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Supreme Court of New Mexico
3/22/2024 2:49 PM
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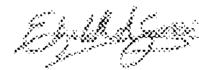

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40162

KATE FERLIC, as the Personal Representative of the Wrongful Death Estate of LB-R, a deceased minor, CARISSA BREALEY, individually, and as the Guardian and Next Friend of K.B.R., a minor, JAMES ROOD, individually and AIDAN BREALEY-ROOD, individually,

Plaintiffs,

v.

MESILLA VALLEY REGIONAL DISPATCH AUTHORITY, DANIEL GUTIERREZ, DAVID WOODARD and QUINN PATTERSON, individually and as Mesilla Valley Regional Dispatch officers and employees, DONA ANA COUNTY BOARD OF COUNTY COMMISSIONERS, ARTURO HERRERA, individually and as Dona Ana County officer and Employee, ADRIAN HERRERA, individually and as Dona Ana County officer and employee, NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, and CITY OF LAS CRUCES,

Defendants.

BRIEF IN CHIEF

For Defendant New Mexico Department of Public Safety

LAW OFFICE OF MICHAEL DICKMAN
Michael Dickman
P. O. Box 549
Santa Fe, New Mexico 87504
505-989-9360
mikedickman@yahoo.com

For Defendants Mesilla Valley Regional Dispatch Authority, Daniel Gutierrez, David Woodard, and Quinn Patterson

MASON & ISAACSON, P.A.
Thomas Lynn Isaacson
P.O. Box 1772
Gallup, New Mexico 87301
505-722-4463
tli@milawfirm.net

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SUMMARY OF PROCEEDINGS

This matter is before the Court upon certification from the United States District Court for the District of New Mexico (Hon. David Herrera Urias). The certified question is as follows:

> Considering the Enhanced 911 Act, NMSA 1978, §§ 63-9D-1 to -11.1 (1989, as amended through 2017), and the Emergency Medical Services Act, NMSA 1978 §§ 24-10B-1 to -7 (1983, as amended through 2014), are 911 dispatchers immune from liability for negligence under the New Mexico Tort Claims Act?

Memorandum Opinion and Order Sua Sponte Certifying Question to the New Mexico Supreme Court and Denying Pending Motions to Dismiss Without Prejudice ("Memorandum Opinion"). **[RP, Vol. III, 184-193]**

The certified question arises from litigation presently pending before the United State District Court (on removal) involving the July 8, 2020 death of Isaac Brealey-Rood, a minor. The wrongful death estate, Brealey-Rood's mother, father, and adopted brother sued the Mesilla Valley Regional Dispatch Authority ("MVRDA"), three employees of MVRDA, the Dona Ana County Board of County Commissioners ("County"), two employees of the County, the New Mexico Department of Public Safety ("NMDPS"), and the City of Las Cruces ("City"). The First Amended Complaint ("FAC") asserts claims for negligence, negligent hiring, supervision, and training, spoliation of evidence, negligent and

intentional infliction of emotional distress, and loss of consortium. **[RP, Vol I, 6-49]** At issue in the current proceeding before this Court are the claims asserted against the dispatchers employed by MVRDA and NMDPS. Neither the County nor the City are participants in this briefing.

In general, Plaintiffs allege that the immunity of the MVRDA and NMDPS Defendants has been waived by Sections 41-4-6 (waiver of immunity for machinery and equipment) and 41-6-10 (waiver of immunity for health care providers) of the New Mexico Tort Claims Act, NMSA 1978, §§ 41-4-1 to -30 (1976, as amended through 2020). **[RP, Vol. I, 4-6]** While it is unclear whether Plaintiffs are making the same claim against the NMDPS dispatchers, they are clearly alleging that the MVRDA dispatchers are "law enforcement officers," for whom they contend immunity has been waived under Section 41-4-12. **[RP, Vol. I, 3]** In general terms, Plaintiffs are alleging the MVRDA dispatchers:

- Canceled two ambulance calls. **[RP, Vol. I, 23]**
- Failed to timely and accurately communicate the minor's location on the trail. **[RP, Vol. I, 15]**
- Referred the call to a County Fire Prevention Specialist. **[RP, Vol. I, 18]**
- Failed to adequately convey the minor's condition to first responders. **[RP, Vol. I, 19]**

- Classified the incident as a search and rescue event. **[RP, Vol. I, 20]**
- Failed to inform the minor's mother that the requests for an ambulance had been cancelled. **[RP, Vol. I, 26]**

Plaintiffs allege the NMDPS dispatcher incorrectly noted the distance the minor was located from the trailhead. **[RP, Vol. I, 15]**

The NMDPS and MVRDA Defendants filed separate motions to dismiss the FAC. **[RP, Vol. I, 212-219, and Vol. II, 280-292]** U. S. District Court Judge David Herrera Urias heard oral arguments on the motions (as well as a separate motion to dismiss filed by the County) on August 24, 2023. **[RP, Vol. III, 84-183]** On October 2, 2023, Judge Urias issued the Memorandum Opinion certifying the foregoing question to this Court. This Court accepted the certified question pursuant to its February 5, 2024 Order.

ARGUMENT

A. 911 Dispatchers are not law enforcement officers.

Plaintiffs argue repeatedly that the MVRDA Defendants are "law enforcement officers." **[RP, Vol. I, 8]** Plaintiffs similarly assert that the County Fire Prevention Specialists are law enforcement officers. **[RP, Vol. I, 10]** It is not entirely clear whether they are alleging the NMDPS dispatchers are law enforcement officers, but Defendants assume they are. The issue is not addressed

in the Memorandum Opinion, but Defendants believe the issue must be raised in considering dispatcher immunity.

The Tort Claims Act confers immunity on public entities and public employees unless such immunity is specifically waived. "A governmental entity and any public employee while acting within the scope of duty are granted immunity from liability for any tort except as waived by the New Mexico Religious Freedom Restoration Act [28-22-1 NMSA 1978] and by Sections 41-4-5 through 41-4-12 NMSA 1978." NMSA 1978, § 41-4-4 (A). Seven of the eight waivers of immunity address negligence claims against public entities or employees. The eighth, Section 41-4-12, "waives immunity for specified intentional torts, violation of property rights, or deprivation of constitutional rights 'caused by law enforcement officers while acting within the scope of their duties.'" *Rayos v. State ex rel. Dep't of Corrs.*, 2014-NMCA-103, ¶ 7, 336 P.3d 428. Of note, Section 41-4-12 does not waive immunity for negligence claims, as such. *See Blea v. City of Espanola*, 1994-NMCA-008, ¶ 12, 117 N.M. 217, 870 P.2d 755.

The Tort Claims Act contains two specific definitions for determining whether a public employee is acting as a law enforcement officer. Section 41-4-3, the "definitions" provision of the Act, states that a

> "law enforcement officer" means a full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer

> employed by a governmental entity, whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes, or members of the national guard when called to active duty by the governor.

Section 41-4-12 contains a separate definition: "For purposes of this section, 'law enforcement officer' means a public officer or employee vested by law with the power to maintain order, to make arrests for crime or to detain persons suspected of or convicted of committing a crime, whether that duty extends to all crimes or is limited to specific crimes." This definition was added by Laws 2020, chap. 5, § 14, presumably to make clear, once and for all, what the legislature intended regarding law enforcement officer liability. Under either definition, 911 dispatchers are not law enforcement officers.

The Court of Appeals, in *Rayos v. State ex rel. Dep't of Corrs.* 2014-NMCA-103, 336 P.3d 428, 433, examined the three categories of activities associated with the duties of law enforcement officers, making arrests for crime, holding persons accused of crimes in custody, and maintaining public order. Like the probation and parole officers in *Rayos*, there can be little doubt that 911 dispatchers are not tasked with making arrests for crimes or holding persons accused of crimes in custody. And the Court in *Rayos* noted that "to fall within the 'maintaining public order' category, a public employee's principal duties must be duties traditionally performed by law enforcement officers that directly impact public order." *Id.*, at ¶ 16, *citing*, *Dunn v. McFeeley*, 1999-NMCA-084, ¶ 25, 127

N.M. 513, 984 P.2d 760. "Even being a member of a law enforcement team is insufficient by itself to make one a law enforcement officer." *Rayos*, 336 P.3d, at 434. As this Court stated in *Weinstein v. City of Santa Fe, ex rel. Santa Fe Police Dep't*, 1996-NMSC-021, ¶ 12, 121 N.M. 646, 916 P.2d 1313, a court looks to see if an actor's principal duties to which they devote a majority of their time are of a law enforcement nature. *See also, Anchondo v. Corr. Dep't*, 1983-NMSC-051, ¶ 5, 100 N.M. 108, 666 P.2d 051 (finding Secretary of Department of Corrections was not a law enforcement officer because "the vast majority of his duties and responsibilities are those of a public employee and not a law enforcement officer"); *Coyazo v. State,* 1995-NMCA-056, ¶ 11, 120 N.M. 47, 897 P.2d 234 (rejecting argument that by prosecuting criminals and deterring persons from criminal activity, a prosecutor is, of necessity, found to be maintaining public order).

Whether a dispatcher is a law enforcement officer was addressed by United States Magistrate Judge William Lynch in *Leyba v. City of Santa Fe*, 198 F. Supp. 3d 1254 (D.N.M. 2016). *Leyba* involved an accidental police shooting after a dispatcher failed to notify responding officers that a concerned neighbor was at the scene of an alarm call. The plaintiff in *Leyba* asserted that the dispatcher's immunity was waived by the provisions of Section 41-4-12. Magistrate Judge conducted an extensive review of New Mexico law on the duties of law enforcement officers for purposes of determining immunity from suit under the

Tort Claims Act, and compared those to the duties of dispatcher. He concluded that "[u]nder New Mexico law, any impact of the dispatcher's duties on public order is only incidental and is 'too indirect to satisfy the statutory definition. [Internal citation omitted.] Therefore, § 41-4-12's waiver of immunity does not apply." *Leyba*, 198 F. Supp. 3d, at 1260.

Plaintiffs rely on the unpublished Court of Appeals decision in *Thompson v. Torrance County Bd. of Comm'rs*, 2011 N.M. App. Unpub. LEXIS 352 (nonprecedential), to argue that dispatchers are law enforcement officers. *Thompson* did not hold as such, but simply stated that it did not view the question as reviewable as a matter of law. While the Court of Appeals may have been judicious in exercising such constraint, the issue is now clearly before this Court for resolution.

The mechanic at the municipal vehicle service center may play an integral role in keeping a police presence on the street by servicing the vehicles necessary for police officers to go onto patrol and perform their duties. Yet no one would rationally argue that the mechanic should be considered a "law enforcement officer" for purposes of determining whether or not immunity has been waived. The same conclusion is required here: 911 dispatchers are not law enforcement officers and may not be sued pursuant to the provisions of Section 41-4-12. Which

leads to the question directly presented in this proceeding: are 911 operators immune from negligence claims under the Tort Claims Act.

B. There is no waiver of immunity for dispatcher error under Section 41-4-6.

While this case was pending before Judge Urias, the New Mexico Court of Appeals issued an opinion in *Gebler v. Valencia Reg'l Emergency Communs Ctr.*, 2023-NMCA-070 (Filed July 13, 2023). *Gebler* involved a claim that dispatchers were allegedly negligent by failing to include certain information in the computer-aided dispatch system (CAD). Plaintiff asserted that the dispatchers' immunity was waived by Section 41-4-6 of the Tort Claims Act ("the building waiver") in that the 911 call "was mishandled by the dispatchers." *Id.*, at ¶ 13. Judge Bustamante, sitting by designation, conducted an exhaustive review of the "considerable judicial attention" paid to Section 41-4-6. Judge Bustamante noted that there was no dispute that information was provided to the dispatchers that was not passed on to the officers, and that the information would have been helpful in handling the call. *Id.*, at ¶ 32. Accepting that the dispatchers may have been negligent in their actions, Judge Bustamante found that immunity is not waived for employee negligence. *Id.* Counsel for MVRDA and NMDPS are aware of no New Mexico authority to the contrary.

C. 911 Dispatchers are immune from liability under the Tort Claims Act.

Plaintiffs appear to rely principally on the provisions of the Emergency Medical Services Act, NMSA 1978, §§ 24-10B-1 to -13 (1983, as amended through 2023) for their argument that 911 dispatchers may be sued for negligence pursuant to the Tort Claims Act. The statute is not a model of clarity, but purports to allow claims under the Act against certain classes of emergency medical services providers. Specifically, Section 24-10B-8, states that

> in any claim for civil damages arising out of the provision of emergency medical services by personnel described in Section 24-10B-5 NMSA 1978, those personnel shall be considered health care providers for purposes of the Tort Claims Act [41-4-1 NMSA 1978] if the claim is against a governmental entity or a public employee as defined by that act.

Section 24-10B-5, in turn creates licensure requirements for persons who provide emergency medical services within the state. This includes “licensed emergency medical technicians.” *Id.*, at 24-10B-5(B). And then it gets tricky, as the statute in Subsection C goes on to list other classes of providers, including “emergency medical dispatchers,” emergency medical technicians,” emergency medical services first responders,” and “paramedics,” as those whom the department [of health] may license. Then, to create yet another layer of complexity, Subsection D refers to yet other differently titled providers, including those in the following

classifications: "emergency medical technician-basic," "emergency medical technician-intermediate," and "emergency medical technician-paramedic." Subsection D appears to apply only to those situations where individuals wrongfully hold themselves out as being licensed in the covered positions, and imposing criminal sanctions for such actions. Despite the obtuse way the statute is cobbled together, one conclusion is obvious: it addresses many classifications of individuals NOT at issue in this case, i.e., EMT-Basics, EMT-Intermediates, EMT-Paramedics, and emergency medical services first responders, and thus must not be read too broadly when answering the question presented in this action.

Thus, if one starts with the premise that all classifications of responders may be considered as "health care providers" for purposes of the Tort Claims Act, one must then look at the adoption dates of the relative statutes. The Tort Claims Act, of course, was enacted in 1976 in response to this Court's decision in *Hicks v. State*, 1975-NMSC-56, 88 N.M. 588, 544 P.2d 1153. The Emergency Medical Services Act was enacted seven years later, in 1983. Thus, one can assume that the Legislature, in 1983, intended to subject all emergency services providers to Tort Claims Act liability as of 1983.

However, one must then fast forward another six years, to 1989, and the enactment of the Enhanced 911 Act, NMSA 1978, §§ 63-9D-1 to -20 (1989, as amended through 2017). A short, but informative, explanation of one state's

method of addressing the trade-offs inherent in an enhanced 911 system may be found in *Wilson ex rel. Manzano v. City of Jersey City*, 209 N.J. 558, 563, 39 A.3d 177, 180 (S. Ct. 2012):

> In creating an enhanced 9-1-1 system that would allow police, fire, and first-aid personnel to respond to emergencies, the Legislature mandated the participation of telecommunications companies and governmental entities. In exchange for this compelled cooperation, the Legislature apparently devised a statute, N.J.S.A. 52: 17C-10 to shield public and private entities, and their personnel, from civil liability for certain acts of ordinary negligence arising from the operation of the 9-1-1 system.

The Court in *Wilson* was concerned with the New Jersey statute enacted in response to the Wireless Communications and Public Safety Act of 1999, 47 U.S.C.A. § 615 (1999). That statute, N.J.S.A. 52:17C-10 (1989, as amended through 1999), provides, in relevant part that

> [n]o telephone company, person providing commercial mobile radio service as defined in 47 U.S.C. 332 (d), public safety answering point, or manufacturer supplying equipment to a telephone company, wireless telephone company, or PSAP, or any employee, director, officer, or agent of any such entity, shall be liable to any person for civil damages, or subject to criminal prosecution resulting from or caused by any act, failure or omission in the development, design, installation, operation, maintenance, performance or provisioning of any hardware, software, or any other aspect of delivering enhanced 9-1-1 service, wireless 9-1-1service, or wireless enhanced 9-1-1 service. This limitation of liability is inapplicable if such failure resulted from a malicious purpose or a wanton and willful disregard for the safety of persons or property.

Wilson, 209 N.J. 558, 579, 39 A.3d 177, 189. The Court in *Wilson* was adjudicating negligence claims similar to those raised by Plaintiffs in this case: that a computer-aided dispatch (CAD) ticket listed an incorrect address, that the operator never clarified with the caller what he meant by the use of the term "next door," and that the operator violated procedures by not asking for the caller's name or confirming his number. *Id.* at 568, 39 A.3d at 181-182. The Court rejected as "absurd" the conclusion of the lower appellate court that the immunity provided by the Act applied only to the mechanical aspects of a 911 call. "The careless design and implementation of 9-1-1 software and hardware, even the insertion of a plug in the wrong socket to turn on the system, receives the shield of immunity but the 9-1-1 operator who is working under the high stress of receiving a frantic call and who must act decisively in a matter of seconds does not." *Id.* at 585-586, 39 A.3d at 193-194. The Court further cataloged the states that provide immunity to 9-1-1 operators "in clearly written statutes,"[1] as well as a plethora of "other states [that] have enacted broadly written statutes---some infused with ambiguity---that seemingly provide immunity to individuals and entities involved in the 9-1-1 system." *Id.* at 587, 39 A.3d at 194. "Courts---when given the opportunity to

[1] Mo. Rev. Stat. § 190.307(1) (2011); Nev. Rev. Stat. § 707.500(1)(c) (2011); S.D. Codified Law § 34-45-17 (2011).

construe some of those statutes—have read them as providing immunity to 9-1-1 operators who mishandle emergency calls."[2]

The *Wilson* Court ultimately held "that the 9-1-1 operators, and their employer the City of Jersey City, are immune for any negligent mishandling of the emergency calls in this case under subsection (d) of N.J.S.A. 52: 17C-10." *Wilson*, 209 N.J. 558, at 588, 39 A.3d 177, at 195. But, as noted before, the Court recognized the trade-offs:

> The Legislature, it appears, did not conscript municipalities and other public and private entities into providing and operating an enhanced 9-1-1 system without according them some measure of immunity for acts and omissions that do not rise to "wanton and willful disregard for the safety of persons or property." [Citation omitted.] An enhanced 9-1-1 system—developed and operated by telecommunications companies and public entities—that allows for a rapid response by police, fire, and first-aid personnel to emergencies is of incalculable benefit to society and saves lives. [Citations omitted.] But as with every system that depends on human endeavor and decision-making, errors will occur.
>
> The tragic events underlying the lawsuit in this case naturally evoke sympathy. However, the Legislature has decided that the overall benefits to our State from an enhanced 9-1-1 system require shielding telecommunications and public entities, and their personnel, from potentially costly lawsuits for mistakes, even negligent ones.

Id. at 588-589, 39 A.3d at 195.

[2] *Id.* at 588, 39 A.3d at 195, *citing, Harrell v. City of Chicago Heights*, 945 F. Supp. 1112, 1116-11118 (N.D. Ill. 1996); *Giles v. Brown County*, 868 N.E.2d 478, 480-82 (Ind. 2007); *Lewis v. Four Corners Volunteer Fire Dep't,* 994 So. 2d 696, 699, 701 (La. Ct. App. 2008).

The Court of Appeals of Indiana, First District, reached a similar result, for similar reasons, in *Burns v. City of Terre Haute*, 744 N.E.2d 1038 (Ct. App., 1st Dt. 2001). *Burns* involved the failure of a dispatcher to follow internal protocols requiring that a map displayed on the computer console be consulted before giving directions to emergency personnel. The dispatcher "gave directions 'off the top of [his] head,'" ultimately directing personnel to the wrong side of the street. The mistake resulted in the emergency care providers taking nine or ten minutes to arrive, instead of the one minute it should have taken had directions been accurate. *Burns*, 744 N.E.2d, at 1039. Noting that the Indiana General Assembly had "declared that the 'provision of emergency services is a matter of vital concern affecting the public health, safety, and welfare of the people of Indiana," the Court concluded that the defendant was entitled to immunity. *Id.* at 1040.

The *Wilson* and *Burns* decisions provide guidance on why immunity is a key element of an enhanced 911 system. Returning to the New Mexico statute at issue, NMSA 1978, § 63-9D-10 (1989, amended through 2017), it is obvious that the New Mexico Legislature intended immunity to apply in this case. *Wilson*, and the majority of the cases cited in the *Wilson* decision, address immunity statutes that preclude actions based on negligence, while preserving claims for willful and wanton conduct. Such would have been the result in New Mexico until 2017.

The New Mexico Enhanced 911 Act was enacted in 1989. S.B. 77 (N.M. 1989) contained the following provision:

> Section 10. Immunity.—911 systems are within the governmental powers and authorities of the local governing body or state agency in the provision of services for public health, welfare and safety. In contracting for such services or the provisioning of a 911 system, **except for willful or wanton negligence or intentional acts,** the local governing body, public agency, equipment supplier, local exchange telephone company and mobile telephone company including a cellular service company as defined in Subsection B of Section 63-9B-3 NMSA 1978, their employees and agents shall be immune from litigation or the payment of any damages in the performance of installing, maintaining or providing 911 systems and transmitting 911 calls.

(Emphasis added). The immunity language underwent a moderate revision in 2001:

> 63-9D-10. Immunity.—911 systems are within the governmental powers and authorities of the local governing body or state agency in the provision of services for public health, welfare and safety. In contracting for such services or the provisioning of a 911 system, except for willful or wanton negligence or intentional acts, the local governing body, public agency, equipment supplier, telecommunications company, commercial mobile radio service provider, and their employees and agents are not liable for damages resulting from installing, maintaining or providing 911 systems or transmitting 911calls.

H.B. 339, § 10 (N.M. 2001) (nmlegis.gov/sessions/01%20Regular/FinalVersions/house/HB0339FV.PDF) A 2005 amendment only added the word "enhanced" before each reference to a "911

system." H.B. 174, § 7, 2005 Regular Session (N.M. 2005) (nmlegis.gov/Sessions/05%20Regular/final/HB0174.pdf)

But in 2017, the Legislature made a significant change that is material to this action:

> 63-9D-10. Immunity.---
>
> 911 systems are within the governmental powers and authorities of the local governing body or state agency in the provision of services for the public health, welfare and safety. In contracting for such services or the provisioning of a 911 system, **except for intentional acts,** the local governing body, public agency, equipment supplier, communications service provider and their officers, directors vendors, employees and agents are not liable for damages resulting from installing, maintaining or providing 911 systems or transmitting 911calls.

(Emphasis added). S.B. 46, §6 2017 Regular Session (N.M. 2017)(nmlegis.gov/Sessions/17%20Regular/final/SB0046.pdf) Thus, in 2017 the Legislature removed the words "willful or wanton negligence" from the immunity section and provided that the operation of an enhanced 911 system should be immune from all claims except for those arising from intentional acts.

Which leads to the interplay between the relevant provision of the Emergency Medical Services Act, NMSA 1978, § 24-10B-8 (1983, as amended through 1993), and the Enhanced 911 Act, NMSA 1978, § 63-9D-10 (1989, as amended through 2017). The legislature is presumed to know the law when it enacts legislation. *See, State ex rel. Human Servs. Dep't (In re Kira M.),* 1994-

NMSC-109, ¶ 15, 118 N.M. 563, 883 P.2d 149. Thus, one can only conclude that, as of 2017, any claim for enhanced 911 operations not based on an intentional act would be barred by the provisions of Section 63-9D-10. While the other classifications of emergency medical services providers referred to in Section 24-10B-5 may still be considered health care providers for purposes of the Tort Claims Act, it is clear that dispatchers are not.

The language of Section 63-9D-10 is precise. It does not require a strained interpretation to arrive at the only logical conclusion: 911 dispatchers are immune from negligence claims made under the New Mexico Tort Claims Act. The certified question from the United States District Court must be answered in the affirmative.

CONCLUSION

For the reasons set forth above, the MVRDA and NMDPS Defendants respectfully request that this Court conclude that 911 dispatchers are immune from liability for negligence under the New Mexico Tort Claims Act.

Respectfully submitted,

MASON & ISAACSON, P.A.

By, */s/Thomas Lynn Isaacson*
P.O. Box 1772
104 E. Aztec
Gallup, New Mexico 87301
(505) 722-4463
(505) 722-2629 (f)
tli@milawfirm.net
Attorneys for Defendants MVRDA,
Gutierrez, Woodard, and Patterson

and

LAW OFFICE OF MICHAEL DICKMAN

By, */s/ Michael Dickman*
Michael Dickman
P. O. Box 549
Santa Fe, New Mexico 87504
505-989-9360
mikedickman@yahoo.com
Attorneys for Defendant NMDPS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was filed via the Odyssey system on this 22nd day of March, 2024 and that the following counsel were served by the system by electronic mail as follows:

Mollie McGraw
mollie@lawfirmnm.com

Brandon Huss
bhuss@nmcounties.org

David Roman
droman@nmcounties.org

Michael Dickman
mikedickman@yahoo.com

Luis Robles
luis@roblesrael.com

Renni Zifferblatt
renni@roblesrael.com

/s/ Thomas Lynn Isaacson