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 Huling, District Judge

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

Plaintiff-Respondent,

vs.

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

Defendants-Petitioners.

OPENING BRIEF OF DEFENDANTS-PETITIONERS

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SUMMARY OF PROCEEDINGS

A. Nature Of The Case And Introduction

Maureen Sanders, as Personal Representative of the Estate of Katherine Paquin (Plaintiff) asserts claims for "Negligent Operation of a Public Facility" (Claim I) and "Death Caused by Negligence of Law Enforcement Officers" (RP210-12) against the New Mexico Corrections Department (NMCD), Secretary Gregg Marcantel, and Records Chief Cathleen Catanach (together, Defendants), seeking "damages pursuant to the New Mexico Tort Claims Act, NMSA 1978, §41-4-1 et. seq." (TCA) based on allegations that Christopher Blattner murdered Paquin six months after his premature release from a prison facility operated by private contractor GEO Group, Inc. (GEO) and that "Paquin would not have been murdered" had "NMCD and GEO not erred and held Mr. Blattner for the full term of his sentence." RP206-10 & ¶43.[1] It is undisputed that Blattner was erroneously released from a GEO-operated facility before he was eligible under the applicable law. It is also undisputed that Blattner and Paquin knew each other before Blattner's release and that Paquin invited him back into her life and home before she disappeared. RP1302-11,1330,1336-39. There is no allegation (or evidence) that Defendants knew of a relationship between the two, or that Paquin was murdered in, on the grounds of, or near the prison from which Blattner was released, or that Paquin ever set foot in or near that or any other state prison.

[1]The claims against GEO and Joe Booker, and all claims brought by Cheri Rodriguez were dismissed. RP1719,1573,1576,1719.

The TCA provides 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" by enumerated exceptions (§41-4-4(A)) and is "the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the [TCA]" (§41-4-17(A)).[2] Plaintiff invoked §41-4-6(A), which waives immunity for damages "resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings" and §41-4-12, which waives immunity for certain enumerated claims resulting in certain types of injury "when caused by law enforcement officers while acting within the scope of their duties." The summary-judgment motion from which this appeal arises (MSJ) was based solely on "sovereign immunity," arguing that Plaintiff's cited exceptions to the TCA's general rule of immunity do not apply to the claims as alleged. The issues raised in the MSJ are antecedent to inquiry as to whether the elements of the asserted torts have been established in that, if the answer to the waiver question is no, the claims must be dismissed as a matter of law, regardless of whether the tort elements are established.[3] *E.g.*, *Thompson v.*

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[2]The applicable TCA provisions are those in effect at the time of the conduct alleged and when this suit was filed. N.M. Const. art. IV, §34; NMSA 1978, §12-2A-8; *State v. Perea*, 2001-NMSC-026, ¶4, 130 N.M. 732.

[3]A defendant may, of course, seek dismissal of a claim predicated on an exception to the TCA's general rule of immunity based on arguments that, even if the cited exception applied, the claim would fail under the substantive tort law. But there is no requirement that this be done, and Defendants did not do so here.

City of Albuquerque, 2017-NMSC-021, ¶¶11,17, 397 P.3d 1279 (discussing TCA waiver as issue determined before considering claim elements under traditional tort concepts); *Espinoza v. Town of Taos*, 1995-NMSC-070, ¶14, 120 N.M. 680 (even if defendant "arguably had a duty in this case, there can be no liability for any breach of that duty because immunity has not been waived"); *Kreutzer v. Aldo Leopold High Sch.*, 2018-NMCA-005, ¶¶47-48, 64-65, 79, 409 P.3d 930 (and cases cited); *Armijo v. Dep't of Health & Env.*, 1989-NMCA-043, ¶5, 108 N.M. 616 ("we need not reach the issue of duty unless we determine that plaintiff's cause of action is one for which immunity has been waived").

The district court granted the MSJ (Order), concluding that neither §41-4-6(A) nor §41-4-12 waives immunity and that Plaintiff failed to meet her Rule-1-056 burden. RP2026-34. The court agreed with Defendants that, while "the allegations concerning Ms. Paquin's disappearance are tragic," §41-4-6 "was not intended to extend to this situation[,]" concluding, *inter alia*, that precedents including Plaintiff's cited cases (*e.g.*, *Encinias v. Whitener Law Firm*, 2013-NMSC-045, 310 P.3d 611, and *Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-040, 140 N.M. 205) "concerned injuries that occurred in the buildings or property immediately surrounding and linked to the structure which were public property or where the governmental entity had both a legal interest and control over the property," which Plaintiff does not allege, and that "[a]llowing the present matter to proceed under this waiver would be an extension of the law." RP2022-31. The Order acknowledged (RP2028) but did not address Defendants' argument that §41-4-6 does not waive immunity for negligent performance of administrative functions, as

held in *Archibeque v. Moya*, 1993-NMSC-079, 116 N.M. 616, and progeny, other than to note (RP2030-31) that *Lessen v. City of Albuquerque*, 2008-NMCA-085, ¶27, 144 N.M. 314, held, in affirming summary judgment, that §41-4-6 does not waive immunity for a decision to permit a released inmate to exit a parking lot.

In the decision below (Opinion), a majority of the Court of Appeals (COA) panel affirmed the Order's holding that §41-4-12 does not apply (Op.¶¶27-31); and reversed the holding that §41-4-6(A) does not waive TCA immunity (Op.¶¶12-20), declining to affirm based on Defendants' *Archibeque* argument, which the district court did not reach (Op.¶¶21-26). The dissent disagreed with the majority's §41-4-6(A) analysis, explaining that this exception now "swallows the rule" of immunity, but "not by legislative enactment[,]" expanding "public liability for faraway torts, at least as measured by distance and time, from any claimed occurrence of negligence related to a government building." Op.¶¶34-35. Under this Court's precedents, the dissent reasoned, "there must be some nexus between the defendant's property, an injured user thereof, and the off-premises location where the injury occurs"; "precedent has never held that [§41-4-6(A)] applies to injuries caused by an intentional tortfeasor at an off-premises location as attenuated and disconnected as here"; this Court has "stated that it remains clear that there are limits to [§41-4-6(A)]'s applicability"; and "if that limit exists somewhere within the boundaries of New Mexico, we have found it." Op.¶¶35-38 (quotation, citation omitted). The dissent agreed with the district court that "to allow 'the present matter to proceed under [§41-4-6(A)] would be an extension of the law.'" Op.¶38.

For the reasons discussed herein, the Court should reverse the Opinion's analysis and rulings as to §41-4-6(A), including the refusal to affirm based on *Archibeque*, and remand with instructions to dismiss this case with prejudice.[4]

B. Additional Background

NMCD is a cabinet-level state agency/department established by statute. NMSA §9-3-3. The NMCD Secretary (Marcantel at the time) is the agency's chief executive and administrative officer, with duties prescribed by statute. §9-3-4(A), §9-3-5, §33-1-6. Catanach oversaw "offender management services," including obtaining and reviewing records used in making release decisions, and was involved in audits. RP1363. These facts are undisputed. RP1362-63,1453.

NMSA §33-2-1 provides that NMCD "shall adopt such rules concerning all prisoners committed to the penitentiary as shall best accomplish their confinement and rehabilitation." NMSA §33-2-38, "Computation of term," states:

> A prisoner shall not be discharged from the penitentiary of New Mexico or any other correctional facility until he has served the full term for which he was sentenced. The term shall be computed from and include the day on which his sentence took effect and shall exclude any time the convict may have been at large by reason of escape, unless he is pardoned or otherwise released by legal authority. The provisions of this section shall not be interpreted to deprive a prisoner of any reduction of time to which he may be entitled pursuant to the provisions of Sections 31-20-11, 31-20-12 and 33-2-34 NMSA 1978.[5]

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[4]Plaintiff did not seek review of the holding that §41-4-12 does not apply, so it is not addressed further.

[5]The "full term," and therefore release eligibility, is calculated based not only on the sentence imposed but also reductions prescribed by law—*e.g.*, time served and merit deductions, as provided in the referenced statutes. RP1604-05.

The operative complaint (RP203-14) seeks damages "pursuant to the [TCA]" for "the murder of" Paquin," alleged to be "the direct result of errors made by the [NMCD] and [GEO] and their employees, resulting in the premature release of a dangerous inmate named" Blattner" (RP203) and to have occurred on or about August 14, 2012 (RP208¶35;1452¶24). Claim I alleges that Paquin's death was caused by Defendants' breach of "a duty to ensure that dangerous inmates—such as Mr. Blattner—serve the full measure of their sentences." RP210-11¶¶44-52. Failure to hold Blattner for the full term of his sentence, based on performance of administrative functions, is the only conduct alleged to be negligent. RP205-06,210-12. Defendants' affirmative defenses include that the claims are governed by and subject to the TCA's immunities, caps, and other limitations and that §41-4-6(A) does not waive immunity because "[o]peration or maintenance of a building does not include security, custody and classification of inmates." RP226¶¶6-9.

The MSJ (RP1361-82) was based solely on sovereign immunity, arguing that the TCA governs and the undisputed material facts demonstrate that §41-4-6(A) does not waive immunity where, as here, the claim is based on alleged negligent performance of administrative functions necessary to calculate Blattner's term of confinement correctly (RP1361-64,70-71). The response (RP1447-87) did not dispute any facts in the MSJ (RP1453) but asserted additional "facts" (RP1447-53) Plaintiff argued show that NMCD failed to follow procedures to compute Blattner's correct release date and that §41-4-6(A) waives immunity for NMCD's failure to ensure that violent criminals are not erroneously released (RP1454-60).

Defendants argued in reply (RP1599-1640) that Rule 1-056 does not contemplate additional "facts" from the non-movant, but that Plaintiff's "facts" are undisputed for purposes of the MSJ or not supported by competent evidence, as Rule 1-056 requires and/or immaterial (RP1600-09). Defendants argued that TCA waivers are strictly construed, and that the waiver has limits, including that it does not waive immunity for negligent performance of administrative functions associated with the operation of the corrections system or for negligent supervision. RP1617-20. In addition, applying §41-4-6(A) here, where (as Plaintiff alleges) Paquin's disappearance and murder occurred in an unknown location six months after Blattner's release and had nothing to do with Paquin's use of or injury in or near a building operated/maintained by NMCD, would contravene §41-4-6(A)'s text and purpose "to ensure the general public's safety by requiring public employees to exercise reasonable care in maintaining and operating the physical premises owned and operated by the government." *Archibeque*, 1993-NMSC-079, ¶8. RP1617-18. Cases applying §41-4-6(A) have done so where there is alleged injury to a user of government-operated/maintained premises or injury on or in the vicinity of such premises. Claim I, as alleged by Plaintiff, has nothing to do with Paquin's use of or injury on NMCD-operated premises and would waive immunity whenever any government decision allegedly caused harm anytime, anywhere, to anyone. RP1618-19. The reply also argued that the response's allegations of a "systemic problem" with the NMCD system (not made in the complaint) and assertions about an unrelated district court case are immaterial; Plaintiff did not

show that the proffered information would be admissible; and the court was not bound by an unpublished decision from a district court in another case. RP1620.

The Order granted the MSJ (with rulings summarized above).[6] Plaintiff appealed. RP2038.[7] After the Opinion was filed, Defendants timely petitioned for certiorari, which the Court granted on all questions. *Ct. Rec.* (12/27/2022 (order on motion); 12/30/2022 (petition with Opinion); 3/28/2023 (order granting petition).

C. Preservation

The record shows that all claims rest on allegations that Defendants failed (breached an obligation) to hold Blattner for the full term of his sentence based on alleged negligent performance of administrative tasks necessary to calculate his term of confinement correctly (RP205-06, 210-12); Defendants' pleaded defenses include that Plaintiff's cited TCA exceptions do not waive TCA immunity (RP226¶¶6-9); and the MSJ was based on TCA immunities, not on whether the elements of the asserted tort claims had been established under traditional tort concepts. RP1361-82. It also shows that the MSJ relied on *Archibeque* (and related

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[6]The Order also explained that Plaintiff requested at a hearing on another issue further briefing on the MSJ concerning NMCD audit results but that "this type of evidence would not change the determinative facts on [the MSJ]." RP2025.

[7]Plaintiff asserted in the COA that the court entered summary judgment without considering "an emergency motion for sanctions seeking, inter alia, the opportunity to conduct discovery" on information in documents she claims were produced after discovery closed and that she "was thereby deprived of her ability to seek additional discovery relevant to her claims under §41-4-6." BIC12 n.10. As Defendants explained (AB12 n.6), this provides no basis to reverse the Order. The motion (RP1815-29, to which Defendants would have responded had the Order not issued) sought relief under Rules 1-016 and 1-037 (RP1815,1828). Plaintiff did not seek relief under Rule 1-56(F), and her notice of appeal and BIC identify no basis for appeal other than the Order. RP2058; BIC15.

cases) in arguing that §41-4-6(A) does not waive immunity for Claim I, as the claim was based solely on alleged negligent performance of administrative tasks (RP1370-72), and the reply relied on *Archibeque* and related cases and also argued other cases as necessary to respond to Plaintiff's arguments (RP1617-20). The Order's resolution of the §41-4-6(A) waiver issue without reaching Defendants' *Archibeque* argument made it necessary for Defendants to do just what they did: argue on appeal for affirmance on the Order's stated grounds and as right for any reason based on *Archibeque*. *E.g.*, *Ideal v. Burlington Res. Oil & Gas Co.*, 2010-NMSC-022, ¶19, 148 N.M. 228 (district court decision "will be upheld as long as the right result was reached, even if the court reached the decision for the wrong reason"); *State v. Vargas*, 2008-NMSC-019, ¶8, 143 N.M. 692 ("[W]e may affirm the district court's order on grounds not relied upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below.") (quotation, citation omitted).

Plaintiff said nothing about Defendants' *Archibeque* argument in her opening COA brief. And no case cited for the first time on appeal in her reply or in the Opinion undermines *Archibeque*'s reasoning and holdings that "'operation' and 'maintenance' of the penitentiary premises, as these terms are used in [§]41-4-6, does not include the security, custody, and classification of inmates"; "[§]41-4-6 does not waive immunity when public employees negligently perform such administrative functions"; §41-4-6's purpose concerns operation/maintenance of "physical premises"; and "[t]o read [§]41-4-6 as waiving immunity for negligent performance of administrative functions would be contrary to the plain language

and intended purpose of the statute." 1993-NMSC-079, ¶¶8-9. Defendant's *Archibeque* argument (AB4,5,19,25-27) is clear and sufficiently developed, and (contrary to the Opinion's characterization (at ¶26)) a question that may be decided as a matter of law on the MSJ's undisputed material facts. It is also an issue of fundamental importance and substantial public interest this Court may and should decide, even if it were not well briefed. *Cf. Ideal*, 2010-NMSC-022, ¶16.

ARGUMENT

A. Review Standards

1. Summary judgment

The Court reviews summary-judgment orders *de novo*. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶7, 148 N.M. 713. Where, as here, "a pure question of law is at issue," the Court "will not review a grant of summary judgment in the light most favorable to the party opposing the motion." *Rutherford v. Chaves Cty.*, 2003-NMSC-010, ¶8, 133 N.M. 756 (addressing TCA waiver issue).

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 1-056(C) NMRA. "The movant need not demonstrate beyond all possibility that no genuine factual issue exist[s]." *Horne v. Los Alamos Nat'l Sec., LLC*, 2013-NMSC-004, ¶14, 296 P.3d 478 (quotation, citation omitted). If the movant establishes a prima facie case that there are no material fact issues and that it is entitled to judgment as a matter of law, "the burden shifts to the non-movant to demonstrate the existence of specific

evidentiary facts which would require trial on the merits." *Romero*, 2010-NMSC-035, ¶10 (quotation, citation omitted). This burden cannot be met with allegations or speculation, but only with competent evidence demonstrating a genuine dispute of material fact requiring trial. Rule 1-056(C), (E); *see V.P. Clarence Co. v. Colgate*, 1993-NMSC-022, ¶2, 115 N.M. 471 ("briefs and arguments of counsel are not evidence upon which a trial court can rely in a summary judgment proceeding"). If the non-movant fails to meet this burden, "summary judgment, if appropriate, shall be entered against h[er]." Rule 1-056(E).

Claimed disputed facts "cannot serve as a basis for denying summary judgment" if the proffered evidence is insufficient to support "reasonable inferences." *Romero*, 2010-NMSC-035, ¶10 (quotation, citation omitted). Disputed facts must be material—*i.e.*, necessary under the governing law to ground the claim. *Id.* ¶11; *NARAL v. Johnson*, 1999-NMSC-005, ¶24, 126 N.M. 788. Summary judgment is proper "[w]here the defendant negates an essential element of the plaintiff's case, and the plaintiff fails to show that admissible evidence creates an issue of fact regarding that element[.]" *Firstenberg v. Monribot*, 2015-NMCA-062, ¶13, 350 P.3d 1205; *see Goradia v. Hahn Co.*, 1991-NMSC-040, ¶18, 111 N.M. 779 ("A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.") (text only). "The Rule 1-056 procedure serves a worthwhile purpose in disposing of groundless claims, or claims which cannot be proved, without putting the parties and the courts through the trouble and expense of full blown trials on these claims." *Kreutzer*, 2018-NMCA-005, ¶30 (text only).

2. Statutory construction

De novo review applies to statutory-interpretation issues, including whether TCA immunity bars suit on a tort claim. *Rutherford*, 2003-NMSC-010, ¶8. "When construing statutes, our guiding principle is to determine and give effect to legislative intent." *Baker v. Hedstrom*, 2013-NMSC-043, ¶11, 309 P.3d 1047 (quotation, citation omitted). "When a statute contains language which is clear and unambiguous," courts "must give effect to that language and refrain from further statutory interpretation." *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶9, 148 N.M. 426 (quotation, citation omitted). But courts may depart from the plain text if necessary "to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions." *Regents of UNM v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶28, 125 N.M. 401; *see id.* ¶30 ("It is the policy of New Mexico courts to determine legislative intent primarily from the legislation itself. . . . If the intentions of the Legislature cannot be determined from the actual language of a statute, then we resort to rules of statutory construction, not legislative history.") (citation omitted); *Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶11, 146 N.M. 473 ("We must also consider the practical implications and the legislative purpose of a statute, and when the literal meaning of a statute would be absurd, unreasonable, or otherwise inappropriate in application, we go beyond the mere text of the statute."); *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶3, 117 N.M. 346 ("[W]here the language of the legislative act is doubtful or an adherence to the literal use of words would lead to

injustice, absurdity or contradiction, the statute will be construed according to its obvious spirit or reason, even though this requires the rejection of words or the substitution of others.") (quotation, citation omitted).

In determining legislative intent, courts "look at the overall structure and function of the statute, as well as the public policy embodied in the statute." *Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS*, 2016-NMSC-009, ¶38, 368 P.3d 389 (quotation, citation omitted); *see State v. Rivera*, 2004-NMSC-001, ¶13, 134 N.M. 768 (courts may not consider subsections "in a vacuum" but must analyze the "statute's function within a comprehensive legislative scheme") (quotation, citation omitted); *Key v. Chrysler Motors Corp.*, 1996-NMSC-038, ¶14, 121 N.M. 764 ("[A]ll parts of a statute must be read together to ascertain legislative intent. We are to read the statute in its entirety and construe each part in connection with every other part to produce a harmonious whole.") (citation omitted). Courts may not "second-guess the legislature's selection from among competing policies or adoption of one of perhaps several ways of effectuating a particular legislative objective." *Helman*, 1994-NMSC-023, ¶22. In determining whether a TCA immunity waiver applies, courts must follow this Court's "instruction that '[s]tatutory provisions purporting to waive governmental immunity are strictly construed.'" *Kreutzer*, 2018-NMCA-005, ¶45 (quoting *Rutherford*, 2003-NMSC-010, ¶11).

B. The Opinion's §41-4-6(A) Analysis And Rulings Must Be Reversed As In Conflict With And Contrary To The TCA's Text, The Legislature's Intent And Policy Choices, And Properly Applied Precedents.

1. The Opinion errs by conflating the §41-4-6(A) waiver inquiry with the question whether the elements of premises liability are established under "common law jurisprudence."

The MSJ did not argue that Claim I should be dismissed because it fails under the substantive law of premises liability but because §41-4-6(A) does not waive sovereign immunity for the conduct Plaintiff alleges: negligent performance of administrative functions associated with the operation of the corrections system. The immunity issue here is antecedent to the question whether the elements of negligence under a premises-liability theory are established—*i.e.*, if, as the MSJ argued, §41-4-6(A) does not waive sovereign immunity, Claim I must be dismissed as a matter of law, regardless of the elements of premises liability. The Opinion portrays the issue presented as the "narrow" question whether §41-4-6(A) waives TCA immunity "because the death did not occur on or adjacent to NMCD facilities" and holds that it does based on an analysis that conflates the §41-4-6(A) waiver inquiry with the "common law jurisprudence" of premises liability and rejects "Defendants' contrary argument." Op.¶¶12-20 & n.3. The Opinion's errors evince a failure to heed and give effect to, in addition to §41-4-6(A)'s text, key aspects of the TCA, including the legislature's expressed concerns and policy choices, and precedents, properly understood and applied.

a. The TCA's text expressly recognizes the legislature's choice to make immunity the rule and waiver the exception and its view that government and private parties should be treated differently.

The legislature chose in the TCA to make immunity the rule and waiver the exception, providing 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 by . . . [§§]41-4-5 through 41-4-12 NMSA 1978." §41-4-4(A);[8] *Kreutzer*, 2018-NMCA-005, ¶43. It also chose to make the TCA "the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the [TCA]." §41-4-17(A). In so doing, the legislature stated certain concerns, policies, and directions, as follows:

> A. The legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the doctrine of sovereign immunity. On the other hand, *the legislature recognizes that while a private party may readily be held liable for his torts within the chosen ambit of his activity, the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done. Consequently, it is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the [TCA] [41-4-1 to 41-4-27 NMSA 1978] and in accordance with the principles established in that act.*
>
> B. The [TCA] shall be read as abolishing all judicially-created categories such as "governmental" or "proprietary" functions and "discretionary" or "ministerial" acts previously used to determine immunity or liability. *Liability for acts or omissions under the [TCA]* shall be based upon the traditional tort concepts of duty and the reasonably prudent person's standard of care in the performance of that duty. *The [TCA] in no way imposes a strict liability for injuries upon governmental entities or public employees. Determination of the standard of care required in any particular instance should be made with the knowledge that each governmental entity has financial limitations within which it must*

[8]The TCA defines "governmental entity" as "the state or any local public body as defined in Subsections C and H of [the TCA's definitions] section" (§41-4-3(B)); "local public body" as "all political subdivisions of the state and their agencies, instrumentalities and institutions" (§41-4-3(C)); "public employee" as "an officer, employee or servant of a governmental entity" (§41-4-3(F)); and "state" or "state agency" as "the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions" (§41-4-3(H)).

exercise authorized power and discretion in determining the extent and nature of its activities.

§41-4-2 (emphases added).

As numerous precedents make clear, these textual expressions of key requirements, concerns, and policy choices must be considered in determining legislative intent as to the TCA's enumerated exceptions, *see Safeway*, 2016-NMSC-009, ¶38; *Baker*, 2013-NMSC-043, ¶11; *Bishop*, 2009-NMSC-036, ¶11; *Rivera*, 2004-NMSC-001, ¶13; *Key*, 1996-NMSC-038, ¶14, without "second-guess[ing] the legislature's selection from among competing policies or adoption of one of perhaps several ways of effectuating a particular legislative objective[,]" *Helman*, 1994-NMSC-023, ¶22, and while following this Court's direction that "[s]tatutory provisions purporting to waive governmental immunity are strictly construed," *Rutherford*, 2003-NMSC-010, ¶11; *Kreutzer*, 2018-NMCA-005, ¶45.

Legislative intent is evident in the choice to adopt a TCA structure *opposite* to that of the earlier-enacted Federal Tort Claims Act (and analogous statutes of other states), which waives sovereign immunity subject to certain exceptions. *Compare* §41-4-4 through 12 *with* 28 U.S.C. §2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances[.]"); §2680 (exceptions). The choice to make immunity the rule and waiver the exception in the TCA, and not vice-versa, is itself a significant indicator of legislative intent. It is even more significant in light of the further choices (1) not to direct, as the FTCA does, that government entities and public employees be liable "in the same

manner and to the same extent as a private individual under like circumstances" and (2) to emphasize that there are consequential differences between government and private parties. §41-4-2(A),(B). This Court has itself recognized that "[g]overnmental entities are different from private parties" and determined that §41-4-2(A)'s text shows that "*[t]he legislature never intended government and private tortfeasors to receive identical treatment.*" *Marrujo v. N.M. State Hwy. Transp. Dep't*, 1994-NMSC-116, ¶24, 118 N.M. 753 (emphasis added); *see* Ruth L. Kovnat, Torts: *Sovereign & Governmental Immunity in N.M.*, 6 N.M. L.Rev. 249,261-62 (1976) (Kovnat) ("examination of the [TCA's] statutory structure compels the conclusion that the purpose of the act is to treat the State and other governmental entities differently from individuals because to do otherwise threatens the public treasuries too much"); *Kreutzer*, 2018-NMCA-005, ¶46.

b. TCA immunity is statutory sovereign immunity from suit, subject to strictly construed statutory exceptions.

In enacting the TCA, the legislature reinstated the general rule of sovereign immunity from tort suits, abolished as a matter of the common law in *Hicks v. State*, 1975-NMSC-056, ¶15, 88 N.M. 588, and declared it to be "the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the [TCA] and in accordance with the principles established in that act." §41-4-2(A); Kovnat, 6 N.M. L.Rev. at 251 (the TCA "is a direct response to *Hicks v. State*").

"Sovereign immunity is the privilege of the sovereign not to be sued without its consent." *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253 (2011);

Black's Law Dictionary (11th ed. 2019) (defining "sovereign immunity" as "[a] government's immunity from being sued in its own courts without its consent"). New Mexico law reflects this understanding of the nature of sovereign immunity. Before *Hicks*, this Court "consistently held the State of New Mexico may not be sued in its courts without its permission or consent." *Sangre De Cristo Dev. Corp. v. City of Santa Fe*, 1972-NMSC-076, ¶14, 84 N.M. 343. Immediately after this Court abolished sovereign immunity as to tort, *Hicks*, 1975-NMSC-056, ¶9, and other actions, *Brosseau v. N.M. State Hwy. Dep't*, 1978-NMSC-098, ¶11, 92 N.M. 328, the legislature reinstated it for certain types of actions as a matter of statute.

This Court recently acknowledged the equivalence between sovereign immunity and statutory government immunity while reaffirming that the legislature "may statutorily impose sovereign immunity" and that "such immunity must be honored by the courts." *Nash v. Bd. of Cty. Comm'rs of Catron Cty. v. Valencia Cty*, 2021-NMSC-005, ¶2-5, 23, 480 P.3d 842 (in addressing immunity under a different statute, stating that the issue "arises from the evolution, abolition, and resurrection of governmental immunity in New Mexico"; characterizing government immunity as "sovereign immunity" while distinguishing between the statutory source of the former and the common-law origins of the latter; holding that "[a]lthough application of sovereign immunity can produce inequitable results, we will not judicially repeal an immunity that the Legislature lawfully created unless such immunity violates the United States or the New Mexico Constitution"; "[t]he common law now recognizes a constitutionally valid statutory imposition of sovereign immunity, and such immunity must be honored by the courts where the

legislature has so mandated"; and that "it is clear that the Legislature may statutorily impose sovereign immunity'") (quotation, citation omitted); *see also Ferguson v. N.M. State Hwy. Comm'n*, 1982-NMCA-180, ¶6, 99 N.M. 194.

Consistent with this understanding—and the definition of sovereign immunity—decisions of this Court and the COA treat TCA immunity as immunity from suit, notwithstanding the TCA's reference to "immunity from liability" (§41-4-4(A)). These include decisions on which the Opinion (and Plaintiff) rely, *see Encinias*, 2013-NMSC-045, ¶9 ("In general, the state is immune from tort suits. The exceptions to this rule are the specific waivers of immunity contained in the TCA.") (citing §41-4-4(A)); *Upton*, 2006-NMSC-040, ¶8 ("The TCA grants all government entities and their employees general immunity from actions in tort, but waives that immunity in certain specified circumstances.") (citing §41-4-4), and many others.[9]

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[9]*E.g.*, *Valdez v. State*, 2002-NMSC-028, ¶¶9, 12, 132 N.M. 667 (because plaintiffs' claims "have not specifically been waived by the TCA, the government cannot be sued for these causes of actions"; "in order for a plaintiff to sue a governmental entity, the cause of action must fit within one of the exceptions under the TCA"); *Weinstein v. City of Santa Fe Police Dep't*, 1996-NMSC-021, ¶6, 121 N.M. 646 ("Generally, the [TCA] provides governmental entities and public employees acting in their official capacities with immunity from tort suits unless the Act sets out a specific waiver of that immunity."); *Marrujo*, 1994-NMSC-116, ¶24 ("The right to sue the government is a statutory right and the legislature can reasonably restrict that right."); *Milliron v. Cty. of San Juan*, 2016-NMCA-096, ¶2 384 P.3d 1089 (appellees "immune from suit" where "well-pleaded facts, while potentially sufficient to support a claim of negligence, are insufficient to establish a waiver of the governmental immunity granted by [§]41-4-4(A)"); *Brenneman v. Bd. of Regents UNM*, 2004-NMCA-003, ¶5, 135 N.M. 68 (explaining that the legislature enacted the TCA in response to this Court's decision to abolish state sovereign immunity and that the TCA "re-established sovereign immunity, but created eight

Also consistent with this view of TCA immunity as sovereign immunity with exceptions, this Court has held that "the issue of governmental immunity is jurisdictional in nature and that it may be raised at any time during the proceedings." *Spray v. City of Albuquerque*, 1980-NMSC-028, ¶13, 94 N.M. 199; *see Rubio v. Carlsbad Mun. School Dist.*, 1987-NMCA-127, ¶¶14-15, 106 N.M. 446 (holding that "the courts of this state would have no jurisdiction over the claim unless there was a waiver of immunity" and trial court correctly dismissed claims "sounding in negligence" because no waiver exists); *Begay v. State*, 1985-NMCA-117, ¶¶10-12, 104 N.M. 483 (holding that "[c]onsent to be sued may not be implied, but must come within one of the exceptions to immunity under the [TCA]"; affirming dismissal on jurisdictional grounds where "no specific waiver of immunity" applied), *rev'd sub nom. on other grounds by Smialek v. Begay*, 1986-NMSC-049, ¶10, 104 N.M. 375; *see also Sangre De Cristo*, 1972-NMSC-

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exceptions, or circumstances under which the state would waive its sovereign immunity and allow suit"); *id.* ¶13 ("Defendant correctly summarizes our [TCA] precedents to say that courts are hesitant to expand the obligations of public employees and seek a 'specific waiver of immunity' before allowing suit."); *Derringer v. State*, 2003-NMCA-073, ¶17 133 N.M. 721 ("Plaintiff has no claim because Defendants are immune from suit alleging prima facie tort.") (emphasis added); *Ford v. N.M. Dep't of Pub. Safety*, 1994-NMCA-154, ¶26, 119 N.M. 405 (absent a waiver of TCA immunity, "a person may not sue the state for damages for violation of a state constitutional right"); *M.D.R. v. State ex rel. Human Servs. Dep't*, 1992-NMCA-082, ¶3, 114 N.M. 187 ("Governmental entities and public employees, while acting within the scope of their duties, are immune from tort liability except as waived by the [TCA] and "[t]he right to sue and recover is therefore specifically limited to the rights, procedures, limitations, and conditions of the [TCA]."") (citing, *inter alia*, §41-4-4); *Rubio v. Carlsbad Mun. School Dist.*, 1987-NMCA-127, ¶10, 106 N.M. 446 ("Section 41-4-21 does not provide a waiver of immunity and, therefore, furnishes no basis for suing defendant.").

076, ¶¶9,21 (describing governmental immunity as a "jurisdictional issue" that may be raised for the first time in this Court). As a matter of law and logic, an immunity that presents a jurisdictional issue is, necessarily, not only immunity from liability but also immunity from suit.

TCA immunity as immunity from suit comports as well with the legislature's express recognition and concern that, "while a private party may readily be held liable for his torts within the chosen ambit of his activity, the area within which the government has the power to act for the public good is almost without limit, and therefore government should not have the duty to do everything that might be done" (§41-4-2(A)) and the TCA's status as "the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the [TCA]" (§41-4-17). Given the legislature's requirements and expressly declared concerns and policies, it is impossible to conclude that the legislature intended the TCA's references to immunity from liability to mean that a government defendant cannot obtain a ruling as to whether sovereign immunity has been waived unless and until it has expended the vast amount of time and resources necessary to litigate through to a determination of liability—*i.e.*, that plaintiff has or has not proved all elements of the asserted tort.

Although the legislature's concerns that "government should not have the duty to do everything that might be done" (§41-4-2(A)) and that "each governmental entity has financial limitations within which it must exercise authorized power and discretion in determining the extent and nature of its activities" (§41-4-2(B)) are stated in relation to the government (and the latter in connection with the standard

of care), it also makes no sense that the legislature intended to require a plaintiff to expend the time and resources necessary to litigate to a determination of liability only to learn that, even if all tort elements are proved, the government cannot be held liable because no TCA waiver applies. *E.g.*, *Helman*, 1994-NMSC-023, ¶22 (statute should be construed in accordance with its "obvious spirit or reason, even though this requires the rejection of words or the substitution of others" if "adherence to the literal use of words would lead to injustice, absurdity or contradiction") (quotation, citation omitted); *see Bishop*, 2009-NMSC-036, ¶11; *Regents*, 1998-NMSC-020, ¶¶28,30.

An interpretation of TCA immunity as anything but immunity from suit, and an issue to be determined before considering whether the elements of the asserted tort are established, robs the concept of immunity of any meaning, utility, or purpose. If TCA immunity is not immunity from suit, no defendant or claim could ever be dismissed for lack of an applicable waiver. If there is no basis for holding a government entity/public employee liable because the claim as alleged does not fall within a TCA waiver, there is no basis for a lawsuit either. The law does not require "the doing of useless things," and this Court may intervene to prevent that. *State ex rel. Peters v. McIntosh*, 1969-NMSC-103, ¶9, 80 N.M. 496; *Sender v. Montoya*, 1963-NMSC-220, ¶12, 73 N.M. 287. Regardless of whether it is deemed "jurisdictional," TCA immunity is undeniably a complete defense that is utterly useless unless it is immunity from suit.

c. The Opinion's conflation of the §41-4-6(A) waiver inquiry with the "common law jurisprudence" of premises liability is erroneous and not dispositive of the issue raised in the MSJ.

Defendants argued below (AB1-2,5,22-24) that the only question the MSJ presents is whether the claims as alleged are within the exceptions to TCA immunity upon which Plaintiff relies and that, although claims for which §41-4-6(A) waives immunity may be analyzed as premises-liability cases, the question whether a TCA waiver applies is an antecedent legal issue resolved before considering whether the elements of the tort are sufficiently alleged or established, relying on decisions including *Thompson*, 2017-NMSC-021, ¶¶11,17 (discussing TCA waiver as issue determined before considering claim elements under traditional tort concepts); *Cobos v. Doña Ana Cty. Hous. Auth.*, 1998-NMSC-049, ¶19, 126 N.M. 418 ("[I]t is not enough for the public employees to have a duty—that duty must fit within the legislative intent of the [TCA] waiver in order to state a meritorious claim for relief."); *Espinoza*, 1995-NMSC-070, ¶14 (even if defendant "arguably had a duty in this case, there can be no liability for any breach of that duty because immunity has not been waived"); *Kreutzer*, 2018-NMCA-005, ¶¶47-48, 51, 65, 79 ("[w]hile claims determined to fall within [§]41-4-6(A) are analyzed as premises liability cases, a negligence claim is not actionable against a government defendant unless it falls within the waiver"; "[h]aving concluded as a matter of law that there is no waiver, we have no need or reason to consider evidence concerning the elements of negligence"; "[e]ven if the facts did support a negligence claim, this would not suffice to establish a waiver"); *Armijo*, 1989-NMCA-043, ¶5 ("we need not reach the issue of duty unless we determine that plaintiff's cause of action is one for which immunity has been waived"); *Pemberton v. Cordova*, 1987-NMCA-020, ¶¶2-7, 105 N.M. 476 (holding that

claim "must fit within one of the exceptions to the immunity granted, or it may not be maintained" and that "[i]f no specific waiver of immunity can be found in the [TCA], plaintiffs' complaint must be dismissed" as to governmental defendant).

The Opinion concludes that this Court's decision in *Encinias* "collapses the distinction between the government's waiver of immunity under [§41-4-6] and premises liability for private parties in general, subject only to limitations found in case law," rejecting "Defendants' contrary argument" in a footnote that purports to show that "Defendants' reliance on *Kreutzer* and *Thompson* is inapposite here." Op.¶12&n.3. The Opinion misapprehends and misses the point of "Defendants' contrary argument." Defendants do not argue that the law prohibits any consideration of the substantive tort law in cases involving a claim predicated on a TCA waiver. As noted, a defendant may seek dismissal based on arguments that, even if a TCA waiver applied, the claim would fail under the substantive tort law. There are, moreover, instances in which questions of a jurisdictional nature are not entirely distinct from questions requiring consideration of the elements of the cause of action. *E.g.*, *Phoenix Funding, LLC v. Aurora Servs., LLC*, 2017-NMSC-010, ¶19, 390 P.3d 174 ("Where a cause of action is created by statute, the Legislature empowers the courts to adjudicate a new kind of claim and, thus, the Legislature may condition the exercise of that power on the plaintiff's satisfaction of certain prerequisites."); *Key*, 1996-NMSC-038, ¶¶10-50 (concluding that there is no "significant difference between having standing to sue and having a [statutory] cause of action'"; both are answered by determining legislative intent).

That said, the MSJ did not seek dismissal of Claim I based on failure to establish the elements of premises liability, but on the ground that §41-4-6 does not waive immunity for alleged negligent performance of administrative functions associated with operation of the corrections system. RP1370-72. As the MSJ presents it, the §41-4-6 inquiry is antecedent to consideration of the elements of premises liability in that, if the answer to the waiver question is no, the claim must be dismissed as a matter of law, regardless of the tort elements. This point is supported by the cases cited in the COA, and by other cases as well.[10]

The Opinion does not demonstrate that *Thompson* and *Kreutzer* are inapposite or otherwise show that Defendants' argument is wrong. *Thompson* concluded that "the state may be treated like any private party," but did so only after first

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[10]*Methola v. County of Eddy*, 1980-NMSC-145, ¶25, 95 N.M. 329 ("In the event a suit is instituted as permitted and limited by [§]41-4-12 of the [TCA], then the established law of negligence and damages shall apply to the claims as well as to all defenses which may be available to the defendants in those suits."); *Hernandez v. Parker*, 2022-NMCA-023, ¶19, 508 P.3d 947 ("The TCA provides for the cause of action if immunity is waived[.]"); *Milliron*, 2016-NMCA-096, ¶2 (appellees "immune from suit" where "well-pleaded facts, while potentially sufficient to support a claim of negligence, are insufficient to establish a waiver of the governmental immunity granted by [§]41-4-4(A)"); *Derringer*, 2003-NMCA-073, ¶17 ("Plaintiff has no claim because Defendants are immune from suit alleging prima facie tort."); *Rutherford v. Chaves Cty.*, 2002-NMCA-059, ¶¶11,14, 132 N.M. 289 ("the concepts of duty and immunity under the TCA are distinct"; breach of duty is "not a question of sovereign immunity"; TCA waiver of immunity for alleged acts of negligence is "an entirely separate question"), *aff'd*, 2003-NMSC-010, ¶24, 133 N.M. 756 (government defendant may be held liable *if* found to have breached its common-law duty "because such negligence falls within the [§41-4-11] waiver of sovereign immunity"); *Armijo*, 1989-NMCA-043, ¶5 ("we need not reach the issue of duty unless we determine that plaintiff's cause of action is one for which immunity has been waived").

determining that "there is waiver of immunity for Plaintiffs' claim." 2017-NMSC-021, ¶17. In citing §41-4-2(B) and the statement in *Encinias*, 2013-NMSC-045, ¶15, that, "[i]n enacting the TCA, the Legislature expressed an intent to waive the state's immunity in situations that would subject a private party to liability under our common law," *Thompson* recognized that "the state is treated the same way as any other defendant for purposes of that claim" only "*once there is a waiver of immunity under the under the TCA*." 2017-NMSC-021, ¶17 (emphasis added). And *Kreutzer* rejected the notion that "all [plaintiffs] need do to demonstrate that their claim falls within [§]41-4-6(A) is allege negligence under a 'premises liability' theory," holding that "[w]hile claims determined to fall within [§]41-4-6(A) are analyzed as premises liability cases, a negligence claim is not actionable against a government defendant *unless it falls within the waiver*." 2018-NMCA-005, ¶65 (emphasis added) (citing *Thompson*, 2017-NMSC-021, ¶¶11,17).[11]

These decisions reflect the legislative intent and policies expressed in the TCA's text, discussed above. Although the legislature has directed that *liability* under the TCA be determined based on "traditional tort concepts" (§41-4-2(B)), it has *not* directed that the question whether immunity has been waived must be determined based on "traditional tort concepts," much less, on analysis of whether the elements of the asserted tort are met. The Opinion transforms what the

[11]*Enriquez v. NM Dep't of Corr.*, No.A-1-CA-39033, 2022 WL 17413723, at *4 (N.M.Ct.App. Dec. 5, 2022) (unpublished), issued a week after the Opinion, cites *Kreutzer*, 2018-NMCA-005, ¶47, for the proposition that "there must first be a waiver of immunity before there is a need to address the elements of the alleged negligence."

legislature intended as immunity from suit into a judicially imposed requirement that defendants seeking dismissal on the ground that §41-4-6(A) does not waive immunity for the claim as alleged must show that the claim fails under the "common law jurisprudence" of premises liability, in conflict with and contrary to the TCA's text, legislative intent, and policies, and with the precedents cited in the COA and herein. *See also Kreutzer*, 2018-NMCA-005, ¶51 ("judicial directives to read TCA waiver provisions broadly cannot be understood to authorize or require an interpretation that exceeds the boundaries of legislative intent").

The statements from *Encinias* on which the Opinion relies (Op.¶12, citing 2013-NMSC-045, ¶¶9, 15) are dicta. They cannot be treated as a holding that §41-4-6(A) waives immunity in any case in which plaintiff alleges premises liability. *Kreutzer* rightly rejected that proposition. 2018-NMCA-005, ¶65. Such a rule is contrary to §41-4-6(A)'s text, which addresses negligence in "the operation or maintenance of any building, public park, machinery, equipment or furnishings." Furthermore, it is well established that the §41-4-6(A) waiver has limits, as discussed in many cases and acknowledged in *Encinias*, 2013-NMSC-045, ¶12. The bottom line: §41-4-6(A) waives immunity for some conduct that does not involve operation/maintenance of "premises"—*e.g.*, machines, equipment, furnishings, *see Cobos*, 1998-NMSC-049, ¶9—and does not waive immunity for other conduct that may or may not occur on "premises"—*e.g.*, negligent supervision, *see Espinoza*, 1995-NMSC-070, ¶¶7,14, and negligent performance of administrative functions "associated with the operation of the corrections system," *see Archibeque*, 1993-NMSC-079, ¶¶8-9. *Encinias* held that "[t]here can be no

waiver under [§]41-4-6(A) without a dangerous condition on the premises." 2013-NMSC-045, ¶13. Here, where Plaintiff's allegations and evidence do not involve operation of government "premises" but administrative functions of the corrections system, *Archibeque* is dispositive; the "common law jurisprudence" of premises liability is not.

C. The Opinion Errs In Its Treatment Of Defendants' *Archibeque* Argument And In Refusing To Affirm The District Court's §41-4-6(A) Holding Based On *Archibeque*.

In *Archibeque v. Moya*, plaintiff sued an employee of a state penitentiary for injuries allegedly sustained during an assault by other inmates in the prison weight room, claiming that his injuries "resulted from the negligent operation of the prison facilities." 1993-NMSC-079, ¶¶2-3. Plaintiff argued that §41-4-6 waived immunity because defendant, a prison intake officer, participated "in the operation of the penitentiary" when she classified plaintiff as an inmate who "could safely be released into the general prison population" and the officer's alleged misclassification and release of plaintiff into the general population "constituted negligent operation of the penitentiary." 1993-NMSC-079, ¶5.

This Court held in *Archibeque* that "'operation' and 'maintenance' of the penitentiary premises, as these terms are used in [§]41-4-6, does not include the security, custody, and classification of inmates"; §41-4-6's purpose "is to ensure the general public's safety by requiring public employees to exercise reasonable care in maintaining and operating the physical premises owned and operated by the government"; the intake officer "was not operating and maintaining the prison's physical premises when she negligently classified Archibeque as an inmate that

could be released into the general prison population" but "was performing an administrative function associated with the operation of the corrections system"; "[§]41-4-6 does not waive immunity when public employees negligently perform such administrative functions"; and "[t]o read [§]41-4-6 as waiving immunity for negligent performance of administrative functions would be contrary to the plain language and intended purpose of the statute." 1993-NMSC-079, ¶¶8-9. The Court rejected arguments that *Bober v. N.M. State Fair*, 1991-NMSC-031, 111 N.M. 644, and *Castillo v. Cty. of Santa Fe*, 1988-NMSC-037, 107 N.M. 204, required a different conclusion, reasoning that a "careful reading" of these cases reveals that both rejected "reading [§]41-4-6 to limit waiver of immunity to those instances where injury occurred due to a physical defect in a building" but "left intact the rule that the security, custody, and classification of inmates does not comprise the 'operation' and 'maintenance' of penitentiary premises" and that, while both cases "support a broader reading of [§]41-4-6 by expanding the definition of 'building,' neither case supports the argument that" §41-4-6 waives immunity for "alleged negligence in classifying Archibeque as an inmate suitable for release into the general prison population." *Archibeque*, 1993-NMSC-079, ¶9.

It should be beyond dispute that *Archibeque* controls and requires the conclusion that §41-4-6(A) does not waive immunity for Claim I (or any claim in the operative complaint). The text of §41-4-6(A) waives TCA immunity for negligence in "the operation or maintenance of any building, public park, machinery, equipment or furnishings." Plaintiffs' claims rest solely on allegations that Defendants failed to hold Blattner for the full term of his sentence because of

negligent performance of administrative functions necessary to calculate his term of confinement correctly. RP205-06, 210-12. Even if some or all of the complained-of conduct occurred in a government "building," that conduct had nothing to do with the "physical premises," *Archibeque*, 1993-NMSC-079, ¶¶8-9. Section 41-4-6(A) does not waive immunity for all conduct that may or does occur in a government building; nor does all conduct that occurs in a building or on other kinds of "premises" present a claim properly analyzed under the "common law jurisprudence" of premises liability." The "administrative functions" alleged here involved obtaining and reviewing Blattner's inmate file to calculate the time remaining on his sentence and determine whether he could be classified as eligible for release in light of the law and facts bearing on that determination. *Archibeque* is binding precedent; has not been abrogated by statute or subsequent precedent; and has been followed by other courts applying New Mexico law.[12]

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[12]*E.g.*, *Herrera v. Dorman*, No. 13-1176, 2014 WL 7653393, at *7 (D.N.M. Aug. 5, 2014) (unpublished) (holding under New Mexico law that "classification officers with the NMCD, and Marcantel, Director of the NMCD, were not operating and maintaining the physical premises of the correctional facility where Plaintiff was detained"; "*in calculating the length of his term of incarceration, they were performing an administrative function associated with the operations of the corrections system*") (emphasis added); *Lymon v. Aramark Corp.*, 728 F.Supp.2d 1222, 1266-67 (D.N.M. 2010), *aff'd*, 499 Fed.App'x 771 (10th Cir. 2012) (applying *Archibeque* in holding that §41-4-6(A) does not waive immunity for claim based on negligent misclassification of plaintiff for work assignment contrary to medically ordered restriction; rejecting allegation that others were misclassified and that this created a danger for the inmate population as insufficient for §41-4-6(A) waiver; also noting that plaintiff had not alleged injury to any other inmates resulting from alleged misclassifications).

It could not be more clear that the conduct for which Plaintiff seeks to recover has nothing to do with "the operation or maintenance of any building" or "premises" but rather with operation of the state corrections system, and the TCA includes no waiver of immunity for negligent operation of a state agency. Yet the Opinion refused to affirm based on *Archibeque*, criticizing Defendants for not addressing *Callaway v. NM Dep't of Corr.*, 1994-NMCA-049, 117 N.M. 637, and not explaining why "this case ought to be governed by *Archibeque* and not *Callaway*," citing evidence proffered by Plaintiff "detailing how Defendants failed to follow prisoner release and documentation policies." Op.¶¶25-26. The criticism is misplaced and, in any event, does not justify the refusal to affirm the district court's §41-4-6(A) decision based on *Archibeque*.

As to Plaintiffs' proffered evidence, the Opinion does not acknowledge that Plaintiff did not dispute any undisputed facts presented in the MSJ and that her allegations of a "systemic problem" were not made in the complaint and were not supported by competent evidence from which a jury could conclude that there was a "systemic problem" and/or were immaterial to the issues raised in the MSJ. RP1600-09,1620. These allegations, moreover, do not change the fact that the conduct for which Plaintiff seeks to recover has nothing to do with "the operation or maintenance of any building" or "premises" but with operation of the state corrections system, for which the TCA provides no waiver of immunity.

As to *Callaway*, the Opinion ignores that Plaintiff did not address *Archibeque* or *Callaway* in the COA until her reply, to which Defendants had no right to respond. In any event, nothing in *Callaway*—or *Garner v. Department of*

Corr., 1995-NMCA-103, 120 N.M. 547—justifies the COA's refusal to affirm on the basis of *Archibeque*. The allegations and circumstances in these cases are obviously and materially distinct from those in *Archibeque*, as the courts in those cases observed. *See Garner*, 1995-NMCA-103, ¶¶5-6 (the claim differs from that in *Archibeque* because "the nature of the claim does not involve security or classification" but "the safety of equipment or machinery used on the prison premises"); *Callaway*, 1994-NMCA-049, ¶¶13,18-19 (explaining that "Plaintiff's argument that Defendants were negligent in allowing the known and dangerous gang members loose to victimize the general prison population distinguishes it from the facts and argument in *Archibeque*"; holding that §41-4-6 waived immunity "because Defendants knew or should have known that roaming gang members with a known propensity for violence had access to potential weapons in the recreation area, that such gang members created a dangerous condition on the premises of the penitentiary"). While *Garner* and *Callaway* concern claims involving "operating and maintaining the prison's physical premises," *Archibeque*, 1993-NMSC-079, ¶8, *Archibeque* does not. Nor does this case, where, as Plaintiff alleges, Paquin's disappearance and murder occurred some six months after Blattner's release and had nothing to do with Paquin's use of or injury in or near a building operated/maintained by NMCD. Importantly, moreover, neither *Callaway* not *Garner* undermines in any way *Archibeque*'s holdings that "'operation' and 'maintenance' of the penitentiary premises, as these terms are used in Section 41-4-6, does not include the security, custody, and classification of inmates"; "Section 41-4-6 does not waive immunity when public employees negligently perform such

administrative functions"; and "[t]o read Section 41-4-6 as waiving immunity for negligent performance of administrative functions would be contrary to the plain language and intended purpose of the statute." 1993-NMSC-079, ¶¶8-9.

Defendants respectfully contend that there is no justification for depriving Defendants of the sovereign immunity the TCA affords government defendants, forcing them to litigate through a determination of liability, where Defendants have shown that *Archibeque* requires the conclusion that the §41-4-6 waiver does not apply, but two lower courts declined to rule on that argument. Defendant's *Archibeque* argument is clear and sufficiently developed, and a question that may be decided as a matter of law on the MSJ's undisputed material facts. *Ideal*, 2010-NMSC-022, ¶19 (district court decision "will be upheld as long as the right result was reached, even if the court reached the decision for the wrong reason"); *Vargas*, 2008-NMSC-019, ¶8 ("[W]e may affirm the district court's order on grounds not relied upon by the district court if those grounds do not require us to look beyond the factual allegations that were raised and considered below.") (quotation, citation omitted). It is also an issue of fundamental importance and substantial public interest this Court may and should decide, even if it were not well briefed. *Cf. Ideal*, 2010-NMSC-022, ¶16.

D. The Opinion Otherwise Errs In Its §41-4-6(A) Analysis.

As discussed above, the MSJ relied on *Archibeque* (and related cases) in arguing that §41-4-6 does not waive immunity for Claim I, and argued other cases in the reply as necessary to respond to Plaintiff's arguments. *Archibeque* remains the principal basis for Defendants' contention that §41-4-6(A) does not waive TCA

immunity for Claim I. In sum, because Plaintiff's allegations and evidence do not involve operation of government "premises" but rather administrative functions of the corrections system, *Archibeque* is dispositive, and the "common law jurisprudence" of premises liability is not.

Defendants maintain, however, that the Opinion's §41-4-6(A) analysis and rulings are erroneous and must be reversed for the additional reasons discussed in the foregoing sections, including that the holding that "Defendants 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" is based on an analysis that improperly conflates the §41-4-6(A) waiver inquiry with analysis of the elements of negligence under the substantive law of premises liability and that also transforms what the legislature intended as immunity from suit into a judicially imposed requirement that defendants must litigate the merits of the claim under the "common law jurisprudence" of premises liability, unmoored from (and contrary to) the TCA's text, legislative intent, and policies, and in conflict with precedents of this Court and the COA. Defendants contend that no "premises liability" case cited in the Opinion or by Plaintiff below supports the Opinion's reversal of the Order, and that the reasons discussed above explain why.

Defendants also contend that the Opinion rests in no small part on arguments concerning the elements of negligence not raised by the parties and rejects Defendants' *Archibeque* argument, in part, because Defendants did not discuss a

decision not raised in Plaintiff's opening brief, as required to preserve it[13] and that, in doing so, the COA abdicated its responsibility to act as "neutral arbiter of matters the parties present" in violation of the party-presentation rule.[14]

CONCLUSION

For the foregoing reasons, the Court should (1) reverse the Opinion's analysis and rulings as to §41-4-6(A), including the refusal to affirm based on *Archibeque*; (2) remand with instructions that this lawsuit be dismissed with prejudice; and (3) award such other, further relief in favor of Defendants as the Court deems proper. Defendants respectfully contend 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. *See Montaño v. Allstate Indem. Co.*, 2004-NMSC-020, ¶22, 135 N.M. 681. If the Court disagrees that such a rule should apply prospectively only, Defendants request the opportunity to brief the issue.

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[13]Rule 12-321(A); *Beneficial Fin. Co. v. Alarcon*, 1991-NMSC-074, ¶17, 112 N.M. 420; *Nellis v. Farmers Ins. Co. of Ariz.*, 2012-NMCA-020, ¶23, 272 P.3d 143.

[14]*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."); *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020); *United States v. Burkholder*, 816 F.3d 607, 620 n.11 (10th Cir. 2016); *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶70, 309 P.3d 53 ("It is of no benefit either to the parties or to future litigants for [appellate courts] to promulgate case law based on our own speculation rather than the parties' carefully considered arguments."); *State ex rel. Human Servs. Dep't v. Staples*, 1982-NMSC-099, ¶¶3, 5, 98 N.M. 540; *Brake v. Brake*, No.A-1-CA-37634, 2020WL6326467, at *1 (N.M.Ct.App. Oct. 28, 2020) (unpublished) ("developing a party's appellate argument would be an entirely inappropriate role for an impartial judiciary").

ORAL ARGUMENT REQUEST

Pursuant to Rule 12-319(B) NMRA, Defendants request oral argument based on the respectful contention that this case concerns issues affecting and of great significance to the government, policy, and law of New Mexico.

DATED this 10th day of May 2023

Respectfully submitted,

BUTT, THORNTON & BAEHR, P.C.

By: */s/ Sarah L. Shore*

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CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of this Opening Brief of Defendants-Petitioners to be served electronically to the following through the Court's file-and-serve system and via mail on this 10th day of May, 2023:

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