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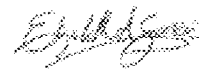

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

MACKENZIE JOHNSON,

Plaintiff-Appellee

v.

S. Ct. No. S-1-SC-39961
Ct. App. No. A-1-CA-39732
Dist. Ct. No. D-202-CV-2020-00121

Board of Education for the
Albuquerque Public Schools
and Mary Jane Eastin,

Defendants-Appellants

Appellant's Reply Brief

Court of Appeals Decision: May 23, 2023
Second Judicial District Court Decision: April 9, 2021
Hon. Benjamin Chavez

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ORAL ARGUMENT REQUESTED: Pursuant to Rule 12-319(B)(1) NMRA, Defendant-Appellant Board of Education for Albuquerque Public Schools requests oral arguments on this appeal.

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Statement of Compliance: This Reply Brief was prepared utilizing Word, Microsoft Office 16. The body of this Reply Brief is less than 15 pages and was prepared using 14-point Times New Roman, a proportional-spaced typeface. In addition, the body does not exceed 4,400 words. Defendant-Appellant certifies that this Petition complies with NMRA 12-305, 12-318 and 12-502.

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I. Introduction

This case presents a set of circumstances that should not have occurred in a classroom and Defendant-Appellant ("Appellant") does not condone or otherwise seek to minimize those actions. But the real question before the Court is: What was the appropriate legal mechanism for vindicating the rights of the student, Ms. Johnson, because of those events? Her attorneys selected law unequal to that task. First, they selected the New Mexico Tort Claims Act, a claim that was dismissed at the District Court and not pursued on appeal because it was clear that the necessary elements could not be proven. Second, her attorneys elected to file a claim under the New Mexico Human Rights Act (NMHRA). They did so knowing that there was not a single case in the entire history of the NMHRA that supported their claims related to events in a classroom setting. In their selection of law, the Plaintiff's attorneys did Ms. Johson a grave disservice. The NMHRA is the incorrect form of law for remedying the issues here. But, it is not the province of this Court to correct the errors of the attorneys or to create law that the Legislature did do.

While this Court cannot step into the shoes of the advocates or the Legislature, the Court can accomplish two important tasks: first, determine if the decision of the Court of Appeals was incorrect and if so, reverse it, and, secondly, determine if the District Court's application of the law was correct. These two

determinations are not the same as each court engaged in distinctly different approaches to addressing the same set of questions. The core legal matters have been extensively briefed. Appellant's summary argument is that the Court of Appeals was incorrect in its holding and should therefore be reversed because that court rejected Supreme Court precedent and review process without appropriate reason to do so. The Court of Appeals also failed to consider the traditional and historical application of statutory terms, and then, relied on extraneous facts and arbitrary definitions to render its incorrect decision. In contrast, the District Court understood that as upsetting as the facts were, the law selected by the Appellee does not support the claim made and properly dismissed the case. As those arguments have been briefed, this Reply will address only the arguments in Appellee's Answer Brief regarding the standard for motions to dismiss and the statutory interpretation process.

II. The Court of Appeals improperly considered allegations outside the pleadings in reaching its decision.

In the Brief-in-Chief, Appellant argues, and continues to argue here, that the Court of Appeals erred when relying on matters not included in the pleadings. BIC, p. 26-29. Specifically, the Court of Appeals determined that the Appellant offers its services to the community as a whole by providing to parents and other members of the community who are not enrolled students certain services outside the regular

educational program. *Johnson v. Brd. Of Education for Albuquerque Public Schools*, 2023-NMCA-069, ¶¶ 10, 11, and 13, --P.3d – (2023). This finding of the Court of Appeals is inconsistent with well-pled complaint facts and the position of the parties before the prior tribunals.

In their Answer Brief, Appellee indicates that the Appellant has misunderstood the applicable law because New Mexico is a notice pleading state so New Mexico Courts can rely on "widely recognized facts" when reaching their decision. Ans. p. 12. But, Appellee's complaint did not provide notice of this new argument now being placed before the Court and this is not the type of fact amenable to judicial notice. Judicial notice is limited to facts that are not subject to reasonable dispute and reserved for obvious facts, universally accepted as true. *See* New Mexico Rules of Evidence, Rule 11-201(B)(2023)*; State v. Valdez*, 2013-NMCA-016, 293 P.3d 909 *citing City of Aztec v. Gurule*, 2010-NMSC-006, ¶9, 147 N.M. 693, 228 P.3d 477 (taking judicial notice of a municipal ordinance); *State v. Yanez*, 1976-NMCA-073, 553 P.2d 252, 253 (taking judicial notice of the fact that morphine is an opium derivative.) Even the cases cited by the Appellee for this proposition bear out this position. *See State v. Ware*, 1993-NMCA-041, 850 P.2d 1042 (addressing judicial notice of the Rules of Criminal Procedure) and *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir. 1977) (addressing judicial notice of statutes, city charters and city ordinances). Accepting as fact Appellee's assertion that Appellant

provides services to the public as a whole is outside the bounds of judicial notice and is grounds for reversal.

This addition of facts should also fail for a secondary reason: it was not in Appellee's Complaint and it was never argued by the Appellee until the Reply Brief in the Court of Appeals. This Court should decline to accept the argument and it should be not have been accepted by the Court of Appeals. *See Kersey v. Hatch*, 2010-NMSC-020, 237 P.3d 683 (refusing to address an argument raised for the first time in a reply brief). This late-added argument was never preserved below, and Appellant was never given an opportunity to respond to these new claims put before the Court of Appeals, then relied upon by that Court in making their decision. Until then, Appellee did not argue that Appellant was open the public as a whole. See Rsp. Mtn. to Dimiss, RP 57-70. Rather, the Appellee's position had been: "APS provides and offers it services, facilities, accommodations, and goods to the public- the education of *all children of school age in the state*- as it is required to do pursuant to the New Mexico Constitution." COA BIC p. 20; see also COA BIC p. 12-14. Then, in its Reply to the Court of Appeals, Appellee changed the argument and, for the first time, alleged that Appellant provides its services to the "public at large." COA Resp. p. 9. This change is a critical point because it was this very changed "fact" that the Court of Appeals apparently relies upon in rendering its decision that Appellant falls within

the definition of a public accommodation which renders services to the "community as a whole." *Johnson*, 2023-NMCA-069, ¶11.

The standard for a motion to dismiss does test the law and assumes that the well-pled facts are true. *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150 N.M. 97. It nonetheless requires that the facts relied upon be pled. In this instance, the "facts" relied upon were not well pled and were not even part of Appellee's argument until the Reply Brief was filed with the Court of Appeals with no opportunity for Appellant to respond. The Court of Appeals reliance upon said "facts" was improper and requires reversal of their decision.

III. Appropriate statutory interpretation requires consideration of the traditional and historical application of statutory terms and existing caselaw.

The question of the facts used by the Court of Appeals is critical because the present appeal hinges on the meaning of "public accommodation," as defined by the NMHRA, which is a question of law and, as such, requires that phrase be construed in concert with legislative intent. *Baker v. Hedstrom*, 2013-NMSC-043. ¶10-11, 309 P.3d 1047, 1050 (*citations omitted*). The statute defines a public accommodation as "any establishment that provides or offers is services, facilities or goods to the public…" NMSA 1978, § 28-1-2(H)(2007). To determine if Appellant falls within this definition, the Court of Appeals applied its own version of a plain language interpretation to find that Appellant does fall within this

definition because it offers its services to the public as a whole. *Johnson*, 2023-NMCA-069, ¶11. In reaching its decision, the Court of Appeals did not even accept the arguments made by Appellee in the Brief-In-Chief before the Court but instead created its own set of arguments.[1] In contrast, the District Court correctly found that Appellant did not offer its services to the public at large. RP 173 ("… and with APS not being engaged in commerce and business activity with the public at large, APS and Eastin are not public accommodations under the NMHRA.").

In applying a plain language statutory interpretation, Courts cannot avoid or ignore legislative intent. Indeed, Appellee argues strenuously that this Court should consider the legislative intent behind the NMHRA. Appellant agrees. When the legislative intent is appropriately considered, as was done by this Court in *Regents* and by the District Court, the only reasoned conclusion would be to find that the legislature did not intend to include public schools within the framework of the NMHRA. *Human Rights Commission of New Mexico v. Board of Regents of*

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[1] In their Brief in Chief before the Court of Appeals, Appellee argues that a constitutionally mandated public school is distinct from a public university's selective program and therefore Regents does not apply (COA BIC p. 10), that the public accommodations definition is not limited to business or commercial enterprises (COA BIC p. 21) or that the District Court misapplied Regents (COA BIC p 26). None of these arguments were adopted by the Court of Appeals. Moreover, none were raised by the Appellee in the Answer Brief before this Court and therefore have been waived.

University of New Mexico College of Nursing, 1981-NMSC-026, 95 N.M. 576 ("*Regents*").

The Appellant's objection to the Court of Appeals' statutory interpretation process is that, though it first indicated it would apply only a plain language review, the Court of Appeals proceeded to do more than that by including new terms. This alone was an inappropriate expansion of the definition of a public accommodation and a contortion of the plain language of the law. *Johnson*, 2023-NMCA ¶ 8. Instead of adopting this inappropriate interpretation, in addition to examining the actual statutory language, this Court should also consider the traditional and historical application of the term "public accommodation" when conducting its analysis. In doing so, the Court will find that public schools, like universities, were never intended to be covered under the definition of public accommodation. *See Regents*, 1981-NMSC ¶ 14. Further, it is only in the context of a historical and traditional review that the importance of commercial activity becomes evident, particularly in light of the precedent established in *Elane Photography, LLC v. Willock*, 2012-NMCA-086, 284 P.3d 428 with a focus on operation of a business in public commerce. But the Appellee confuses the nature of Appellant's argument by insisting Appellant seeks to include commercial activity in the definition of a public accommodation. Instead, Appellant argues that consideration of commercial activity is a useful point of reference when

conducting a review of the traditional and historical definition of public accommodations and the entities covered thereunder. This leads to the determination that public schools are not covered entities under the definition of a public accommodation.

Even if this Court were to determine that public schools were public accommodations under the NMHRA definition, this Court would still need to address the application of *Regents* which plainly lays out an exception for the "manner and method of administering its academic program." *Regents*, 1981-NMSA ¶16. Appellee acknowledges, and does so in contrast to their own position, "[t]o be clear, Plaintiff … does not argue that the NMHRA covers all conduct by a teacher that could be considered discriminatory while teaching a lesson." COA Reply p. 12. This is an important acknowledgement because it recognizes that the academic exception established in *Regents* plays a vital role in ensuring continued academic and instructional freedom covering critical and necessary conversations that occur every day in classrooms. What this Court should not do is abrogate the clearly established academic exception in *Regents* in favor of a creating a new and hazy standard that calls on the courts to assess the particular discriminatory actions alleged rather than the context and circumstances under which they occur. Following the limitation mandates of *Regents* and *Elane Photography*, properly

construing those opinions narrowly is accomplished only when the *Regents* exception for academic programs *is applied to academic programs*.

Discriminatory conduct like use of racist terms is offensive and should not ever occur, but such conduct is not necessarily illegal and cognizable. It is only the circumstances under which they occur that leads to valid claims under the NMHRA or any other law. For the purposes of identifying the appropriate legal mechanism, the focus is not on the actions that occurred, as Appellee repeatedly argues, but rather the context in which they occurred. Lawsuits are filed against individuals who perform their jobs badly or even unacceptably, but that does not change the nature of the context in which the bad acts occurred. *See Risk Management Div., Dept. of Finance and Administration v. McBrayer*, 2000-NMCA-104, 14 P.3d 43 (Action by student brutally attacked, sexually assaulted and tortured by professor survived summary judgment as the court determined the actions were within the scope of duties).

In the current context, then, focusing on the comments made by the teacher, as bad and unacceptable as they were, is the incorrect focus. Instead, the circumstances under which they occur is critical to determining whether the NMHRA applies. Here, the traditional and historical application of the public accommodation definition excludes public schools for the exact same reasons universities were excluded in *Regents*: they were never public accommodations in

the "ordinary and usual sense of the words." *Regents*, 1981-NMSC ¶14. Moreover, even if public schools were public accommodations, the exception in *Regents* for academic programs applies in the context of this case as well because the circumstances clearly implicate the academic setting. We are not arguing that Appellant as a whole is exempt from the NMHRA, but rather that because of the specific activity that was occurring, a classroom lesson, as alleged in the complaint, this claim is exempted from the NMHRA.

This position does not result in a wholesale freedom for teachers to discriminate against students while in the classroom as Appellee argues. As stated herein, Appellant is not condoning the actions in this case. Instead, the laws designed specifically to guide, protect and address violations occurring within this context should be properly applied. *See Serna v. Portales Municipal Schools*, 499 F.2d 1147 (10th Cir. 1974) (Claims for declaratory judgment and injunctive relief, constitutional claims and Title VI alleging school was discriminating against Spanish surnamed students were upheld and Court fashioned a plan of provide meaningful education). Other forms of law, that directly address classroom events, have been designed, revised, amended, implemented, and interpreted over decades to address these very circumstances. These laws would have been more appropriate than the selection of the NMHRA. Never in its entire history has the NMHRA been used for a claim over events occurring in the classroom, particularly after *Regents*

undoubtedly created an exception for academic settings. The disservice to Ms. Johnson as a result of her counsel's decisions is immeasurable for sure. But this Court should not change the law to address the shortcomings of counsel by creating a cause of action under the NMHRA.

Finally, the most recent change in the NMHRA (which post-date Appellee's claim) is not determinative of the Legislature's intent in this matter. Indeed, it could be used to support either side of this argument. Either the Legislature wanted to "remove any ambiguity" about whether the NMHRA applied to public schools as Appellee argues (Ans. p. 16), or the Legislature recognized that up to that point it had not applied to the public school classrooms and wanted to change the law. Either explanation is plausible since there is no official legislative record from which to glean legislative intent. Notwithstanding, the application to this case minimal, if at all, since the new language did not exist at the inception of this case.

IV. Conclusion

Appellant request this Court reverse the decision of the Court of Appeals, uphold the ruling of the District Court and reaffirm its holding in *Regents* creating an exception to the New Mexico Human Rights Act for public schools in the manner and method of administering their academic program.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November 2023, the foregoing was electronically filed with the Court and served on all counsel of record via the tylerhost system.

/s/_Roxie P. Rawls-De Santiago ____
Roxie P. Rawls-De Santiago