FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

MARY ANN McCONNELL, as personal representative of the Estate of Elizabeth Garcia, deceased, and as next friend of XAVIER MENDOZA, a minor, JEROME MENDOZA, a minor, and CENE MENDOZA, all minors with individual claims,
Plaintiffs,

v. No. D-0101-CV-2005 00045

ALLSUP'S CONVENIENCE STORES, INC.,
A New Mexico Corporation.
Defendant.

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, P.A.
Third-Party-Defendant.

RESPONSE TO ALLSUP'S MOTIONS *IN LIMINE* ATTEMPTING TO EXCLUDE EVIDENCE OF ALLSUP'S NOTICE, KNOWLEDGE OF DANGER AND *DELGADO* WILLFULNESS

The Garcia family, through their personal representative, Mary Ann McConnell, and their attorneys of record, McGinn, Carpenter, Montoya & Love, P.A., and pursuant to Rules of Evidence 11-401, 11-402, 11-403, 11-801, 11-802, 11-803, and 11-804 requests that the Court deny Allsup's four motions *in limine* which collectively attempt to keep out *all* of Plaintiff's evidence that proves the willfulness attendant to Allsup's choice to leave clerks like Elizabeth Garcia unprotected and vulnerable to violence, sexual assault, serious injury, and death. This pleading responds to the following four Allsup's motions:

- ***Allsup's Motion in Limine Regarding Testimony from Tony Knott***
- ***Allsup's Motion in Limine Regarding Other Criminal Events***

☐ ***Allsup's Motion in Limine Regarding Claimed Staffing Promises***

☐ ***Allsup's Motion in Limine Regarding the 1995 North River Testimony and Documents*** *(incorrectly titled by Allsup's "regarding use of a report and transcript of testimony from a trial held over fourteen years ago")*

Since the legal argument related to the admissibility of notice, knowledge, duty, and foreseeability evidence is virtually the same for all of the areas of evidence that Allsup's seeks to exclude, Plaintiff has prepared this consolidated response to avoid repetition and streamline the issues.

ARGUMENT

The four Allsup's motions collectively attempt to keep out virtually every piece of evidence that reflects the warnings Allsup's had ignored, the volume of violent attacks occurring in Allsup's stores, and the admissions of danger it had expressed in the years leading up to the January 16, 2002 abduction, rape and murder of Liz Garcia. The evidence targeted by Allsup's motions includes:

1. Tony Knott, former police chief in Hobbs, New Mexico, regarding his specific warning to Mark Allsup before Liz Garcia was killed that unless Allsup's implemented the kinds of security measures being used successfully by the other convenience store chain in town, someone would be murdered. *See Tony Knott Deposition Excerpts, Plaintiff's Response to Allsup's Motion for Summary Judgment, filed May 12, 2006, Ex.10.*

2. All evidence of other deaths, near deaths, sexual assaults and violent attacks taking place at Allsup's stores in the years prior to Liz's murder. *See Summaries of these incidents attached as Ex. A (Most Violent Attacks), Ex. B (History of Violence), Ex. C (Hobbs Crime Summary by Location) and Ex. D (Hobbs Crime Summary by Date)*[1].

3. Prior promises (admissions and statements against interest) Allsup's management made to the Burdine family following the rape and killing of Sarah Vineyard, and to clerk Eva Pellissier, whose throat was slit, that it would never again leave a lone female on the graveyard shift. *See Ex. E*, Don Burdine Deposition excerpts; *Ex. F,* Eva Pellissier Deposition excerpts.

[1] Pursuant to the Court's recent discovery ruling, Allsup's has apparently produced District 702 robbery reports for 10 years for which there has not yet been opportunity to update the attached summaries.

4. Evidence that Allsup's hired an expert in 1995 to testify that security precautions like bullet proof enclosures, video cameras, training clerks about what to do in the event of a robbery, and security guards would reduce clerk injuries; that Allsup's earned $7 million from that lawsuit (*Northriver*) but failed to institute these precautions in its stores, including #146. *See Northriver Documents and Epstein testimony, Plaintiff's Response to Allsup's Motion for Summary Judgment, filed May 12, 2006, Ex. 34.*

Because this evidence demonstrates notice, knowledge of danger, intent on the part of Allsup's, and in some instances constitutes admissions or statements against interest, it is all relevant to and admissible in this *Delgado* action.

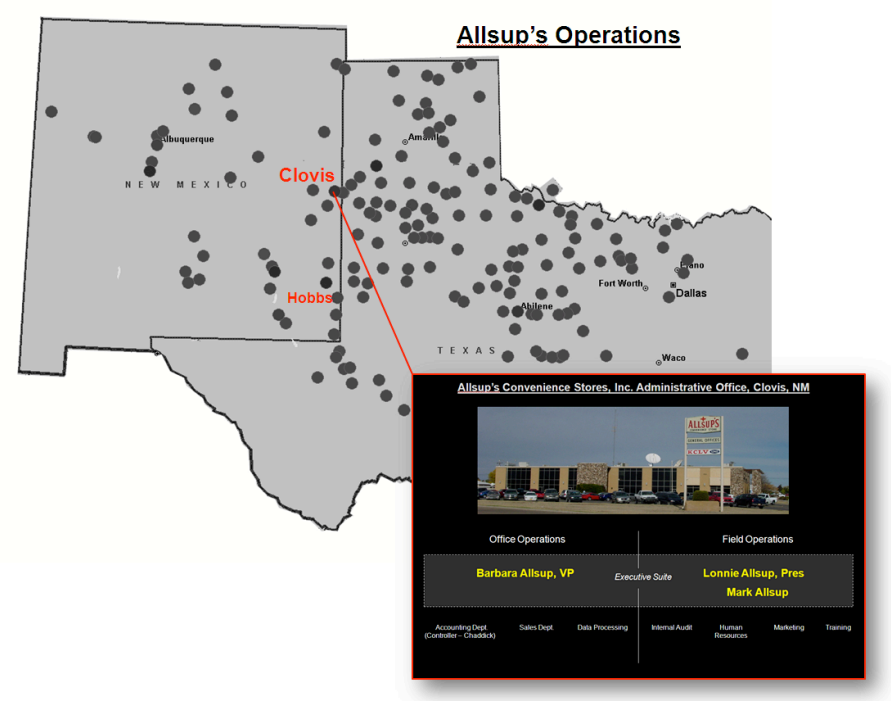
Allsup's request that the Court impose arbitrary temporal or geographic cutoffs for the evidence is inimical to the *Delgado* willfulness elements. Plaintiff has a fundamental due process right to present evidence that supports her claim. New Mexico Constitution, Art. II, §§12 and 18. Moreover, arbitrary time or place cut-offs create unfair prejudice, because to exclude evidence from certain regions or time periods will create a false inference that there was no crime occurring. Nothing could be more prejudicial than for the jurors to be presented with a false reality. Any challenges that Allsup's may have to the evidence go to weight, not admissibility.

I. ALLSUP'S WILLFUL INTENT IS AN ESSENTIAL ELEMENT OF THIS CASE. PLAINTIFF MUST BE ALLOWED TO INTRODUCE EVIDENCE THAT ALLSUP'S KNEW FOR OVER 30 YEARS THAT IT WAS PLACING CLERKS IN DANGER.

Evidence of an essential element is presumed relevant. *State v. Balderama*, 2004-NMSC-8, ¶ 25. The quintessential element that must be proven under *Delgado v. Phelps Dodge Chino, Inc.*, 2001-NMSC-34, is that the employer acted "willfully." *Delgado* at ¶ 24. It is the employer's "willfulness" that renders a worker's injury non-accidental, and therefore outside the scope of the Workers' Compensation Act . *Delgado* at ¶ 26.

Of the willfulness standard, the *Delgado* Court states, "we determine whether a reasonable person would ***expect*** the injury suffered by the worker to flow from the intentional act or omission." *Delgado* at ¶ 27 (emphasis added). The existence of "willfulness" is informed by the *Tallman* requirement of **foreseeability**. *See Tallman v. ABF*, 108 N.M. 124, 133 (Ct. App. 1988)(superseded on other grounds). *Tallman* stated that "[w]illful misconduct requires that the worker have **knowledge of the peril** and the **ability to foresee the injury…**" *Tallman*, 108 N.M. at 133 (emphasis added). Any and all evidence that bears on Allsup's *notice* of danger and potential for injury is relevant to this case.

The Allsup's corporation has been centrally owned and operated by Lonnie and Barbara Allsup from the beginning. They are the founders, the President and Vice President of field and home office operations and they operate a chain of 300 stores that are homogenous in layout, lighting, security and staffing. They are informed of every violent attack that occurs on one of their properties. The operations are centralized in a Clovis office building covered in satellite dishes that oversees stores in just 2 states: New Mexico and Texas.



Over the years, each and every time a clerk was hurt, raped, attacked, or killed, Lonnie and Barbara Allsup knew about it, had the opportunity to learn from the violence, correct mistakes, take action to deter future robberies and violence, yet refused to do so. With every passing violent attack, Allsup's knowledge of the danger grew and its willful decision not to protect its clerks became more and more indefensible. It is a worse thing that Allsup's *broke* promises than if it had never made them. It is a worse thing that Allsup's hired an expert to testify about available security precautions *when it benefited Allsup's*, but when the money was in the bank, didn't bother to make the safety changes that would save clerk lives. That Allsup's ignored hundreds of instances of violence makes its willfulness greater than if it had ignored just dozens of attacks. That incidents of violence were occurring across all of their operations in New Mexico and Texas makes it worse than if they had been occurring in just one particular area. There is a quantitative value that attaches to the fact that these incidents were occurring universally across all of Allsup's operations, repetitively, and in steady frequency. It is for the

jury to assess the weight to give these facts and evidence based on proximity or recency. *See, e.g.*, *State v. McDonald*, 1998-NMSC-034; *State v. Vigil*, 110 N.M. 254 (1990)(Jurors authorized to afford due weight or disregard entirely).

New Mexico stare decisis dictates that any attempt to limit the notice evidence, through temporal, geographic or other means, is improper:

> "[e]vidence of the happening of accidents at other places … would have the ***tendency to make the existence of defendants' allegedly negligent omissions in this case, after notice and knowledge of danger, more or less probable, the evidence is relevant and admissible***."

Ruiz v. Southern Pac. Transportation Co., 97 N.M. 194, at 202 (Ct. App. 1981) (citing N.M.R.Evid. 401, N.M.S.A. 1978)(emphasis added). In *Ruiz*, the Court was presented with a request for evidence spanning a geographic scope far larger than here, including Mexico and the United States, and found the entire area relevant to the defendant's knowledge of danger.

Similarly, in *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1245 (10th Cir. 2000), the Court rejected a defendant's attempt to chisel away at the available notice evidence. In admitting all of the prior incidents, the *Smith* court noted that to be admissible on the theory of notice, the incidents need merely "be similar enough to the event in question that they would have **alerted** the defendant to the problem or danger at issue." *Id.* at 1248. The degree of similarity required to support admissibility is **even less** when the evidence **goes to notice**, rather than causation. *Id.* at 1246-47 (emphasis added). In New Mexico, foreseeability "**does not mean that the precise hazard** or the exact consequences which were encountered **should have been foreseen**." *Ortega v. Texas-New Mexico Ry. Co.*, 70 N.M. 58, 60 (1962). The *Ortega* court noted that if the exact injury must be foreseen, then recovery would be consistently denied. *Ortega*, 70 N.M. at 61 (quoting *Pease v. Sinclair Refining Co.*, 104 F.2d 183, 185). "…[T]he **courts look more for the possibility of hazard** of some form to some person than for an expectation of the particular

chance that happened." *Id.* In *Pittard v. Four Seasons Motor Inn, Inc.,* 101 N.M. 723, 726 (Ct. App. 1984), the Court of Appeals noted that "[f]oreseeability does not require that the particular consequence should have been anticipated, but rather that some **general harm or consequence** be foreseeable." *Id.* at 730.

As in *Ruiz, Smith, Ortega, and Pittard*, all of the evidence establishes notice. Tony Knott's warning is more than sufficiently similar because it was specifically directed to Hobbs Allsup's stores and predicted a murder. The long history of violence spanning all four corners of Allsup's operations gave resounding notice of a general harm or consequence of deciding not to institute security measures. The incidents that spurred Allsup's staffing promises to the Burdine family and Eva Pellissier were sufficiently similar because both women were left alone on the graveyard shift – Ms. Pellissier in the same town, Hobbs, where Liz Garcia was killed. Finally, Allsup's expert Robert Epstein's recommendations in the *North River* case were for the very types of security measures that, had they been implemented, would have saved Liz Garcia's life. All of this notice evidence, and Allsup's statements arising out them, must be admitted.

A. While neither *Delgado* nor New Mexico's Foreseeability Standard Require Specific Warning, It Is Hard to Imagine a Warning More Specific to Allsup's than That of Chief Tony Knott.

While refusing to acknowledge that there is no "specificity prong" in the *Delgad*o case, nor the jury instruction (*See Delgado* at ¶22, rejecting proof "comparable to a 'left jab to the chin'"), Allsup's simultaneously seeks to exclude from this case the evidence that most specifically placed it on notice of Liz's impending murder. Chief Knott, following a long career as a Hobbs law enforcement officer, had identified the Allsup's crime problem, compared it statistically to that of a competitor chain in Hobbs, personally compared security policies at the two chains, and resolved

that Allsup's could and had to be made safer. He called Mark Allsup, the then Vice President of Operations, and stated among other things:

> **If we don't resolve this problem, if we don't make these stores safer, we're going to be talking about a murder.**
>
> *Tony Knott deposition, p. 42, Plaintiff's Response to Motion for Summary Judgment, filed May 12, 2006, Ex. 10.*

Although it is not necessary to prove specificity, it is hard to imagine a warning more specific than Chief Knott's. Chief Knott provided Mark Allsup with his data, with his security recommendations, and with the above chilling warning. Allsup's was on specific notice of danger. There is no basis upon which this evidence can be precluded at trial.

B. Allsup's Foreseeability and Duty Analysis Dictates that all Notice that Warned Allsup's of the Incidence of Third Party Crime on its Property is Admissible.

It is curious that Allsup's brief re-argues issues previously rejected via denial of the Motion for Summary Judgment, specifically that a legal duty existed for Allsup's to address injury stemming from third party crime, because the Court's ruling is law of the case. *See Reese v. State*, 106 N.M. 505, 507 (1987). However, to the extent that Allsup's will assert before the jury that Liz's murder was ***un***foreseeable or that Allsup's had ***no duty*** to protect against the acts of criminals, this argument requires the Court to admit all of the evidence that establishes Allsup's knew the crime was coming, thereby establishing the foreseeability that its stores, and consequently the lone clerks inside, were easy targets and magnets for crime.

Under New Mexico's foreseeability/duty analysis, the Plaintiff must demonstrate that the defendant's actions or omissions "had ***possibilities of danger so many and apparent*** as to entitle [the plaintiff] to be protected against the doing [of those acts or omissions]." *Herrera v. Quality Pontiac*, 2003-NMSC-18, ¶ 19 (quoting *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 101 (N.Y. 1928). Of this standard, the New Mexico Supreme Court states: "In other words…a

plaintiff must demonstrate that the defendant's act [or omission] created a foreseeable ***zone of danger of such a magnitude*** that the defendant owes a duty…." *Herrera* at ¶ 19 (citing *Calkins v. Cox Estates*, 110 N.M. 59, 61 (1990)). That the source of danger is from a third party, makes no difference in the foreseeability analysis, and liability arises where the defendant "reasonably could be said to have created or increased a risk of harm to Plaintiffs through the criminal conduct…." *Herrera* at ¶ 21 (overruling prior caselaw that deemed the criminal acts of a third party a independent intervening cause).

In *Herrera*, the plaintiff was injured by the careless driving of a car thief who had stolen the car from a car dealership parking lot whose practice was to leave cars unattended with the keys in the ignition. Plaintiff claimed that this practice invited car thieves and that it was foreseeable that car thieves would drive recklessly, causing accidents to unsuspecting motorists with whom the dealership had no special relationship. The New Mexico Supreme Court agreed. In overruling prior case law, and despite the fact that only 1.3% of cars are stolen in New Mexico and only a portion of those end up in accidents, the Supreme Court deemed this a foreseeable risk that Quality Pontiac had a duty to protect against.

Numerous jurisdictions have imposed liability on convenience store operators stemming from injury caused by third party criminal acts. *Bryant v. Lawson Milk Co,* 22 Ohio App.3d 69, 488 N.E.2d 934 (1985); *Bradfield v. Stop-N-Go Foods,* 17 Ohio St. 3d 58, 477 N.E.2d 621 (reversing summary judgment against employee fatally stabbed during robbery who claimed death was result of intentional act of convenience store in failing to protect health and safety of employees); *Franko v. Standard Oil Company,* 1991 Ohio App. LEXIS 307 (Where clerks had been the victims of armed robberies, convenience store was found to have knowledge of violent crimes from which a jury could conclude that employer knew further injuries were substantially

certain to occur in the future.) In West Virginia, the appellate court reversed the trial court's decision that criminal acts of a third party shielded the employer convenience store and found that failure to provide minimal protections served as evidence of "***deliberate intent***." *Blake v. John Skidmore Truck Stop, Inc.,* 201 W.Va. 126, 493 S.E.2d 887 (1997) (emphasis added). In *Blake,* the Court found: 1) the criminal acts of a third party do not shield the employer from liability for its own role and "deliberate intent" in failing to provide a safe workplace; and 2) evidence sufficient to prove "deliberate intent" could be premised on an employer's excess cash in the register policy, its blocked windows, absence of a drop safe, poor lighting, and inadequate training. *Id*., 201 W.Va. at 135, 493 S.E.2d at 896.

The existence of violence at Allsup's stores over the past several decades predicted danger and determined Allsup's duty. If there were 500 prior incidents of violence against Allsup's clerks, then the magnitude of danger and Allsup's duty was greater than if there were only 100, or several dozen. For this reason, *all* of the occurrences of violence at Allsup's stores are relevant. Plaintiff must be permitted to demonstrate the incidence of crime occurring in Allsup's operations. To create arbitrary cut-offs in time or geography makes it impossible to present the jury with a complete picture of the facts that made the danger foreseeable, thus reflecting Allsup's willful conduct.

C. Allsup's Misrepresents the Texas *Timberwalk* Case, Which Did Not Exclude Any Evidence.

Allsup's writes in two of its motions *in limine* (regarding Tony Knott and Other Incidents), that New Mexico has "not addressed" the "question of how foreseeability is proved." Allsup's uses this statement as a platform to engage in a detailed discussion of *Timberwalk v. Cain*, 972 S.W.2d 749 (1998), a Texas case. On the contrary, New Mexico has ample case law addressing the established principle of foreseeability. The most relevant of those cases are

discussed above. It is not necessary to look outside of New Mexico for assistance in understanding the concept of foreseeability.

Besides being an unnecessary secondary source, *Timberwalk* does not stand for the proposition for which Allsup's cites it, namely that only evidence of recent crime on the property in issue can establish foreseeability of crime. Just the opposite, the *Timberwalk* court wrote "**This is not to say that evidence of remote criminal activity can never indicate that crime is approaching a landowner's property**." *Timberwalk* at **25. *Timberwalk* stands for nothing more than the principle that a fact finder is permitted to give more weight to recent events than to past events and that more events equals more notice. *Timberwalk*, 972 S.W.2d 749, at 757-58". The case goes on to mention that a significant number of crimes within a short time period strengthens the claims, but the complete absence of previous crimes or the occurrence of "a few crimes over an extended time period, negates the foreseeability element." *Timberwalk* at 758. *Timberwalk* confirms what Plaintiff says here: that a significant number of crimes over an extended time period serves to establish foreseeabilty.

The *Timberwalk* court recognized that issues such as recency and proximity go to weight, not admissibility. The decision makes no mention of rejecting any of the evidence that was presented, but made its legal determination based on the unique presentation of facts before it. The *Timberwalk* result, which found no foreseeability on the party of an apartment complex, is easily distinguished from this case involving a chain of convenience stores. If the *Timberwalk* defendant had operated a chain of stores, uniformly operated from a centralized headquarters, by the same management team who had been placed on actual notice of hundreds of incidents of violent crime for several decades, the result would likely have been much different. As it is, the

Timberwalk holding is limited to its facts and offers no support for Allsup's evidence elimination campaign.

This court has already found, as a matter of law, that based on the available evidence here, "a reasonable person in Defendant's position **would have expected** the injury suffered by Ms. Garcia…." *See Court's Denial of Allsup's Motion for Summary Judgment, Dec. 20, 2007.* In reaching its decision, the Court was presented with the history of violent crime that was then available. The jury in this case must also be permitted access to all of the facts, and give those facts their due weight, taking into account proximity and recency.

D. In Analyzing Foreseeability, All Evidence of Crime is Relevant.

The testimony of two of Plaintiff's experts – Dr. Richard Swanson and Wayland Clifton – who are experts in convenience store crime and provide consulting services to businesses on crime avoidance, testify that in analyzing a business operation's vulnerability to crime, analysis of the entire crime history is warranted.

Dr. Swanson, who has expertise in the area of late-night retail security, has been retained by businesses to consult and provide analysis of their security practices and policies. *See Ex. G*, Swanson Affidavit, ¶ 2. One of the things he requests of his clients is that they provide him the entire crime history of their operation, for all locations and all available time periods. *Id.* at ¶ 3. The *entire* crime history is relevant to his analysis. *Id.* This is particularly true where a company's stores use the same environmental design and policies throughout the company's operation. *Id.* at ¶ 5. Crimes or near-misses occurring many years ago may reflect breaches or vulnerabilities that still exist in the present if they have been left unaddressed. *Id.* at ¶ 6. That a crime occurred some time ago does not render it irrelevant. *Id.*

Wayland Clifton also confirms this standard among premises security experts. Wayland Clifton is a former police officer, administrator, and criminal justice system official who has been associated with law enforcement for 40+ years. *See Ex. H*, Clifton Affidavit, ¶ 2. Chief Clifton has been involved in numerous efforts to reduce crime at late night retail establishments, including a comprehensive robbery prevention strategy for late night retail businesses during his years as Police Chief in Gainesville, Florida. *Id.* at ¶ 2a. Through his vast experience, Chief Clifton has gained the understanding that all past crime at a company's stores, for all locations and for all available time periods, is relevant to determining a pattern of victimization and violent criminal incidence. *Id.* at ¶ 2.

While Allsup's experts may have a different standard, Plaintiff's experts confirm the relevance and admissibility of all of the notice evidence. The jury should not be provided an artificial sub-sample, but be given the opportunity to make its own decision regarding the relevance of the available data.

E. Allsup's Cannot Limit Plaintiff's Scope of Evidence While Simultaneously Relying on an Even Broader Geographic Scope of Data to Advance Its Own Theories.

Yet another basis to reject Allsup's attempts to create arbitrary cut-offs in the notice evidence based on time or place derives from Allsup's own reliance on national statistics, which it uses for misleading apples-to-oranges comparisons designed to minimize the appearance of crime at store #146. Allsup's can't have it both ways. If Allsup's is permitted to draw on averages from crime statistics across the entire United States, Plaintiff must in fairness be permitted to demonstrate the volume of crime that was consistently occurring at Allsup's stores in the limited area of New Mexico and Texas. It is a wholly appropriate inference, and one that goes to the heart of the *Delgado* standard, for the jury to hear evidence of the warning Allsup's

received from the sheer volume of serious injuries being suffered in its stores. If Allsup's wishes to compare those statistics to national trends, it shouldn't be permitted to limit Plaintiff to a small subsection, while comparing that small subsection against the world.

Allsup's cannot select a broad geographic scope to generate misleading statistical comparisons, but then deny Plaintiff the right to demonstrate how Allsup's operations spanning just two states reflected specific warning of danger and likelihood of serious injury.

II. THE FOUR CATEGORIES OF NOTICE EVIDENCE ALLSUP'S SEEKS TO EXCLUDE PASS THE RULE 11-403 BALANCING TEST WITH EASE.

The threshold inquiry in any dispute over the admissibility of evidence is whether the evidence is relevant. *Smith*, 214 F.3d at 1249. All relevant evidence is admissible, except as otherwise provided by constitution, statute, the Rules of Evidence or other rules adopted by the Supreme Court. Rule 11-402, NMRA 2003. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. Rule 11-401, NMRA 2003. Evidence which is offered to prove an issue in a case and which sheds light on that issue is material and should be admitted. *State v. Gutierrez*, 79 N.M. 732, 735 (Ct. App. 1968). Whatever naturally and logically tends to establish a fact in issue is relevant. *Wilson v. Hayner*, 98 N.M. 514, 515 (Ct. App. 1982). The determination of relevancy, as well as of materiality, rests largely within the discretion of the trial court. *Id.* As demonstrated above, this evidence is directly relevant to elements that plaintiff must prove under *Delgado*.

A. Simply Because Evidence is Damaging to One Party's Case Does Not Mean that its Probative Value is Substantially Outweighed By the Danger of Unfair Prejudice.

It is understandable why Allsup's does not want this notice evidence to come in – it demonstrates that Allsup's knew of the danger and utterly disregarded the welfare of its clerks.

However, the fact that the evidence is damaging to Allsup's defense is not a basis for exclusion. The purpose of Rule 11-403 "is not to guard against the danger of any prejudice whatever, but only against the danger of *unfair* prejudice. A statement is not unfairly prejudicial simply because it inculpates the defendant." *State v. Woodward*, 121 N.M. 1, 6 (1995) (emphasis in original) (citing 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 185, at 780 (John W. Strong ed., 4th ed. 1992) ("Prejudice does not simply mean damage to the opponent's cause.")). "Relevant evidence is inherently prejudicial; but it is only *unfair* prejudice, *substantially* outweighing probative value, which permits exclusion of relevant matter under [Rule 403]." *United States v. Sides*, 944 F.2d 1554, 1563 (10th Cir. 1991) (quoting *United States v. Naranjo*, 710 F.2d 1465, 1468-69 (10th Cir. 1983) (emphasis in original). Any doubt should be resolved in favor of admissibility. *State v. Stampley*, 1999-NMSC-27, ¶ 38.

The danger of unfair prejudice is created, not prevented, by any attempt to tamper with the truth. By limiting the available evidence, or creating fictional cut-offs in time or place, the Court injects false facts into the equation. Specifically, without information about the incidence of crime occurring in Texas stores, or during Allsup's early operations, the jury will infer that no crime was occurring. Unfair prejudice is surely created when false facts become evidence in the case. To avoid unfair prejudice to either party, the full factual presentation must be permitted, allowing the jurors the right to agree or disagree as to the value and proper weight to afford the available evidence.

III. STATEMENTS BY ALLSUP'S *NORTHRIVER* EXPERT AND ITS PROMISES TO THE BURDINE FAMILY AND EVA PELLISSIER ARE ADMISSIBLE ADMISSIONS OF A PARTY OPPONENT OR STATEMENTS AGAINST INTEREST.

Admissions of a party opponent and statements against interest are not hearsay. *See Rule 11-801(D)(2); 11-804(C)*.

Admissions of a party opponent are admissible where "the statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship… 11-801(D)(a, c, and d). This rule serves as the basis for admission of the statements made by Allsup's hired expert in the *Northriver* case, the statements made by the Allsup's District Manager who made promises to Eva Pellissier, and the representative, most probably Lonnie Allsup, who went to the Burdine home on Allsup's behalf following the death of Sarah Vineyard, and similarly promised women clerks would no longer be left working alone. That Allsup's denies the statements occurred is of no consequence. It is permitted to deny such in court, but because the statements were made by representatives of Allsup's, will be subject to cross-examination, and Allsup's will be in the courtroom, the statements are all admissible under 11-801(D)(2)(a, c, and d).

Where the declarant is unavailable, a non-hearsay statement against interest exception renders admissible statements which at the time of their making are so contrary to the declarant's pecuniary or proprietary interest…that a reasonable person would not have made them unless believing them to be true. *See* Rule 11-804(B)(3). Neither Mr. Epstein, the District Manager who spoke to Eva Pellissier, nor the representative at the Burdine home (if it was not Lonnie Allsup) are available to testify. Common law courts have long recognized the statement-against-interest exception to the hearsay rule. *State v. Gonzales*, 1999-NMSC-33, ¶ 8 (citing 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1455, at 323 (James H. Chadbourn rev. ed. 1974)). New Mexico has joined the majority of American jurisdictions in following the federal judiciary's lead by returning to a broad interpretation of the statement-against-interest

exception. *Gonzales*, ¶ 8 (citing DAVID F. BINDER, HEARSAY HANDBOOK § 29.02, at 516-18 (3d ed. 1991 & Supp. 1998)). The statements were against the pecuniary interest of Allsup's when made, thus all of the statements, additionally and as further described below, are admissible under Rule 11-801(B)(3).

Don Burdine

Sarah Vineyard was an Allsup's clerk working the graveyard shift alone when she was abducted, raped and beaten to death. Her brother, Don Burdine, recalls that after Sarah's death, an Allsup's representative came to the family's home, and he believes the person was Lonnie Allsup. *Ex. E,* Don Burdine Deposition, p. 8. This Allsup's representative stood in the Burdine living room and, with Don present, assured "my mother that – that they would not have women working the graveyard shifts again." *Ex. E*, p. 8. This statement was an admission by Allsup's regarding the danger *it knew* it could prevent. Don Burdine's recollection of this promise is admissible under Rule 11-804(B)(3) and 11-801(D)(2).

This statement, like the promise to Eva Pellissier, constitutes an admission by a party opponent. If it was indeed Lonnie Allsup, he, as president, is of course authorized to speak on behalf of Allsup's. Even if it was another representative of the company, the fact that this person had been sent by Allsup's to represent the company at the home of a recently slain clerk requires the conclusion that this person was acting pursuant to Allsup's authority.

Besides being liable for acts within the actual authority of an agent, a principal also is responsible for the acts of the agent when the principal has clothed the agent with the appearance of authority. *Romero v. Mervyn's*, 109 N.M. 249, 253 (N.M. 1989). "While actual authority is determined in light of the principal's 'manifestations of consent' to the agent, apparent authority arises from the principal's manifestations to third parties, *Restatement (Second) of Agency* § 8

(1958), and can be created by appointing a person to a position that carries with it generally recognized duties. *Id.* § 27 comment a." *Romero* at 253. In *Romero*, the plaintiff fell in defendant store, and a manager promised her the store would pay her medical bills. *Id.* at 251. The store then argued it was not bound by the manager's promise. *Id.* at 252. In *Romero*, the court noted that the plaintiff's claim of apparent authority was based on the defendant's placement of its agent in a position that would lead a reasonably prudent third party to believe the agent possessed authority to make promises on behalf of the defendant. *Id.* at 253, 254 (actual authority need not be proved by direct testimony but it can be inferred from attending circumstances).

The promise made to Don Burdine's family after his sister was slain was certainly sufficient to lead a third party to believe the agent possessed the authority to speak for Allsup's. Any reasonable person would think, as Don Burdine and his family did, that the person sent by Allsup's who was making promises that Allsup's would change their ways, had the authority to speak for Allsup's. Allsup's clearly considered the agents to have authority to speak for the corporation, since it sent them to make promises on the corporation's behalf. It cannot now argue that authority is uncertain. The promises made by Allsup's agent on its behalf can be considered admissions or statements against interest, but in either case, are admissible.

Eva Pellissier

Eva Pellissier was a clerk working alone on the graveyard shift at an Allsup's in Hobbs when the store was robbed, her throat was slit, and she was left for dead. While she was at the hospital, on what all thought was her deathbed, an Allsup's District Manager came and told Eva "it's going to be okay." *See Ex. F*, Eva Pellissier Deposition, p. 6. This Allsup's District Manager asked Eva what he could do. Although her throat had been sliced open, she still had a

bit of a voice left, and said "Promise me, just promise, me, you will never again ask a female to work the midnight shift alone." *Ex. F*, p. 6. The District Manager told her, "It will never happen again." *Id.* As with the promise to Don Burdine and his family, the promise to Eva Pellissier reflected Allsup's knowledge that it could make stores safer with a double staffing policy. The promise constituted an admission or a statement against interest by an Allsup's District Manager and is admissible as such.

Actual authority need not be proved by direct testimony but it can be inferred from attending circumstances." *Romero* at 254 (citing *Jameson v. First Saving Bank & Trust Co.*, 40 N.M. 133, 138-39 (1936). It does not matter that Ms. Pellissier cannot now remember the name of the declarant district manager. She remembers that it was a district manager with whom she had worked under for 2 years and was someone she had encountered approximately once per month. *Id.* at pp. 24-25. The district manager who made promises to Ms. Pellissier on behalf of Allsup's was an agent of Allsup's; thus his promises are attributable to Allsup's and are admissible either as admissions or statements against interest.

North River

Richard Epstein was hired by Allsup's to give testimony on its behalf in the *North River* litigation brought by Allsup's against various insurance interests. Mr. Epstein was undeniably Allsup's agent for purposes of the statements he made on their behalf within the context of the *Northriver* case. To this end, he wrote a report recommending various security measures and gave under oath testimony in deposition and at trial. This all occurred in the 1994-1995 time frame. Allsup's proceeded to profit from the statements of Mr. Epstein and the jury awarded Allsup's over $17 million, although Allsup's claims the company pocketed "only" $7 million. Yet despite the fact that Allsup's expert had outlined what it needed to do to make its stores

safer, and despite the fact that it now clearly had ample funds to implement these safety standards, in January 2002, Liz Garcia's store did not have cameras, did not have guards, there were no training materials or time spent explaining to her what to do in the event of a robbery, the store did not have functioning lighting or clear visibility, and did not have a bullet proof enclosure, all of which precautions had been identified by Mr. Epstein as the measures Allsup's should have been taking as early as 1995. Mr. Epstein's statements as found in testimony and his written expert report are not excluded on hearsay grounds because they meet the definition of an admission of a party opponent.

An additional basis for the admissibility of the Epstein report and testimony is that it is not offered for the truth, but merely to show notice. Like all evidence that goes to notice, hearsay concerns are inapplicable. 11-801 (C); *see also Kunz v. Utah Power & Light Co.*, 913 F.2d 553 (1st Cir. 1989) (holding admission of press release proper because it was not offered to prove the truth of the releases, but rather to show notice).

The admissions made in the course of the *North River* litigation are attributable to Allsup's through its hired agent. They are admissible non-hearsay, along with the promises made to the Burdines and Eva Pellissier.

V. WHILE ARTIFICIAL TEMPORAL OR GEOGRAPHIC LIMITATIONS CAN BE JUSTIFIED BY BURDEN IN DISCOVERY, THAT ANALYSIS DOES NOT APPLY TO ADMISSIBILITY WHERE PLAINTIFF HAS GATHERED EVIDENCE ON HER OWN.

The Court may have determined that it was unreasonable to expose Allsup's to the burden of having to produce in discovery criminal incidents occurring before 1990, or beyond the counties bordering Texas. However, where Plaintiff has discovered these incidents on her own, at her own expense, and through her own burden, there is no logic to denying the Plaintiff the right to inform the jury about the existence of those criminal incidents of warning to

Allsup's. The burden analysis ended with the close of discovery. When determining what notice evidence will be admitted, any arbitrary temporal or geographic limitations will mislead the jury and create the incorrect and opposite inference – that Allsup's had experienced no crime in other stores or at other times. This result would be *unfairly* prejudicial to plaintiff because it would be *untrue*. For the jury to be able to form a true and accurate picture of the history of violence at Allsup's stores, all known incidents must be admitted.

CONCLUSION

Allsup's four motions *in limine* must be denied. The evidence Allsup's seeks to keep out – the vast majority of facts proving Allsup's notice, knowledge, and foreseeability of danger – goes to the essence of this *Delgado* action. That Allsup's history of behavior has generated so much evidence against the company is not a basis to winnow it down. Plaintiff has gone to great effort to consolidate the data in summaries so that the presentation of facts at trial is not cumbersome or time consuming. Just because Allsup's conduct has generated substantial proof of its willful behavior is not a basis to limit the evidence. Willfulness is a matter of degree, so all evidence is relevant. Allsup's motions *in limine* must be denied.

McGinn, Carpenter, Montoya & Love, P.A.

MCML

Randi McGinn
Allegra Carpenter
A. Elicia Montoya
201 Broadway SE
Albuquerque, New Mexico 87102
p/ (505) 843-6161
f/ (505) 242-8227

I hereby certify that a copy of the foregoing pleading
was hand-delivered to all counsel of record
on February 1, 2008.

_____
Allegra Carpenter