Filed
Supreme Court of New Mexico
8/23/2023 5:22 PM
Office of the Clerk

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

JOHN MARTENS and PAT MARTENS, Individually, and as Co-Personal Representatives of the ESTATE of Victoria Martens, Plaintiffs/Respondents, v. CITY OF ALBUQUERQUE, Defendant/Petitioner.	)	S-1-SC-39826 A-1-CA-39614 D-202- CV-2017-05905

PLAINTIFF'S/RESPONDENT'S RESPONSE BRIEF

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ORAL ARGUMENT IS REQUESTED

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INTRODUCTION & RESPONSE TO SUMMARY OF FACTS

The City has complicated the single legal issue in this case, raised facts in its briefing that are not relevant and presented arguments that are not properly preserved. The legal issue before this court is very narrow and simple: Does the Plaintiffs' written Tort Claims Notice (TCN or "Notice") sent to the City of Albuquerque set forth the "time, place and circumstance of the loss or injury" sufficient to put the City on proper notice under the law that they could be subject to a lawsuit arising out of negligence leading up to the death of Victoria Martens ("V.M.)?

The current claims against the City are for negligence and wrongful death. [RP 340-347]. The relevant facts pertaining to the issue on appeal are nothing more than 1) the actual contents of the written Notice sent to the City on behalf of the Estate of Victoria Martens and 2) the City's response to the Estate's written Notice acknowledging the claim. The City never preserved an objection below to the district court findings that the Notice was sent before the expiration of the ninety-day time limit by the proper party or that it was properly served on the correct parties. Like the Court of Appeals, this Court need only review the written Notice in the record [4 RP 853-855], the City's response to the Notice in the record [4 RP 856] and apply the appropriate law to the Notice.

In applying the law, the City has conflated the two parallel but very different lines of reasoning that stem from the notice requirements in the Tort Claims Act (TCA), namely, the one for written notice contained in subsection (A) of NMSA §41-4-16 and the one for actual notice contained in subsection (B) of the statute. Both the district court and the City have imposed the greater requirements that come with subsection (B)'s actual notice clause, and the Court of Appeals corrected that error and applied the appropriate standard that stems from subsection (A) involving written notice. This Court should respectfully quash the Writ, or alternatively affirm the Court of Appeals and find that when dealing with written notice under subsection (A), nothing additional is required in the written notice beyond what is stated in the statute.

I. THE PETITIONER HAS FAILED TO PRESERVE NUMEROUS OBJECTIONS TO "NOTICE DEFICIENCIES" AND THEREFORE WAIVED THESE ISSUES

"In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon." *State v. Montoya*, 2015-NMSC-010, ¶ 45, 345 P.3d 1056 (internal quotation marks and citation omitted). The requirement of preservation serves the twin purposes of allowing the trial court an opportunity to correct errors and creating a record for appeal. *See Diversey Corp. v. Chem-Source Corp., 1998-NMCA-112,¶ 38 125 N.M. 748, 965 P.2d 332, cause dismissed sub nom.*

Diversey Corp. v. Chemsource Corp., 129 N.M. 386, 9 P.3d 69 (1998). It also serves the purpose of allowing the opponent of an objection to meet the objection with either evidence or argument. *See State v. Gomez,* 1997–NMSC–006, ¶ 29, 122 N.M. 777, 932 P.2d 1 (indicating that one of the purposes of the preservation rule is to give the opposing party a fair opportunity to respond to the objection) *See* Rule 12-321(A) NMRA ("To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked.").

The city devotes multiple pages of its brief discussing alleged "notice deficiencies" that have never been fairly invoked in the district court or appealed to the Court of Appeals and are not relevant to the issue on appeal. First, Petitioner claims that Pat Martens knew of Michelle Martens' ex-boyfriend attempting to kiss V.M. but did not report it to police. *Brief at pg. 10, ¶ 22.* This has nothing to do with whether the TCN was sufficient under New Mexico law to put the City on notice of future litigation.

Next, Petitioner claims that the Notice was submitted by "Michael Martens" as Personal Representative on behalf of the Estate of Victoria Martens, not "John and Pat Martens" as personal representatives. *Id. at pg. 13.* This is another non-issue that was not preserved below. The claim was brought by the Personal Representative of the Estate. The individual who serves in that role can be substituted for various reasons and the rules contemplate that. *See Rule 1-025(B) (Rule allowing for*

substitution of parties). Even if the Court considered this argument properly preserved and relevant, which it was not, the City's complaints still fail on the merits since Michael Martens was the Personal Representative at the time the TCN was sent, then he was substituted by order of a district court. This Court can take judicial notice of D-202-CV-2016-05707 where, on October 25, 2016, Michael Martens was appointed as personal representative of the estate of V.M. He timely submitted the TCN on November 17, 2016. Then, on October 13, 2017, the district court entered an order granting his request to withdraw as personal representative in favor of John and Pat Martens. As such, this claim by petitioner that the Notice came from "Michael" instead of "John and Pat" does not support a "deficiency" in the TCN because it came from the proper Personal Representative of the Estate of Victoria Martens. This Court, however, need not reach this argument on the merits because it was never properly preserved below by Petitioner.

Finally, the petitioner claims that the mayor was not served and that the notice was "undated". *Brief at 14.* The City cannot deny that the TCN was timely and that it was sent to proper parties. The City acknowledged receipt and investigated the claim in a written response to the TCN. [4 RP 856] The district court order provides that the "notice was served November 17, 2016, eighty-five days after August 24, 2016." [4 RP 949] (*June 29, 2020 Order at FN2).* The district court order explicitly finds "timeliness is not the issue." *Id. at 951.* Petitioner never objected to these

findings to preserve this argument on appeal. As such, the Court of Appeals found that "The parties do not appear to dispute that the Notice was sent within ninety days of V.M. 's death." *Martens v. City of Albuquerque*, 2023-NMCA-037, ¶ 7, 531 P.3d 607, 611. Also, the petitioner's unpreserved argument that the Notice was not submitted 90 days of the CYFD March 28, 2016 report is nonsensical since the injury, VM's brutal sexual assault and murder, had not occurred until four months later on August 24, 2016. There was not even an "Estate of Victoria Martens" at that time to make a claim. Had the City properly investigated that March 28, 2016 report as they are required by statute, there reasonably would not have been a murder because Victoria would have been protected from her mother's boyfriends attempted sexual assaults. That is what Plaintiffs' complaint is regarding. This Court should not fall for the petitioner's red herring arguments that are not properly preserved.

"[O]n appeal, the party must specifically point out where, in the record, the party invoked the court's ruling on the issue." *Crutchfield v. N.M. Dep't of Taxation & Revenue*, 2005-NMCA-022, ¶ 14, 137 N.M. 26, 106 P.3d 1273. Here, the City fails to do that as to any of these arguments. If a party fails to preserve its issue for appeal, the only way the court can determine the matter is under a fundamental error review. Courts are only to apply the doctrine of fundamental error in civil cases "under the most extraordinary and limited circumstances" *Estate of Gutierrez ex rel. Jaramillo v. Meteor Monument, L.L.C.*, 2012-NMSC-004, ¶¶ 32-33, 274 P.3d 97. "This Court

has no duty to review an argument that is not adequately developed.". *Corona v. Corona,* 2014-NMCA-071, ¶ 28, 329 P.3d 701. These arguments of alleged "notice deficiencies" have not been properly preserved below and should therefore not be considered by the Court. Moreover, they are irrelevant to the narrow issue on appeal that the City has so convoluted.

II. THE COURT OF APPEALS CORRECTLY FOUND THE WRITTEN NOTICE COMPLIED WITH § 41-4-16(A) OF THE NMTCA

The TCA's notice provision states:

> A. Every person who claims damages from the state or any local public body under the Tort Claims Act shall cause to be presented to the risk management division for claims against the state, the mayor of the municipality for claims against the municipality, ... ***within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act, a written notice stating the time, place and circumstances of the loss or injury***.

NMSA § 41–4–16(A) (emphasis added).

If an injured party fails to meet the written notice requirement, they still may have a chance for recovery if the "governmental entity had actual notice of the occurrence." NMSA 1978, §41-4-16 (B). Most of the cases published on this topic deal with the latter situation, where a party has failed to give the written notice and must rely on proving the public body actually knew about the occurrence. This standard is harder to meet, and for good reason because when dealing with actual

notice in subsection (B), the injured party should have given the written notice contemplated by the statute, but failed to do so.

The TCA's notice requirements resemble constructive versus actual notice where a party can avoid having to prove actual notice to an opponent if certain formal requirements, like recording or publication, are met or can go forward with a lawsuit even if the served party threw the summons in the trash. *See Romero v. Sanchez*, 1971-NMSC-l 92,125,492 P.2d 140; *Town of Hurley v. New Mexico Municipal Boundary Commission*, 1980-NMSC-083, 116-18, 614 P2d 18. Likewise, here, it follows from the plain language of NMSA 1978, §41-4-16 (A) that a public body could throw a written notice away unopened and still have been given sufficient notice pursuant to the Act.

In this case, the only issue for appeal is Plaintiffs' written Notice and the sufficiency of that Notice, not whether the City had actual notice. Cite Regarding that written Notice, the only issue appealed was whether that written Notice provided the "time, place and circumstances of the loss or injury" as required in subsection (A) of the statute governing *written* notice. *Paragraph 1 COA.* Under the TCA, the burden is on the City to prove that the notice-of-claim requirement was not met. *Cummings v. Board of Regents of University of New Mexico*, 2018, 444 P.3d 1058, certiorari denied 2019 WL 11706056.

A. The Notice Contained the Time, Place and Circumstance of the Loss as Required by the Plain Language of the Statute

The City presents the issue as "[w]hether a written notice that references a different time, place, and circumstance that allegedly results in loss or injury than what was plead in a lawsuit against the governmental entity complies with the Section 41-4-16 TCA notice requirement." *Petition at 2.* This misconstrues the language of the entire Notice and the City's response to the Notice. There was no "different" time, place or circumstance of injury as to the City negligence noticed. The district court erred in finding that "[t]he claim Plaintiffs gave written notice of is a claim that the City breached its duty to monitor Fabian Gonzales on probation." [4 RP 951] (June 29, 2020 order at pg. 6). Based on that false premise, the district court found that "nowhere is it alleged in the Complaint that Fabian Gonzales was on probation or that the City had a duty to supervise persons on probation." *Id.* The district court said, "[t]he reason the written notice fails is that it does not give notice of the claims brought in this lawsuit." *February 8, 2021 order at 3.* The City builds on that same false premise in its brief before this Court by arguing how the Complaint "contains no allegations that Fabian Gonzales was in the City of Albuquerque's custody and control; or allegations that the City had a legal duty to supervise him prior to the date of V.M.'s death." *Brief at 16.* Looking at the written Notice, however, it is clear that the Notice did not allege that type of conduct as to the City, it alleged general negligence leading up to her death against the City and

negligence to supervise Fabian Gonzales as to the State, Probation, CYFD and the Second Judicial District Court. The failure to monitor Fabian Gonzales was explicitly directed to the other entities on the notice in the subject line and not directed to the City of Albuquerque:

> Re: Incident on or about, in the City of Albuquerque, County of Bernalillo, State of New Mexico, in which the minor child Victoria Martens suffered serious injuries, and subsequently death, after the New Mexico Corrections Department Probation and Parole Division, located at 111 Gold Ave. SE, Albuquerque, NM 87102, the New Mexico Children, Youth and Families Department, located at 1031 Lamberton Pl. NE, Albuquerque, New Mexico 87107, and the Second Judicial District Court in Bernalillo County, located at 400 Lomas Blvd. NW, Albuquerque, New Mexico 87102, failed to properly monitor her alleged killer, Fabian Gonzales, on probation; this is the Notice of Claims pursuant to NMSA 1978, § 41-4-16. (1989 Repl.) of New Mexico Tort Claims Act.

[4 RP 853]

Elsewhere in the written Notice, it notified the City that claims against it were "**arising out of the incident…on August 24, 2016, when [two individuals] drugged, sexually assaulted, tortured and killed 10 year old Victoria Martens, after the …city of Albuquerque generally engaged in tortious conduct…leading to injury and death of Victoria Martens…**". The notice went on to specify that the "**claims may be brought regarding the negligence of the …City of Albuquerque, which resulted in the death of Victoria Martens on or about August 24, 2016.**" This is demonstrated by looking at the entire Notice:

Please take notice that Michael Martens, Wrongful Death Personal Representative of the Estate of Victoria Martens, may make a claim or claims against the County of Bernalillo, and all affected departments, agencies and divisions within the State, County, and City arising out of the incident involving an accident which took place on August 24, 2016, when Fabian Gonzales, along with two others (Michelle Martens and Jessica Kelley), drugged, sexually assaulted, tortured and killed 10-year-old Victoria Martens, after the State of New Mexico, County of Bernalillo, and City of Albuquerque generally engaged in tortious conduct and circumstances leading to injury and death of Victoria Martens, including failure to properly monitor Fabian Gonzales on probation.

Notice is provided that claims may be brought regarding the negligence of the State of New Mexico, County of Bernalillo, and City of Albuquerque, which resulted in the death of Victoria Martens on or about August 24, 2016.

Sincerely,

Jeremy M. Worley
Sanders, Bruin, Coll & Worley, P.A.

The key mistake by the district court was limiting its review to one sentence in the written Notice that did not ever reference the City, instead of looking at the entire Notice, and specifically looking at where it referenced the City's general negligence and claims for "tortious conduct" leading to the death of Victoria Martens.

As if that was not sufficient evidence that the City was given proper written Notice, in this case, in this case, the City's response to the written Notice also demonstrates that the written Notice was sufficient. The City's response demonstrates that the City knew the claim against it was not pertaining to a failure to monitor probationer Fabian Gonzales and that it was pertaining to the

Albuquerque Police Department's (APD)'s investigative policies and procedures, which is what the City claimed they investigated in its response to the Notice on December 15, 2016. [4 RP 856] The City responded, stating that the City does not provide coverage for the claims asserted against the State of New Mexico, Probation and Parole, CYFD or the Second Judicial District Court, but **"[r]egarding the claim against the City of Albuquerque, it was determined that subsequent to a murder investigation by the Albuquerque Police Department, the manner in which the crime was investigated was appropriate and in accordance with departmental polices and procedures.**" *See* [4 RP 856] and below:

December 15, 2016

Jeremy M. Worley
Sanders, Bruin, Coll & Worley, P.A.
POB 550
Roswell, NM 88202-0550

VIA U.S. MAIL

RE: CLAIM NUMBER: 17-03306
CLAIMANT: Estate of Victoria Martens
INCIDENT DATE: 08/24/2016

Dear Mr. Worley:

The New Mexico Tort Claims Act provides that the City is responsible for injuries or damages to property only when those injuries or damage are caused by City negligence that can be demonstrated by substantiated facts.

Please be advised that the City of Albuquerque does not provide coverage for the New Mexico Corrections Department, Probation and Parole Division, nor the New Mexico Children Youth and Families Department, or the Second Judicial District Court, so we can't accept any claim on their behalf.

Regarding the claim against the City of Albuquerque, it was determined that subsequent to a murder investigation by the Albuquerque Police Department, the manner in which the crime was investigated was appropriate and in accordance with departmental polices and procedures.

Based on these circumstances and in the absence of any verifiable City negligence, there is no legal or factual basis by which your client's claim can be honored, and we are obliged to respectfully deny it.

Sincerely,

William F. Soblen
Senior Tort Claims Adjuster

The City, therefore knew the claim against it was not concerning a failure to monitor Fabian Gonzales and that it instead involved whether APD's investigation involving the death of Victoria Martens was in accordance with departmental policies and procedures. That is what the current complaint alleges—that the City was negligent because it failed to properly investigate, as required by law, information prior to her death that was provided to APD alleging she was being sexually assaulted by one of her mother's boyfriends.

The Notice states the time of the injury—that is when Victoria died, on August 24, 2016. The Notice states the place of the injury—in the city of Albuquerque, county of Bernalillo, State of New Mexico. The Notice states the circumstances of the loss or injury—the negligence of the city leading up to the drugging, sexual assault, torture and killing of 10-year-old Victoria Martens. The district court's order acknowledged that the claim "states the date of the incident—the murder of Victoria—and describes the circumstances of her death…" [4 RP 950] The district court also said the Notice "states Victoria was drugged, sexually assaulted, tortured and killed [by one of her mother's boyfriends]". [4 RP 949] The district court determined that the claim was not "simulated" and that portions of the claim have "survived a duty and sovereign immunity waiver analysis". [4 RP 950] The court found that "the complaint adequately pleads a breach of the duty imposed on local law enforcement…to investigate reports of child abuse that are transmitted by

CYFD, and to ensure that immediate steps are taken to protect the welfare of the abused child…[and] that sovereign immunity for such claims is waived." [4 RP 951]

The City's argument relies on the false premise that the Notice states a different time, place and circumstance than what the City was on notice of, when it does not. Had the written Notice *only* given notice that the City breached its duty to monitor Fabian Gonzales on probation, and did not include allegations that the City engaged in general negligence leading up to the death of V.M., and the City had not responded and acknowledged it knew the claim was about APD's violation of investigative policies and procedures, the City would have a better argument. However, the district court completely ignored the Notice as to the City, ingored the City's response, and instead only cited the sentence in the notice that was provided to other entities.

The Court of appeals reviewed that decision *de novo* and in so doing, looked at the plain language of the TCA requirements, the legislative intent of the Act, the entire body of the submitted tort claims notice and the city's response to the tort claims notice. The Court of Appeals also analyzed the New Mexico caselaw interpreting the purpose of the TCA notice and the sufficiency of written and actual notice to find that the Plaintiff's written Notice "provided the City with the information necessary to investigate its involvement with the circumstances leading

to V.M.'s injuries and death" and that it therefore satisfied the requirements of Section 41-4-16(A).

The notice "specifically alleged negligence." *Martens*, 2023-NMCA-037, ¶ 7, 531 P.3d 607, 611. It did not allege a property claim, a civil rights violation or a battery or other intentional tort violation, it alleged a claim of negligence against the City. The notice also provided that the specific negligence claim against the city was pertaining to city negligence ***before*** V.M.'s murder, not after. Despite the Notice identifying City negligence that occurred before the murder, the city failed to investigate its negligence before the murder, only investigating possible negligence that occurred after the murder (i.e. APD's investigation of the actual murder). That is the fault of the city. The Notice did not say it was for negligence occurring after the murder, it said the opposite. This goes back to the point that the City could have thrown the written Notice in the trash and not investigated, or it could have, like it appears here, investigated APD negligence *after* the murder instead of *before* like the notice said, but because there was written Notice of the time, place and circumstances of the injury, the Notice requirements in the statute are met.

B. The TCA Does Not Require More Specificity for Written Notice, and Raising the Requirements Beyond the Language of the Statute Would Lead to Injustice, Absurdity and Contradiction of the Notice Pleading Standard in Civil Complaints

In construing a statute, courts first "look first to the plain meaning of the statute's words, and we construe the provisions of the Act together to produce a harmonious

whole." *Grine v. Peabody Nat. Res., 2006-NMSC-031,* ¶17 *140 N.M. 30, 139 P.3d 190* (internal quotation marks and citation omitted). We do not read a statute in such a way that "would lead to injustice, absurdity, or contradiction." *Otero v. State,* 105 N.M. 731, 733, 737 P.2d 90, 92 (Ct.App.1987).

The plain words of this statute require a written notice to contain nothing more than the "time, place and circumstances of the loss or injury." As the Court of appeals held in paragraph 6 of its opinion, the written notice provision requires nothing more of a claimant seeking damages under the TCA. *See Godwin v. Mem'l Med. Ctr.*, 2001-NMCA-033, ¶ 80, 130 N.M. 434, 25 P.3d 273 (Pickard, J., concurring in part and dissenting in part) ("The written notice required by Section 41-4-16(A) is limited to the time, place, and circumstances of the loss or injury. Nothing more is required.").

Petitioner cites fault in the Notice because it "does not specifically reference any other allegations upon which Respondents claim Petitioner was negligent…any City of Albuquerque employee…any witnesses to the alleged tortious conduct." *Petition for Writ of Certiorari at pg. 10.* In its brief, the City complains that the written Notice did not mention "any City of Albuquerque employee...," *Brief at 25,* and demands that the written Notice "should have, at a minimum, cited to one or more of the waiver provisions…" in the statute. *Brief at 27.* The City demands that the written Notice must also "describe the [r]elevant [f]acts of the [n]egligence

[c]laims". *Brief at 30.* Petitioner is raising the standard in a way that would result in an injustice, absurdity and contradiction. It's argument for a higher standard is based on an analysis of *actual* notice cases that are not on point in this *written* notice case.

The City relies, for example on *Cummings,* a case that had a "notice affidavit" submitted by Plaintiff. What distinguishes *Cummings* is that the appellate court did not base its decision on an analysis of whether the written affidavit satisfied the Notice requirements in Subsection (A) of the TCA because in that case, there was already a pending class action lawsuit against defendant that provided them with *actual* notice. The affidavit only further advised the defendant that Plaintiff was a member of that same class the defendant had actual notice of. The Court of Appeals in this case pointed out this distinction:

> The *Cummings* Court did not consider whether or decide that a written tort claim notice must specifically identify a claim or meet a factual threshold that would permit an investigation. *Id.* ¶ 21. Instead, this Court held that the already-filed class action complaint provided notice and the affidavit alerted the defendants that the plaintiffs intended to make claims. *Id.* ¶ 20.

Martens, 2023-NMCA-037 ¶ *9.* The Court of Appeals in this case correctly determined that because this case did not have actual notice of a class action to provide actual notice, or a completed investigation to provide actual notice, the written Notice had to comply with the written notice standard in subsection (A) of the statute. *Id. ("*The present case does not involve an existing class action or a completed investigation, and the Notice must therefore meet the statutory

requirements on its own terms. We have concluded that it does." *Id.*). The City's brief brushes over the fact that *Cummings* is an **actual** notice case, but the City does have to admit it. *See Page 20 of Brief (Cummings "found that this evidence that UNMH* ***already had notice*** *to investigate the merits..." emphasis added).*

The City misconstrues the Court of Appeals' discussion of the other actual notice cases. The brief claims that the "Court of Appeals concluded that the Ferguson case was irrelevant in determining the sufficiency of the notice." *Brief at 21, citing paragraph 8 of Court of Appeals opinion.* To the contrary, the Court of Appeals said that *Cummings, Ferguson*[1] and *Marrujo*[2] "do not address the degree to which a claim must be specified in order for a written notice to satisfy Section 41-4-16(A)." *Martens v. City of Albuquerque*, 2023-NMCA-037, ¶ 8, 531 P.3d 607, 610. That is an accurate statement about those three cases. *Cummings* addressed the fact that actual notice was provided by the pending class action, and Plaintiff's "notice affidavit" in that case provided additional notice that Plaintiffs were in fact included in that class that gave defendants actual notice of Plaintiff's claims. *Ferguson* did not address the sufficiency of the written notice section of the TCA, let alone require more than the "time, place and circumstances of the loss or injury" to be included in

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[1] *Ferguson v. N.M. State Highway Comm'n*, 1982-NMCA-180, 99 N.M. 194, 656 P.2d 244.

[2] *Marrujo v. New Mexico State Highway Transp. Dep't, 1994-NMSC-116, 118 N.M. 753, 887 P.2d 747*

a *written* notice. Instead, *Ferguson* discussed the legislative purpose, which the Court of Appeals considered and found that "had the Legislature intended for the notice to refer to a specific waiver or incorporate facts to show a waiver, it could have so required." *Martens v. City of Albuquerque*, 2023-NMCA-037, ¶ 11, 531 P.3d 607, 611. Indeed, the Court of Appeals quoted to *Ferguson* in paragraph 5 of its opinion when discussing the purpose of the legislature in enacting the TCA.

The *Marrujo* case was another actual notice case that is inapposite. *Marrujo* involved a traffic accident resulting in death. The issue was whether the accident reports by the investigating agency provided actual notice of the wrongful death claim. As the Court of Appeals found, "The *Marrujo* Court considered the sufficiency of an actual notice claim and not the requirements for written notice under Section 41-4-16(A)." *Martens v. City of Albuquerque*, 2023-NMCA-037, ¶ 8, 531 P.3d 607, 610, cert. granted (May 31, 2023). Yet still, the City strains a comparison of the accident reports in *Marrujo* to the written Notice provided by Plaintiffs in this case. Of course, a police report is going to provide facts and witness identities and much more details. That is the nature of a police report. However, the Court of Appeals correctly found in *Marrujo* that the reports could not be relied on to demonstrate *actual notice* in subsection (B) of the TCA because they offered no suggestion that a tort had occurred or that a lawsuit was impending so there "was nothing in the reports to distinguish…from the many other traffic fatalities in New

Mexico…" *Marrujo v. New Mexico State Highway Transp. Dep't, 1994-NMSC-116,¶ 25 118 N.M. 753, 887 P.2d 747.* In this case, Plaintiffs are not relying on a police report to demonstrate that the City was on "actual notice" because Plaintiffs complied with Section (A) of the TCA and provided timely written notice of a potential claim.

In further support of its argument that more is required in the written Notice beyond the time, place and circumstances of injury, the City stretches an argument even further. It relies on an innocuous phrase in a case that was not addressing sufficiency of a tort claims Notice or even actual notice. In *Maestas v. Zager,* 2007-NMSC-003 this Court addressed when a claim accrues for purposes of the 90 day time limit. This Court in *Maestas* quoted a Court of Appeals case that said the notice requirement under the TCA "accrues when the plaintiff knows or should know the *relevant facts…*" *Brief at 28.* The City reasons that since the language "references that a claimant's knowledge of relevant facts to establish a legal cause of action triggers the accrual of the notice requirement in Section 41-4-16" a written Notice must also contain other specific facts and not just the time, place and circumstance of injury. *See Brief at 29.* However, *Maestas* and the case it was citing were in the context of the *time* for a claimant to provide notice, not the *sufficiency* of what is required in the written Notice. *Maestas* also includes language that the accrual occurs "once a plaintiff has ***discovered his or her injury and the cause of that***

injury" and when the plaintiff "***knows or should have reasonably known of the general nature and extent of an injury***". *Maestas v. Zager*, 2007-NMSC-003, ¶ 22, 141 N.M. 154, 161, 152 P.3d 141, 148. Following the City's reasoning, because the *Maestas* Court used the verbiage 'discovery of an injury and a cause of that injury', that is all that is required in a written TCN. Indeed, Plaintiffs included a "general nature" and extent of injury in its written Notice, so either way, the City's argument does not support the result it wants. The bottom line is that had the Legislature intended for the written notice to refer to specific facts supporting a specific legal theory, it could have so required. *See Velasquez v. Regents of N. N.M. Coll.*, 2021-NMCA-007, ¶ 85, 484 P.3d 970 (noting that the Legislature "could have easily" included words to achieve a particular effect had it so intended that effect). Instead, the Legislature required that claimants present written notice within ninety days of the occurrence of a claim that gives rise to a TCA claim and that written notice states "the time, place and circumstances of the loss or injury." Section 41-4-16(A). Nothing more is required. The statute does not require an injured citizen to list specific allegations supporting a claim, a specific employee, or witnesses before they can pursue a civil case against a negligent governmental agency. It does not even require specific causes of action or legal theories. All that is required is the "time, place and circumstances of the loss or injury." To the extent the City is asking this Court to create new law that requires specific facts beyond a time, place and

circumstance of injury, a listing of witnesses, exact citations to waiver provisions, or specific causes of action to be identified in a 90-day tort claims notice, the Court should reject such an invitation. A TCN cannot be held to a specificity requirement higher than that of a civil complaint.

Oddly, the City complains about this notice being both too vague and general and also that the notice was too specific in listing a failure to monitor probationer Fabian Gonzales. *See Page 10 of Petition ("the vague and general nature of this notice makes it indistinguishable…"; Compare to Page 14 of Brief claiming the notice "only provided notice of Fabian Gonzales' conduct.").* As already demonstrated, the Notice stated general negligence against the City and specific failure to monitor Fabian Gonzales against three other public bodies. However, this demonstrates the problem with requiring highly particularized and specific facts in a written Notice. It allows governmental agencies to wiggle out of any suit that is not exactly what is stated in the Notice, when parties have not conducted discovery or sometimes even contacted an attorney within 90 days of a tragedy.

To demonstrate just why a TCN does not require specific relevant facts or a specific citation to a subsection of a waiver of immunity, it is important to look at New Mexico law on what is required to state a claim in a civil complaint. A TCN is required to be submitted within 90 days of a tragic incident. A civil complaint must be filed within a 2-year statute of limitations. A TCN cannot possibly or logically

be expected to be more precise than that of a civil complaint filed 2 years later. New Mexico is a notice pleading state and does not require specific facts or exact theories of liability to state a claim, even in a complaint. It only requires general allegations. The reason for this is "with the contemplation that the facts would be developed during discovery proceedings …." *See Zamora v. St. Vincent Hosp.*, 2014-NMSC-035, ¶ 10, 335 P.3d 1243, 1246 (quoting *Malone v. Swift Fresh Meats Co.,* 1978–NMSC–007, ¶ 10, 91 N.M. 359, 574 P.2d 283. In *Zamora,* the Court highlighted the "seventy-five years, this Court has maintained our state's notice pleading requirements, emphasizing our policy of avoiding insistence on hypertechnical form and exacting language." *Zamora*, 2014-NMSC-035, ¶ 10.

These standards are a part of Rule 1-008, which states that all that is required for a complaint to set forth a claim for relief is "a short and plain statement of the claim…". The policy behind notice pleading is to alert potential parties to pending lawsuits, and "general allegations of conduct are sufficient." *Schmitz v. Smentowski*, 1990–NMSC–002, ¶ 9, 109 N.M. 386, 785 P.2d 726. *Schmitz* offers a litmus test for whether defendants are able to anticipate the charge and present a defense: "It is insufficient for [the defendants] to complain that they did not recognize the theory underlying the allegations..." *Id.* ¶ 12. In *Zamora,* this court stated that there "is nothing in either our Rules of Civil Procedure or the New Mexico Statutes that requires a civil complaint to specifically recite reliance on theories of vicarious

liability or apparent agency in order to provide fair notice of a cause of action." *Zamora*, 2014-NMSC-035, ¶ 14. Instead, our New Mexico courts have recognized that the principal function of pleadings is to give fair notice of the claim asserted. "[I]t is sufficient that defendants be given only a fair idea of the nature of the claim asserted against them sufficient to apprise them of the general basis of the claim; specific evidentiary detail is not required at [the complaint] stage of the pleadings." *Petty v. Bank of N.M. Holding Co.,* 1990–NMSC–021, ¶ 7, 109 N.M. 524, 787 P.2d 443. This Court in *Zamora* said,

> [The rules of civil procedure] were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits." *Martinez v. Segovia,* 2003–NMCA–023, ¶ 12, 133 N.M. 240, 62 P.3d 331 (alteration in original) (citation omitted). "The Rules of Civil Procedure disfavor looking upon pleadings as tests of skill where a single misstep could bar recovery." *Mendoza v. Tamaya Enters., Inc.,* 2010–NMCA–074, ¶ 15, 148 N.M. 534, 238 P.3d 903.

These standards are applicable to a civil complaint. Less is required of a TCN. The district court has determined that this is a bona fide complaint, as already noted. The Court of Appeals decision finding that this TCN is sufficient per statute, in line with the eighty-five years of precedent involving New Mexico's notice pleading standards. Despite it being less than 90 days since V.M.'s brutal murder, the tort claim notified the City that claims against it were "arising out of the incident…on

August 24, 2016, when [two individuals] drugged, sexually assaulted, tortured and killed 10 year old Victoria Martens, after the …city of Albuquerque generally engaged in tortious conduct…leading to injury and death of Victoria Martens…". The Notice went on to specify that the "claims may be brought regarding the negligence of the …City of Albuquerque, which resulted in the death of Victoria Martens on or about August 24, 2016.". This is arguably sufficient to meet the Rule 1-008 notice pleading standard for a civil negligence and wrongful death complaint against the City, which Plaintiffs did not even need to meet until filing the complaint two years later. It absolutely meets the TCA's lower standard.

The City's attempt to require such detailed specification about facts and theories of a potential claim so early, before investigation and discovery, as a prerequisite to get into court two years later and engage in discovery, would stifle New Mexicans' rights to file suits against the government. It would put an enormous burden on claimants who have had fewer than ninety days to recover from an injury and consult legal counsel all without the benefit of any formal discovery. It would invite a floodgate of litigation from every pending TCA case about lack of proper notice that had generalized claims of negligence or limited and broad information, yet still identified the time, place and circumstance. The Court should not go down that road.

C. The Legislative Objective of the Statute Has Been Fulfilled

In construing a statute, courts seek to achieve the intent of the legislature. *Grine v. Peabody Nat. Res., 2006-NMSC-031,* ¶17 *140 N.M. 30, 139 P.3d 190* (internal quotation marks and citation omitted). The purpose of the TCA notice requirement is well established: "(1) to enable the person or entity to whom notice must be given, or its insura11ce company, to investigate the matter while the facts are accessible; (2) to question witnesses: (3) to protect against simulated or aggravated claims; and (4) to consider whether to pay the claim or to refuse it." *Ferguson v. N.M. State Highway Comm'n*, 1982-NMCA-180, ¶ 12, 99 N.M. 194, 656 P.2d 244.

Petitioner does not explain how the Notice in this case is inconsistent with legislative intent or fails to account for the purpose of the notice requirement when the City was noticed of negligence leading up to the sexual assault and death of a girl on a specific date. Moreover, it is inexplainable how the legislative purpose is unsatisfied when the City did do an investigation of APD's work on the Victoria Martens case and determined (incorrectly) that there were no policy or procedure violations by APD. It appears that the City incorrectly investigated APD's handling of the investigation of the murder, not APD's negligence "leading up to" the murder, which is what the TCN identified. The first step the city should have done was to run APD reports involving Victoria Martens. If they had done that first step of

investigation, they would have seen the CYFD tip to APD of sexual assault against Victoria before her death by one of Michelle Marten's ex boyfriends that was not investigated by APD, in violation of statute, which is the exact subject of this lawsuit. In accordance with *Ferguson,* this written Notice enabled enable the City to notify its insurance carrier, contact APD, investigate its involvement in Victoria Martens' sexual assault and murder, and analyze its policies and procedures to see if there were violations or exposure to litigation by way of paying the claim. The City did all that and denied the claim. The City then litigated the case for years, went through discovery and depositions and then decided to raise the issue that it did not have sufficient written notice in an effort to get the case dismissed. The Notice also protected against aggravated and simulated claims as the City could see if any other claims were presented involving Victoria Martens' death against the City. Indeed, the district court found and the City did not challenge that this claim was not "simulated". [4 RP 950] As such, the legislative purpose was fulfilled by this written Notice and the City's argument to the contrary does not support reversing the Court of Appeal's decision.

CONCLUSION

The issue is whether a written tort claims notice alleging general negligence by the City that lead to the sexual assault and murder of V.M. by one of her mom's ex boyfriends, adequately put the city on notice for a complaint that pled negligence

related causes of action against the City for failing to investigate a reported sexual assault on V.M. by one of her mom's boyfriends. The answer is that under the plain language of the statute, is it does. There is no higher standard that should apply to a TCN than that of a civil complaint filed 2 years later. The burden is on the City to prove that the written Notice requirements were not met, and the City has not come close to meeting that burden.

WHEREFORE, Plaintiff-Respondent requests that the Court quash the Writ of Certiorari, or alternatively affirm the decision of the Court of Appeals, which remanded this matter back to the district court for further proceedings.

Respectfully submitted,

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STATEMENT OF COMPLIANCE

This brief was prepared in Microsoft Word 2016 using a proportionally-spaced type style or typeface. The number of words contained in the body of this brief is 6, 469.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 2023, I caused to be delivered a true and correct copy of the foregoing on the following, via the Odyssey efile and serve system, as indicated:

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