IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
NO. S-1-SC-39690

Court of Appeals No. A-1-CA-36256
Dist. Ct. No. D-202-CV-2014-04792
Hon. Valerie A. Huling, District Judge

MAUREEN SANDERS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE PAQUIN,

Plaintiff-Respondent,

vs.

NEW MEXICO CORRECTIONS DEPARTMENT, GREGG MARCANTEL, and CATHLEEN CATANACH,

Defendants-Petitioners.

PLAINTIFF-RESPONDENT'S ANSWER BRIEF

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INTRODUCTION

This Court issued a writ of certiorari to review the Court of Appeals' decision that NMSA 1978, Section 41-4-6(A) of the New Mexico Tort Claims Act permits the New Mexico Corrections Department and its employees to be held liable for the negligent release of a prisoner who killed a woman off of the premises at a time when – but for the defendants' negligence – the prisoner would have been incarcerated. *See Sanders v. New Mexico Corr. Dep't*, 2023-NMCA-030, ¶¶ 1–6 ("Opinion"). The Court of Appeals' dispositive holding was that Section 41-4-6(A)'s immunity waiver is not limited to injuries occurring on or adjacent to government property, because the waiver incorporates the common law premises liability principles for private property owners, and the common law places no such geographic limitation. *See Id.* ¶¶ 12–20 (citing *Encinias v. Whitener L. Firm, P.A.*, 2013-NMSC-045, ¶ 16).

In Petitioners' Brief-in-Chief, Petitioners have chosen not to address with any substance the Opinion's dispositive holding. Instead, they argue: (i) that the Court of Appeals erred when it considered common law premises liability principles to determine whether the New Mexico Tort Claims Act ("TCA") waived immunity; and (ii) that the Court of Appeals erred in declining to affirm the District Court's decision under the right-for-any-reason doctrine, based on the "discrete administrative function" rule from *Archibeque v. Moya*, 1993-NMSC-079, 116 N.M.

616. Because Petitioners have declined to address the Opinion's primary holding, their Brief-in-Chief fails to raise any significant issue of law justifying the Court's granting a writ of certiorari. *See* NMSA 1978, § 34-5-14(B); Rule 12-502(C)(2)(d) NMRA. Accordingly, the Court should quash the writ of certiorari as improvidently granted.

Alternatively, if the Court proceeds with its review, Plaintiff-Respondent Maureen Sanders, as Personal Representative of the Estate of Katherine Paquin ("Respondent") requests that the Court affirm the Court of Appeals' decision, because: (i) the Court should not consider Petitioners' cursory arguments regarding Section 41-4-6(A)'s waiver's geographic scope; (ii) the Court of Appeals did not err in determining that Section 41-4-6(A)'s waiver applies, because the TCA does not require that courts resolve an "antecedent" question before considering common law premises liability principles; (iii) the Court of Appeals did not abuse its discretion in declining to affirm the District Court's order under a right-for-any-reason doctrine; and (iv) if the Court considers Petitioners' *Archibeque* argument, it should reject it.

I. PETITIONERS DO NOT SUBSTANTIVELY ADDRESS THE COURT OF APPEALS' HOLDING REGARDING SECTION 41-4-6(A)'S WAIVER'S GEOGRAPHIC SCOPE.

The Court of Appeals reversed the District Court on the grounds that Section 41-4-6(A)'s waiver may apply even when the negligent operation of a building results in injury in a location that is neither on nor adjacent to property owned or

controlled by the government. *See* Opinion ¶ 20. Because Petitioners have elected not to address that holding, the Court should not review it. "Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment). Under the party presentation rule, appellate courts should not address an issue the parties do not raise or argue. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present."). As Petitioners have not raised this issue in their Brief-in-Chief, the Court should not address it.

To the extent that Petitioners' arguments may touch upon the Court of Appeals' primary holding, the Court should not consider them, because they are cursory, without citations to legal authority or to the record. In the Opinion, the Court of Appeals reversed the District Court, "find[ing] no basis to conclude there is a geographical limit on the location of an injury that would preclude waiver as a matter of law." *See* Opinion ¶ 20 (alteration added). Accordingly, the Court of Appeals concluded that Petitioners "are not immune from liability due solely to the fact that Paquin's death did not occur in or on property linked to NMCD facilities." *Id.* In

their Brief-in-Chief, Petitioners devote only a single paragraph to directly address the Court of Appeals' primary holding regarding Section 41-4-6(A)'s geographic limits. **[BIC 34]**. That paragraph features conclusory statements without substantive arguments. Petitioners contend that the Court of Appeals' Section 41-4-6(A) analysis is erroneous "for the additional reasons discussed in the foregoing sections," *id.*, apparently incorporating the preceding thirty-three pages. Petitioners add that "no 'premises liability' case cited in the Opinion or by Plaintiff below supports the Opinion's reversal of the Order," but Petitioners do not identify which cases they mean, nor do they explain why those cases do not support the reversal. *Id.*

The Court should not consider such unsupported, cursory arguments.[1] This Court has made clear that it will not rule on inadequately briefed issues because to do so, the Court "would have to develop the arguments itself, effectively performing the parties' work for them. This creates a strain on judicial resources and a substantial risk of error. It is of no benefit either to the parties or to future litigants

[1]Petitioners make another cursory argument on another issue in their Brief-in-Chief's final paragraph. Petitioners state that, "if the Court were to affirm the Opinion's rulings against Defendants, it would be making new law, not clearly foreshadowed by current New Mexico law, and so should instruct that such a rule be applied prospectively only." **[BIC 35]**. Petitioners do not attempt to explain why affirming the Opinion's rulings would mean "making a new law," or why it should be applied prospectively only. Petitioners nonetheless ask for an opportunity to brief the matter, if the Court disagrees, but Petitioners do not explain why they did not do so in their Brief-in-Chief. *Id.* Petitioners have offered no sound basis for the Court to consider this cursory argument, or to provide Petitioners with a second chance to make it.

for [the] Court to promulgate case law based on [its] own speculation rather than the parties' carefully considered arguments." *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70 (alterations added) (internal citation omitted.); *see also City of Santa Fe v. Komis*, 1992-NMSC-051, ¶ 22, 114 N.M. 659 ("Issues not briefed will not be reviewed by this Court."). To the extent that the Court wishes to review the Court of Appeals' primary holding, Respondent requests that the Court order Petitioners to file a supplemental brief to address the matter with the arguments and citations that this Court requires, and permit Respondent to file a response once the issue has been adequately presented. As it stands, Petitioners have not asserted arguments to which Respondent could answer in this brief, nor have Petitioners sufficiently briefed the issue for the Court to consider it.

II. THE COURT OF APPEALS DID NOT ERR BY APPLYING COMMON LAW PRINCIPLES TO DETERMINE WHETHER SECTION 41-4-6(A) WAIVES IMMUNITY FOR RESPONDENT'S CLAIM.

Petitioners argue that the Court of Appeals made reversable error by considering common law premises liability principles when determining Section 41-4-6(A)'s waiver's scope. **[BIC 13–28]**. Petitioners contend that the nature of TCA's immunity requires courts to first consider whether a waiver applies solely as a matter of statutory interpretation, before proceeding with any waiver analysis based on common law negligence principles. **[BIC 13]**.

Petitioners are incorrect for a number of reasons. First, caselaw does not support Petitioners' position that whether a negligence-based TCA waiver applies is a separate and "antecedent" question to whether the plaintiff has stated a claim based on common-law principles. Petitioners cite to numerous cases supposedly standing for that proposition **[BIC 23]**, but none do. Rather, in each of those cases, the courts underwent the routine process of deciding whether to dismiss a claim by considering whether a TCA waiver applied to the alleged facts at issue. Sometimes, courts may resolve that question without having to consider common law tort principles. In *Kreutzer v. Aldo Leopoldo High School*, for instance, the Court of Appeals determined that there was no need to consider negligence elements when the plaintiff's purported premises liability claim was, in essence, one for negligent supervision (for which Section 41-4-6(A) did not waive immunity). 2018-NMCA-005, ¶¶ 53–54, 79. In *Thompson v. City of Albuquerque*, this Court noted that it had, in another case, considered and rejected a loss-of-consortium claim "when we could have simply declared that there was no waiver of immunity." 2017-NMSC-021, ¶ 11 (citing *Wachocki v. Bernalillo Cnty. Sheriff's Dep't*, 2011-NMSC-039, ¶ 4, 150 N.M. 650)). Petitioners also rely on cases that make the unremarkable observation that a plaintiff does not state a TCA claim unless the TCA waives immunity for it. *See, e.g.*, *Cobos v. Doña Ana Cnty. Hous. Auth.*, 1998-NMSC-049, ¶ 19, 126 N.M. 418 (stating that a "duty must fit within the legislative intent of the Tort Claims Act

waiver in order to state a meritorious claim for relief"); *Espinoza v. Town of Taos*, 1995-NMSC-070, ¶ 14, 120 N.M. 680 (same).

Rather than demonstrating that a court must determine certain "antecedent" questions before considering any common law principles, the caselaw demonstrate that, if a court can determine that there is no immunity waiver for a claim without considering the elements of the underlying claim, there is no need for further analysis. But if the waiver's applicability depends on common-law tort principles, the court must necessarily consider those principles in order to determine whether the waiver applies. Here, the Court of Appeals was asked to determine whether Section 41-4-6(A)'s waiver applied to Respondent's claim. Because Section 41-4-6(A) is (with some judicially-crafted exceptions) coextensive with common-law premises liability, *see Encinias*, 2013-NMSC-045, ¶ 15 ("[T]he facts of a case will support a waiver under Section 41–4–6(A) if they would support a finding of liability against a private property owner."), the Court of Appeals properly followed this Court's precedents and considered common-law premises liability elements to determine whether the waiver applied.

Second, Petitioners are mistaken about the nature of their immunity under the TCA. Petitioners argue that courts must undergo a two-step analysis when deciding whether TCA waives immunity for a claim, because – they contend – the TCA gives them "immunity from suit," and not immunity from liability. **[BIC 13–28]**. It has

long been settled, however, that the TCA creates immunity from *liability*, not absolute immunity from *suit*. *See Carmona v. Hagerman Irrigation Co.*, 1998-NMSC-007, ¶ 21 n.5, 125 N.M. 59 ("The Tort Claims Act provides immunity from liability, not absolute immunity from suit[.]" (alteration added)). The TCA says so expressly, stating that a "governmental entity and any public employee while acting within the scope of duty are granted immunity *from liability* for any tort except as waived[.]" NMSA 1978, § 41-4-4(A) (emphasis added). New Mexico's courts have repeatedly recognized that TCA waives immunity from liability, and not absolute immunity from suit. *See, e.g., Handmaker v. Henney*, 1999-NMSC-043, ¶¶ 13–14, 128 N.M. 328 (stating that the TCA grants immunity from liability, whereas, in contrast, NMSA 1978, Section 37-1-23(A), which provides governmental immunity for actions based on contract is an absolute immunity from suit); *Carmona*, 1998-NMSC-007, ¶ 21 n.5 ("The Tort Claims Act provides immunity from liability, not absolute immunity from suit, so the collateral order exception to the finality of judgments rule would not apply in this case."); *Carrillo v. Rostro*, 1992-NMSC-054, ¶ 19, 114 N.M. 607 (stating that "the difference between the immunity granted by the Tort Claims Act and the immunity conferred" by 42 U.S.C. Section 1983 is that the "former is an immunity from *liability*, whereas the latter is an immunity from *suit*" (emphasis in original)); *Allen v. Bd. of Educ. of City of Albuquerque*, 1987-NMCA-152, ¶ 7, 106 N.M. 673 ("Since Section 41-4-4(A) provides for immunity

from liability, and not absolute immunity from suit, we do not find that a denial of a claim of immunity under that section meets the requirements for immediate appellate review under the collateral order exception based on absolute immunity from suit.").

Petitioners' insistence that the TCA bestows them with "immunity from suit," despite clear statutory language and caselaw to the contrary, appears to stem from a basic misapprehension over that concept's meaning. It may be that Petitioners believe only "immunity from suit" would protect TCA defendants from having to undergo trial for claims for which the TCA does not waive immunity, whereas "immunity from liability" would mean those entities must endure the expense of trial, while being saved only from having to pay any resulting judgments. For instance, Petitioners argue that, "[i]f TCA immunity is not immunity from suit, no defendant or claim could ever be dismissed for lack of an applicable waiver," and that "TCA immunity is undeniably a complete defense that is utterly useless unless it is immunity from suit." **[BIC 22]**. But "immunity from liability" is anything but "utterly useless," given that, when a court dismisses a TCA claim on the basis that no TCA waiver applies, the court does so because the TCA defendant is immune from liability for the claim – i.e., the plaintiff has failed to state a claim upon which relief can be granted.

Petitioners also suggest that the TCA's waiver may be a jurisdictional matter. **[BIC 20]**. Again, Petitioners mischaracterize the TCA. Courts have held that TCA's

only jurisdictional element is its timely notice provision – not its waivers. *See, e.g.*, *Gallegos v. Bernalillo Cnty. Bd. of Cnty. Commissioners*, 278 F. Supp. 3d 1245, 1273 (D.N.M. 2017) (Browning, J.) (stating that the TCA's "notice requirement is jurisdictional"); *Todd v. Montoya*, 877 F. Supp. 2d 1048, 1102 (D.N.M. 2012) (Browning, J.) ("The Court has not located any New Mexico authority indicating that a waiver under the NMTCA is a jurisdictional prerequisite to suit."). That the TCA's notice requirement is jurisdictional is clear from the TCA's text. *See* NMSA 1978, § 41-4-16(B) ("No . . . court shall have jurisdiction to consider any suit or action against the state or any local public body unless notice has been given as required by this section, or unless the governmental entity had actual notice of the occurrence."). The Legislature could have used similar jurisdictional language when discussing waiver, but it did not.

Petitioners' authority that waiver under the TCA is jurisdictional is inapposite. **[BIC 20–21]**. For instance, Petitioners rely on cases that discuss governmental immunity predating the TCA or under statutes other than the TCA. *See Spray v. City of Albuquerque*, 1980-NMSC-028, ¶13, 94 N.M. 199 (discussing governmental immunity under Section 37-1-23(A)); *Handmaker*, 1999-NMSC-043, ¶ 14 (same); *Sangre de Cristo Dev. Corp. v. City of Santa Fe*, 1972-NMSC-076, ¶ 9, 84 N.M. 343 (discussing governmental immunity prior to the TCA's enactment in 1976). Petitioners also rely on cases that make passing references, without citations to

authority, about courts lacking jurisdiction to hear tort claims where the TCA has not waived immunity. *See Rubio v. Carlsbad Mun. School Dist.*, 1987-NMCA-127, ¶ 14, 106 N.M. 446; *Begay v. State*, 1985-NMCA-117, ¶ 12, 104 N.M. 483. Those cases fall short of demonstrating that waiver is a jurisdictional prerequisite to suit. *See Dominguez v. State*, 2015-NMSC-014, ¶ 16 (noting the general rule that "cases are not authority for propositions not considered.").

III. THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION IN DECLINING TO CONSIDER PETITIONERS' *ARCHIBEQUE* ARGUMENT.

Petitioners asked the Court of Appeals to affirm the District Court's decision on an alternative basis: that Respondent's claim alleged negligence in a "discrete administrative function" that, under *Archibeque*, Section 41-4-6(A) did not waive immunity. The Court of Appeals declined to affirm the District Court's holding based on Petitioners' *Archibeque* argument, reasoning that Petitioners' underdeveloped briefing made the argument a poor fit for the right-for-any-reason doctrine. *See* Opinion ¶¶ 21-26. This Court "review[s] the Court of Appeals' application of the right for any reason doctrine for abuse of discretion." *Freeman v. Fairchild*, 2018-NMSC-023, ¶ 29 (alteration added). This Court will find an abuse of discretion only if the Court of Appeals' ruling "is clearly untenable or contrary to logic and reason," *id.* (quoting *State ex rel. King v. B & B Inv. Group, Inc.*, 2014-NMSC-024, ¶ 28), or if it "applies an incorrect standard, incorrect substantive law,

or its discretionary decision is premised on a misapprehension of the law." *Freeman*, 2018-NMSC-023, ¶ 29 (quoting *Mintz v. Zoernig*, 2008-NMCA-162, ¶ 17, 145 N.M. 362)). The Court of Appeals acted well within its sound discretion when it declined to affirm under the right-for-any-reason doctrine, because Petitioners' briefing failed to provide an adequate factual basis or address caselaw it knew would be critical for the Court of Appeals to consider.

a. Petitioners' *Archibeque* Argument's Procedural History.

To demonstrate why Petitioners failed to sufficiently brief their alternative *Archibeque* argument, it is worth summarizing that argument's procedural history. In the District Court, Petitioners argued that they were entitled to summary judgment because (i) Respondent's claim alleged a negligent act of a discrete administrative function for which, under *Archibeque*, Section 41-4-6(A) did not waive immunity; and (ii) the Legislature did not intend that Section 41-4-6(A)'s waiver should extend to a scenario when the decedent died six months after the inmate's release, when the death had "nothing to do" with the use of a state facility. **[RP 1370–71, 1619]**. The District Court granted Petitioners' summary judgment motion, concluding that Section 41-4-6(A) did not, as a matter of law, extend to liability for harm occurring so geographically far from the premises. **[RP 2031]**. The District Court did not address the discrete administrative function argument under *Archibeque*. **[RP 2026–34]**.

Respondent appealed, arguing that the District Court erred, because, under *Encinias*, 2013-NMSC-045, Section 41-4-6(A)'s immunity waiver was coextensive with common-law premises liability, and the common law imposes no geographic limitation on an injury under a theory of premises liability. *See* Appellant's Brief-in-Chief at 16–21, originally filed September 24, 2017, in A-1-CA-36256, filed April 4, 2023, in S-1-SC-39690. Instead, the limiting principle under common-law premises liability – and therefore under Section 41-4-6(A) – is the factfinder's proximate causation determination. *Id.* at 21.

In Petitioners' answer brief, they argued that, even if the Court of Appeals did not agree with the District Court's decision, it should nonetheless affirm the decision under a right-for-any reason rationale based on Petitioners' *Archibeque* argument. *See* Appellee's Answer Brief at 25, originally filed in A-1-CA-36256 on January 19, 2018, filed in S-1-SC-39690 on April 4, 2023. But Petitioners failed to support their argument with facts in the record, and failed to address caselaw supporting Respondent's position. *See id.* Most notably, Petitioners did not address *Callaway v. New Mexico Department of Corrections*, a case holding that Section 41-4-6(A) waives immunity for administrative classification decisions when those decisions endanger a population of inmates. 1994-NMCA-049, ¶¶ 18–19, 117 N.M. 637.

Respondent argued, in her reply brief, that *Archibeque*'s discrete-administrative-function exception to Section 41-4-6(A)'s waiver did not apply to her

claim, because *Archibeque* pertained to acts placing only a single, specific person at risk. *See* Appellant's Reply Brief at 8, originally filed in A-1-CA-36256 on February 20, 2018, filed in S-1-SC-39690 on April 4, 2023. By contrast, she alleged ongoing negligence that placed a *population* at risk, such that, pursuant to *Callaway*, Petitioners could be held liable. *See id.* at 9–12.

The Court of Appeals determined that, because Petitioners asserted underdeveloped briefing on such a fact-dependent question, Petitioners' *Archibeque* argument was a bad fit for the right-for-any-reason doctrine. The Court of Appeals explained:

> In their right for any reason argument on appeal, Defendants do not address *Callaway*; nor do they explain, in light of the evidence presented by Plaintiff, why this case ought to be governed by *Archibeque* and not *Callaway*. Moreover, whether the record is sufficient to establish a "general condition of unreasonable risk" or to otherwise demonstrate a disputed issue of material fact are fact-dependent inquires. Such inquiries are not well suited to the application of the right for any reason doctrine, particularly in the absence of a well-developed argument from the appellee. *See Freeman v. Fairchild*, 2018-NMSC-023, ¶ 30, 416 P.3d 264 ("When applying the right for any reason rationale, appellate courts must be careful not to assume the role of the trial court by delving into fact-dependent inquiries." (alteration, internal quotation marks, and citation omitted)); *Atherton v. Gopin*, 2015-NMCA-003, ¶ 36, 340 P.3d 630; *see also State v. Serna*, 2018-NMCA-074, ¶¶ 32-34, 429 P.3d 1283 (declining to decide an undeveloped, right for any reason argument); *State v. Randy J.*, 2011-NMCA-105, ¶¶ 27-30, 150 N.M. 683, 265 P.3d 734 (same). As in *Freeman*, we conclude "[t]he district court is the appropriate forum to determine the merits of [Defendants'] motion for summary judgment in the first instance." 2018-NMSC-023, ¶ 35, 416 P.3d 264. We therefore

> decline Defendants' invitation to affirm on right for any reason grounds.

Opinion ¶ 26.

b. The Court of Appeals did not Abuse its Discretion.

The Court of Appeals did not abuse its discretion when it declined to affirm the District Court based on Petitioners' *Archibeque* argument. Its reasoning is well-rooted in sound legal authority cautioning against an appellate court affirming under the right-for-any-reason doctrine when faced with what it considers insufficient briefing on fact-dependent questions[2] better left to trial courts. *See*, *e.g.*, *Freeman*, 2018-NMSC-023, ¶ 30 ("When applying the right for any reason rationale, appellate courts must be careful not to assume the role of the trial court [by delving] into fact-dependent inquiries." (quoting *Atherton v. Gopin*, 2015-NMCA-003, ¶ 36) (alteration in *Freeman*)); *State v. Serna*, 2018-NMCA-074, ¶¶ 33-34 (declining to decide an underdeveloped argument under the right-for-any-reason doctrine, reasoning that doing so would "create[] a strain on judicial resources and a substantial risk of error," and stating that "is of no benefit either to the parties or to future litigants for this Court to promulgate case law based on our own speculation

[2]Respondent's Brief-in-Chief to the Court of Appeals summarizes the facts, with citations to numerous pages from the record, demonstrating Petitioners' ongoing problems calculating inmates' release dates (including Christopher Blattner's release date), *see* Appellant's Brief-in-Chief at 11–13, originally filed September 24, 2017 in A-1-CA-36256, filed April 4, 2023 in S-1-SC-39690, and the danger that early releases pose to the public, *see id.* at 28–29.

rather than the parties' carefully considered arguments" (quoting *Elane*, 2013-NMSC-040, ¶ 70)).

The Court of Appeals likely would have *abused* its discretion had it affirmed under a right-for-any-reason rationale. *See Freeman*, 2018-NMSC-023, ¶ 35 (holding that the Court of Appeals erred in affirming the district court, because the case was "not well-suited to application of the right for any reason doctrine due to the voluminous record on appeal and the fact-dependent nature of Fairchild's cross-claims," and because the "district court is the appropriate forum to determine the merits of Fairchild's motion for summary judgment in the first instance"). *See also Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 1999-NMSC-006, ¶ 20, 127 N.M. 1 ("While we could affirm a trial ruling which is right for the wrong reason, . . . we may not do so in the absence of any substantial evidence supporting what would be the right reason.").

c. The Court of Appeals' Decision to not Affirm the District Court Under the Right-for-Any-Reason Doctrine was not Unfair to Petitioners.

Petitioners' protests that they were unfairly penalized for not addressing *Callaway* ring hollow. First, the right-for-any-reason doctrine concerns itself with fairness only to the extent that affirming on an alternative basis may be unfair to the *appellant*. *See Atherton*, 2015-NMCA-003, ¶ 36. Thus, the only relevant fairness question for the Court of Appeals to have considered was whether affirming on an

alternative basis would be unfair to *Respondent*. Declining to affirm on an alternative basis means the parties return to the trial court, where the Petitioners may present that alternative argument for the trial court's consideration in the first instance. That outcome is not unfair to Petitioners.

Second, Petitioners had multiple opportunities to address *Callaway*, but did not take them. Petitioners knew (or should have known) that they should affirmatively address *Callaway* in their answer brief, because Respondent relied on *Callaway* to respond to Petitioners' *Archibeque* argument in the District Court.[3] **[RP 1455]**. Accordingly, Petitioners should not have been surprised that Respondent would rely on *Callaway* again in the Court of Appeals.[4] Petitioners again missed a chance to address *Callaway* after Respondent served her reply brief, because they could have sought the Court of Appeals' leave to file a surreply. *See* Rule 12-318(D)(1) NMRA ("Except for those briefs specified in this rule, no briefs may be filed without prior approval of the appellate court.").

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[3]Respondent had no reason to address *Callaway* in her Brief-in-Chief to the Court of Appeals, given that the order from which she appealed did not base its decision on *Archibeque*, or address *Archibeque* at all. **[RP 2026–34]**.

[4]Given that *Callaway* is binding authority seemingly adverse to Petitioners' interests, it was arguably Petitioners' counsel's professional to duty to disclose it to the Court of Appeals. *See* Rule 16-303(A)(2) NMRA ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

There is, in any case, no sound basis for New Mexico's court of last resort to be the first to determine a fact-dependent question that two lower courts declined to decide. The Court should decline to assume the role of the trial court, and instead remand this question for the District Court to decide in the first instance. *See Garcia-Montoya v. State Treasurer's Off.*, 2001-NMSC-003, ¶ 48, 130 N.M. 25 (stating that, "rather than this Court addressing the issue in the first instance, we believe it is more appropriate in this case to allow the district court to consider initially whether the record" supported summary judgment, vacating the grant of summary judgment, and remanding for the trial court's reconsideration); *Atherton*, 2015-NMCA-003, ¶ 38 (declining to consider whether to "analyze any of the facts developed as the litigation progressed to see if they support affirmance"; concluding it would be "improper" for it to "weigh[] evidence in a way the district court did not"; and stating that "the trial court should undertake the task in the first instance" (alteration added)); *Pena Blanca P'ship v. San Jose Cmty. Ditch*, 2009-NMCA-016, ¶ 8, 145 N.M. 555 (recognizing a "preference to have trial courts decide issues in the first instance" before an appellate court rules on them"). *See also Meiboom v. Watson*, 2000-NMSC-004, ¶ 20, 128 N.M. 536 (stating that the Court "will not assume the role of the trial court and delve into fact-dependent inquiries"); *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1238 (10th Cir. 2005) ("Where an issue has been raised,

but not ruled on, proper judicial administration generally favors remand for the district court to examine the issue initially.").

IV. PETITIONERS' *ARCHIBEQUE* ARGUMENT IS UNAVAILING.

If the Court decides to resolve Petitioners' *Archibeque* argument in the first instance, it should reject it. *Archibeque* does not require that Respondent's Section 41-4-6(A) claim fails, because its holding pertains to discrete administrative acts that create a risk to a *single, specific person*. Instead, *Callaway* and its progeny demonstrate that Section 41-4-6(A) waives immunity under circumstances where negligence creates a dangerous condition for a *population*.

In *Archibeque*, this Court held that the building waiver did not waive immunity for a prison intake officer's negligence in releasing a prisoner into the general population at a prison who was an enemy of the plaintiff. 1993-NMSC-079, ¶¶ 1–2. The *Archibeque* court held that classification decisions causing a dangerous condition for *a single prisoner* was "an administrative function associated with the operation of the corrections system" to which Section 41-4-6(A)'s building waiver did not apply. *Id.* ¶ 8. By contrast, the *Archibeque* court noted that Section 41-4-6(A) waives immunity for negligence causing a dangerous condition to the *general public*:

> While [the defendant's] misclassification of Archibeque put him at risk, the negligence did not create an unsafe condition on the prison premises as to the general prison population. Reading Section 41–4–6 to waive immunity every time a public employee's negligence creates a risk of

> harm for a single individual would subvert the purpose of the Tort Claims Act, which recognizes that government, acting for the public good, "should not have the duty to do everything that might be done," and limits government liability accordingly.

Archibeque, 1993-NMSC-079, ¶ 11 (quoting Section 41–4–2(A)) (alteration added).

Subsequently, in *Callaway*, the Court of Appeals applied that aspect of *Archibeque* to hold that Section 41-4-6(A) waives immunity for a prison's negligent classification of inmates when the negligence causes a risk of harm to a larger portion of the prison population. In *Callaway*, an inmate alleged that several other inmates beat him in the facility's recreation area. 1994-NMCA-049, ¶ 4. The plaintiff asserted a Section 41-4-6(A) claim against the New Mexico Department of Corrections, alleging that the facility's negligent classification of his attackers allowed inmates with known gang ties and propensities for violence into the facility's general population. *Id.* The *Callaway* court determined that the plaintiff had stated a claim under Section 41-4-6(A). *Id.* ¶ 19.

Callaway recognized that although Section 41-4-6(A) does not waive immunity for a discrete administrative decision creating risk to a single person, it does waive it for negligence placing a larger population at risk, even when the negligence involves acts that are administrative in nature:

> The majority in *Archibeque* specified that "[w]hile a segment of the population at risk might justify waiver of immunity under Section 41–4–6, a situation in which a single inmate is put at risk is not comparable." [1993-NMSC-079,] n. 3. Chief Justice Ransom in his special concurrence elaborated on the significance between a "discrete

> administrative decision" which does not waive immunity and "a general condition of unreasonable risk from negligent security practices" which could waive immunity. *Id.* [¶ 18] . . . .
>
> Accordingly, . . . we hold that Plaintiff has stated a claim sufficient to waive immunity under Section 41–4–6[.]

Callaway, 1994-NMCA-049, ¶¶ 18–19 (alterations added).

New Mexico courts, including this Court, have continued to apply the distinction that *Archibeque* created and *Callaway* followed. In *Garner v. Department of Corrections*, the Court of Appeals held that inadequate safety equipment and training of prisoners to use an electric wire brush in a prison paint shop came under the building waiver. 1995-NMCA-103, ¶ 8, 120 N.M. 547. *Garner* noted that, "[w]hereas, in *Archibeque*, the danger was unique to Archibeque . . . , in both *Callaway* and this case, there was a generally present danger to members of the prison population at large." *Id.* (alteration added).[5]

In *Upton v. Clovis Municipal School District*, this Court again affirmed these principles, applying them outside of the prison context to hold that a school district's negligence in following safety policies for students with special needs or in acute medical distress created a dangerous condition for a broader subset of the school population—students with special safety needs and medical risks – and thus fell under Section 41-4-6(A)'s immunity waiver. *See* 2006-NMSC-040, ¶¶ 13-14, 24,

[5]It is worth noting that Petitioners do not contend that *Callaway* or *Garner* were wrongly decided; Petitioners contend only that *Archibeque* is controlling, and *Callaway* and *Garner* are inapposite. **[BIC 32]**.

140 N.M. 205. The *Upton* court observed that "the TCA does not waive immunity for a single, discrete administrative decision affecting only a single person, as opposed to a dangerous condition affecting the general public." *Id.* ¶ 17. Instead, "the negligence must be of a kind which makes the premises dangerous, or potentially so, to the affected public, the consumers of the service or the users of the building, including the plaintiff." *Id.* ¶ 23. *See also Espinoza*, 1995-NMSC-070, ¶ 8 ("[T]he critical question is whether the condition creates a potential risk to the general public.").

In this case, a jury could find that Petitioners' negligence created a risk of harm to the people of New Mexico at large, where Petitioners released a dangerous inmate years before his release date – endangering everyone with whom he came into contact. And Petitioners did so as part of an *ongoing* failure to correctly calculate inmates' sentences, resulting in multiple instances of erroneously calculated release dates, thereby creating risk to the population beyond the risk of harm caused by the inmate at issue in this case. *See* Appellant's Brief-in-Chief at 11–13, originally filed September 24, 2017m in A-1-CA-36256, filed April 4, 2023, in S-1-SC-39690 (discussing evidence of NMCD's ongoing problem with calculating release dates); *id.* at 28–29 (discussing the danger to the population at large caused by early releases).

CONCLUSION

Petitioners offer no substantive argument regarding the Court of Appeals' primary holding, and the Court should not consider Petitioners cursory arguments. The Court of Appeals did not err when it considered common law premises liability principles to decide whether Section 41-4-6(A)'s waiver applied, nor did it abuse its discretion by declining to affirm the District Court under the right-for-any-reason doctrine. Petitioners' *Archibeque* argument is unavailing, in any case. For the reasons stated herein, the Court should quash the writ of certiorari as improvidently granted, or, in the alternative, affirm the Court of Appeals' decision and remand for further proceedings in the District Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Plaintiff-Respondent's Answer Brief was served by email upon all counsel of record on June 9, 2023.

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