



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Sup. Ct. No. S-1-SC-40987

TRISHA CONKLIN,

Plaintiff-Respondent,

v.

**SIERRA VISTA HOSPITAL GOVERNING BOARD
And SIERRA VISTA HOSPITAL,**

Defendants-Petitioners.

PLAINTIFF-RESPONDENT TRISHA CONKLIN'S ANSWER BRIEF

BENCOE & LACOUR LAW, PC
Lori M. Bencoe
Cherie L. LaCour
9201 Montgomery Blvd NE #404
Albuquerque, New Mexico 87111
Phone: (505) 247-8800
Fax: (505) 247-8801
lori@bencoelaw.com
cherie@bencoelaw.com

TRIAL LAWYERS FOR JUSTICE
Nicholas Rowley
Courtney Rowley, Pro Hac Vice
421 W. Water Street, Third Floor
Decorah, Iowa 52101
Phone: (866) 864-5529
NR@TL4J.com
therowleylawfirm@gmail.com

BOWEN HATCH LAW
Theresa Bowen Hatch
1902 Wright Place Suite 200
Carlsbad, California
Phone: (760) 539-7603
theresa@bowenhatchlaw.com
Attorneys for Plaintiff-Respondent

STALTER LAW LLC
Kenneth H. Stalter
7441 Bartlett St NE Suite 1D
Albuquerque, NM 87109
(505) 315-8730
ken@stalterlaw.com
*Appellate Attorney for
Plaintiff-Respondent*

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Statement of Compliance

This brief complies with Rule 12-318(F)(3) NMRA because it uses a proportionally spaced typeface, and its body contains 9,772 words. This word count was obtained with Microsoft Word.

Statement of Related Cases

Counsel is not aware of related cases in the New Mexico Appellate Courts.

I. INTRODUCTION

The New Mexico Tort Claims Act, NMSA 1978, Section 41-4-16 (1977), generally requires that claimants give notice of their claims “within ninety days after an occurrence” but tolls this period for “the time, not exceeding ninety days, during which the injured person is incapacitated from giving the notice by reason of injury.”

Trisha Conklin underwent surgery at Sierra Vista Hospital in February 2018. The surgery went badly. She developed wound dehiscence and sepsis, requiring a seventeen-day hospitalization. For months afterward, she required continuous narcotic pain medications—fentanyl, oxycodone, morphine, benzodiazepines—and comprehensive assistance from her parents with basic daily functions. Her father managed her finances after she forgot to pay her rent. Her mother moved into her apartment to provide daily wound care and help with personal hygiene. Her children moved out of state because she could not care for them. A medical expert opined that her medication regimen would impair her “ability to make reasoned decisions.” She later testified that during this period she was not in her “right mind.”

The question in this case is whether this evidence—viewed in the light most favorable to Conklin—raises a genuine dispute of material fact about whether she was “incapacitated from giving the notice by reason of injury” under Section 41-4-16(B). The Court of Appeals held that it does. That conclusion was correct, and this Court should affirm.

When Petitioners—Sierra Vista Hospital and Sierra Vista Hospital Governing Board (collectively, SVH)—moved to dismiss for lack of subject matter jurisdiction, the district court was required to determine whether Conklin’s incapacity claim triggered the tolling provision. But because that determination required findings about the nature, severity, and functional impact of her surgical injuries—the same facts relevant to her damages—the jurisdictional inquiry was “intertwined with the merits.” Under the federal standard New Mexico adopted in *South v. Lujan*, 2014-NMCA-109, ¶¶ 8-9, that meant the district court was required to convert the motion to one for summary judgment and refrain from weighing evidence or making credibility determinations. The district court did the opposite: it expressly found the nurses “credible” and “in the best position to observe” Conklin, while discounting the contrary testimony from her family, her medical expert, and even the nurses themselves. [10-31-2022 Tr. 3:03:56-4:29] The Court of Appeals correctly held that this approach was error.

As for the meaning of “incapacitated,” Petitioners urge this Court to hold that incapacity requires proof of mental incompetence to make healthcare decisions or enter contracts—a standard that appears nowhere in the statutory text. Section 41-4-16(B) asks only whether “the injured person is incapacitated from giving the notice by reason of injury.” The Court of Appeals correctly interpreted this language to require a functional inquiry: was the claimant, by reason of injury, unable to prepare

and give notice or to cause another to do so on her behalf? This interpretation follows from the statutory text. Petitioners offer no textual basis for their restrictive standard—only policy arguments that ignore the statutory safeguards the Legislature already provided.

Petitioners stress testimony from two home health nurses who assessed Conklin’s capacity to consent to healthcare services. But a complete review of the nurses’ testimony undermines rather than supports Petitioners’ position. Nurse Ryan Ramos could not remember Conklin at all before his deposition. Nurse Jennifer Ramirez—while stating that Conklin was not “incapacitated” by her lay definition—also testified that Conklin “slept a lot,” was “debilitated,” lacked the “mind skill-set” to make independent decisions, and “needed guidance to make decisions,” and that her fentanyl medication “puts you to sleep.” Neither nurse had legal training or had heard of the TCA. Their assessments addressed whether Conklin could consent to home healthcare—not whether she could comprehend a potential legal malpractice claim and provide formal notice to a governmental entity within a statutory deadline. At most, this testimony creates a factual dispute; it does not resolve one as a matter of law.

The narrow question for the jury is whether Conklin was incapacitated for a length of time sufficient to render her June 20, 2018 notice timely. The conflicting evidence in this record—expert medical testimony, daily family observations

spanning months, the nurses’ own acknowledgments of Conklin’s substantial limitations, and her own testimony about her condition—easily raises a genuine dispute on that question. Petitioners ask this Court to resolve that dispute in their favor as a matter of law, based on sporadic assessments by nurses who were evaluating another question.

The Court of Appeals’ opinion applies established procedural standards to an intertwined jurisdictional question. It interprets a statutory term according to its plain meaning and consistent precedent. And it remands a genuine factual dispute for resolution by a jury. This Court should affirm.

II. STATEMENT OF PROCEDURAL HISTORY AND FACTS

This appeal arises from the district court’s dismissal of Respondent Trisha Conklin’s medical malpractice claims against Petitioners Sierra Vista Hospital and Sierra Vista Hospital Governing Board, following extensive proceedings on the hospital’s jurisdictional challenge based on Conklin’s alleged failure to provide timely notice under the Tort Claims Act (“TCA”). *Conklin v. Sierra Vista Hosp. Governing Board*, 2025-NMCA-____ (A-1-CA-40924, June 5, 2025) (“Op.”), ¶¶ 1, 4-5. The district court ultimately granted dismissal after making express credibility findings—finding that two home health nurses were “in the best position to observe” Conklin and that their testimony was “credible.” [10-31-2022 Tr. 3:03:56-3:04:29] Based on those findings, the district court concluded that Conklin had failed to

establish incapacity under Section 41-4-16(B) sufficient to toll the ninety-day notice requirement. Op. ¶¶ 1, 4-5; [8 RP 1829-30]

The Court of Appeals reversed. It held that a person is “incapacitated” under Section 41-4-16(B) “if the person was, on the days incapacity is claimed, unable as a result of their injury to prepare and give notice of their tort claim, or to cause another to give such notice on their behalf.” Op. ¶ 23. The Court also held that the jurisdictional determination was “intertwined with the merits” requiring summary judgment treatment because “resolution of the jurisdictional issue requires resolving factual disputes that bear on both jurisdiction and the merits of the underlying claim.” Op. ¶ 10. Once the motion was converted to summary judgment, it became “inappropriate for the district court to weigh evidence and judge the credibility of witnesses.” Op. ¶ 11 (citing *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 27, 139 N.M. 12). The Court of Appeals concluded that genuine disputes of material fact precluded summary judgment. Op. ¶¶ 24-27.

Petitioners’ factual presentation before this Court is incomplete. The full record establishes extensive evidence of Conklin’s incapacity between the February 2018 surgeries and the June 2018 notice of claim—evidence that supported the Court of Appeals’ conclusion that genuine disputes of material fact precluded summary judgment.

A. Conklin's Injuries and Medical Treatment

Conklin's incapacity stemmed from severe surgical complications. In February 2018, Conklin—a paraplegic—suffered burns to her buttocks from a heating pad. Op. ¶ 2; [3 RP 721]; [4 RP 811] She sought treatment at SVH, where Dr. David Paustian performed surgical debridement on February 15 and wound closure on February 16. [3 RP 721]; [4 RP 811] She was discharged on February 18 without adequate pain management or wound care instructions. *Id.*

Conklin returned to SVH's emergency room on February 22 with post-operative pain, nausea, and fever, and was discharged with pain medication. Op. ¶¶ 3-4; [3 RP 719, 721]; [4 RP 811] She returned again on February 24, complaining of “uncontrolled pain, excessive sweating[,] and nausea,” and was transferred to MountainView Regional Medical Center (“MVRMC”). *Id.*; Op. ¶ 3. Conklin remained hospitalized at MVRMC from February 24 through March 13, 2018—a seventeen-day admission—for surgical wound dehiscence and sepsis. [3 RP 663-664, 719, 721]; [Sealed Exhibit 3, at CONKLIN SHH 0053] She was discharged with orders to remain bedbound and place no pressure on her surgical wounds due to high risk of reinfection or wound breakdown. [Sealed Exhibit 3, at CONKLIN SHH 0064]

Following discharge, Conklin required continuous narcotic pain medications—including fentanyl, oxycodone, morphine, and benzodiazepines—

from February through June 2018. Op. ¶ 26; [3 RP 721, 784-808] The record includes photographic evidence documenting the severity of her wounds. [Sealed Exhibit 4]

B. Conklin's Condition During the Relevant Period

Following her February 2018 surgeries at SVH, Conklin required comprehensive assistance with activities she had previously managed independently, including childcare, apartment maintenance, personal hygiene, wound care, and financial management. [3 RP 722, 754-758] Conklin herself acknowledged lacking “a good memory of events between February 14, 2018 and June 20, 2018,” stating generally that “after my surgery, my dad and mom took care of all my finances. I was very ill and just was having a lot of problems with fevers and being sick. They took over everything.” [3 RP 722, 780] She testified that after the surgeries she was not in her “right mind.” [4 RP 1038-1039] She could not brush her hair, bathe herself, or care for her children. [4 RP 1041, 1043]

Conklin's parents assumed total responsibility for her daily functioning through June 2018, including childcare, financial management, personal care, housekeeping, nutrition, and transportation. [3 RP 722, 754-756] Her father provided daily assistance—performing tasks including prescription pickup, physical assistance with bathroom needs, transportation to medical appointments, food preparation, meal reminders, and complete management of her financial obligations.

[3 RP 722, 745-746] Her father observed that “[w]hen Trisha came home from her hospital stays after the surgeries, she was not her normal self. She slept most of the day and she was groggy and forgetful. I had to wake her up for things many times.”

[3 RP 746] Demonstrating her impaired judgment, Conklin believed she had paid her rent when she had not, requiring her father to discover the oversight and make payment on her behalf. [3 RP 746] He continued managing her finances and bill payments “for at least five (5) or six (6) months after she got home from” her hospitalization. [3 RP 746]

Conklin’s mother moved into her apartment to care for her and her children, drove the children to school, cooked for the family, provided daily wound care, assisted with personal hygiene, and helped schedule medical appointments that Conklin could not remember on her own. [3 RP 746-747; 755] Her children moved out of state to live with their father when school recessed for summer 2018 because Conklin “still could not take care of them.” Op. ¶ 26; [3 RP 722, 752-753, 757-758]

Expert testimony from Kenneth S. Waxman, M.D., F.A.C.S., addressed Conklin’s capacity during the relevant period. [1 RP 167-71] While Dr. Waxman declined to make any definitive pronouncements about Conklin’s capacity because he did not evaluate her at the time, he opined that “as long as a patient requires significant doses of pain medicines like fentanyl and oxycodone to treat postoperative wound pain, they would not be competent to safely operate a motor

vehicle, enter into a legal contract or to fully comprehend risks, benefits, and alternatives[.]” [1 RP 170-171] Regarding Conklin’s specific medication regimen—”fentanyl 25 mcg transdermal patch, oxycodone/apap 10/325 q 4 hrs, clonazepam 0.5 mg bid for anxiety and gabapentin 600 mg tid”—Dr. Waxman opined this combination “would be highly likely to make her incompetent to fully understand the risks, benefits, and alternatives” to medical decisions. [1 RP 170-171] As a surgeon, he “would be concerned about that patient’s ability to make reasoned decisions.” [1 RP 170-171]

C. The Home Health Nurse Testimony

Petitioners emphasize testimony from two home health nurses who assessed Conklin’s capacity to consent to healthcare services. A complete review of this testimony demonstrates it creates factual disputes rather than resolving them.

Nurse Ryan Ramos was an admitting nurse—not Conklin’s primary nurse—who had “very limited interaction” with her, visiting fewer than five times over seven months. [3 RP 723, 736-737] Before his deposition, he asked another nurse who Conklin was “because I don’t remember her at all.” [3 RP 723, 734-735] His capacity assessments were limited to determining whether patients could answer basic questions indicating they were “alert and oriented”—not whether they could comprehend legal claims and take formal action. [3 RP 737-739] He acknowledged concerns about Conklin’s ability to care for her children due to her physical

limitations, and noted she was “[h]aving difficulty coping.” [3 RP 741-743] He had no legal training in the United States. [3 RP 742]

Nurse Jennifer Ramirez, the treating nurse, opined that Conklin was not “incapacitated” by her lay definition. [3 RP 695] But her full testimony tells a different story. Ramirez testified that Conklin “slept a lot due to her pain and was debilitated from being bedbound and clinically depressed,” which “alters a state.” [3 RP 765, 769] She stated that Conklin lacked the “mind skill-set” to make independent decisions and “needed somebody to oversee and to assist her with the next steps.” [3 RP 771] She explained that Conklin’s fentanyl medication “puts you to sleep” and impacted her ability to function. [3 RP 775] When asked whether Conklin could make decisions for her children, Ramirez was “uncomfortable” answering and declined to do so. [3 RP 767] Ramirez had no legal training and had never heard of the TCA; her assessments were for healthcare consent purposes only. [3 RP 773]

D. Notice

Conklin’s mother first thought to seek legal advice and contacted attorneys on June 14, 2018, handing her daughter the phone to speak with an intake paralegal. [3 RP 722, 752-753] Written notice was submitted on June 20, 2018. [1 RP 136-137]; [3 RP 663, 719] Conklin formally retained counsel on June 28, 2018. [3 RP 753]

E. The Court of Appeals' Decision

The Court of Appeals reversed and remanded after conducting a thorough analysis of both the procedural framework for Rule 1-012(B)(1) motions and the statutory meaning of “incapacitated” under Section 41-4-16(B).

The Court first clarified the standard of review for factual challenges to subject matter jurisdiction. Following *South v. Lujan*, 2014-NMCA-109, and the Tenth Circuit precedent it adopted, the Court explained that while district courts ordinarily have “wide discretion” to consider evidence outside the pleadings when resolving jurisdictional challenges, conversion to summary judgment is required “when resolution of the jurisdictional question is intertwined with the merits of the case.” Op. ¶ 9. Drawing on *Holt v. United States*, 46 F.3d 1000 (10th Cir. 1995), and *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987), the Court concluded that “a jurisdictional issue is so intertwined with the merits of the case, requiring the district court to convert a Rule 1-012(B)(1) motion into one for summary judgment, when resolution of the jurisdictional issue requires resolving factual disputes that bear on both jurisdiction and the merits of the underlying claim.” Op. ¶ 10.

The Court explained that once a motion is converted to summary judgment, “it is inappropriate for the district court to weigh evidence and judge the credibility of witnesses.” Op. ¶ 11 (citing *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 27, 139 N.M. 12). Accordingly, “any genuine disputes of fact must be resolved by a jury as

a threshold matter to determine jurisdiction.” Op. ¶ 11. Applying this framework, the Court determined that Conklin’s incapacity was intertwined with the merits because “[r]esolution of the jurisdictional issue—whether Appellant was incapacitated from giving the notice—depends on facts that are relevant to Appellant’s substantive claim of negligence, including her damages.” Op. ¶ 14.

As a matter of first impression, the Court conducted a statutory interpretation analysis to determine when a claimant is “incapacitated from giving the notice by reason of injury” under Section 41-4-16(B). Op. ¶¶ 18-23. Beginning with the plain language, the Court noted that the term “incapacitated” is modified by the phrases “from giving the notice” and “by reason of injury,” and that “to qualify for tolling under Section 41-4-16(B), a claimant must have (1) sustained an injury that (2) incapacitates them from (3) giving notice as required by Section 41-4-16(A).” Op. ¶ 20.

The Court found guidance in Minnesota case law interpreting similar statutory language. Under *Wibstad v. City of Hopkins*, 190 N.W.2d 125, 127 (Minn. 1971), whether someone is incapacitated is determined by “whether, on the days for which incapacity from giving notice is claimed, [the] plaintiff was [themselves] physically unable as a result of the injury to investigate and otherwise prepare and give legally sufficient notice of claim, and, if so, whether plaintiff was during the same time unable to cause another to do it for [them]” Op. ¶ 22. The Court noted that *Hestbeck*

v. Hennepin County, 212 N.W.2d 361, 367 (Minn. 1973), further clarified that incapacity requires “an objective consideration of all the circumstances . . . including the claimant’s mental ability to comprehend [their] situation, understand what must be done, and be moved to act.” Op. ¶ 22.

The Court found these articulations “consistent with our own jurisprudence, which instructs that a claimant is not incapacitated from giving notice of their tort claim if they can cause another person to give notice on their behalf.” Op. ¶ 23 (*citing Ferguson v. N.M. State Highway Comm’n*, 1982-NMCA-180, ¶ 13, 99 N.M. 194). The Court emphasized that the TCA “contemplates recovery for both physical and mental injury and does not limit a claimant’s ‘injury’ in the way Appellees propose,” and that “determination of a claimant’s ‘incapacit[y] from giving the notice by reason of injury,’ is a fact-dependent inquiry.” Op. ¶ 23.

The Court concluded that Conklin “presented evidence to demonstrate a genuine question of material fact regarding her incapacity.” Op. ¶ 26. The Court detailed the substantial evidence in the record: the narcotic medications she received throughout the relevant period; the medical expert’s opinion that such medications would impair “a patient’s ability to make reasoned decisions”; her prior independence contrasted with her post-surgical need for comprehensive assistance with “childcare, financial affairs, personal care/hygiene, housekeeping, property management, nutrition, transportation, and other responsibilities”; her father’s daily

assistance and management of her finances after she forgot to pay her rent; her mother's move into the apartment to provide care; and her children's move out of state because Conklin "still could not take care of them." Op. ¶ 26.

The Court held that "[v]iewing this evidence in the light most favorable to Appellant, Appellant raised an issue of material fact regarding her ability to prepare and give notice of her tort claim during the relevant period as a result of injury." Op. ¶ 27. The Court concluded that "the district court erred in granting summary judgment" and that "in finding that [Conklin] was not 'incapacitated from giving the notice by reason of injury,' [...] the district court improperly resolved this dispute of fact." Op. ¶ 27. Because the incapacity question is "a jurisdictional question intertwined with the merits," the Court reversed and remanded "for trial with instructions to the district court to allow the jury to decide the factual question of whether [Conklin] was 'incapacitated from giving the notice by reason of injury.'" Op. ¶ 27.

III. STANDARD OF REVIEW

The two issues before this Court require different analytical frameworks, though both ultimately involve questions of law subject to de novo review.

Whether a jurisdictional question is "intertwined with the merits"—and thus requires conversion from a Rule 1-012(B)(1) motion to one for summary judgment—is a legal question this Court reviews de novo. *See, e.g., State v.*

Rodriguez, 2023-NMSC-004, ¶ 19 (“Questions of subject matter jurisdiction are also reviewed de novo.”).

Matters of statutory interpretation—the meaning of “incapacitated from giving the notice by reason of injury” under Section 41-4-16(B)—are subject to de novo review. *Maestas v. Zager*, 2007-NMSC-003, ¶ 8, 141 N.M. 154. This Court reviews de novo whether the evidence raised genuine issues of material fact precluding judgment as a matter of law. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 6.

Even if conversion was not required, the standard remains de novo review: “In reviewing an appeal from an order granting or denying a motion to dismiss for lack of jurisdiction, the determination of whether jurisdiction exists is a question of law which an appellate court reviews de novo.” *Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, ¶ 6, 132 N.M. 207.

The jurisdictional issue was preserved through extensive litigation in the district court. *E.g.*, [8 RP 1829-30]

IV. ARGUMENT

A. The Court of Appeals Correctly Applied Established Federal Law in Determining That the Jurisdictional Inquiry Is Intertwined With the Merits.

Petitioners seek to reverse the Court of Appeals’ determination that the District Court was required to convert its Rule 1-012(B)(1) motion to dismiss into a

motion for summary judgment. Petitioners’ argument rests on the false premise that the Court of Appeals adopted a new or “watered-down” standard for determining when jurisdictional issues are intertwined with the merits. [BIC 43] In reality, the Court of Appeals faithfully applied the federal standard adopted in *South v. Lujan*, 2014-NMCA-109, ¶ 9, and correctly concluded that the incapacity inquiry in this case cannot be resolved without addressing facts central to Conklin’s substantive negligence claim.

1. The Court of Appeals Applied the Correct Federal Standard.

The legal framework governing conversion of Rule 1-012(B)(1) motions is well-established. In *South*, the Court of Appeals adopted the Tenth Circuit’s standard from *Holt v. United States*, 46 F.3d 1000 (10th Cir. 1995), holding that “a court is required to convert a Rule [1-012(B)(1)] motion to dismiss into a Rule [1-012(B)(6)] motion or a . . . summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case.” *South*, 2014-NMCA-109, ¶ 9 (quoting *Holt*, 46 F.3d at 1003).

The Tenth Circuit has refined this standard in post-*Holt* cases. In *Pringle v. United States*, 208 F.3d 1220 (10th Cir. 2000), the court explained that “the underlying issue is whether resolution of the jurisdictional question requires resolution of an aspect of the substantive claim.” *Id.* at 1223. The *Pringle* court emphasized that the inquiry focuses on whether jurisdictional and merits facts

“overlap.” *Id.* at 1223 n.3. This “overlap” framework has been consistently applied. *See Paper, Allied-Indus., Chem. & Energy Workers Int’l Union v. Cont’l Carbon Co.*, 428 F.3d 1285, 1292-93 (10th Cir. 2005) (conversion not required only when “[t]here is no overlap between the cause of action and the jurisdictional” question); *see also Knellinger v. Young*, 134 F.4th 1034, 1041-42 (10th Cir. 2025).

The Court of Appeals correctly synthesized this authority and held that “a jurisdictional issue is so intertwined with the merits of the case, requiring the district court to convert a Rule 1-012(B)(1) motion into one for summary judgment, when resolution of the jurisdictional issue requires resolving factual disputes that bear on both jurisdiction and the merits of the underlying claim.” Op. ¶ 10. This formulation directly implements *South*’s adoption of federal precedent.

2. *Petitioners’ Semantic Attack on the “Bears On” Language Lacks Merit.*

Petitioners’ central argument is that the Court of Appeals “watered down” the federal standard by using the phrase “bear on” rather than “aspect of.” [BIC 43-44] This argument fails for three independent reasons.

First, Petitioners misread the Court of Appeals’ actual holding. The operative language is not merely that facts “bear on” both jurisdiction and merits, but that “resolution of the jurisdictional issue requires resolving factual disputes that bear on both jurisdiction and the merits.” Op. ¶ 10 (emphasis added). The phrase “requires resolving” tracks *Pringle*’s formulation that jurisdiction is intertwined when

“resolution of the jurisdictional question requires resolution of an aspect of the substantive claim.” 208 F.3d at 1223 (emphasis added).

Second, federal courts have explicitly used the “bears on” formulation when applying this standard. In *Ortiz v. United States*, 786 F.3d 817 (10th Cir. 2015), the Tenth Circuit applied a summary judgment standard when it expressly “consider[ed] certain ‘aspect[s] of the substantive claim’ . . . that *bear on* our jurisdictional analysis.” *Id.* at 829 n.11 (emphasis added). The Court of Appeals’ language thus tracks established federal circuit interpretation.

Third, Petitioners cannot articulate any meaningful distinction between factual issues that “bear on” a substantive claim and factual issues involving an “aspect of” that claim. A factual dispute cannot “bear on” a substantive claim without simultaneously involving an “aspect” of that claim. Petitioners’ semantic argument creates a distinction without a difference.

3. *The Incapacity Inquiry Is Inherently Intertwined With the Merits.*

The Court of Appeals correctly concluded that “[r]esolution of the jurisdictional issue—whether [Conklin] was incapacitated from giving the notice—depends on facts that are relevant to [her] substantive claim of negligence, including her damages.” Op. ¶ 14. This conclusion follows from the statutory text and the factual record.

Section 41-4-16(B) does not ask whether a plaintiff was “incapacitated” in some abstract sense. It asks whether “the injured person is incapacitated *from giving the notice by reason of injury.*” § 41-4-16(B) (emphasis added). The Legislature explicitly linked the incapacity inquiry to the injury that gives rise to the plaintiff’s claim. To determine whether Conklin was “incapacitated by reason of injury,” the District Court was required to make findings about the nature, severity, and functional impact of her surgical injuries—the same injuries for which she seeks damages. This is not “tangential” overlap, as Petitioners suggest. [BIC 45] It is direct, substantial, and legislatively mandated overlap.

Petitioners’ own recitation of facts proves that the jurisdictional and merits inquiries are inextricably intertwined. To argue against incapacity, Petitioners expressly rely on evidence of Conklin’s multi-week admission to Mountain View Regional Medical Center following her surgeries, [BIC 3]; Nurse Ramos’s evaluation of Conklin’s capacity, [BIC 4]; Nurse Ramirez’s “head-to-toe assessment” evaluating Conklin’s “neurological status,” [BIC 5-6]; and a detailed section entitled “Plaintiff’s Physical Capacity After Surgeries,” [BIC 7-8] Every piece of evidence Petitioners cite to defeat the incapacity tolling provision is evidence about Conklin’s injuries and their effects. These same facts—her hospitalization, her need for in-home nursing care, her neurological status, her physical limitations—go directly to her damages under the Uniform Jury

Instructions. *See* UJI 13-1806 (nature, extent, and duration of injury); UJI 13-1807 (pain and suffering); UJI 13-1807A (loss of enjoyment of life).

The District Court’s ruling further demonstrates the intertwined nature of the inquiries. The District Court relied expressly and directly on the testimony of Nurses Ramos and Ramirez to support the jurisdictional ruling. [10-31-2022 Tr. 3:03:56-3:04:29] Yet these nurses interacted with Conklin for the purpose of providing care necessitated by the surgery alleged to have been tortious. Any ruling on their credibility inevitably resolves substantive factual issues. The District Court’s approach—weighing conflicting evidence about Conklin’s post-surgical condition and making credibility determinations—demonstrates precisely why conversion to summary judgment was required.

4. Petitioners’ Policy Arguments Fail.

Petitioners warn that the Court of Appeals’ ruling will permit plaintiffs to “avoid dismissal of TCA claims on jurisdictional grounds simply by arguing that they were ‘incapacitated.’” [BIC 45] This mischaracterizes both the Court’s holding and the procedural safeguards embedded in existing law. The Court of Appeals expressly recognized that defendants enjoy “the benefit of a presumption that [plaintiffs] had the capacity to provide timely notice.” Op. ¶ 25 (citing *Lent v. Emp. Sec. Comm’n*, 1982-NMCA-147, ¶ 9). This presumption creates a substantial evidentiary burden. Moreover, under the rules governing summary judgment, mere

“argument” is insufficient. To overcome a motion for summary judgment, a plaintiff must raise a genuine issue of material fact through evidence—affidavits, deposition testimony, medical records—sufficient to overcome the presumption. Rule 1-056 NMRA. A plaintiff who cannot present such evidence will lose on summary judgment. *See, e.g., Horne v. Los Alamos Nat'l Sec., LLC*, 2013-NMSC-004, ¶ 15 (To avoid summary judgment, the non-movant “may not simply argue” that evidentiary facts “might exist, nor may it rest upon the allegations of the complaint.”)

Petitioners also argue that under the Court of Appeals’ standard, “a plaintiff’s capacity to give notice under Section 41-4-16(B) will always be intertwined with the merits of a claim under the TCA, because incapacity will always involve facts that are tangentially related to emotional, mental, and/or physical damages.” [BIC 45] This argument proves too much. First, Petitioners’ use of “tangentially” mischaracterizes the relationship. The statutory text requires that incapacity result from the injury giving rise to the claim—this is direct, not tangential, overlap. Second, if Petitioners are correct that incapacity claims inherently require factual findings about the plaintiff’s injury-induced condition, this supports rather than undermines the Court of Appeals’ approach. The purpose of requiring conversion is to protect the factfinder’s prerogative to decide the merits. *See, e.g., Madrid v. Brinker Rest. Corp.*, 2016-NMSC-003, ¶ 22 (“It is the role of the fact[-]finder to judge the credibility of witnesses and determine the weight of evidence.”) The

conversion requirement appropriately applies to the incapacity exception because that inquiry requires resolution of facts central to the plaintiff's damages.

5. *Petitioners' Reliance on Exhaustion and Immunity Cases Is Misplaced.*

Petitioners rely on cases holding that administrative exhaustion requirements are not intertwined with the merits. *See* [BIC 41-42] (citing *Gabriel v. United States*, 683 F. App'x 671 (10th Cir. 2017); *Cizek v. United States*, 953 F.2d 1232 (10th Cir. 1992)). This analogy fails because exhaustion involves procedural compliance—whether a plaintiff followed proper administrative steps—which is genuinely separate from substantive tort elements. The *Sizova* court made this distinction clear: “[T]he jurisdictional issue is whether Sizova has exhausted her administrative remedies, a matter that is simply not an aspect of her substantive claim of discrimination[.]” *Sizova v. Nat’l Inst. of Standards & Tech.*, 282 F.3d 1320, 1324-25 (10th Cir. 2002). By contrast, the incapacity inquiry under Section 41-4-16(B) directly requires findings about the plaintiff's physical and mental condition “by reason of injury.”

Similarly, Petitioners' reliance on *Holt v. United States* is unavailing. In *Holt*, the jurisdictional question was whether water had been released for flood-control purposes under the Flood Control Act. 46 F.3d at 1003. This was “wholly separate” from the merits because the status and purpose of water releases had nothing to do with the plaintiff's injuries, the defendant's duty of care, or any element of

negligence. Here, by contrast, the jurisdictional question asks whether Conklin was incapacitated “by reason of injury.” This requires findings about her physical and mental condition following surgery—the precise facts that will determine her damages if she proves a tort. *Holt* supports conversion because its reasoning—that jurisdictional facts must be “wholly separate” to avoid conversion—cannot be satisfied when the statute explicitly links the jurisdictional inquiry to the injury underlying the claim.

This case parallels *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987), where the Tenth Circuit held that a plaintiff’s “employee” status was intertwined with the merits because “the determination of whether [the plaintiff] qualifies as an employee under the federal discrimination statutes is both a jurisdictional question and an aspect of the substantive claim in her discrimination action.” *Id.* at 259. Whether Conklin was incapacitated “by reason of injury” is both a jurisdictional question (for tolling purposes) and an aspect of her substantive negligence claim (for damages purposes). If employee status in *Wheeler* required conversion because the same facts determined both jurisdiction and an element of the claim, then incapacity status here requires conversion for precisely the same reason.

The Court of Appeals correctly applied established federal precedent in concluding that the incapacity inquiry is intertwined with the merits of Conklin’s negligence claim. The statutory text mandates examination of injury-related facts,

Petitioners’ own briefing demonstrates the factual overlap, and the District Court’s credibility determinations confirm that conversion to summary judgment was required. Even if conversion were not required, the district court’s application of an incorrect legal standard and its disregard of substantial contrary evidence would independently require reversal. This Court should affirm the Court of Appeals on this issue.

B. The Court of Appeals Correctly Interpreted “Incapacitated” Under Section 41-4-16(B), and the Evidence Raised Genuine Issues of Material Fact Precluding Summary Judgment.

Petitioners challenge the Court of Appeals’ interpretation of “incapacitated” under Section 41-4-16(B), arguing that the Court adopted an overly broad definition that gives claimants “two routes” to establish incapacity. [BIC 28] This characterization misrepresents the Court’s analysis, ignores the statutory text, and disregards the substantial evidence of incapacity in the record. The Court of Appeals correctly concluded that genuine issues of material fact precluded summary judgment on the incapacity question, and this Court should affirm.

1. The Statutory Framework and the Narrow Question Before This Court.

The issue before this Court is not whether to adopt a “broad” or “narrow” definition of incapacity in the abstract. It is whether the Court of Appeals correctly concluded that genuine issues of material fact precluded summary judgment on

whether Conklin was incapacitated from giving notice by reason of her injury. § 41-4-16(B).

The tolling provision operates on a day-by-day basis. Section 41-4-16(B) provides that “[t]he time for giving notice does not include the time, not exceeding ninety days, during which the injured person is incapacitated from giving the notice by reason of injury.” This language is significant: The statute excludes from the notice period any days of incapacity, up to a maximum of ninety more days. Thus, if a claimant was incapacitated for the first fifteen days following an occurrence, notice would be due 105 days after the incident—even if the claimant regained full capacity on day sixteen.

Here, the issue is whether there was evidence from which a reasonable finder of fact could conclude that Conklin was incapacitated for a sufficient number of days following her injury to render her June 20, 2018 notice timely. Petitioners rely primarily on testimony from two nurses who saw Conklin on a handful of occasions during the relevant period, while ignoring substantial contrary evidence from family members who observed her daily and a medical expert who testified about the cognitive effects of her medications. This conflicting evidence demonstrates precisely why summary judgment was inappropriate.

Because statutory constructions requires construing various provisions as a harmonious whole, Section 41-4-16(A) may inform this Court’s interpretation of

Section 41-4-16(B). Subsection (A) provides that a claimant must “cause to be presented” a proper written notice. Thus, a claimant is “incapacitated from giving the notice” under Section 41-4-16(B) when, by reason of injury, the claimant is unable to “cause” the presentation of notice by any means, whether by personal delivery or through an agent. This is a conjunctive test: the claimant must be unable to use either available route for providing notice.

2. *Petitioners Misread the Court of Appeals’ Holding.*

Petitioners claim the Court of Appeals created “two routes to establishing incapacity”—physical inability or mental inability—permitting a showing based solely on physical limitations. [BIC 28] According to Petitioners, a physically incapacitated but mentally sound claimant could somehow game the system to gain extra days under the notice provision. [BIC 28-29]

This argument fundamentally misreads the Court of Appeals opinion. The Court of Appeals expressly recognized that “a claimant is not incapacitated from giving notice of their tort claim if they can cause another person to give notice on their behalf.” Op. ¶ 23 (citing *Ferguson*, 1982-NMCA-180).

The Court of Appeals held that “a person is ‘incapacitated’ within the meaning of Section 41-4-16(B) if the person was, on the days incapacity is claimed, unable as a result of their injury to prepare and give notice of their tort claim, or to cause another to give such notice on their behalf.” Op. ¶ 23. Petitioners seize on the word

“or” and argue it creates alternative paths to prove incapacity. But this reading ignores the structure of the sentence and the context of the opinion.

The Court of Appeals identified two methods of giving notice—personally or through an agent—and held that a claimant must be unable to use either method to establish incapacity. The “or” is disjunctive in describing notice-giving methods, not in describing alternative paths to prove incapacity. Read in context with the Court’s express statement that a claimant who “can cause another person to give notice on their behalf” is not incapacitated, Op. ¶ 23, the holding is clear: if a claimant retains the ability to direct an agent to give notice, that claimant cannot establish incapacity—regardless of physical limitations.

Even if this Court concludes the Court of Appeals’ wording was imprecise, the result was correct. The proper standard—whether set forth in the Court of Appeals or clarified by this Court—requires inability to give notice personally and inability to cause an agent to do so. Under that standard, as the Court of Appeals recognized, Op. ¶¶ 26-27, the evidence here raises genuine disputes of material fact that preclude summary judgment.

Petitioners devote considerable space to distinguishing Minnesota’s statutory scheme—arguing that Minnesota permits indefinite tolling, imposes a longer baseline notice period, and treats notice as non-jurisdictional. [BIC 32-37] Even accepting these distinctions, nothing in the Court of Appeals’ analysis depends on

Minnesota law. The Court of Appeals derived its interpretation from the text of Section 41-4-16(B) itself: the statute asks whether the claimant was “incapacitated from giving the notice by reason of injury,” language that focuses on the claimant’s functional ability to perform a specific act. Op. ¶¶ 20-23. The Court cited *Wibstad* and *Hestbeck* as persuasive support for a textual conclusion it had already reached—not as the foundation of its holding. This Court may find Minnesota cases persuasive or not, but Petitioners’ statutory distinctions do not undermine an interpretation grounded in New Mexico’s own statutory language.

3. *Petitioners Improperly Import a “Mental Competence” Standard That Has No Basis in the Statutory Text.*

Petitioners argue that incapacity under Section 41-4-16(B) requires proof that the claimant was “mentally unable to understand the factual basis for their claim and communicate a decision to pursue the claim[.]” [BIC 49] The statutory text contains no such limitation. Section 41-4-16(B) refers only to being “incapacitated from giving the notice by reason of injury”—language that encompasses any injury-induced inability to perform the required act, without limiting the inquiry to specific mental conditions.

The Legislature knows how to limit incapacity to mental conditions when it chooses to do so. In the Probate Code, for example, the Legislature defined “incapacitated person” with specific reference to “mental illness, mental deficiency, physical illness or disability” that renders a person “unable to manage the person’s

personal affairs.” NMSA 1978, § 45-5-101(F) (2019). The Legislature could have incorporated this definition into the TCA or used similarly restrictive language. It chose not to.

Similarly, the New Mexico Uniform Health-Care Decisions act includes a comprehensive scheme for determining capacity to make health-care related decisions. NMSA 1978, § 24-7A-1(C) (2015) (defining “capacity”); NMSA 1978, § 24-7A-11 (2015) (setting out rules related to capacity). Again, the Legislature could have incorporated similar frameworks into the TCA but did not.

Instead, when it comes to TCA notice, the Legislature used the phrase “incapacitated from giving notice by reason of injury”—language that focuses on the claimant’s functional ability to perform a specific act, not on a categorical determination of mental competence. *See Chavez v. Am. Life & Cas. Ins. Co.*, 1994-NMSC-037, ¶ 9 (Legislature presumed to know existing statutory law when enacting new legislation).

These statutory schemes for capacity determinations in other contexts undercut Petitioners’ argument that nurses found Conklin “mentally competent to make healthcare decisions and enter contracts.” [BIC 4-6] Capacity to consent to medical treatment—a binary determination focused on understanding immediate healthcare choices—is a fundamentally different inquiry than whether an injured patient can investigate the circumstances of her injury, identify potentially liable

parties, understand the legal significance of what occurred, and direct someone to prepare and deliver formal written notice to the correct governmental entity within a statutory deadline. A patient may be sufficiently lucid to consent to a wound dressing change while remaining entirely incapable of navigating the legal process the TCA requires. Petitioners' reliance on healthcare capacity assessments thus conflates distinct statutory frameworks addressing different functional abilities—precisely the error the Legislature avoided by using broader, injury-focused language in Section 41-4-16(B).

Moreover, accepting the nurses' "capacity" testimony as dispositive requires impermissible weighing of lay opinion evidence. The nurses were not qualified as experts on legal incapacity under Section 41-4-16(B). They offered lay opinions based on limited training and periodic interactions with Conklin, for the entirely different purpose of determining whether she could consent to home healthcare services. To credit this testimony as establishing capacity to comprehend a legal malpractice claim and provide formal notice to a governmental entity, the District Court necessarily weighed the nurses' lay opinions against the medical expert's testimony regarding the cognitive effects of Conklin's medications, the family members' daily observations of her functional limitations, and Conklin's own testimony about her condition. This is precisely the kind of evidence-weighing and credibility determination that is inappropriate on summary judgment. *See Juneau*,

2006-NMSC-002, ¶ 27. At most, the nurses’ testimony creates a factual dispute—it does not resolve one as a matter of law.

4. *The Authority on Which Petitioners Rely Supports Affirming the Court of Appeals.*

Petitioners invoke several cases—*Ferguson*, *Galvan*, *Varnell*, *Lent*, and *Bellman*—claiming they establish that “incapacitated” in New Mexico tolling statutes “generally references a cognitive inability to understand and make decisions regarding a claim.” [BIC 28] A careful examination of these authorities reveals the opposite: each supports the functional, fact-specific inquiry the Court of Appeals adopted, and each is distinguishable on the evidence.

Petitioners repeatedly invoke *Ferguson v. N.M. State Highway Comm’n*, 1982-NMCA-180, claiming it established a rule about when claimants are “incapacitated.” [BIC 25, 29] This fundamentally misreads the case. *Ferguson* was a due process challenge to the constitutionality of the TCA’s notice provisions—not a statutory interpretation case about what “incapacity” means. *See Ferguson*, 1982-NMCA-180, ¶ 3. The plaintiffs argued that the notice periods were “unreasonably short” and violated due process “as a matter of law.” *Id.* ¶ 13. All *Ferguson* decided was that the notice periods were facially constitutional. *Id.* The court never interpreted “incapacitated,” defined its elements, or evaluated an actual incapacity claim. Petitioners’ error is treating an observation about constitutional adequacy as a substantive rule of statutory construction.

Petitioners cite *Galvan v. Board of County Commissioners*, 261 F. Supp. 3d 1140 (D.N.M. 2017), as “the only case that analyzes the meaning of ‘incapacitated’ in Section 41-4-16(B).” [BIC 24] *Galvan* supports the Court of Appeals analysis. The federal court in *Galvan* applied a functional approach, examining whether the plaintiff demonstrated “the capacity to vindicate her legal interests.” 261 F. Supp. 3d at 1151. This is precisely the inquiry the Court of Appeals endorsed. The plaintiff in *Galvan* lost not because of any restrictive legal standard, but because the evidence proved her capacity: she “continued to work at all three jail jobs without interruption[,]” “requested medical treatment” and “mental health” services, “saw a mental health counselor at least once a week[,]” and—critically—“demonstrated the capacity to vindicate her legal interests by submitting requests (and at least once calling her public defender)” to accelerate her transfer or modify her sentence. *Id.* at 1151-52. The court was “impressed by the capacity that Plaintiff manifested in the days and weeks after the beating.” *Id.* at 1151.

Conklin’s situation is the opposite of *Galvan*. Where the *Galvan* plaintiff worked three jobs and actively pursued legal remedies, Conklin could not brush her hair, bathe herself, or care for her children. [4 RP 1041, 1043] Where the *Galvan* plaintiff called her public defender and submitted legal requests, Conklin required her parents to manage every aspect of her daily life—and it was her mother, not Conklin, who eventually thought to contact an attorney. [3 RP 752-753] Where the

Galvan plaintiff saw a counselor weekly and requested medical treatment, Conklin was on continuous narcotic medications that a medical expert opined would impair her “ability to make reasoned decisions.” [1 RP 170-171] *Galvan*’s functional inquiry, properly applied to this record, supports the Court of Appeals’ conclusion that genuine factual disputes preclude summary judgment.

Petitioners also rely on cases interpreting “incapacitated persons” under NMSA 1978, § 37-1-10 (1975), the general tolling statute. [BIC 25-28] These cases establish a functional test that the evidence here satisfies.

In *Lent v. Employment Sec. Commission*, 1982-NMCA-147, ¶ 13, the Court of Appeals explained that the relevant inquiry is “whether a person is capable of understanding in a reasonable manner, the nature and effect of the act in which the person is engaged.” The court noted that in “the assertion or non-assertion of legal rights,” the disability must be such that the person is “unable to manage his business affairs or estate, or to comprehend his legal rights or liabilities.” *Id.* (quoting Annot., 9 A.L.R.2d 964 at 965 (1950)). The plaintiff in *Lent* failed to establish incapacity because the undisputed evidence showed she was “alert, oriented,” her “thinking process was not inappropriate,” and she “clearly perceived reality appropriately.” *Id.* ¶ 18. Before her discharge, she had given “oral notice that she intended to file a compensation claim”—demonstrating actual comprehension of her legal rights. *Id.* ¶ 16.

Varnell v. Dora Consol. School District, 756 F.3d 1208 (10th Cir. 2014), applied *Lent* and found no incapacity where the plaintiff “produced no evidence of incompetence”—she was attending college and pursuing a biology degree at the time she filed suit. *Id.* at 1210, 1214. The court emphasized that the plaintiff failed to show she could not “comprehend [her] legal rights or liabilities.” *Id.* at 1214.

Bellman v. NXP Semiconductors USA, Inc., 248 F. Supp. 3d 1081 (D.N.M. 2017), is particularly instructive. There, the court considered whether plaintiffs whose injuries “appear[ed] to be physical and not mental” could qualify for incapacity tolling. *Id.* at 1157-58. Applying *Lent* and *Varnell*, the court concluded that physical injuries can support incapacity tolling if they render the claimant “unable to manage [their] business affairs or estate, or to comprehend [their] legal rights and liabilities.” *Id.* at 1157-58. The court found it “possible” that the plaintiffs’ complex physical injuries qualified for tolling and declined to dismiss their claim. *Id.* at 1158.

These cases establish three principles that favor Conklin. First, incapacity is evaluated through a functional, fact-specific inquiry—not a categorical rule requiring a particular type of mental diagnosis. Second, physical injuries can support incapacity tolling when they impair the claimant’s ability to understand and pursue legal rights. Third, the question is whether the claimant could actually comprehend

and act on her legal situation during the relevant period—not whether she possessed some abstract “mental competence” in other contexts.

The evidence here raises genuine disputes under this standard. Unlike the *Lent* plaintiff who gave oral notice of her intent to file a claim, Conklin took no steps toward legal action until her mother handed her the phone in June 2018. Unlike the *Varnell* plaintiff who was attending college and “produced no evidence of incompetence,” Conklin could not manage basic daily functions and testified she was not in her “right mind.” [4 RP 1038-1039] Unlike the *Galvan* plaintiff who demonstrated capacity by actively pursuing legal remedies, Conklin required comprehensive parental assistance with every aspect of her life—her father managed her finances after she forgot to pay her rent, her mother provided daily wound care and helped schedule appointments she could not remember, and her children moved out of state because she could not care for them.

Dr. Waxman’s expert testimony that Conklin’s medication regimen would impair her “ability to make reasoned decisions,” combined with Nurse Ramirez’s acknowledgment that Conklin lacked the “mind skill-set” to make independent decisions and “needed guidance,” raises precisely the factual disputes that *Lent*, *Varnell*, and *Bellman* contemplate. Whether these facts establish incapacity is a question for the jury—not for resolution on summary judgment based on nurses’ assessments of an entirely different functional capacity.

5. *The Evidence Raised Genuine Issues of Material Fact Precluding Summary Judgment.*

Petitioners' characterization of the evidence is selective and misleading. A fair review of the record demonstrates that conflicting testimony regarding Conklin's functional capacity presents precisely the type of credibility and weight determinations that must be resolved by a jury, not by a court on summary judgment.

Nurse Ramos, the admitting nurse, testified that he "didn't remember [Conklin] at all" and asked another nurse who she was before his deposition. [3 RP 723, 734-35] His "capacity" determinations were based on basic questions indicating only whether a person is "alert and oriented"—not whether she could comprehend a legal claim and take formal action. [3 RP 737-39, 742] He had limited interactions with Conklin during the relevant period. [3 RP 723, 736-37] A witness who cannot remember the patient and whose assessments were limited to basic orientation questions cannot provide conclusive evidence of capacity to give TCA notice.

Nurse Ramirez, the treating nurse, offered testimony that Petitioners characterize as establishing capacity but that actually demonstrates the opposite. While Ramirez stated that Conklin was not "incapacitated" by her lay definition, she also testified that Conklin "slept a lot due to her pain and was debilitated from being bedbound and clinically depressed," which "alters a state." [3 RP 765, 769] Ramirez testified that Conklin "needed guidance" to make decisions regarding care and "needed somebody to oversee and to assist her with the next steps." [3 RP 771] She

stated that Conklin lacked the “mind skill-set” to make independent decisions. [3 RP 771] She explained that Conklin’s fentanyl medication made her sleepy and impacted her ability to function. [3 RP 775] When asked whether Conklin could make decisions for her children, Ramirez did not feel comfortable answering and declined to do so. [3 RP 767]

Neither nurse was qualified as an expert on legal incapacity under Section 41-4-16(B). Their lay opinions—offered solely to assess healthcare consent—cannot be dispositive on the distinct legal question of incapacity to give TCA notice. Crediting the nurses’ conclusory statements that Conklin was “not incapacitated” while disregarding their own testimony about her substantial limitations requires the court to weigh evidence and make credibility determinations—functions reserved for the jury.

The family testimony provides critical evidence of incapacity. Unlike the nurses—who saw Conklin on a handful of occasions for limited purposes—her family members observed her condition daily throughout the relevant period. The record documents the extensive assistance Conklin required from her family, including help with basic decision-making, assistance with financial management, and help with activities of daily living. [3 RP 722, 746, 754-56]; [4 RP 811, 1036, 1038-43] Her parents assisted with reminders to eat and drink, management of prescriptions, cooking, grocery shopping, and childcare. [3 RP 746, 772]

This testimony paints a picture of a person who could not independently manage basic life functions—let alone comprehend a complex legal situation, understand the need to provide formal notice to a governmental entity within a statutory deadline, and take action to do so. The family’s daily observations over months carry significant weight compared to nurses’ periodic assessments focused solely on healthcare consent. Yet the District Court credited the nurses while disregarding contrary testimony—an impermissible weighing of evidence on summary judgment. At minimum, the family testimony contradicts the nurses’ limited observations and creates genuine issues of material fact that must be resolved by a jury.

The medical expert testimony supports incapacity. Dr. Waxman testified that based on the medications Conklin was administered, he had concerns about her “ability to make reasoned decisions[.]” [1 RP 170-171] Unlike the nurses offering lay opinions about healthcare consent, Dr. Waxman provided expert testimony specifically addressing the cognitive effects of Conklin’s medication regimen on her decision-making capacity.

The District Court dismissed this testimony as “incomplete” because Dr. Waxman could not opine that Conklin was incapacitated “at all material times.” [10-31-2022 Tr. 3:03:00-3:03:19] But summary judgment does not require the non-movant to prove her case conclusively—only to raise genuine disputes of material

fact. Dr. Waxman's testimony that heavy narcotics affected Conklin's ability to make reasoned decisions, combined with the family's daily observations and the nurses' own testimony about her limitations, easily satisfies that standard.

At minimum, the evidence raises a genuine issue of material fact whether there were sufficient periods of time during which Conklin was both 1) unable to personally prepare and give notice; and 2) unable to cause another to give such notice on her behalf. That is all that is required to defeat summary judgment and obtain a trial on the incapacity question.

6. *Petitioners' Policy Arguments Ignore Statutory Safeguards and Would Nullify the Tolling Provision.*

Petitioners warn of "floodgates" and claim the Court of Appeals' ruling permits plaintiffs to "avoid dismissal of TCA claims on jurisdictional grounds simply by arguing that they were 'incapacitated.'" [BIC 45] This argument ignores multiple statutory and procedural safeguards that prevent the abuse Petitioners fear.

First, governmental defendants enjoy "the benefit of a presumption that [plaintiffs] had the capacity to provide timely notice." Op. ¶ 25 (*citing Lent v. Emp. Sec. Comm'n*, 1982-NMCA-147, ¶ 9). This presumption creates a substantial evidentiary burden that prevents frivolous incapacity claims.

Second, mere "argument" or "allegation" is insufficient to overcome this presumption. Claimants must present "specific evidentiary facts which would require trial on the merits." Op. ¶ 24 (*citing Kreutzer v. Aldo Leopold High Sch.*,

2018-NMCA-005, ¶ 26). Summary judgment remains available—and appropriate—when claimants cannot meet this burden. The Court of Appeals’ holding does not guarantee plaintiffs access to a jury trial; it simply ensures that when genuine factual disputes exist, those disputes receive appropriate procedural treatment.

Third, the Legislature provided an absolute outer limit that eliminates the endless extension scenario Petitioners fear. Section 41-4-16(B) limits tolling to a maximum additional 90 days. This hard cap ensures that even the most severely incapacitated claimant cannot extend the notice period indefinitely. The Legislature balanced the interests of injured claimants against the government’s need for timely notice, and this Court should respect that balance rather than judicially narrowing the exception the Legislature created.

Petitioners’ proposed interpretation would effectively nullify the tolling provision. Under their approach, only a claimant who is comatose or entirely non-responsive could qualify for tolling. This reading would render the incapacity exception virtually meaningless, violating the principle that statutes must be construed to give effect to all their provisions. *See Katz v. N.M. Dep’t of Hum. Servs.*, 1981-NMSC-012, ¶ 18, 95 N.M. 530.

The TCA “attempts to balance two important but conflicting public policies”—limiting governmental liability while providing means to “compensate those injured by negligence of public employees.” *Cobos v. Dona Ana Cty. Hous.*

Auth., 1998-NMSC-049, ¶ 6, 126 N.M. 418. Petitioners’ narrow reading ignores the compensatory side of this balance. The Legislature chose to give time-limited protection to injured claimants who, because of their injuries, could not give notice within 90 days.

7. *Even Under Petitioners’ Proposed Standard, the Evidence Creates Genuine Disputes of Material Fact.*

Even accepting Petitioners’ argument that incapacity requires mental inability to make decisions about a claim, the evidence here raises genuine disputes about Conklin’s mental capacity during the relevant period. The record includes evidence of heavy narcotic medications including fentanyl, oxycodone, morphine, and benzodiazepines; expert testimony expressing concerns about Conklin’s “ability to make reasoned decisions”; nurse testimony that Conklin lacked the “mind skill-set” to make independent decisions; nurse testimony that Conklin “needed guidance to make decisions”; clinical depression affecting her mental state; chronic pain and sleep disruption; and family testimony that Conklin required help with basic decision-making and could not manage her own affairs.

This evidence, viewed in the light most favorable to Conklin as the non-movant, creates at minimum a genuine dispute about her mental capacity during the time necessary to render her notice timely. Whether the standard is inability to give notice personally and cause another to do so (the correct standard) or mental incapacity to make decisions (Petitioners’ proposed standard), the conflicting

evidence—particularly the stark contrast between nurses’ periodic assessments and family members’ daily observations—precludes summary judgment and requires resolution by a jury.

C. Even Under Rule 1-012(B)(1), the District Court Applied the Wrong Legal Standard.

As an alternative grounds for granting relief to Conklin, even if the procedural framework remains Rule 1-012(B)(1), the district court applied an incorrect legal standard—an error subject to de novo review regardless of procedural posture. *See* Op. ¶ 15; *Maestas v. Zager*, 2007-NMSC-003, ¶ 8.

The Court of Appeals correctly held that “incapacitated from giving the notice by reason of injury” requires a functional inquiry: whether the claimant “was unable to prepare and give notice of their tort claim, or was unable to cause another to give such notice on their behalf.” Op. ¶ 11. This inquiry examines the claimant’s actual ability to perform a specific legal task during the relevant time period—not her general mental competence or capacity to make other kinds of decisions.

The district court applied a different standard. It framed the question as whether Conklin “lacked sufficient understanding to make or communicate reasonable personal decisions”—language drawn from healthcare consent and contractual capacity frameworks. [10-31-2022 Tr. 2:57:52-2:58:39] And it relied primarily on nurses’ assessments that Conklin could consent to home healthcare

services. But capacity to answer orientation questions and agree to wound care is not the same as capacity to investigate whether one has a legal claim against a governmental entity, understand the TCA's formal notice requirements, and either prepare such notice or identify and direct an agent to do so. The nurses were never asked—and had no basis to opine on—whether Conklin could perform those tasks.

Even under Rule 1-012(B)(1), a district court commits reversible error when it resolves the wrong legal question, no matter how much deference its factual findings might otherwise receive. The district court asked whether Conklin was mentally competent in a general sense; the statute asks whether her injuries prevented her from giving TCA notice. Because the court answered a question the statute does not pose, its dismissal cannot stand.

V. CONCLUSION

The Court of Appeals correctly held that when incapacity must result from “the injury” giving rise to the claim, the jurisdictional inquiry is intertwined with the merits and requires summary judgment treatment. The district court's express credibility findings confirm it did precisely what that standard prohibits.

On the interpretive question, “incapacitated from giving the notice by reason of injury” means what it says: a functional inquiry into whether the claimant could give notice or cause another to do so. Petitioners' proposed mental-competence

standard appears nowhere in the statutory text and would nullify the tolling provision the Legislature created.

The evidence here—expert testimony on the cognitive effects of continuous narcotic medications, daily observations by family members who assumed total responsibility for Conklin’s care, the nurses’ own acknowledgments of her substantial limitations, and Conklin’s testimony that she was not in her “right mind”—easily raises a genuine dispute about whether she was incapacitated for a sufficient period to render her notice timely. That question belongs to a jury.

This Court should affirm.

Respectfully submitted,

STALTER LAW LLC

/s/ Kenneth H. Stalter

Kenneth H. Stalter

7441 Bartlett St NE Suite 1D

Albuquerque, NM 87109

ken@stalterlaw.com

tel: (505) 315-8730

Appellate Attorney for Plaintiff-Respondent

BENCOE & LACOUR LAW, PC

Lori M. Bencoe

Cherie L. LaCour

9201 Montgomery Blvd NE #404

Albuquerque, New Mexico 87111

Phone: (505) 247-8800

Fax: (505) 247-8801

lori@bencoelaw.com

cherie@bencoelaw.com

TRIAL LAWYERS FOR JUSTICE
Nicholas Rowley
Courtney Rowley
421 W. Water Street, Third Floor
Decorah, Iowa 52101
Phone: (866) 864-5529
NR@TL4J.com
therowleylawfirm@gmail.com

BOWEN HATCH LAW
Theresa Bowen Hatch
1902 Wright Place Suite 200
Carlsbad, California
Phone: (760) 539-7603
theresa@bowenhatchlaw.com

Attorneys for Plaintiff-Respondent

Certificate of Service

I hereby certify that on February 2, 2026, a copy of this brief was served as follows:

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MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.

Tim L. Fields
Elizabeth A. Martinez
Mia K. Lardy
Post Office Box 2168
500 Fourth Street NW, Suite 1000
Albuquerque, New Mexico 87103-2168
Telephone: 505 .848.1800
timothy.fields@modrall.com
elizabeth.martinez@modrall.com
mia.lardy@modrall.com

*Attorneys for Sierra Vista Hospital and
Sierra Vista Hospital Governing Board*

/s/ *Kenneth H. Stalter*
Kenneth H. Stalter