

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO



TRISHA CONKLIN,

Plaintiff/Respondent,

v.

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

Ct. App. No. A-1-CA-40924

SIERRA VISTA HOSPITAL GOVERNING
BOARD and SIERRA VISTA HOSPITAL,

Defendants/Petitioners,

and

DAVID L. PAUSTIAN, D.O.; SURGICARE,
LLC, a New Mexico Limited Liability
Corporation; CHG MEDICAL STAFFING,
INC., a Delaware Corporation; QUORUM
HEALTH RESOURCES, LLC; QUORUM
HEALTH CORPORATION; and QUINCY
HEALTH, LLC,

Defendants.

**SIERRA VISTA HOSPITAL GOVERNING BOARD AND SIERRA VISTA
HOSPITAL'S REPLY BRIEF**

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

Tim L. Fields

Elizabeth A. Martinez

Mia K. Lardy

P.O. Box 2168

Albuquerque, NM 87103-2168

Telephone: (505) 848-1800

*Attorneys for Defendants-Petitioners Sierra Vista
Hospital Governing Board and Sierra Vista Hospital*

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF COMPLIANCE

As required by Rule 12-318(G), we certify that this Brief complies with the type-volume limitation of Rule 12-318(F)(3). According to Microsoft Office Word, the body of the Brief, as defined by Rule 12-318(F)(1), contains 4,397 words.

DATED this 10th day of February, 2026.

/s/ Elizabeth A. Martinez
Elizabeth A. Martinez

STATEMENT REGARDING CITATIONS TO THE PROCEEDINGS

Citations to any audio-recorded transcripts are to the date of the proceedings and, where applicable, to the time stamp provided by the FTR software. Citations to any written transcripts are to the date of the proceedings and, where applicable, to the page number of the written transcript.

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I. INTRODUCTION

Plaintiff advocates for a system in which virtually every claimant who asserts incapacity under §41-4-16(B) can proceed to summary judgment, then burden government entities with discovery and briefing regarding all facts and circumstances surrounding the claimant's alleged injuries. This runs contrary to the language, structure, and policy of the TCA. The Court should reject Plaintiff's arguments, reverse the Court of Appeals, and affirm the District Court's dismissal of Plaintiff's claims.

II. ARGUMENT

a. "Incapacitated from Giving the Notice" Focuses on Mental Abilities.

Plaintiff argues that "incapacitated from giving the notice" should be decided on a case-by-case basis after considering all facts regarding a claimant's alleged injuries. As explained in the BIC, however, this broad approach to incapacity is inconsistent with the language and policy of the TCA. In addition, Plaintiff's specific arguments for a broad incapacity standard fail for the following reasons.

1. Plaintiff fails to address flaws in the Court of Appeals' Opinion.

Plaintiff concedes that incapacity requires an inability to give notice both personally and through an agent. **[AB 26-27; BIC 29]** In support of this position, she points to Paragraph 23 of the Court of Appeals' Opinion. **[AB 26]** In light of the inconsistent language in Paragraph 1 of the Opinion, however **[see BIC 28]**, this

Court should clarify that—as both parties now agree—a claimant is incapacitated only when they are unable to cause notice to be given both personally and through an agent.

Plaintiff does not respond to SVH’s arguments regarding other analytical flaws in the Opinion. As SVH has explained, the Court of Appeals erred by basing its definition of “incapacitated” on (1) Minnesota law, and (2) TCA remedies that extend to physical and mental injuries. **[BIC 30-37]** Plaintiff apparently concedes these points. *See Delta Automatic Sys., Inc. v. Bingham*, 1999-NMCA-029, ¶31, 126 N.M. 717 (failure to respond constitutes concession).

Nevertheless, Plaintiff argues that the Court of Appeals should be affirmed because it “derived its interpretation from the text of §41-4-16(B) itself.” **[AB 28]** The Opinion does not support this interpretation. The Court of Appeals conducted a general discussion of the TCA’s language before turning to Minnesota law. Op. ¶¶20-21. It failed to consider SVH’s arguments that the jurisdictional nature of the notice provision, the TCA’s statutory structure, and the Legislature’s use of limited tolling language support a narrow definition of incapacity. **[BIC 16-30 (also raised below)]** The court should have conducted this complete statutory analysis and clarified that “incapacitated” turns on a claimant’s inability to (1) understand and make decisions regarding a claim, and (2) communicate those decisions to the government. In this case, for example, Plaintiff had capacity to give notice because

she (1) recognized a problem with her surgeries on February 21, 2018, when she complained to a nurse that “the MD should not have been so invasive” **[RP3:691 at 22:14-23:24]**, and (2) had the capacity to call a lawyer to pursue her potential claim. **[BIC 4-7]**

2. The TCA did not have to define “incapacitated” as mental.

Plaintiff argues that this Court should reject SVH’s interpretation of “incapacitated” because the Legislature did not define incapacity as “mental.” **[AB 28-30]** In support of this argument, Plaintiff cites the Probate Code and Uniform Health-Care Decisions Act, which expressly define incapacity. But a statute does not have to define incapacity in order for courts to interpret the term as cognitive in nature. In fact, caselaw on §37-1-10 interprets “incapacitated person”—an undefined term—as focused on a plaintiff’s mental capacity. *Varnell v. Dora Consolidated Sch. Dist.*, 756 F.3d 1208 (10th Cir. 2014); *Bellman v. NXP Semiconductors USA, Inc.*, 248 F. Supp. 3d 1081 (D.N.M. 2017); **[BIC 26-28]** This authority is persuasive because §37-1-10 involves incapacity-based tolling of a statute of limitations, which is analogous to tolling of a notice provision. *See Hagen v. Faherty*, 2003-NMCA-060, ¶14, 133 N.M. 605.

Furthermore, neither statute identified by Plaintiff is relevant here. Under the Probate Code, “incapacitated person” extends to impairments caused by “mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic

intoxication, or other cause” that render the person “unable to manage” their affairs. NMSA 1978, §45-5-101(F). This unusually broad definition makes sense in the context of the Probate Code, which identifies individuals who would benefit from the protection of guardians. *See generally* §§45-5-101, *et seq.* It is not necessary to incorporate a uniquely broad definition into the TCA, however, because the plain statutory language limits incapacity to situations in which a claimant is unable to cause notice to be given.

Plaintiff’s reliance on the Uniform Health-Care Decisions Act, which was enacted more than a decade after the TCA, makes even less sense. *See* NMSA 1978, §24-7A-1. As Plaintiff notes, the Legislature is presumed to be aware of existing law when passing new legislation. **[AB 29]** However, the Legislature was not aware of *subsequent* statutes when it enacted the TCA. Thus, the language of the 1995 Uniform Health-Care Decisions Act is irrelevant to legislative intent underlying §41-4-16.

3. Plaintiff defines “incapacitated” more broadly than the Court of Appeals.

Plaintiff argues that “incapacitated from giving the notice” turns on whether a claimant can investigate their injury, “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.” **[AB 29-30. *See also* AB 38 (Plaintiff was incapacitated because she could not “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”)] However, a claimant is not incapacitated simply because they do not understand §41-4-16 and the underlying “complex legal situation.” Regardless, Section 41-4-16(B) only references the capacity to cause notice to be given. This requires nothing more than the ability to understand the “time, place and circumstances” of an injury, decide to pursue the claim, and communicate that decision to a lawyer. §§41-4-16(A)-(B). A person must comply with the law regardless of whether they know or understand it. *State v. Tower*, 2002-NMCA-109, ¶9, 133 N.M. 32 (“Every person is presumed to know the law.”), *overruled on other grounds by State v. Archuleta*, 2015-NMCA-037, ¶9. Thus, all TCA claimants must comply with §41-4-16, regardless of whether they comprehend the notice provision, the “complex legal situation,” or the “legal significance” of the underlying injury.

Nor is there authority supporting Plaintiff’s argument that capacity to give notice is fundamentally different from capacity to enter a contract or consent to healthcare. **[AB 29-30]** Capacity to give notice is analogous to other contexts—such as consenting to medical care—in which a claimant must be able to recognize a medical injury or symptoms and decide to seek treatment, as Plaintiff was able to do in this case.

4. Caselaw supports a limited interpretation of incapacity.

Plaintiff suggests that authorities identified in the BIC support the Court of Appeals' broad interpretation of incapacity. **[See AB 31]** This is incorrect.

- *Ferguson* indicates, in dicta, that a claimant is not incapacitated under §41-4-16(B) if they can cause an agent to give notice. 1982-NMCA-1980, ¶¶11-13. This supports SVH's position that a claimant who can understand a claim and call a lawyer is not incapacitated.
- *Galvan, Lent, and Varnell* indicate that incapacity focuses on a plaintiff's mental ability to understand and pursue a claim. **[BIC 24-28]** Plaintiff argues that she was not as mentally sharp and physically capable as the plaintiffs in those cases. **[AB 32-34]** However, *Galvan, Lent, and Varnell* do not set a minimum bar for capacity. Even if Plaintiff lacked the sophistication of the plaintiffs in those cases, it does not mean that she was incapacitated under §41-4-16(B).
- *Bellman* indicates that a plaintiff's physical condition is only relevant to incapacity if it impairs the plaintiff's mental ability. **[BIC 27-28]** This supports SVH's position.

5. Plaintiff's policy arguments lack merit.

Plaintiff asks the Court to disregard SVH's policy concerns because (1) §41-4-16(B) only extends the notice period by 90 days, and (2) the TCA strikes a balance

between the interests of injured plaintiffs and government defendants. [AB 40] With respect to the first point, SVH’s concern is that a broad definition of incapacity will permit any claimant with injuries to assert incapacity and burden governmental entities with years of incapacity litigation. The 90-day limit on extensions does not address this issue. With respect to the second point, while the TCA as a whole balances the interests of plaintiffs and defendants, some of its provisions protect one interest rather than the other. Section 41-4-16 was enacted to “limit[] the sphere of government liability.” *Lopez*, 1996-NMSC-071, ¶8; *Hagen*, 2003-NMCA-060, ¶14. It should be read narrowly in light of this goal. [BIC 22-23]

b. The Court of Appeals’ “Intertwined” Standard Conflicts with Federal Law.

1. The Court of Appeals did not adopt the federal standard.

Plaintiff argues that the Court of Appeals “faithfully applied the federal standard” for converting Rule 12(b)(1) motions into summary judgment motions. [AB 16] Yet, if the Court of Appeals had wished to follow the federal standard, surely it would have acknowledged that standard and developed a New Mexico standard that tracks the federal language. It failed to do so.

The Tenth Circuit clarified the “intertwined” standard in *Pringle v. United States*, 208 F.3d 1220 (10th Cir. 2000). Earlier cases addressing the conversion of Rule 12(b)(1) motions focused on whether jurisdictional and substantive questions arose under the same statute. *E.g.*, *Holt v United States*, 46 F.3d 1000, 1003 (10th

Cir. 1995). *Pringle* explained that the statutory origin of jurisdictional and substantive issues is not dispositive. 46 F.3d at 1223. Instead, the “intertwined” analysis turns on whether “resolution of the jurisdictional question requires resolution of an aspect of the substantive claim.” *Id.*

According to Plaintiff, the Court of Appeals “synthesized” federal authority and arrived at the new “bears on” standard. **[AB 17]** But the Court of Appeals did not even mention the governing *Pringle* standard. Instead, it relied almost exclusively on *Holt*, in which the Tenth Circuit held that jurisdiction and the merits were not intertwined because they arose under separate statutes. 46 F.3d at 1003. Despite this limited holding, the Court of Appeals extrapolated from *Holt* that jurisdiction is intertwined with the merits “when resolution of the jurisdictional issues requires resolving factual disputes that bear on both jurisdiction and the merits of the underlying claim.”¹ Op. ¶9.

In support of the “bears on” standard, the Court of Appeals and Plaintiff both assert that jurisdiction in *Holt* was “wholly separate from the merits.” Op. ¶9; **[AB 23]** This is incorrect. The jurisdictional inquiry in *Holt* required the court to determine whether the defendant’s flood-control activities gave rise to the plaintiffs’

¹ Plaintiff suggests that *Ortiz v. United States*, 786 F.3d 817 (10th Cir. 2015), supports the “bears on” standard. **[AB 18]** But *Ortiz* merely stated that **following conversion** of a Rule 12(b)(1) motion, a district court only considers aspects of a substantive claim that “bear on” jurisdiction. 786 F.3d at 829 n.11.

claimed injuries. *Holt*, 46 F.3d at 1004. This fact-based analysis—which turned on what the government did, why they did it, and whether it had a “nexus” with the plaintiffs’ injuries—overlaps with substantive issues of duty, breach, and causation, and is not “wholly separate from the merits.” *Id.* It does not support the Court of Appeals’ standard.

Plaintiff also contends that the differences between the federal standard and the “bears on” standard are merely “semantic.” **[AB 17-18]** This, too, lacks merit. Although both standards use the words “require” and “resolution”/“resolve,” the subject of those verbs—*i.e.*, the issue that must be “resolved”—differs. The federal standard triggers conversion when the jurisdictional inquiry requires resolution of “an aspect of the federal claim.” In contrast, the Court of Appeals’ standard mandates conversion when a jurisdictional issue requires resolution of “factual disputes” that “bear on” jurisdiction and the merits. Thus, while the federal standard requires direct resolution of an aspect of the merits, the Court of Appeals’ standard telescopes out from the merits and merely requires resolution of a jurisdictional fact that is somehow relevant to the merits.

This has practical consequences. Motions are converted under the federal standard only when the District Court “cannot resolve [the] jurisdictional question without addressing the merits of a substantive claim.” *Baker v. USD 229 Blue Valley*, 979 F.3d 866, 874 n.5 (10th Cir. 2020). This occurs when jurisdiction requires a

district court to decide an important element of the substantive claim. *E.g.*, *Knellinger v. Young*, 134 F.4th 1034, 1041-42 (10th Cir. 2025); *Pringle*, 208 F.3d at 1222-24 & n.3. For example, in this case, the substantive claim requires a determination of whether there was a breach of the standard of care, causation, and damages as a result of the breach, none of which are at issue when deciding the jurisdictional question of whether Plaintiff was “incapacitated from giving the notice.” Thus, jurisdiction is not intertwined with the merits under the federal standard.

In contrast, the Court of Appeals’ standard requires conversion anytime a jurisdictional fact “bears on” the merits. Under this attenuated standard, a number of cases that are currently decided under Rule 12 would have to be resolved under Rule 56. For example, the jurisdictional inquiry in *Holt* required resolution of factual issues regarding what the government did to create an ice slick and whether there was a “nexus” between that conduct and the plaintiffs’ claimed injuries. 46 F.3d at 1004. Under the Court of Appeals’ standard, this case would be resolved on summary judgment, because the jurisdictional facts “bear on” duty/breach elements of the plaintiffs’ negligence claims. Similarly, the tribal immunity cases discussed in SVH’s BIC—which Plaintiff does not address—involve resolution of jurisdictional facts that “bear on” the merits. **[BIC 46-47]** If the Court of Appeals’ Opinion stands, these cases will have to be decided on summary judgment or at trial.

2. Plaintiff misconstrues the federal standard.

Plaintiff argues that the federal standard, like the “bears on” standard, creates an “overlap framework” that requires conversion of Rule 12(b)(1) motions any time jurisdictional and substantive issues contain factual overlap. **[AB 16-17]** This turns on a misreading of two federal cases. First, Plaintiff cites *Paper, Allied-Indus., Chem & Energy Workers v. Cont’l Carbon Co.*, 428 F.3d 1285 (10th Cir. 2005), for the proposition that “conversion [is] not required **only when** ‘[t]here is no overlap between the cause of action and the jurisdictional question.’” **[AB 17]** In *Paper*, however, the court held that conversion will not occur when there is “no overlap” between substantive and jurisdictional issues. 428 F.3d at 1292. It stands for the proposition that issues with “no overlap” are not intertwined. It does not support the converse proposition that cases involving **any** overlap are intertwined, *i.e.*, that **only** cases with no overlap can be decided under Rule 12(b)(1).

Plaintiff also cites *Knellinger v. Young*, 134 F.4th 1034 (10th Cir. 2025), for the proposition that any overlap requires conversion under the federal standard. But *Knellinger* involved a situation of complete overlap, in which determination of the jurisdictional issue could fully resolve the substantive claim. 134 F.4th at 1041-42; **[BIC 41]** It does not establish that **any** overlap requires conversion.

Plaintiff also references *Pringle* in support of the idea that any overlap triggers conversion. **[AB 16-17]** In *Pringle*, however, the plaintiff claimed that he had been

negligently ejected from a military club, which led to a beating in the club’s parking lot. 208 F.3d at 1222. The district court’s jurisdictional fact-finding—regarding the plaintiff’s “duty status, whether his injuries occurred on a military base, the type of activity appellant engaged in when the injury occurred, and whether there was direct military control over that activity”—contained substantial overlap with questions of duty/breach. *Id.* at 1223 n.3. This does not suggest that any minor overlap converts a motion to dismiss into a summary judgment motion.

3. Conversion is not required under the federal standard.

Plaintiff argues that the Court of Appeals properly converted SVH’s motion to dismiss into a summary judgment motion because this case “parallels” *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987). **[AB 23]** But *Wheeler* pre-dates *Pringle* and, thus, does not address conversion under the modern standard. 825 F.2d at 259. Moreover, even if *Wheeler* is persuasive, it does not support conversion here. In *Wheeler*, jurisdiction and the merits of a workplace discrimination claim turned on whether the plaintiff qualified as an “employee.” *See id.* at 259, 262. If the plaintiff was not an “employee,” her substantive and jurisdictional claims would both fail. *See id.* Here, in contrast, whether Plaintiff was “incapacitated” from understanding a claim and causing an agent to give notice is not a required or significant element of Plaintiff’s malpractice claim.

Next, Plaintiff suggests that federal cases on exhaustion are not relevant because they typically involve clear separation between jurisdiction and the merits. **[AB 22]** In *Davis ex rel. Davis v. United States*, 343 F.3d 1281 (10th Cir. 2003), however, the question of whether the plaintiffs had exhausted their claim by properly seeking CDIB cards involved factual overlap with the substantive question of whether the BIA unlawfully denied the cards. **[BIC 42-43]** Despite this overlap, the court concluded that jurisdiction and the merits were not intertwined because they were conceptually distinct. 343 F.3d at 1296. The same is true here.

4. *A jurisdictional nexus does not require conversion.*

Plaintiff argues that incapacity is “inherently intertwined” with the merits here because §41-4-16(B) only applies to claimants who are incapacitated “by reason of injury.” **[AB 18-19]** As explained in the BIC, however, “by reason of injury” is a limiting phrase. **[BIC 21]** It narrows the pool of individuals who can extend the notice period by excluding claimants who suffer from pre-existing and/or unrelated incapacity. This narrow definition of incapacity requires 90-day notice in the majority of cases, which permits government defendants to conduct timely investigations, identify false or exaggerated claims, and efficiently resolve meritorious claims. *Lopez v. State*, 1996-NMSC-071, ¶8, 122 N.M. 611; **[BIC 22-23]**

It is ironic, then, that Plaintiff seizes on this statutory limitation as evidence that every case of claimed incapacity must be decided on summary judgment. **[AB 18-19, 21]** This procedure, if accepted, would undermine the goals of the TCA by encouraging drawn-out litigation on the question of incapacity and increasing the settlement value of any case—including non-meritorious substantive claims—in which the plaintiff can make a colorable incapacity argument. Moreover, although “by reason of injury” requires a nexus between the claimed incapacity to give notice and the underlying negligence, this does not require conversion of SVH’s motion to dismiss. To the contrary, *Holt* makes clear that a jurisdictional nexus inquiry is not intertwined with the merits where, as here, jurisdiction is conceptually distinct from the merits.²

Plaintiff argues that the “bears on” standard does not improperly burden government defendants because even on summary judgment, plaintiffs are required to produce evidence of incapacity. **[AB 20-21]** But evidence regarding incapacity is almost entirely within the claimant’s control. Any TCA claimant can sign an affidavit stating that the circumstances surrounding their alleged injury prevented them from giving notice. Under the Court of Appeals’ standard, this could create a

² Moreover, §41-4-16(B) only requires findings regarding the nexus between alleged negligence and incapacity if there is evidence of incapacity in the 90-day notice period.

fact question that precludes summary judgment. The Legislature surely did not intend this result when it drafted the strict language of §41-4-16.

Finally, Plaintiff argues that jurisdiction is intertwined with the merits in this case because SVH's brief referenced Plaintiff's surgeries and mental/physical capacity. **[AB 19]** This makes little sense. Throughout litigation, Plaintiff has argued that she was incapacitated because she lacked the physical ability to perform ordinary tasks. **[E.g., RP3:725-26]** SVH provided background on Plaintiff's physical condition in order to orient the Court to Plaintiff's anticipated arguments. This background does not suggest that jurisdiction is inextricable from the merits. Nor does nurse testimony regarding Plaintiff's mental capacity suggest that jurisdiction and the merits are intertwined. **[See AB 19-20]** SVH and the District Court relied on nurse testimony regarding Plaintiff's ability to understand and respond to questions, make personal decisions, and complete tasks like calling insurance representatives. **[BIC 4-7, 10-12]** This evidence does not address substantive questions of standard of care, causation or damages.

c. The District Court Properly Dismissed Plaintiff's Claims

Plaintiff argues that she created a genuine issue of material fact on the question of incapacity, but this argument largely depends upon the Court of Appeals' (1) incorrect standard for converting motions to dismiss into summary judgment motions, and (2) overly broad interpretation of incapacity.

Assuming that this case is properly decided under Rule 1-012(b)(1), Plaintiff does not contend that she could prevail under the substantial evidence standard. Her only argument under Rule 1-012 is that the District Court erred by addressing Plaintiff's "general mental competence" rather than her ability to give notice. **[AB 42-43]** The record does not support this argument. The District Court properly determined that incapacity turns on a claimant's ability to make and communicate reasonable decisions. **[BIC 10]** The court then decided, based on the evidence, that Plaintiff could not show that she lacked capacity to understand and pursue her negligence claims. **[BIC 10-12]** This record indicates that the court performed a "functional" analysis focused on Plaintiff's capacity to pursue her claim. The analysis was supported by substantial evidence and should be affirmed.

Plaintiff's claims also fail under a summary judgment standard. Plaintiff does not challenge the District Court's finding that a nursing note from February 21, 2018, only a few days after the February 15-16, 2018 surgeries, showed that Plaintiff (1) complained about Dr. Paustian's surgical procedure and therefore had cognitive understanding/concern regarding whether he breached his duty of care, and (2) knew or should have known of her potential claim. **[BIC 10-12]**; Rule 12-318 (appellate brief "shall set forth a specific attack on any finding, or the finding shall be deemed conclusive"). Thus, the only question is whether Plaintiff had the ability to decide to pursue her claim and call an attorney during the notice period. Testimony from

Nurses Ramirez and Ramos established that Plaintiff could make personal decisions—including medical decisions—and was able to call insurance representatives to “do follow-up” regarding equipment and services. **[RP3:695 at 41:7-24]** This is analogous to calling an attorney to discuss whether to pursue a claim: Plaintiff was able to understand an issue, pick up the phone, and communicate decisions to an agent. In light of this undisputed evidence, she cannot establish incapacity.

Plaintiff contends that Dr. Waxman’s affidavit creates a fact dispute regarding capacity. However, Dr. Waxman declined to offer an opinion on capacity because he did not evaluate Plaintiff at relevant times. **[RP1:170-71]** His generalizations regarding how a typical person’s capacity may be affected by narcotics **[RP1:171]** cannot create a fact dispute as to *Plaintiff’s* capacity, because Plaintiff regularly took narcotics before her surgery **[RP4:821-22 at 11:22-13:25]**, and testified that the medication did not affect her. **[RP4:1043 at 58:11-59:25]**

Plaintiff also argues that she was incapacitated because her parents helped with daily tasks and because she experienced depression and sleep disruption. However, Plaintiff’s parents’ assistance generally relates to Plaintiff’s physical condition, and does not indicate that Plaintiff was incapacitated from giving notice. **[RP3:745-47, RP3:772 at 46:25-47:16]** Moreover, Plaintiff’s father paid her bills until one or two months *after* Plaintiff had the capacity to contact an attorney, which

means that financial assistance was not indicative of incapacity. **[RP3:746, ¶¶11-12]** Plaintiff's depression pre-dated the surgeries **[RP3:765 at 20:20-21:5]** and, thus, cannot be used to establish incapacity. **[See AB 18-19]** Finally, there is no evidence that sleep disruption prevented Plaintiff from understanding or pursuing a claim. **[RP3:775 at 59:18-60:1 (Plaintiff was awake at night, slept during school hours so she could spend time with children after school)]**

Plaintiff attempts to create a fact issue by citing Nurse Ramirez's testimony that Plaintiff supposedly "needed guidance" and lacked the "mind skill-set" to make decisions. **[E.g., AB 36-37]** But this testimony was limited in nature. Nurse Ramirez explained that Plaintiff sometimes needed a nurse's input regarding whether to seek follow-up medical care because Plaintiff lacked specialized knowledge regarding surgical lines and could not feel symptoms of infection due to paraplegia. **[RP3:771 at 42:21-43:12]** This limited area in which Plaintiff needed guidance did not impact her ability to understand and give notice of a claim.

Plaintiff also attempts to discount the testimony of Nurses Ramos and Ramirez by suggesting that they were lay witnesses, not experts on incapacity. **[AB 30, 37]** But SVH does not rely on the nurses for expert opinions. To the contrary, the nurses testified regarding their observations of Plaintiff's ability to discuss her medical history, understand and respond to questions, interact with others, make phone calls, and make decisions. **[BIC 4-8]** This testimony is largely undisputed, as

Plaintiff recalls almost nothing from the relevant timeframe **[RP3:700-01; RP4:1040]**, Plaintiff's father focused on Plaintiff's physical limitations in his affidavit **[RP3:746-47]**, and Dr. Waxman did not observe Plaintiff. **[RP1:170-71]** The District Court properly credited the nurses' testimony.

Plaintiff attacks Nurse Ramos' testimony because he did not remember Plaintiff when he was subpoenaed for his deposition. **[AB 36]** However, Nurse Ramos met with Plaintiff in February and March 2018 for sessions that lasted up to one hour. **[RP3:686 at 34:2-12; RP3:744 at 48:16-21; RP3:737 at 17:2-18; RP3:636 at 34:22-36:1]** He assessed capacity by finding that Plaintiff was alert/oriented, and by asking about things like her medical history and medication usage before and after surgery. **[RP3:681 at 10:4-20; RP3:682 at 14:25-16:12]** Although he did not remember Plaintiff at first, he was able to refresh his memory. **[RP3:680-81 at 5:11-23, 13:6-12]** Thus, his testimony is admissible and persuasive as to mental capacity. *See State v. Little*, 2020-NMCA-040, ¶ 12, 473 P.3d 1 (witnesses may refresh memory).

Finally, Plaintiff's new argument regarding the "day-by-day" nature of tolling under §41-4-16(B) does not create a fact dispute. **[AB 25]** Until now, Plaintiff has argued that she lacked capacity from February to June 2018. **[NMCA BIC 2-3, 9-10]** SVH disputes this assertion. **[BIC 2-7, 47-48]** Moreover, Plaintiff has not identified evidence that might create a fact dispute as to a shorter period of

incapacity. [**See AB 25**] This Court need not consider the undeveloped argument.

Muse v. Muse, 2009-NMCA-003, ¶ 72, 145 N.M. 451.

III. CONCLUSION

The Court of Appeals should be reversed and the District Court's dismissal of Plaintiff's claims should be affirmed.

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

By: /s/ Elizabeth A. Martinez

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

Counsel for Defendants-Petitioners

Sierra Vista Hospital and Sierra Vista Hospital

Governing Board

Certificate of Service

I HEREBY CERTIFY that the foregoing pleading was filed via “Odyssey File and Serve” on the 10th day of February, 2026, which caused all counsel of record to be served by electronic means. I hereby further certify that a true and correct copy of the foregoing was also served via e-mail this 10th day of February, 2026, as follows:

Lori M. Bencoe
Cherie L. LaCour
Danielle L. Ceballes
Bencoe & Lacour Law, PC
9201 Montgomery Blvd NE #404
Albuquerque, New Mexico 87111
Phone: (505) 247-8800
Fax: (505) 247-8801
lori@bencoelaw.com
cherie@bencoelaw.com
danielle@bencoelaw.com
Attorneys for Plaintiff/Respondent

Nicholas Rowley
Courtney Rowley, *Pro Hac Vice*
Trial Lawyers for Justice
421 W. Water Street, Third Floor
Decorah, Iowa 52101
Phone: (866) 864-5529
NR@TL4J.com
therowleylawfirm@gmail.com
Attorneys for Plaintiff/Respondent

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

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

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

By: Elizabeth A. Martinez
Elizabeth A. Martinez