



**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

<b>JOHN MARTENS and</b>	)	
<b>PAT MARTENS Individually</b>	)	<b>NO. S-1-SC-39826</b>
<b>and as Co-Personal Representatives)</b>	)	
<b>of the Estate of V.M.,</b>	)	
	)	
<b>Plaintiffs-Respondents</b>	)	
<b>v.</b>	)	
	)	
<b>CITY OF ALBUQUERQUE</b>	)	
	)	
<b>Defendant-Petitioner</b>	)	

**PETITIONER CITY OF ALBUQUERQUE’S BRIEF IN CHIEF**

**John Martens and Pat Martens  
Individually and as Co-Personal,  
Representatives of the Estate of V.M.,  
Plaintiffs-Respondents:**

**City of Albuquerque  
Defendant-Petitioner:**

Jason Bowles  
BOWLES LAW FIRM  
P.O. Box 25186  
Albuquerque, New Mexico 87125-0186  
Phone: (505) 217-2680  
jason@bowles-lawfirm.com

Stephanie M. Griffin  
CITY OF ALBUQUERQUE  
LEGAL DEPARTMENT  
P.O. Box. 2248  
Albuquerque, NM 87103  
Phone: (505) 768-4500  
sgriffin@cabq.gov

Robert J. Gorence  
GORENCE LAW FIRM, LLC  
300 Central Avenue S.W., Suite 1000E  
Albuquerque, New Mexico 87102  
Phone: (505) 244-0214  
gorence@golaw.us

*Attorney for Defendant-  
Petitioner*

*Attorneys for Plaintiffs-Respondents*

**ORAL ARGUMENT IS REQUESTED**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iv

INTRODUCTION .....1

SUMMARY OF THE PROCEEDINGS .....2

    I. Nature of the Case .....2

    II. Course of the Proceedings.....2

    III. Disposition by the Court of Appeals.....5

    IV. Summary of the Facts Relevant to the Issues Presented for Review ....6

ARGUMENT AND AUTHORITIES

    THE COURT OF APPEALS ERRED WHEN IT FOUND THAT  
    RESPONDENTS SUBMITTED A SUFFICIENT WRITTEN NOTICE IN  
    COMPLIANCE WITH SECTION 41-4-16 OF THE NEW MEXICO TORT  
    CLAIMS ACT .....12

    I. Standard of Review .....12

    II. The Section 41-4-16 Notice Requirement is not Satisfied when a  
    Written Notice Contains a Completely Different Time, Place and  
    Circumstance Resulting in Loss Or Injury than what is Pled By the  
    Claimants in a Lawsuit .....13

        A. Notice Deficiencies .....13

        B. The Complaint.....16

        C. The Written Notice Requirement of Section 41-4-16(A) .....17

    III. The Legislative Objective Underlying Section 41-4-16 of the TCA  
    Factors into Whether a Written Notice is Sufficient .....21

IV. The Legal Precedent set forth in Actual Notice Cases should be Applied to Determine to what Degree Written Notice is Sufficient .....	23
V. A Claimant is Required to Describe the Relevant Facts as to the Time, Place, and Circumstance of the Loss or Injury to Satisfy the Section 41-4-16(A) Written Notice Requirement .....	27
A. The Scope of the Degree of the Description of the Time, Place, and Circumstance of the Loss or Injury .....	28
B. The “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” is deficient in Scope and Degree because it does not describe the Relevant Facts of the Negligence Claims alleged in the Complaint .....	30
CONCLUSION .....	32

(THE TRANSCRIPT CITATIONS CONFORM TO THE OFFICIAL LOG)

## TABLE OF AUTHORITIES

### **New Mexico Cases**

<i>City of Las Cruces v. Garcia</i> , 1984-NMSC-106, 102 N.M. 25, 27, 690 P.2d 1019 .....	22, 23
<i>Cummings v. Bd. of Regents of Univ. of New Mexico</i> , 2019-NMCA-034, 444 P.3d 1058.....	13, 18, 19, 20, 22, 27, 28, 29, 30
<i>Ferguson v. N.M. State Highway Comm'n</i> , 1982-NMCA-180, 99 N.M. 194, 656 P.2d 244.....	21, 23
<i>Maestas v. Zager</i> , 2007-NMSC-003, 141 N.M. 154, 152 P.3d 141.....	28, 29
<i>Marrujo v. New Mexico State Highway Transp. Dep't</i> , 1994-NMSC-116, 118 N.M. 753, 887 P.2d 747.....	24, 25, 26
<i>Martens v. City of Albuquerque</i> , 2023-NMCA-037.....	5, 13, 17, 21, 23, 27
<i>Powell v. New Mexico State Highway &amp; Transp. Dep't</i> , 1994-NMCA-035, 117 N.M. 415, 872 P.2d 388.....	23, 24
<i>Smith v. State ex rel. New Mexico Dep't of Parks &amp; Recreation</i> , 1987-NMCA-111, 106 N.M. 368, 743 P.2d 124.....	24
<i>State v. Santillanes</i> , 1982-NMSC-138, ¶ 4, 99 N.M. 89, 654 P.2d 542.....	22

### **Other Cases**

<i>Caruso v. City of Milford</i> , 75 Conn. App. 95, 102, 815 A.2d 167, 172 (2003).....	18
-----------------------------------------------------------------------------------------	----

### **Statutes and Rules**

NMSA 1978 § 41-4-16.....	5, 12, 13, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29
Rule 11-401 NMRA.....	28, 29

## **PETITIONER CITY OF ALBUQUERQUE’S BRIEF IN CHIEF**

Defendant-Petitioner City of Albuquerque (“Petitioner”) hereby submits this Brief in Chief wherein it requests that this Court reverse the Court of Appeals decision filed on February 7, 2023 wherein it reversed the final order of dismissal of this action by the district court judge.

### **INTRODUCTION**

This case involves the tragic death of V.M. that occurred on or about August 23, 2016. Fabian Gonzales, Jessica Kelley, and V.M.’s mother, Michelle Martens, have each been charged and convicted of the crime of child abuse leading to the death of V.M.. Respondents claim that Fabian Gonzales and Jessica Kelley are the perpetrators who caused V.M.’s death. They deny that Michelle Martens caused her death.

On August 15, 2017, Respondents filed a “Complaint for Injunctive Relief and Damages” seeking to hold Petitioner liable for V.M.’s death. During the course of this litigation, Petitioner raised multiple grounds for dismissal and for judgment in its favor. Ultimately, the district court dismissed this action for Respondents’ non-compliance with the notice provision set forth in Section 41-4-16 of the New Mexico Tort Claims Act. On February 7, 2023, the Court of

Appeals reversed this decision by finding that the written notice submitted was sufficient.

## **SUMMARY OF THE PROCEEDINGS**

### **I. Nature of the Case**

On August 15, 2017, Respondents filed a “Complaint for Injunctive Relief and Damages” wherein they asserted claims of “Injunctive Relief and Damages against the City of Albuquerque and a *Monell* Claim Pursuant to 42 U.S.C. § 1983”; Procedural Due Process Violations under 42 U.S.C. § 1983; three counts of Negligence; “Municipal Liability – Failure to Train and Supervise Under the New Mexico Tort Claim Act” and Wrongful Death. **[RP 1-20]**

### **II. The Course of the Proceedings**

On September 15, 2017, Petitioner filed a Notice of Removal to remove Respondents’ Complaint to the United States District Court of New Mexico where Petitioner filed a Motion for Judgment on the Pleadings requesting the dismissal of the Complaint. **[RP 27-56; RP 152-175]** After briefing was completed on this Motion, a Stipulated Dismissal of Counts I and II of the Complaint was filed and entered on April 25, 2018 in the United States District Court of New Mexico. **[RP 264-265]** The United States District Court entered an Order on May 9, 2018

remanding the case back to the Second Judicial District Court of New Mexico. **[RP 57]**

On May 16, 2018, Petitioner filed a Motion for Judgment on the Pleadings in the Second Judicial District Court. **[RP 280-289]** After this Motion was fully briefed and heard before the District Court, the judge entered a Memorandum Opinion and Order Granting in Part and Denying in Part the Motion for Judgment on the Pleadings. **[RP 340 -347]** Based upon the Court's ruling, the claims which remained in the Complaint were Respondents' negligence claims set forth in Counts IV and V; Respondents' derivative supervisory and training claim set forth in Count VI; Respondents' wrongful death claim set forth in Count VII; and Respondents Pat and John Martens' claim for loss of consortium. *Id.*

On March 19, 2020, Petitioner filed a Motion for Summary Judgment (Redacted) **[RP 560-687]**, and on March 20, 2020 this Motion was submitted, pursuant to Court Order, un-redacted and under seal. **[RP 688-820]** In the Motion, Petitioner asserted multiple grounds for judgment in its favor, including argument and evidence of failure to comply with the tort claim notice provision as required by NMSA 1978, § 41-4-16. **[RP 574 -577 and 707-710]** On April 14, 2020, Respondents submitted their Response to Petitioner's Motion for Summary

Judgment under seal. [RP 831-887] On April 28, 2020, Petitioner filed a Reply to Plaintiffs' Response to the Motion for Summary Judgment (Redacted) [RP 917-935], and this same Reply was submitted, pursuant to Court Order, un-redacted and under seal. [RP 896-916]

On June 29, 2020, the District Court Judge issued a Memorandum Opinion and Order wherein the judge granted the Motion for Summary Judgment as to the request to dismiss the John Doe Defendants; denied the Motion on the Tort Claims Act notice issue because further proceedings were required to determine the issue of notice; and the Court reserved ruling on the remaining summary judgment arguments. [RP 946-953] The denial of the Motion as to the Tort Claims Act notice issue pertained only to Respondents' argument that Petitioner had actual notice of their intent to sue because the District Court concluded that Respondents did not comply with the requirement of Section 41-4-16(A) to give *written notice* of these claims. [RP 952] A telephonic hearing on the Tort Claims Act actual notice issue raised by Respondents was held on September 28, 2020. [See Notice of Completion and Transmission of CD Transcript filed in the New Mexico Court of Appeals on 12/3/2021]



On October 5, 2020, Respondents filed a “Motion to Reconsider” wherein they requested that the Court reconsider its ruling in its June 29, 2020 Memorandum, Opinion, and Order that Respondents did not comply with the written Tort Claims Act notice requirement. [RP 992-996] Petitioner filed its Response to the Motion to Reconsider on October 12, 2020. [RP 997-1007] After having considered the evidence and argument presented during the September 28, 2020 hearing concerning whether Petitioner had actual notice of a potential claim, the District Court Judge entered a Memorandum, Opinion, and Final Order on February 8, 2021 dismissing the Complaint and denying the Motion to Reconsider. [RP 1008-1014]

### **III. Disposition by the Court of Appeals**

On February 7, 2023, the Court of Appeals reversed the district court’s decision finding that Respondents did not comply with the requirement of Section 41-4-16(A) of the New Mexico Tort Claims Act (“TCA”) to give *written notice* of their potential claims. *See Martens v. City of Albuquerque*, 2023-NMCA-037, ¶ 12, \_\_\_ P.3rd \_\_\_. The Court of Appeals found that Respondents abandoned their claim that Petitioner had actual notice of their claims. *See id* at ¶ 4. (“Plaintiffs, however, do not appear to challenge the evidence and have explicitly

abandoned any challenge to the actual notice ruling.”).

#### **IV. Summary of the Facts Relevant to the Issues Presented for Review**

1. Neither Appellant Pat Martens nor Appellant John Martens submitted a tort claim notice to the Mayor for the City of Albuquerque prior to filing this lawsuit. **[RP 685-686, Defendant’s Ex. O; RP 818-819, Defendant’s Ex. O]**

2. In response to Request for Production No. 4 that was propounded upon Respondents during discovery, Respondents represented that they had no written or recorded communications and/or statements between them and any non-attorney City of Albuquerque employee/official. **[RP 962, Defendant’s Ex. S]**

3. In response to Request for Production No. 9 that was propounded upon Respondents during discovery, Respondents represented that they had no social media posts concerning this lawsuit or concerning V.M. **[RP 964, Defendant’s Ex. S]**

4. Respondents produced an undated “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” for the first time in this lawsuit when they attached it as an exhibit to their Response to the Motion for Summary Judgment. **[RP 853 – 854, Plaintiffs’ Ex. 1]**

5. Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA”

refers to V.M.'s death as an "accident." **[RP 853 Plaintiffs' Ex. 1]**

6. The "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" only provided notice of Fabian Gonzales' alleged conduct and alleged that Petitioner was negligent in supervising Fabian Gonzales. *Id.*

7. The attorney who authored and signed the notice, James Worley, testified at the September 28, 2020 hearing and claimed that, at the time he drafted the notice, the focus was on Fabian Gonzales. **[9-28-20 1 CD 52:57 – 54:48; 57:09 – 58:09 and RP 1009 - 1010]**

8. Mr. Worley also claimed that because the circumstances of V.M.'s death were still being investigated, he drafted the November 2016 notice to provide the facts that were available at the time but also broadly enough to accommodate claims that were as yet unknown. **[9-28-20 1 CD counter 54:48 – 55:28 and RP 1010]**

9. On August 15, 2017, Respondents filed a Complaint wherein they allege that Respondents Pat and John Martens are the natural grandparents of V.M. **[RP 2 ¶¶ 5-6]**

10. It is alleged that their daughter, Michelle Martens, is the mother of V.M. **[RP 2 ¶ 8]**

11. Respondents alleged in the Complaint that 10-year-old V.M. was murdered on August 24, 2016. **[RP 2-4 ¶¶ 8, 14, 22-23]**

12. It is alleged in the Complaint the crime was committed by Michelle Martens' boyfriend, Fabian Gonzales, and by Jessica Kelley, while Michelle Martens did nothing to stop it. **[RP 4 ¶¶ 22-23]**

13. Respondents have admitted that on June 29, 2018, Michelle Martens pled guilty to the crime of Child Abuse (Recklessly caused or Recklessly Permitted)(Resulting in Death) (Child under 12) for the commission of child abuse against V.M. on or between August 23, 2016 through August 24, 2016. **[RP 677 and 810, Defendant's Ex. M]**

14. Respondents have admitted that on January 7, 2019, Jessica Rosalie Kelley pled no contest to six felony offenses, including the crime of Child Abuse (Recklessly Caused or Permitted) (Resulting in Death or Great Bodily Harm) (Child under 12) for the commission of child abuse against V.M. on or about August 23, 2016. **[RP 678 and 811, Defendant's Ex. M]**

15. Respondents have admitted that Jessica Kelley and Fabian Gonzales caused the death of V.M. **[RP 679-680 and 812-813, Defendant's Ex. M]**

16. The "Notice of Claim Resulting in Injury/Death Per § 41-4-16

NMSA” does not set forth that Michelle Martens committed alleged child abuse prior to the date of V.M.’s death. **[RP 853 Plaintiffs’ Ex. 1]**

17. It is not alleged in the Complaint that Mr. Gonzales was in Petitioner’s custody and control; or that Petitioner had legal duty to supervise him prior to the date of V.M.’s death. **[RP 1-20]**

18. It is not alleged in the Complaint that Petitioner failed to arrest or investigate Fabian Gonzales or breached a legal duty to do so prior to the date of V.M.’s death. *Id.*

19. It is alleged in the Complaint that V.M.’s death resulted from the alleged negligence on the part of Petitioner for failing to investigate a March 28, 2016 CYFD report disclosing allegations that one of Michelle Martens’ boyfriends had attempted to kiss V.M.. **[RP 5-6 ¶¶ 43-47; RP 13-17 ¶¶ 92, 96, 103, 109-110, 112, 118, and 128; and RP 19 ¶ 134]**

20. In 2016, V.M. informed Pat Martens that Michelle Martens’ former boyfriend, David Hernandez, tried to kiss her on the mouth. **[RP 731 citing Defendant’s Ex. A at 70:12-23; 71:8-10]**

21. The March 28, 2016 CYFD report referred to in the Complaint reveals that, prior to her death, V.M. had disclosed the attempted kiss to her grandmother,

Pat Martens. **[RP 763-765, Defendants' Ex. F]**

22. Even though Respondents Pat and John Martens were aware of this allegation of an attempted kiss by Michelle Martens' ex-boyfriend, David Hernandez, they did not report it to the police because they had no concerns about Michelle Martens' care of V.M. and because Pat Martens had told Michelle Martens to take care of it. **[RP 733-734; 740; 742 and 958 (citing Defendant's Ex. A Dep. of PM 77:15-20; 80:6-14; and 83:7-9 and Defendant's Ex. B Dep. of JM 54:5-8; 66:2-9)]**

23. Mr. Worley, who represented Pat and John Martens at the time he drafted and submitted the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA", concedes that he did not include facts in the notice related to the CYFD report or make any reference to a potential claim that Petitioner negligently handled this report. **[Sept. 28, 2020 CD 1 counter 53:00 - CD 2 counter 00:00-8:30 and RP 1013]**

24. During the hearing that was held on September 28, 2020, Albuquerque Police Department Lieutenant Richard Evans testified that he reviewed the March 2018 CYFD report of an attempted kiss and determined that it did not CACU protocol for investigation. **[9-28-20 1 CD counter 2:13- 5:21; 6:15]**

**– 6:58 and RP 1012]**

25. Lieutenant Evans testified he was never notified, prior to the filing of this lawsuit, that Respondents believed his decision was negligent; or that it resulted in injury, or that it potentially could be the subject of a lawsuit. **[9-28-20 1 CD counter 7:15 – 8:36; 9:45 – 10:25 and RP 1012]**

26. Lieutenant Evans was not involved in the subsequent homicide investigation and did not know whether the March 2016 CYFD referral was part of the homicide investigation. **[9-28-20 1 CD counter 22:25 – 26:15 and RP 1012]**

27. Lieutenant Evans testified that the first time he learned of Respondents' allegations was when defense counsel gave him a copy of the Complaint after it was filed. **[9-28-20 1 CD counter 8:47 – 9:28 and RP 1012]**

28. During the hearing that was held on September 28, 2020, Albuquerque Police Department Detective Josh Brown testified that he was the lead detective investigating V.M.'s murder that occurred on August 23, 2016. **[9-28-20 1 CD counter 27:50 – 29:26 and RP 1012]**

29. Detective Brown spoke with Respondents during the course of his investigation, and they did not inform him that they were contemplating suing the City of Albuquerque or that they believed that the City of Albuquerque was

responsible for V.M.’s death. [9-28-20 1 CD counter 30:35 – 31:28 and RP 1012]

30. Detective Brown became aware of Respondents’ allegations after this lawsuit was filed, when he watched a new story reporting the filing of suit. [9-28-20 1 CD counter 31:28 – 31:38 and RP 1012]

31. Respondents have offered no evidence to rebut Petitioner’s showing that they did not notify either Officer Evans or Detective Brown, or any person associated with the Petitioner, of their claims that the March 2016 CYFD referral was handled incorrectly, that Petitioner breached its duty to investigate reports of child abuse received from CYFD, or that the failure to investigate the referral resulted in injury to V.M. [RP 1012 -1013]

### **ARGUMENT AND AUTHORITIES**

#### **THE COURT OF APPEALS ERRED WHEN IT FOUND THAT RESPONDENTS SUBMITTED A SUFFICIENT WRITTEN NOTICE IN COMPLIANCE WITH SECTION 41-4-16 OF THE NEW MEXICO TORT CLAIMS ACT**

##### **I. Standard of Review**

Section 41-4-16(B) of the New Mexico Tort Claims Act (“TCA”) sets forth, in relevant part, “no court shall have jurisdiction to consider any suit or action against the state or any local public body unless notice has been given as required



by this section [Section 41-4-16].” NMSA 1978, § 41-4-16(B)(1977). Whether a district court properly dismissed a plaintiff’s claims for failing to comply with the TCA’s notice requirement is an issue of law for which an appellate court reviews de novo. *Cummings v. Bd. of Regents of Univ. of New Mexico*, 2019-NMCA-034, ¶ 16, 444 P.3d 1058.

**II. The Section 41-4-16 Notice Requirement is not Satisfied when a Written Notice Contains a Completely Different Time, Place and Circumstance Resulting in Loss Or Injury than what is Pled By the Claimants in a Lawsuit**

The Court of Appeals found that the “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” satisfied the written notice requirement set forth under Section 41-4-16 of the TCA. *See Martens*, 2023-NMCA-037, ¶¶ 4-7. This finding is error because the written notice is flawed in multiple respects and because Respondents’ cause of action pled in the Complaint does not contain the time, place, and circumstance set forth in the notice.

**A. Notice Deficiencies**

First, the written notice was not submitted by or on behalf of John and Pat Martens individually or as Co-Personal Representatives of the Estate of V.M. [RP 853 – 854, Plaintiffs’ Ex. 1] The notice represents that Michael Martens is the Personal Representative of the Estate of V.M. *Id.* Pat and John Martens were

appointed as the Personal Representatives of the Estate on August 14, 2017. **[RP 935 – Defendant’s Ex. Q]** The attorney who submitted the “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” claims that he represented Pat and John Martens at the time he submitted this notice. However, there is no reference to them anywhere in the notice, including any reference to any claim for damages for loss of consortium as they have alleged in the Complaint filed in this cause. **[RP 853 – 854, Plaintiffs’ Ex. 1]** There is nothing contained within the body of the notice that Pat and John Martens intended to file suit or assert a claim on their own behalf or on behalf of the Estate of V.M. *Id.* As set forth in Petitioner’s Motion for Summary Judgment, neither Pat nor John Martens submitted a tort claims notice to the Mayor for the City of Albuquerque prior to filing this lawsuit, and they did not produce any such notice when responding to discovery specifically requesting such. **[RP 707-708, Fact No. 89 and RP 818, Exhibit O and RP 820, Exhibit P]**

Second, the written notice submitted on behalf of non-party Michael Martens did not set forth the time, place, and circumstances of the alleged negligence claim asserted in the lawsuit filed on behalf of Respondents. The “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” only provided

notice of Fabian Gonzales’ conduct and alleged that the City of Albuquerque and other governmental agencies were negligent in supervising Fabian Gonzales. **[RP 853 Plaintiffs’ Ex. 1]** The notice also refers to V.M.’s death as an “accident.” *Id.* The “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” does not set forth that Michelle Martens committed alleged child abuse or neglect prior to the date of V.M.’s death. Mr. Worley explained during a hearing held on September 28, 2020 that the focus of the notice was the conduct of Fabian Gonzales. **[9-28-20 1 CD 52:57 – 54:48; 57:09 – 58:09 and RP 1009 – 1010]**

Mr. Worley represented Pat Martens and John Martens at the time the “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” was submitted; but he elected to exclude the information ultimately pled in the Complaint concerning the time, place, and circumstance of the alleged attempted kiss by David Hernandez from this notice. **[RP 853 – 854, Plaintiffs’ Ex. 1 and Sept. 28, 2020 CD 1 counter 53:00 - CD 2 counter 00:00–8:30 and RP 1013]**

There is also no information in the notice that this alleged attempted kiss resulted in the death of V.M. or that any alleged negligence on the part of the City for not investigating the CYFD report caused her death. **[RP 853 – 854, Plaintiffs’ Ex. 1]**

## **B. The Complaint**

The Complaint that was filed on behalf of Pat and John Martens and the Estate of V.M. 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. **[RP 1-20]** There are also no allegations in the Complaint that the City failed to arrest or investigate Fabian Gonzales or breached a legal duty to do so prior to the date of V.M.'s death. *Id.* Instead, it is claimed in the Complaint that V.M.'s death resulted from the City of Albuquerque's alleged negligence in failing to investigate an attempted kiss by Michelle Martens' ex-boyfriend. **[RP 5-6 ¶¶ 43-47; RP 13-17 ¶¶ 92, 96, 103, 109-110, 112, 118, and 128; and RP 19 ¶ 134]** This alleged attempted kiss was documented in a March 28, 2016 CYFD report. **[RP 853 – 854, Plaintiffs' Ex. 1]** The March 28, 2016 CYFD report referred to in the Complaint reveals that, prior to her death, V.M. had disclosed the attempted kiss to her grandmother, Pat Martens. **[RP 763-765, Defendants' Ex. F]** **Even though** Pat and John Martens were aware of this alleged attempted kiss prior to the date of V.M.'s death they did not report this alleged attempted kiss to the police because they had no concerns about Michelle Martens' care of V.M. and because Pat Martens had told Michelle

Martens to take care of it.. [RP 733-734; 740; 742 and 958 (citing Defendant's Ex. A Dep. of PM 77:15-20; 80:6-14; 80:23-81:1 and 83:7-9 and Defendant's Ex. B Dep. of JM 54:5-8; 66:2-9)]

### **C. The Written Notice Requirement of Section 41-4-16(A)**

In setting forth the Section 41-4-16 written notice requirement, the Court of Appeals said that a written notice must set forth the time, place, and circumstance of an injury or loss and be presented “within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the [TCA].” *Martens*, 2023-NMCA-037, ¶ 6. Under the Court of Appeals rationale, Section 41-4-16(A) only requires the submission of a written notice after an occurrence that results in injury or loss regardless of whether the notice also contains the relevant time, place, and circumstances of what is ultimately pled in a lawsuit. This reasoning defeats the purpose of the Section 41-4-16 TCA notice requirement to put the governmental entity on notice of a potential claim. When the written notice sets forth a completely different time, place and circumstance than what is alleged in a lawsuit, it defeats that purpose of any pre-suit investigation that has been or could be conducted. This is the case because investigation into the time, place, and circumstance that is irrelevant to the claims pled in a lawsuit does not provide the

governmental entity with notice of probative evidence/facts pre-suit of a claim for which a claimant contends immunity has been waived under the TCA. The consequence of this is unfair surprise to the entity at the time suit is filed. *See, e.g., Caruso v. City of Milford*, 75 Conn. App. 95, 102, 815 A.2d 167, 172 (2003) (“ the defendant is entitled to notice of any statute on which the plaintiffs rely to defeat governmental immunity so as to avoid unfair surprise and to allow time to prepare a defense.”) This is not what is contemplated by the Section 41-4-16 TCA notice requirement.

Unless a public body has actual notice, Section 41-4-16 of the TCA requires that written notice be presented to the Mayor for a municipality for an occurrence that results in injury or death that gives rise to a claim for which immunity has been waived under the Tort Claims Act. *See* NMSA 1978, § 41-4-16(A) and (C). Such notice must state the time, place and circumstance of the loss or injury. *See* NMSA 1978, § 41-4-16(A). “The purpose of the TCA notice requirement is to ensure that the agency allegedly at fault is notified that it may be subject to a lawsuit *and* to reasonably alert the agency to the necessity of investigating the merits of the potential claim against it.” *Cummings*, 2019-NMCA-034, ¶ 21 (emphasis added) (internal citations and quotations omitted).

In *Cummings*, one of the issues discussed by the Court of Appeals was the sufficiency of a written notice. *See id* at ¶¶ 17-22. Embodied within this discussion was the court’s comparison of a “notice affidavit” filed by plaintiff Maria Cummings on July 26, 2001 and two pending class action complaints filed by other claimants. *Id.* at ¶¶ 15, 17-18. It was alleged in the pending class action suits that a University of New Mexico Hospital (“UNMH”) “physician was negligent in her evaluation, consultation, care, and treatment of children suffering from cancer.” *Id.* at ¶ 18. It was also alleged that the physician’s “negligence resulted in the children suffering injuries and death as well as damages to the parents of the children” for which UNMH is liable for its own negligence and for the doctor’s negligence. *Id.* The “notice affidavit” submitted by Ms. Cummings stated she and her son’s estate were members of the class referenced in the pending class action suits. *Id.* at ¶ 17. The affidavit also named the same physician alleged to have been negligent in the pending class action suits. *Id.* In addition, the affidavit set forth the specific negligent conduct claimed as it related to the treatment by the physician of Ms. Cummings’ deceased son. *Id.* Thus, the Court of Appeals comparison in *Cummings* of the pending civil lawsuits and the notice affidavit submitted by Ms. Cummings illustrates that there was a correlation

between a written notice and allegations pled in the pending lawsuits to satisfy the notice requirement set forth in Section 41-4-16. The appellate court specifically said: “The notice affidavit gave UNMH notice that Plaintiffs actually intended to make claims against UNMH for their losses and injuries allegedly caused by the negligence alleged in the *Lovato* and *Sedillo* class action complaints.” *Id.* at ¶ 21. The Court of Appeals also referenced that UNMH had already conducted an investigation into the alleged negligence of the physician named in the pending class action lawsuits and the “notice affidavit.” *Id.* at ¶¶ 4-6, 21. Accordingly, it found that this was evidence that UNMH already had notice to investigate the merits of the time place and circumstances of the events described the notice affidavit and the pending class action lawsuits. *Id.* at ¶ 21. Hence, there was no unfair surprise when UNMH received the “notice affidavit.”

The analysis in *Cummings* illustrates that if the time, place, and circumstance of a claim set forth in a written notice is essentially one in the same alleged in a complaint; then the TCA Section 41-4-16 written notice requirement is satisfied. Obviously, a written notice, such as the “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA,” that references a completely different time, place, and circumstance of a potential claim than what is actually pled against a



governmental entity in a lawsuit does not satisfy this requirement. Therefore, the Court of Appeals erred in finding that the “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” satisfied the written notice requirement set forth under Section 41-4-16(A) of the TCA.

### **III. The Legislative Objective Underlying Section 41-4-16 of the TCA Factors into Whether a Written Notice is Sufficient**

The purpose of the written notice is to enable the entity to: (1) investigate the matter while the facts are accessible; (2) question witnesses; (3) protect against simulated or aggravated claims; and (4) 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. The Court of Appeals concluded that the *Ferguson* case was irrelevant in determining the sufficiency of the notice because this decision only addressed whether the notice requirement violated due process protections. *See Martens*, 2023-NMCA-037, ¶ 8. This reasoning is flawed because the *Ferguson* case discussed the legislative purpose of the notice requirement set forth in the notice statute as a whole. *See Ferguson*, 1982-NMCA-180, ¶¶ 11-12. Accordingly, the Court of Appeals should not have readily disregarded the four factors outlined in the *Ferguson* case interpreting the legislative objective. “The interpretation of a statute must be consistent with the legislature's intent and must

be accomplished by ‘adopting a construction which will not render the statute’s application absurd, unreasonable, or unjust.’” *City of Las Cruces v. Garcia*, 1984-NMSC-106, ¶ 5, 102 N.M. 25, 690 P.2d 1019 (quoting *State v. Santillanes*, 1982-NMSC-138, ¶ 4, 99 N.M. 89, 654 P.2d 542). In addition, the Court of Appeals’ conclusion that the Ferguson factors are not relevant is in conflict with its decision in *Cummings*. In *Cummings*, the court pointed out that the notice requirement serves *two* purposes: (1) to ensure that the agency allegedly at fault is notified that it may be subject to a lawsuit and (2) to reasonably alert the agency to the necessity of investigating the merits of the potential claim against it. *See Cummings*, 2019-NMCA-034, ¶ 21. By stating in *Cummings* that the notice should *reasonably* alert the agency, the Court of Appeals implies that the content of a written notice should serve the legislative objective of Section 41-4-16.

Section 41-4-16(A) clearly states that the content of a written notice must include the time, place and circumstances of the loss or injury. *See* NMSA 1978 § 41-4-16(A). To serve the legislative objective in reasonably alerting the governmental entity to investigate the merits of a potential claim, the time, place and circumstance of the loss or injury should contain, at the very least, the relevant facts that would allow the entity to timely investigate; question witnesses; protect

itself against similar type of claims; and to evaluate the merits of the claim. *See Ferguson*, 1982-NMCA-180, ¶ 12. To find otherwise renders the Section 41-4-16(A) written notice requirement meaningless.

#### **IV. The Legal Precedent set forth in Actual Notice Cases should be Applied to Determine to what Degree Written Notice is Sufficient**

There is no prohibition, as the Court of Appeals seems to suggest (See *Martens*, 2023 NMCA-037, ¶ 8) for this Court to apply the rational from precedential decisions discussing the actual notice provision under Section 41-4-16(B) to determine the sufficiency of written notice that is required to be submitted pursuant to Section 41-4-16(A). Section 41-4-16(B) of the TCA sets forth that a court does not have jurisdiction over a cause of action pled against a governmental entity unless a claimant complies with the notice requirements set forth in Section 41-4-16 or unless the governmental entity had actual notice of the occurrence. This Court has already said that the legislative purpose of both subsections (A) and (B) is one in the same. *See City of Las Cruces*, 1984-NMSC-106, ¶ 5 (“The purpose of Subsections 41–4–16(A) and (B) is “to ensure that the agency allegedly at fault is notified that *it may be subject to a lawsuit.*” (citing *Ferguson*, 98 N.M. at 681, 652 P.2d at 231 (emphasis added)). Subsequent decisions have reiterated this principle. *See, e.g., Powell v. New Mexico State Highway & Transp. Dep't*, 1994-

NMCA-035, ¶ 9, 117 N.M. 415, 872 P.2d 388 (Actual notice decision wherein the Court states: “The purpose of the notice provision is to ensure that the agency allegedly at fault is notified that it may be subject to a lawsuit.”); *Smith v. State ex rel. New Mexico Dep't of Parks & Recreation*, 1987-NMCA-111, ¶ 12, 106 N.M. 368, 743 P.2d 124 (Actual notice decision wherein the court states: “ the statute contemplates that the state must be given notice of a likelihood that litigation may ensue, in order to reasonably alert it to the necessity of investigating the merits of a potential claim against it.”) Ergo, because the legislative purpose is one in the same, this Court can apply the rationale from actual notice cases, including those discussing whether an accident report satisfies actual notice under Section 41-4-16(B) to determine whether the written notice requirement is met under Section 41-4-16(A). Notwithstanding, there is legal precedent in comparing the two subsections to determine the sufficiency of notice of a claim.

In *Marrujo v. New Mexico State Highway Transp. Dep't*, 1994-NMSC-116, ¶ 25, 118 N.M. 753, 887 P.2d 747, this Court discussed whether an accident report provided actual notice of the plaintiffs’ wrongful death claim. In undertaking this analysis, this Court set forth the language contained in Section 41-4-16(A), which pertains to the written notice requirement that notice be given as to the time, place

and circumstance of the loss or injury. *See id.* The plaintiffs in *Marrujo* argued that the two Uniform Accident Reports filed by the police provided actual notice to the State Highway Department. *Id.* However, this Court looked at the content of the reports and said:

The reports, however, offered no suggestion that a tort had occurred or that a lawsuit was impending. There was nothing in the reports to distinguish this case from the many other traffic fatalities in New Mexico in which the State is blameless and the driver or a private party is completely at fault. The reports served a purely statistical function.

*Id.* This paragraph serves as a significant illustration that words do matter. The first sentence in this paragraph indicates that this Court recognizes that there are two components to the notice requirement: (1) that a tort occurred and (2) a lawsuit was impending. This is consistent with the legislative objective in Section 41-4-16 to provide the governmental entity with notice of potential suit and reasonably alert it to the tortious conduct claimed. In the following sentence, this Court points out that the traffic reports were indistinguishable from others where the State is blameless. This conveys that notice must be more than notice of an event or accident. Since the Court refers to Section 41-4-16(A) in the preceding paragraph, it implies that the content of the traffic accident reports should set forth what is required for written notice under this provision, i.e., the time, place, and

circumstance of the loss or injury caused by the alleged tortious conduct. Again, these requirements serve the legislative purpose of Section 41-4-16 to reasonably alert a governmental agency to timely investigate and evaluate the merits of a potential claim.

In the present controversy, the “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” does not mention a time-period other than the date of V.M.’s death; or any City of Albuquerque employee; or any alleged tortious conduct by a City employee; or any witnesses of the alleged tortious conduct by the City and/or employee; or any place or circumstance of the alleged tortious conduct. *Id.* Consequently, the vague and general nature of this notice, like the accident reports discussed in *Marrujo*, make it indistinguishable so as to put the City reasonably on notice of the alleged tortious conduct the Martens have claimed in this suit. The only alleged conduct that is referenced in the notice is a claim that the City and other governmental agencies failed to monitor Fabian Gonzales while he was on probation. **[RP 853, Plaintiffs’ Ex. 1]** Respondents abandoned this negligence theory when they filed suit because these allegations are absent from the Complaint. **[RP 1-20]** Because the Martens’ lawsuit asserts negligence theories based upon their claim that the City failed to investigate the alleged attempted kiss,

their notice should have, at a minimum, cited to one or more of the waiver provisions and/or to alleged conduct pertaining to this alleged failure to investigate. In essence, the notice is misleading because the negligence claim is premised upon a different time, place, and circumstance that resulted in V.M.'s death than what has been alleged in this lawsuit. This does not conform with the written notice requirement set forth in Section 41-4-16(A) or the legislative purpose of this provision. Therefore, the Court of Appeals erred in finding that the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" satisfied the written notice requirement since this ruling is in conflict with the legislative intent of the notice requirement.

**V. A Claimant is Required to Describe the Relevant Facts as to the Time, Place, and Circumstance of the Loss or Injury to Satisfy the Section 41-4-16(A) Written Notice Requirement**

The Court of Appeals acknowledged that the majority of the cases discussing the Section 41-4-16 notice requirements 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). *See Martens*, 2023-NMCA-037, ¶ 8. The appellate court went on to state that the *Cummings* decision did discuss the sufficiency of a written notice. *Id.* at ¶ 9. However, the Court of Appeals determined that this case was inapplicable to the

present controversy since the *Cummings* decision did not consider whether a written tort claim notice must specifically identify a claim or meet a factual threshold that would permit an investigation. *Id.* Accordingly, the Court of Appeals concluded that the sufficiency of a written notice is limited to what is stated in Section 41-4-16(A). *Id.* at ¶¶ 6-8. This is an erroneous conclusion in light of established precedent.

**A. The Scope of the Degree of the Description of the Time, Place, and Circumstance of the Loss or Injury**

The *Cummings* case provides guidance as to what degree a claimant is required to describe the time, place, and circumstance of the loss or injury to satisfy the written notice requirement set forth in Section 41-4-16(A) of the TCA. In quoting from this Court’s decision in *Maestas v. Zager*, 2007-NMSC-003, the Court of Appeals said that the notice requirement under the TCA “accrues when the plaintiff knows or should know the *relevant facts*, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action” *Cummings*, 2019-NMCA-034, ¶ 23 (emphasis added) (quoting *Maestas v. Zager*, 2007-NMSC-003, ¶¶ 20-21, 141 N.M. 154, 152 P.3d 141). Rule 11-401 of the New Mexico Rules of Evidence sets forth: “Evidence is relevant if: (A) it has any tendency to make a fact more or less probable than it would be without the



evidence, and (B) the fact is of consequence in determining the action.” See Rule 11-401 NMRA. Since the Court of Appeals, in quoting *Maestas*, 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, it is evident that a notice must contain the time, place, and circumstances that fall within the scope of Rule 11-401 NMRA. Facts that fall outside of this scope are not relevant. The content of the written notice discussed in the *Cummings* case provides guidance in this regard.

The “notice affidavit” in *Cummings* identified: (1) the specific claimants who were subsequently named as parties in one of the pending lawsuits; (2) the specific physician employed by UNMH who diagnosed and treated the decedent named in the affidavit; (3) the date of death of the decedent; and (4) the claimants’ assertion that they were members of the class referenced in the class action lawsuits that were already pending against UNMH. *Cummings*, 2019-NMCA-034, ¶ 21. In short, this “notice affidavit” set forth the relevant time, place, and circumstances of allegations that would tend to prove a medical negligence cause of action against a specific governmental employee and/or entity. These facts were relevant because they are the premise for the cause of action pled in the Complaint.

**B. The “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” is deficient in Scope and Degree because it does not describe the Relevant Facts of the Negligence Claims alleged in the Complaint.**

In the instant case, the facts that purport to set forth the time, place, and circumstances in the “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” are outside the scope of Rule 11-401 NMRA because there are no allegations in this notice setting forth a potential negligence cause of action for failing to investigate allegations of David Hernandez’s attempt to kiss of V.M. In stark contrast to the “notice affidavit” submitted in *Cummings*, the “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” does not mention a time-period other than the date of V.M.’s death; or any City of Albuquerque employee; or any alleged tortious conduct by a City employee; or any witnesses of the alleged tortious conduct by the City; or any place or circumstance of the alleged tortious conduct. As the District Court found, the record shows that the “Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA” [RP 853 – 854, Plaintiffs’ Ex. 1] is deficient. [RP 948-950 and RP 1009-1010] Other than an allegation that the City of Albuquerque and other governmental agencies did not monitor Fabian Gonzales, this notice of claim does not specifically reference any other allegations upon which the Martens claim the City was negligent. [RP 853, Plaintiffs’ Ex. 1]

Essentially, the District Court Judge found that the allegations set forth in the notice were not relevant to the legal causes of action set forth in the Complaint and therefore the City did not have prior notice of the claims against it. This is the case because the alleged failure to monitor Fabian Gonzales does not tend to prove that V.M.'s death resulted from the City's alleged negligence in failing to investigate the attempted kiss by David Hernandez. Accordingly, the absence of the *relevant facts* as to the time, place, and circumstance from the notice of the Martens' negligence cause of action pled in this litigation against the City renders the notice deficient. Therefore, the Court of Appeals erred in finding otherwise.

## CONCLUSION

**WHEREFORE**, based upon the foregoing arguments, points, and authorities set forth herein, Defendant-Petitioner requests that this Court reverse the Court of Appeals and uphold the District Court's decision dismissing the Plaintiffs-Respondents' Complaint.

Respectfully submitted,

CITY OF ALBUQUERQUE  
Lauren Keefe, City Attorney

*/s/ Stephanie M. Griffin*

Deputy City Attorney

P. O. Box 2248

Albuquerque, New Mexico 87103

(505) 768-4500

(505) 768-4525

sgriffin@cabq.gov

## CERTIFICATE OF SERVICE

I hereby certify that I caused to be served via email upon the following counsel of record one true and correct copy of Petitioner's Brief in Chief to the Supreme Court on the 24th day of July, 2023 to:

Jason Bowles  
BOWLES LAW FIRM  
P.O. Box 25186  
Albuquerque, New Mexico 87125-0186  
Phone: (505) 217-2680  
jason@bowles-lawfirm.com

Robert J. Gorence  
GORENCE LAW FIRM, LLC  
300 Central Avenue S.W., Suite 1000E  
Albuquerque, New Mexico 87102  
Phone: (505) 244-0214  
gorence@golaw.us

*Attorneys for Plaintiffs-Respondents*

By: Stephanie M. Griffin, Deputy City Attorney  
P.O. Box 2248  
Albuquerque, NM 87103  
(505) 768-4500  
sgriffin@cabq.gov

*Attorney for Defendant-Petitioner*