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 V.M.,	)	**NO. S-1-SC-39826**
Plaintiffs-Respondents	)	
v.	)	
CITY OF ALBUQUERQUE	)	
Defendant-Petitioner	)	

PETITIONER CITY OF ALBUQUERQUE'S REPLY BRIEF

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

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

City of Albuquerque Defendant-Petitioner:

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

Attorney for Defendant-Petitioner

ORAL ARGUMENT IS REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

New Mexico Statutes and Rules

INTRODUCTION

It is very apparent from the Answer Brief that Respondents, by and through their attorneys, have chosen to continue to engage in their pattern of subterfuge. One such example of this is their representation that: "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." **[Rsp Brf at p. 26]** It is astounding that Respondents have the audacity to make this assertion when the defense raised the notice issue in its affirmative defenses pled in the Answer and attempted to obtain discovery from Respondents on the notice issue, which they *withheld* and failed to disclose before the termination of discovery. **[RP 112; 853 – 854; 921-922; 999 – 1001; and Sept. 28, 2020 CD 2 counter times 37:07 -38:17]** The Course of Proceedings section of Petitioner's Brief in Chief illustrates that Petitioner has not been dilatory in seeking the dismissal of this case as Respondents represent. The defense has filed *two* Motions for Judgment on the Pleadings that has resulted in the dismissal of the majority of the claims asserted in the Complaint. **[RP 152-175; 264-265; 280-289; 340 -347]** Since the dismissal of the majority of the counts in the Complaint, Respondents have withheld information in discovery, including the undated

"Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA," in an effort to keep this action alive. Petitioner served discovery upon Respondents requesting a copy of any tort claim notice and any correspondence they had to/from any non-attorney City official so that the defense could confirm that no written notice of the claims asserted in this lawsuit had been provided on their behalf. Petitioner sought this confirmation and any evidence or information that Respondents claimed was actual or written notice since it is the burden of defense to prove non-compliance with the Section 41-4-16 notice provision. *See Cummings v. Bd. of Regents of Univ. of New Mexico,* 2019-NMCA-034, ¶ 11, 444 P.3d 1058 (stating that it is the burden of the defense to prove inadequate notice). The defense met this burden in the district court, and Petitioner contends that the Court of Appeals erred in finding otherwise based upon the record cited questions presented discussed in the Brief in Chief.

ARGUMENT

I. Preservation/Waiver Issue Raised by Respondents

Respondents claim that the City has raised arguments 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" by pointing out in its Brief in Chief the multiple

deficiencies in the written notice. **[Rsp. Brf at p. 3]** This claim is legally flawed and factually untrue.

The district court found in favor of Petitioner; consequently, Petitioner did not file a Notice of Appeal in this cause and therefore as the non-appealing party, it has not waived or failed to preserve any arguments. Notwithstanding, by erroneously claiming preservation error, Respondents fail to recognize that the issue as to whether a district court properly dismissed claims for failing to comply with the notice requirement in the Tort Claims Act ("TCA") is an issue of law for which an appellate court reviews *de novo*. *Cummings,* 2019-NMCA-034, ¶ 16. Accordingly, under this standard this Court can review the evidence presented in the record and decide for itself if the TCA written notice requirement is satisfied. This is why Petitioner *reiterated* in its Brief in Chief the multiple flaws contained within the undated "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA." Emphasis is placed upon the word "reiterated" because, contrary to Respondents' representation, the arguments and evidence presented before this Court were also presented at the district court level and to the Court of Appeals.

The first notice that Petitioner had that Respondents were claiming that the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" was a TCN

submitted on their behalf is when they referred to and attached this "Notice" as an exhibit to their summary judgment response brief. **[RP 853 – 854; 921-922]** The defense pointed out during a hearing held on September 28, 2020, that Respondents failed to disclose this "Notice" during discovery and that they had in fact represented that they had no documents or recordings documenting any communications between them and any non-attorney City employees. **[Sept. 28, 2020 CD 2 counter times 37:07 - 38:17]** When Respondents filed a Motion to Reconsider requesting that the district court judge reconsider its ruling that the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" was deficient written notice under the TCA, the defense filed a response brief wherein it once again pointed out Respondents' gamesmanship in failing to produce this document. **[RP 999 – 1001]** In the district court and the Court of Appeals, the defense has argued and pointed out the multiple deficiencies of the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" since receiving it for the first time from Respondents in this litigation. **[RP 921-922; 999 – 1001; 1003 – 1004; Sept. 28, 2020 CD 2 counter times 00:00 – 08:30; 15:55 - 18:50; 23:38 – 24:21; and 34:27 – 36:40 and Answer Brief filed on 4/3/22 at pp. 8-10 and 18-22]** Although the September 28, 2020 hearing pertained to the "actual notice" issue that the

Respondents have now abandoned, the defense incorporated by reference the arguments made during this hearing in Defendant's Response to Plaintiff's Motion to Reconsider on the written notice issue. **[RP 1003]** Petitioner incorporated these arguments because Respondents were using the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" to argue that it satisfied the requirements of the written *and* actual notice provisions under Section 41-4-16 of the TCA.

Petitioner also argued that this "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" did not provide notice that Pat and John Martens intended to file a claim on their own behalf or as the personal representatives of the Estate of V.M. Indeed, the defense pointed out in the response brief to Respondents' Motion to Reconsider how they were unfairly ambushed by the untimely disclosure of this "Notice." **[RP 1000 – 1001]** Petitioner has also argued at the district court level and on appeal that: (1) because Michael Martens, and not Pat and John Martens, was identified as the personal representative of the estate and (2) because the "Notice" makes no reference to the attempted kiss or the CYFD March, 2016 Intake Report, there was no way for the City to ascertain pre-suit that Pat and John Martens would file a lawsuit on their own behalf and/or on behalf of the Estate of V.M. for failing to investigate the attempted kiss. **[RP 921 -922 and Sept. 28,**

2020 CD 2 counter times 00:00 – 08:30; 15:55 - 18:50; 23:38 – 24:21; 34:27 – 36:40 and Answer Brief filed on 4/3/22 at pp. 8-10 and 18-22]

In addition, the defense has argued and presented evidence in the district court and on appeal that Pat Martens knew of the alleged attempted kiss as early as March of 2016; at the time of V.M.'s death; and at the time Respondents claim they were represented by Mr. Worley. **[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); Sept. 28, 2020 CD 2 counter times 18:52 – 24:24; RP 999; 1003 – 1004; and Answer Brief filed on 4/3/22 at pp.24-26]** Respondents claim that this information is irrelevant to the sufficiency of the written "Notice." However, contrary to their assertion, this argument and evidence is relevant because 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). Accordingly, this evidence and argument was made during the district court proceedings and is being made upon appeal to establish that Respondents had knowledge of the "relevant facts"

before V.M.'s murder; *before* the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" was submitted; and *before* the lawsuit was filed and yet elected to omit this information from the purported written notice submitted on their behalf. Therefore, it is unfathomable for Respondents to claim that the defense failed to preserve issues concerning the deficiencies of the written notice, including the omission of the relevant facts, which form the premise for this lawsuit.

II. Sufficiency of the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA"

Respondents also erroneously state in their Answer Brief that Petitioner raised an argument that the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" was untimely because it was not submitted within 90 days of the March 28, 2016 CYFD Intake Report. **[Rsp Brf at p. 9]** However, this argument was not raised in Petitioner's Brief in Chief. Petitioner did not raise it because it is the defense contention that *no* written notice and/or a deficient written notice was submitted on Respondents behalf that fails to set forth the time, place, and circumstance of the relevant facts pled in this lawsuit. The defense did point out that the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" is undated but it did so to illustrate one of its *many* deficiencies. Also, Petitioner set

forth that Respondents knew the relevant facts pertaining to the alleged attempted kiss at the time of V.M.'s death and at the time of the submission of the "Notice" but elected to omit this information. This argument was made to illustrate how this omission from the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" makes the "Notice" deficient because it did not reasonably alert the City pre-suit of the claims pled in this lawsuit.

In an attempt to overcome the obvious defects of the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA," Respondents now contend that the claim within the "Notice" concerning the failure to monitor Fabian Gonzales was directed towards "other entities" and not to the City of Albuquerque. **[Rsp Brf at pp. 8-9]** In making this representation, Respondents fail to mention that the "Notice" also expressly states: "[T]he State of New Mexico, County of Bernalillo, *and the City of Albuquerque* generally engaged in tortious conduct and circumstances leading to the death of V.M. *including failure to properly monitor Fabian Gonzales on probation.*" **[RP 853, Plaintiffs' Ex. 1 (emphasis added)]** Notwithstanding what Respondents' attorneys now represent, Mr. Worley has already conceded that the focus of the "Notice" was Fabian Gonzales. **[Sept. 28, 2020 CD 1 counter times 52:57 – 54:48; 57:09 – 58:09 and RP 1009 – 1010]**

This "Notice" also states that the Estate "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 an incident involving an *accident* that took place on August 26, 2016…" **[RP 853, Plaintiffs' Ex. 1 (emphasis added)]** The "Notice" sets forth that Fabian Gonzales along with two others (Michelle Martens and Jessica Kelley) drugged, sexually assaulted and killed V.M. *Id.* Although Michelle Martens and Jessica Kelley are mentioned in the "Notice," the alleged misconduct of an unknown governmental entity or entities is only linked to Fabian Gonzales. Respondents' reference to them as "two individuals" instead of by name in their Answer Brief supports this assertion. **[Rsp Brf at pp. 9 and 24]** Because of the vague and inconsistent language within the "Notice," it is not readily apparent as to which governmental entities a potential claim or claims is asserted against or for what conduct, other than a claim that Fabian Gonzales was not properly monitored. Indeed, it is expressed in the "Notice" that claims may be brought against the State of New Mexico, County of Bernalillo, *and* the City of Albuquerque, which resulted in the death of V.M. on or about August 26, 2016. **[RP 854 (emphasis added)]** This statement conveys that all three governmental entities were negligent and/or implies that their joint conduct resulted in her death.

Therefore, Respondents' contention that the "Notice" reflects that the claim of failing to properly monitor Fabian Gonzales was directed to "other entities" is disingenuous.

Respondents also contend that because the Risk adjuster's letter to Mr. Worley references that the murder investigation that was conducted in accordance with APD policies and procedures, then the City was aware that the alleged negligence referenced in the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" pertained to "whether APD's investigation involving the death of Victoria Martens was in accordance with departmental policies and procedures." **[Rsp Brf at p. 12]** They also claim this is what is alleged in the Complaint. *Id.* This argument is as farfetched as a description of V.M.'s death as an "accident" in the "Notice." The adjuster logically assumed that the "Notice" complained of how APD conducted the murder investigation because it involved all of the individuals named in the "Notice" as well as the City's only involvement/conduct that is related to V.M.'s death. Respondents absurdly argue that the Risk adjuster erroneously interpreted the "Notice" to only pertain to the post incident investigation and failed to investigate allegations of the City's negligence that led to V.M.'s death. **[Rsp Brf at p. 14]** Respondents claim, without citation to

evidence in the record that the City should have searched APD reports involving V.M. which they claim would have led to the discovery of APD's alleged negligence in failing to investigate the "CYFD tip" to APD of sexual assault against V.M. before her death by one of Michelle Marten's ex boyfriends. **[Rsp Brf at pp. 25-26]** In making this unfounded and misleading assertion, Respondents obviously ignore the evidence in the record that shows that they were aware of the alleged attempted kiss and did not report it to the police because they relied upon Michelle Martens to take care of it and had no concerns about Michelle's care of V.M. **[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)]** Michelle Martens took V.M. to see a doctor who found no evidence of sexual assault and noted *possible* sexual advances by an ex-boyfriend who no longer had contact with Michelle Martens. **[RP 758-759 (Defendant's Ex. E)]** The record also shows that there was no "tip" by CYFD because the March 28, 2016 CYFD Intake Report did not state that V.M. had been sexually assaulted or was in an unsafe environment. **[RP 761-765 (Defendant's Ex. F)]** When an APD sergeant reviewed this report, he determined there was no reasonable suspicion that a crime occurred. **[RP 769-771(citing Defendant's Ex. G at 18:14-25; 20:17-**

21:1; 22:14-19: 23:5-10; and 29:5-15] Therefore, this fallacy invented by Respondents that they use to lay blame on the City for failing to investigate non-existent information does not establish that the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" contained sufficient information for the City to investigate the claims pled in this lawsuit.

There is no doubt that the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA" is so poorly written to the point it is indecipherable and causes one to speculate as the Risk adjuster did as to what Mr. Worley was trying to convey. The multiple deficiencies of this "Notice" is why the questions presented in the Certiorari Petition are before this Court. The defense argued in the district court proceedings that the vagueness of this "Notice" leads a court to speculate as to what is conveyed within the four corners of this document. **[Sept. 28, 2020 CD 2 counter times 17:19 – 17:40 and 36:14 -36:40]** Respondents obviously recognized this with the presentation of Mr. Worley's affidavit an exhibit to their Motion to Reconsider to convey his purported intent. As argued by the defense, Respondents ambushed the defense when they presented this affidavit *after* the September 28, 2020 hearing so that he could convey his purported intent without cross-examination. **[RP 1003 and 1006]**

In an effort to rebut Petitioner's demonstration of deficiencies in the "Notice of Claim Resulting in Injury/Death Per § 41-4-16 NMSA", Respondents also cite to excerpts from the district court's June 29, 2020 Memorandum Opinion and Order to somehow contend that the judge was able to decipher this "Notice." **[Rsp Brf. at pp. 12 - 13]** However, their effort does not help their plight. In their brief, Respondents claim that the district court judge acknowledged that the "Notice" states the date and circumstances of the injury in that it describes the circumstances of V.M.'s death and the date of her death. **[Rsp Brf. at p. 12]** Respondents also cite from the opinion wherein the district court judge acknowledged that it has previously ruled that the Complaint does state a cause of action for breach of a duty to investigate pursuant to NMSA 1978 § 32A-4-3(C). **[Rsp Brf. at pp. 12-13]** However, in their select recitation from the decision, Respondents glaringly omit the relevant portion of the district court's opinion whereby the judge states:

> The TCA notice requirement was not met by stating the date and horrific details of the crime. Misdirected as to the nature of the claim, a potential defendant cannot make an informed assessment regarding whether to pay it.

[RP 950] The district court judge also states in this decision:

> The claim Plaintiffs gave written notice of is a claim that the City breached its duty to monitor Fabian Gonzales on probation.

> However, nowhere is it alleged in the Complaint that Fabian Gonzales was on probation or that the City has a duty to supervise persons on probation. The Court has made no determination that a duty exists, statutory or otherwise, or that immunity has been waived for a claim of negligence in monitoring a person on probation.

[RP 951] These statements by the district court encapsulate the issues and arguments presented in Petitioner's Brief in Chief, i.e., when a pre-suit tort claim notice sets forth a different time, place, and circumstance of the alleged tortious conduct that results in injury/death than what is pled in a lawsuit, the notice is insufficient under Section 41-4-16 of the TCA.

III. Degree of Information required for a Written Tort Claim Notice

With respect to the degree of information that is required for a written TCN, Respondents claim that Petitioner seeks to hold claimants to an unreasonable standard that exceeds what is required by Section 41-4-16. **[Rsp Brf at pp. 14-16]** They specifically claim that since the sufficiency of allegations contained within a Complaint is premised upon a notice pleading standard, then the content of a written notice of tort claim is less than this standard. **[Rsp Brf at pp. 22-23]** In making this argument, Respondents fail to recognize that a Complaint still must set forth sufficient allegations which if accepted as true assert a claim upon which relief can be granted. *See Delfino v. Griffo,* 2011-NMSC-015, ¶ 9, 150 N.M. 97,

257 P.3d 917. (internal quotation marks and citation omitted). A factually deficient Complaint is also subject to a Motion for More Definite Statement. *See* 1-012(B)(E) NMRA. Accordingly, the New Mexico Rules of Civil Procedure afford remedies to a party when a civil complaint is vague or fails to set forth a legal claim for relief. Notwithstanding, even under the notice pleading standard "general allegations of conduct are sufficient, as long as they show that the party is entitled to relief and the averments are set forth with sufficient detail so that the parties and the court will have a fair idea of the action about which the party is complaining and can see the basis for relief." *Schmitz v. Smentowski,* 1990-NMSC-002, ¶ 9, 109 N.M. 386, 785 P.2d 726. Respondents cite to no legal authority that a written tort claim notice requires less information than this. The *Cummings* decision seems to suggest that the notice pleading standard is similar or the same as what is required for a sufficient Section 41-4-16 written notice by stating: "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).

Petitioner still maintains that a Section 41-4-16 written notice should, at a minimum include the relevant facts of a potential claim that reasonably alert a governmental agency of what potential misconduct a claimant may assert against it in a lawsuit. In their Answer Brief Respondents' describe the content of the "Notice" as follows:

> The Notice states the time of the injury—that is when [V.M.] 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 [V.M.].

Their description does not set forth a specific or even a general location of where the alleged tortious conduct by the City took place. An assertion that the injury took place in the City of Albuquerque is insufficient, especially when Respondents know that V.M. was killed at Michelle Martens' apartment. The general reference as to how she was killed and those involved in killing her, Fabian Gonzales, Jessica Kelley, and Michelle Martens, does not reasonably alert the City of Albuquerque of any alleged negligent conduct by it and/or its employees. This is especially true since the "Notice" references multiple governmental agencies and expressly states that claims may be brought against the State of New Mexico,

County of Bernalillo, *and* the City of Albuquerque, which resulted in the death of V.M. on or about August 26, 2016. **[RP 854 (emphasis added)]** Consequently, this "Notice" is still deficient since it does not provide *fair* notice from its omission of relevant facts pertaining to any involvement of the City in V.M.'s death.

CONCLUSION

WHEREFORE, based upon the foregoing arguments, points, and authorities set forth herein and in the Brief in Chief, 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

Attorney for Defendant-Petitioner
City of Albuquerque

STATEMENT OF COMPLIANCE

I hereby certify that the body of the reply brief consists of seventeen (17) pages and that this brief was prepared using a proportionally-spaced type style or typeface such as Times New Roman consisting of **3,743** words in the body of the brief.

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

Attorney for Defendant-Petitioner
City of Albuquerque

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 Reply Brief to the Supreme Court on the 30th day of August, 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

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
Attorney for Defendant-Petitioner
City of Albuquerque