stated Williams was present at the hospital, and referred to him as Ms. Rigolosi's "caregiver". [RP 2844-46; 2847; 2985] Plaintiff adduced evidence that Williams was not, in fact, fired as Ms. Rigolosi's caregiver prior to her death, and that eight hours after he killed Ms. Rigolosi, Williams received a voice message from a Health Force employee regarding his scheduling for the following week. [RP 2922] These facts countered the "undisputed facts" alleged by Health Force in its motion, and showed genuine disputes of material fact at issue, mandating denial of summary judgment.

With respect to Health Force's alleged undisputed facts Nos. 3 and 4 (asserting Mr. Williams was not authorized or given permission by Health Force to visit Ms. Rigolosi at UNMH), Plaintiff adduced contrary evidence that Health Force employees Kasey Whitley, Joyce Kossman, and Williams continued to be the caregivers assigned to Ms. Rigolosi at the time of her death, and to following her anticipated discharge from the hospital. [RP 2843-44;] Kasey Whitley testified that Health Force President Pendleton knew Whitley was continuing to go to UNMH while Ms. Rigolosi was hospitalized. [RP 2838-39; 2843-44] A reasonable inference is that they continued to provide care for her during these times. At no time did Health Force notify Ms. Rigolosi or UNMH that Williams was no longer an employee of Health Force, or that Williams would no longer be assigned as Ms. Rigolosi's caregiver. Kasey Whitley testified that the Health Force personnel who would care for Ms. Rigolosi on discharge

were Whitley, Williams and Joyce Kossman. [RP 2839] A ***31** reasonable inference to be drawn from this failure is that Health Force considered Williams still to be Ms. Rigolosi's caregiver.

Health Force's own expert DuFour provided evidence that, if a home healthcare agency received a report that a health aid had stolen narcotic medication from a patient, there were various steps to be taken regarding investigation and supervision, including talking to the alleged thief, the witness, and sending a nurse to count the medication at the end of a shift. [RP 3542] Health Force produced no evidence that it had inquired into the theft of a patient's drugs, did not investigate the allegation of theft, and did not supervise Williams, knew he was representing himself as an employee at the hospital and called him to confirm his schedule because he remained an employee the day Hope Rigolosi was killed. [RP 2922] A reasonable inference is that Health Force believed Williams to be a good, valuable, qualified employee. Whether that belief was reasonable or not under the circumstances of this case, given the information Health Force had or would have had with minimal inquiry, should have been left to a jury to determine. *Marquez,* 116 N.M. at 630, 866 P.2d at 358.

Contrary to Health Force's allegation No. 5, regarding Williams' employment status with Health Force, there was evidence that on the day Ms. Rigolosi was killed by Williams, Health Force called Williams to verify his continuing work schedule. [RP 2829, 2854] The voice mail recording stated:

> Hey Ben, this is Rachel. I just wanted to go over your schedule for this coming weekend. Give me a call when you get a chance, 883-4900. Thanks. Bye-bye.

[RP 2922] Health Force recognized the probative value of the voice mail message that created a material dispute of facts as to the employment status of Ben Williams and contended that such evidence was inadmissible. [RP 3154-67 [3]] As such, Health Force moved to exclude the voice mail message, pre-trial, through a motion in limine. [Id.]

***32** Several theories from the Rules of Evidence supported the admissibility of the message. Under Rule of Evidence 11-801(C) NMRA 2002, the message could be offered, not for the truth of the matter asserted--that Rachel wanted to go over William's schedule--but to prove that an employment relationship existed on the day Hope died. The voice mail message could be offered under Rule 11-801(D)(2), as an admission by a party-opponent. There was no dispute that Rachel was an employee of Health Force, Inc. and the phone number she left on Mr. Williams' machine, 883-4900, was the phone number of Health Force. [RP 2854] The voice mail message is also admissible under the catch-all exception, Rule 11-803(X) NMRA 2002. Finally, Health Force's employee, Rachel, could be called at trial to testify regarding the voice mail message. Based on the contents of the voice mail message, a jury could reasonably infer an employment relationship. Indeed, Health Force's own expert so testified. [RP 3543] *See Los Ranchitos,* 116 N.M. at 226, 861 P.2d at 267 (Holding determination of an employment relationship is a factual issue for the jury).

Health Force never produced a record of Williams' alleged resignation in its responses to discovery requests. Health Force's discovery responses stated that employment records for Mr. Williams were in storage or had been lost during shipping and it was unable to recover the lost documents. [RP 2883-85] A reasonable inference to be drawn from this situation is that Williams continued to be Health Force's employee after he killed Ms. Rigolosi. Another reasonable inference would be that Williams would continue his assignment with Ms. Rigolosi, a fact also established by the testimony of Kasey Whitley. [RP 2839] Plaintiff met the burden imposed by Rule 1-056 NMRA 2004 of showing genuine disputes regarding material facts as to whether Williams was employed by Health Force on April 23, 1998, whether he was properly hired, retained or supervised, and whether Health Force should have inquired into Williams' suitability as an employee.

***33** Finally, respecting alleged undisputed material Fact No. 6, at the time Health Force hired Williams, the Act was in effect, and specifically required a national and statewide criminal background check to be done prior to employing any caregiver within the State of New Mexico. [RP 2830, 2855-74] Thus, at the time Williams was hired, there was a clear expression of public policy by the legislature that care-dependent persons were entitled to special protections under New Mexico law, and

that special, comprehensive inquiry was to be made to determine the suitability of potential caregivers. *Draper,* 116 N.M. at 777, 867 P.2d at 1159 (language of statute is to be given legal effect).

Plaintiff adduced evidence from Health Force's own expert, Dufour, that it was possible to obtain information from a local police department. [RP 3535] A reasonable inference from this evidence--which should have been drawn in Plaintiff's favor on summary judgment--was that it would be possible to obtain information in other municipalities from other local law enforcement agencies as well. The court of appeals did not assign the benefit of this reasonable inference to Plaintiff. *Celaya,* 135 N.M. 115, 2004-NMSC-005, P. 7 (reviewing court reviews the grant of summary judgment *de novo* and construes reasonable inferences from the record in favor of the party opposing the motion). Dufour testified the purpose of conducting background checks is to "determine work habits, general abilities ...were they able to do the job they were hired to do, and to verify the information on the application". [RP 3533] Dufour testified criminal background checks are the standard of practice [RP 3536], done to protect the client and the employer. [Id.]

At the time Williams was hired, there were outstanding warrants for his arrest and he was a convicted felon. [RP 3323-36] Health Force produced no documentation that it engaged in any inquiry into Williams' background under the statute prior to hiring him, nor that it followed any other professional or common sense guidelines or made minimal inquiry to ensure Williams did not pose a threat to their patients. [RP 3542-3543] In fact, Health Force produced no employment ***34** application for Ben Williams, no evidence of minimal reference checks, no criminal background check, no competency examination, no written skills exam, nor any other documentation showing that Health Force inquired into Williams' background or subjected him to training or testing prior to assigning him to a quadriplegic, vulnerable, care-dependent young woman. [Id.] The inference to be drawn in favor of Plaintiff is that Health Force failed adequately to inquire into Williams' background on any level, and failed to adequately supervise him in his position. The evidence directly rebutting Health Force's motion for summary judgment should have led to denial of the motion. The trial court's decision--and the court of appeals opinion upholding that decision--should be reversed and the matter remanded for trial on Plaintiff's claims against Health Force.

CONCLUSION

For the foregoing reasons, the grant of summary judgment to Health Force should be reversed, and this matter remanded to the district court for trial on the merits of Plaintiff's claims.

Footnotes

1 The Board of Regents for University Hospital were also sued (see caption), but this aspect of the case was settled prior to the Summary Judgment hearing and duly dismissed. [9.R.P. 3073-3072]

2 The Court of Appeals incorrectly identified Ms. Dufour as Plaintiff's expert.

3 The record proper skips from 3154 to 3181. RP 3155 is found after 3196.

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