IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COULTON QUEVEDO, by and through his
Attorney-in-Fact (with power of attorney)
AIMEE BEVAN; BARBARA GUILFOYLE, individually;
SUSAN WECKESSER, as Conservator for
RYAN MORGAN; JAMES and CHERYL MORGAN, individually;
JORDAN ALMANZA, individually; and
MARC FLEMING, individually,

Plaintiffs-Appellants,

vs. Case No. 34,345

NEW MEXICO CHILDREN, YOUTH AND FAMILIES DEPARTMENT;
NEW MEXICO LICENSING AND CERTIFICATION AUTHORITY,
a division of the NEW MEXICO COMMUNITY OUTREACH
AND BEHAVIORAL HEALTH PROGRAMS; and
NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS,

Defendants-Appellees.

ANSWER BRIEF OF DEFENDANTS-APPELLEES

Appeal from the First Judicial District Court
County of Santa Fe
Honorable Francis J. Mathew, D. J.

ORAL ARGUMENT IS NOT REQUESTED

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SUPPLEMENTAL SUMMARY OF PROCEEDINGS

Plaintiffs-Appellants (hereinafter, "Plaintiffs") appeal the trial court's grant of summary judgment in the State's favor as to Count VI of the First Amended Complaint for Damages ("Complaint"), R.P. 228-258. As pertinent to the instant appeal, Plaintiffs sued three state agencies: the Children, Youth and Families Department ("CYFD"); the New Mexico Licensing and Certification Authority, a part of CYFD; and the New Mexico Department of Workforce Solutions ("DWS") (collectively, "State" or "State Defendants").

Plaintiffs expressly alleged, and it is and was not disputed, that the state agencies are "governmental entities" as defined by the Tort Claims Act. See R.P. 253, ¶ 153; see NMSA 1978, § 41-4-3, Subsections (B) and (H).

Count VI, the subject of this appeal, alleged negligence in the operation or maintenance of a building.[1]

Supplemental Summary of Material Facts

The lawsuit stems from the enrollment of the Plaintiffs as "students and residents" in a program at the Tierra Blanca Ranch ("TBR"), alleged to be a "working cattle ranch business" located in Sierra and Otero Counties, which also has a for-profit business called "Tierra Blanca Ranch High Country Youth Program" that provides schooling, counseling and therapy to "troubled youth."

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[1] On appeal, Plaintiffs have abandoned the two other claims brought against the State, and as to which the trial court also granted summary judgment: Count VII (alleging that the employees of CYFD and the DWS constituted "law enforcement officers" under the Tort Claims Act and that immunity was waived under § 41-4-12), and Count VIII (deprivation of New Mexico constitutional rights). See R.P. 255-257; see R.P. 730-731 (summary judgment).

See R.P. 230-231, ¶¶ 11-13. The ranch is a "sole proprietorship" owned by Defendant Scott Chandler, a private citizen, whom Plaintiffs alleged is the director, owner and sole shareholder of the ranch and its for-profit youth program, which allegedly operated as the "alter ego" of Mr. Chandler. See R.P. 231-232, ¶¶ 12-18.

Staff members of Tierra Blanca Ranch's youth program are employed by the ranch. See R.P. 232, ¶ 19. In the Complaint and on appeal, Plaintiffs do not allege that Mr. Chandler or any of the employees of his ranch or his youth program are "public employees" within the meaning and definition of the Tort Claims Act.

The four Plaintiffs were students in TBR's youth program (Coulton Quevedo, Ryan Morgan, Jordan Almanaza and Marc Fleming). They allege that while they were at the ranch participating in the program, they were physically and emotionally abused by TBR staff and other program participants, and were neglected and forced to work at the ranch without pay or reasonable compensation. Some of the Plaintiffs allege additional wrongdoing perpetrated against them by the TBR staff, such as deprivation of adequate food and nutrition, the denial of access to their families, being shackled, being forced to perform extreme exercise, etc. See R.P. 243-246, at ¶¶ 92-93, 101-103, 109-112, 115-117.

Although Plaintiffs allege a failure by the State to license, regulate and ensure TBR's compliance with applicable laws, Plaintiffs do not allege that any of CYFD's and/or DWS's employees participated in any acts of physical or emotional abuse or neglect.

Allegations Pertaining to the Negligent Operation or Maintenance of Any Building By CYFD and DWS.

In Count VI, the subject of the instant appeal, Plaintiffs pled a claim against the State pursuant to § 41-4-6 NMSA 1978 of the Tort Claims Act, alleging that the State's "public employees" negligently operated or maintained a building. See R.P. 253.

In their Complaint, Plaintiffs failed to plead any specifics regarding what particular building or premises surrounding a building was allegedly operated or maintained negligently by the employees of CYFD and DWS. On appeal, however, Plaintiffs have been less than forthcoming to the Court of Appeals in this regard. In summarizing the facts relevant to the issues presented for review (see Rule 12-213(A)(3) NMRA), Plaintiffs state as follows:

> Children enrolled in TBR's "youth program" typically reside at one or several of TBR's locations, which include houses, mobile homes, and camps with little to no infrastructure, for at least a year. First Am. Compl. ¶ 58. [R.P. 238]

See Brief-in-Chief of Plaintiffs, p. 10.

The actual allegation cited by Plaintiffs (R.P. 238, ¶ 58) states: "Upon information and belief, children and adolescents enrolled in the program typically spend at least one school year at the ranch." In fact, the Complaint does not mention any house, mobile home, camp, or infrastructure, nor does the pleading identify any specific building.

As material to Count VI and the alleged duty to operate and maintain a building, the Plaintiffs alleged that the DWS is required to "enforce and execute New Mexico labor laws including those regulating hours of labor, employment of minors, minimum wage

laws, payment of wages, and overtime labor." See R.P. 239, ¶ 66. Plaintiffs alleged that DWS knew or should have known that the Tierra Blanca Ranch youth program was violating such laws including failure to obtain work permits and failing to pay wages and overtime to children and adolescents for work they were performing, and that it failed to "regulate" TBR or to require the ranch to obtain work permits and to pay the children and adolescents, thereby allowing the program to operate in violation of labor laws. See R.P. 241-242, ¶¶ 79-83.

Regarding CYFD and its Licensing and Certification Authority, Plaintiff alleged that those agencies are responsible for administering New Mexico laws related to children, youth and families and overseeing and licensing facilities that provide services to children and adolescents, including Community Homes and Multi-Service Homes. See R.P. 233, ¶¶ 26-31. Plaintiffs further alleged that the ranch and youth program were required to be licensed by CYFD, and should have been, as a Community Home or a Multi-Service Home.[2] The Plaintiffs alleged that CYFD knew or should have known that the ranch and its owners, agents and employees were subjecting the children and adolescents enrolled in its program to physical and emotional abuse and neglect, and that CYFD and its employees failed to investigate the alleged abuse and neglect, and failed to take enforcement, regulatory and/or

[2] Although not pertinent to the issue on appeal (i.e., existence of a waiver of immunity under § 41-4-6 NMSA 1978), CYFD disputed (and continues to dispute) that the applicable New Mexico statutes allowed or required CYFD to license TBR's youth program. See R.P. 352.

corrective action to ensure that the ranch and its program were properly licensed and were made subject to CYFD oversight, including the failure by CYFD to issue a cease-and-desist order. See R.P. 240-241, ¶¶ 67-77.

STANDARD OF REVIEW

The State agrees with the Plaintiffs that appellate review of a grant of summary judgment is a *de novo* review. The State adds, however, that the existence of immunity under the Tort Claims Act is a jurisdictional issue. See Begay v. State, 104 N.M. 483, 486, 723 P.2d 252, 255 (Ct.App. 1985)(citing cases). Immunity is a question of law and is properly raised in a pretrial motion. See, i.e., Leithead v. City of Santa Fe, 1997-NMCA-041, 123 N.M. 353, 940 P.2d 459 (Ct.App. 1997)(question of law for court); Hern v. Christ, 105 N.M. 645, 648, 735 P.2d 1151, 1154 (Ct.App.), cert. denied, 105 N.M. 644 (1987).

ARGUMENT AND AUTHORITY

I. THERE IS NO WAIVER OF IMMUNITY UNDER § 41-4-6 AS A MATTER OF WELL-SETTLED LAW

Plaintiffs acknowledge (and there is in fact no doubt) that the State Defendants are "governmental entities" subject to the Tort Claims Act. See NMSA 1978, § 41-4-3, (B), (H). As such, these Defendants and their public employees are immune from "liability for any tort" except as liability expressly is waived in the Tort Claims Act. Waiver of the State's sovereign immunity is "limited to and governed by" the Tort Claims Act and the act "shall be the exclusive remedy for any tort for which immunity has been

waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought[.]" See NMSA 1978, §§ 41-4-2(A), 41-4-4(A), and 41-4-17. It is well-established that the statute is valid and constitutional as to the immunity and the express, limited waivers of immunity. See Ferguson v. State Highway Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct.App. 1982), cert. denied, 99 N.M. 226 (1983); Jaramillo v. State, 111 N.M. 722, 809 P.2d 636 (Ct.App. 1991).

In Count VI, the focus of this appeal, Plaintiffs attempt to plead a claim for negligence under § 41-4-6 of the Tort Claims Act, which waives immunity for damages caused by:

> 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.

Plaintiffs have alleged that employees of CYFD and its Licensing and Certification Authority have statutory duties to "register and issue licenses" to certain kinds of businesses known as "Multi Service Homes" operating in New Mexico and to take action such as issuing cease-and-desist orders to those businesses that are required to be licensed but are not, and "working with the home to comply with the licensing standards." See R.P. 253-254, ¶¶ 156, 160. Plaintiffs allege that the DWS is authorized to "administer, enforce and execute state labor laws regulating hours of labor, employment of minors, minimum wages, and payment of wages and overtime wages." See R.P. 254, ¶ 157.

Based on these statutory duties of oversight and regulation, Plaintiffs conclude that the public employees of the state agencies

"operated and maintained" some (unidentified) building related in some unspecified way to TBR's private, for-profit business. Plaintiffs further conclude and allege that the public employees "breached their duty of care in the operation of a building" when they failed to take action to have Mr. Chandler's business licensed and registered, after allegedly learning that licensure and registration was required. See 254-255, ¶¶ 158-166. On appeal, Plaintiffs have framed their contention thusly:

> While residing at TBR, the Plaintiffs were subjected to abuse, neglect, and endangerment at the hands of [TBR] staff members who were wholly unqualified to be working with any children, much less children with the types of disabilities that TBR holds itself out as being qualified to work with. That occurred despite the State's obligation to oversee this residential program for New Mexico children, and despite the State's extensive and longstanding knowledge of what was occurring at TBR. (See Brief-in-Chief, at 11-12)

> The State's decision not to act is what gives rise to its liability in this case, meaning that it failed to operate and maintain [TBR] safely despite having a duty to do so. That failure to act constitutes negligence in the operation and maintenance of a building within the meaning of Section 41-4-6. (See Brief-in-Chief, at 44)

In other words, looking at the allegations of their complaint, Plaintiffs argue that the State should have inspected, licensed, regulated and investigated TBR's privately-run youth program, and taken enforcement action against the program, but failed to do so; and that if the State had licensed and regulated the program and enforced the purportedly applicable laws, as the State allegedly was required to have done, the State would have been negligent in the operation or maintenance of some unidentified building; therefore, Section 41-4-6 waives immunity. The argument, however, is not only illogical, but also flies in the face of well-settled,

longstanding New Mexico case law, to the effect that there is no waiver of immunity under Section 41-4-6 for the breach of a duty involving the performance of administrative functions, or the State's duties related to the regulation, inspection, licensure and/or supervision of private property or private businesses.

The Tenth Circuit Court of Appeals recently surveyed the extensive New Mexico law pertaining to the waiver of immunity under Section 41-4-6 of the Tort Claims Act, specifically as applied to CYFD and its public employees. See Johnson ex rel. Estate of Cano v. Holmes, 455 F.3d 1133, 1139 (10th Cir. 2006). The Court explained the waiver of immunity thusly:

> [C]ourts must examine the "scope of the duties" performed by the public employees to operate or maintain the building in question. When public employees have a duty to operate or maintain a structure, the state is liable if the negligent actions of the public employees pose a danger to the "general public." However, claims based on a public employee's duty to inspect and supervise do not fall within the "building waiver" exception.
> (Id. (citations omitted)(emphasis added))

In Johnson, the Court held that a CYFD social worker's duties to investigate the integration of an adopted child into its adoptive home and to investigate allegations of child abuse in the home did not constitute "operation" of the home within the meaning of § 41-4-6. See Johnson v. Holmes, supra, 455 F.3d at 1140-41 (no duties constituting "day-to-day operation" of private residence which was adoptive home; moreover, a social worker's duty to "regulate and investigate violations" does not constitute "operation or maintenance of any building" under § 41-4-6); compare, Cobos v. Doña Ana County Housing Authority, 1998-NMSC-049,

¶ 13, 126 N.M. 418, 423, 970 P.2d 1143 (1998)(public employees had express, statutory duty to "maintain, operate and manage" a housing project building; therefore, § 41-4-6 waived immunity for their alleged negligence in failing to find and fix a physical defect in the chimney flue inside the building which caused a fire); see also Leithead v. City of Santa Fe, 1997-NMCA-041, ¶ 23, 123 N.M. 353, 359, 940 P.2d 459, 465 (Ct.App. 1997) ("the essential ingredient to liability" under Section 41-4-6 is "a condition on the premises" that creates a "potential risk to the general public"); cf M.D.R. v. State ex rel. Human Servs. Dep't, 114 N.M. 187, 190, 836 P.2d 106, 109 (Ct.App. 1992) (no waiver of immunity under §§ 41-4-9 and/or 41-4-10 of the Tort Claims Act for social worker's allegedly negligent placement of child into a privately-owned foster home); accord, Whitely v. CYFD, 184 F.Supp.2d 1146, 1165 (D.N.M. 2001)(no waiver of immunity under Tort Claims Act for social worker's alleged breach of duty to protect children, negligent supervision, negligent entrustment and negligent failure to warn).

As the Johnson court pointed out, the New Mexico case law is well-established that "a public employee's duty to inspect and supervise do not fall within" Section 41-4-6's waiver of immunity. See Johnson v. Holmes, supra, 455 F.3d at 1139; see also p. 1141 ("New Mexico courts have been clear that a duty to regulate and investigate violations does not constitute the operation of a facility under the [New Mexico Tort Claims Act]"). See also, i.e. Espinoza v. Town of Taos, 120 N.M. 680, 683, 905 P.2d 718, 721 (1995)(under § 41-4-6, no waiver of immunity for allegedly

"negligent performance of administrative functions"); Archibeque v. Moya, 1993-NMSC-079, 116 N.M. 616, 619, 866 P.2d 344, 347 (1993) (under § 41-4-6, no waiver of immunity for "negligent performance of administrative functions"); Cobos, supra, 126 N.M. at 424-25, 970 P.2d at 1149-50 (under § 41-4-6, no waiver of immunity based upon the "mere regulation and inspection of private property" or "duty to inspect and regulate private conduct" or "the general regulatory relationship between the government and its citizens" or some "general regulation for the public good"; there must be a specific duty to operate or maintain a building); Caillouette v. Hercules, Inc., 113 N.M. 492, 499, 827 P.2d 1306, 1313 (Ct.App), cert. denied, 113 N.M. 352 (1992) (Tort Claims Act words, of negligence in the "operation" or "maintenance", do not include claim of negligent inspection or negligent supervision); Armijo v. Dep't of Health & Environment, 108 N.M. 616, 618, 775 P.2d 1333, 1335 (Ct.App. 1989)(the term "maintenance" used in Tort Claims Act does not waive immunity for "all activities licensed or inspected by state agencies" because the state's licensing authority is "pervasive" and otherwise, "such liability would circumvent the very grant of immunity provided by the Tort Claims Act[]") ("there is a significant difference between "regulation" and either "operation" or "maintenance"); Martinez v. Kaune Corp., 106 N.M. 489, 492, 745 P.2d 714, 717 (Ct.App. 1987) (Section 41-4-6's building waiver exception does not include a state agency's failure to license or inspect, or the negligent inspection of food or a food manufacturing operation, based upon the statutory obligation

to license and inspect).

As noted, the Supreme Court long has held that Section 41-4-6 does not waive immunity for negligence in the performance of "administrative functions" such as the acts at bar: decisions to license a facility, program or business, for example, or to take, or not take, enforcement action. See Espinoza v. Town of Taos, supra; Archibeque v. Moya, supra ("The purpose of Section 41-4-6 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"). Although the cases have expanded Section 41-4-6 to include negligence in the maintenance of non government-owned buildings that public employees have a duty to operate, and the land or premises adjacent to a building, no case ever has enlarged Section 41-4-6's scope to encompass the duties alleged here: to "register and issue licenses" and "administer, enforce and execute" general state laws.[3]

The cases discussed by Plaintiffs do not support their theory.

To begin with, Plaintiffs are incorrect that the Supreme Court in its opinion in Bober v. New Mexico State Fair, 1991-NMSC-031, "overruled" cases such as Martinez v. Kaune Corp., supra. See

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[3] In Leithead v. City of Santa Fe, supra, for instance, the Court held that waiver of immunity under § 41-4-6 "is not limited to a physical defect in a building" and that "[l]iability may also arise if negligent public employees operate or maintain a facility in such a way as to create an unsafe or dangerous condition on that property or in the immediate vicinity." See 123 N.M. at 355 (emphasis added). No case holds or implies that public employees "operate or maintain a facility" where they fail to license, register or inspect a privately-owned and operated business, or fail to institute legal enforcement action against the business.

Brief-in-Chief at 20. Bober did not overrule the cases; as made clear by the Supreme Court in Cobos, supra, 1998-NMSC-049 at ¶ 10, Bober simply rejected a "narrow and formalistic interpretation" of Section 41-4-6, and rejected the government's actual fee ownership of the property it was negligently operating and/or maintaining as a "prerequisite" for a waiver of liability. The Supreme Court in Cobos, in fact, expressly endorsed the longstanding principle that "a mere duty to inspect and regulate private property" did not waive immunity under § 41-4-6. See Cobos, supra, 1998-NMSC-049 at ¶ 15, 126 N.M. at 424, 970 P.2d at 1149. And Bober itself did not in any way, shape or form involve allegations of the government's failure to license, inspect and/or regulate private property or private conduct, as is plead at bar; instead, the Bober case involved real property owned, operated and maintained by a governmental entity (the State Fair in Albuquerque). The Court held that the State's duty as a landowner to operate its premises safely, exercising ordinary care, was not negated simply because the injury to plaintiff, allegedly caused by negligent operation of the State's premises by the government's lessee, occurred near the exit from and on a roadway adjacent to the government's property.

The Upton v. Clovis Municipal Sch. Dist. case, 2006-NMSC-040, cited by Plaintiffs, likewise did not in any way involve any alleged "failure to investigate" or "failure to inspect" or "failure to regulate" or "failure to prosecute violations of law" as are pleaded by Plaintiffs here; instead, the Upton case involved public-school employees operating a public school building and the

adjacent schoolyard grounds owned by the governmental entity; although the Supreme Court admittedly interpreted the "operation" of the governmental entity's premises by its public employees broadly, the opinion is utterly irrelevant to the theory of liability Plaintiffs seek to assert here: a waiver of immunity under Section 41-4-6 based on the State's failure to license, inspect and regulate a privately-owned and operated business.

Finally, the case of Young v. Van Duyne, 2004-NMCA-074, 135 N.M. 695, 92 P.3d 1269 (Ct.App. 2004), discussed by the Plaintiffs (see Brief-in-Chief at 36-38), is also irrelevant and fails to support the theory of liability at bar. Young involved allegations of negligence related to operation of a state-licensed foster home; the "building" (the foster home) was already licensed by the State, and, although it was a private building, the home was operated by foster parents who themselves are defined in the Tort Claims Act as "public employees." See NMSA 1978, § 41-4-3(F)(4). Plaintiffs in Young also alleged that CYFD's own employees had statutory duties to operate the foster home once it had been licensed as such by CYFD. In contrast to the allegations here, Young did not involve negligence based on CYFD's failure to license the foster home, or a theory that the failure to so license constituted the government's operation or maintenance of the foster home.

The negligence alleged here is based on alleged duties to "register and issue licenses" and "administer, enforce and execute" general state laws. Such allegations are nothing more or less than duties to "regulate and investigate violations" (Johnson v. Holmes)

and/or the "performance of administrative functions" (Espinoza v. Town of Taos) and/or to "inspect and regulate private conduct" and/or the "regulation and inspection of private property" (Cobos v. Doña Ana County) and/or a state agency's "failure to license or inspect" Martinez v. Kaune Corp.). As such, there is no waiver of immunity under unequivocal, longstanding New Mexico case law.

II. PUBLIC POLICY SUPPORTS THE TRIAL COURT'S RULING.

Most of the imaginable varieties of private conduct, and virtually every kind of privately-run business in New Mexico, involve the use of some sort of "building" and/or "equipment" as those terms are used in Section 41-4-6 NMSA 1978. Thus, the scope of the statute, and the government's potential tort liability, would expand to become almost limitless if the waiver of liability was construed to include the failure to license, regulate, oversee and/or take enforcement action against private conduct and/or private business activity, simply because a building or piece of equipment was involved in such private conduct or private business. Yet that is precisely the theory of liability Plaintiffs espouse here: that by failing to license, regulate, oversee and/or inspect TBR's privately-owned and operated for-profit youth program, the State was negligent "in the operation or maintenance of a building" within the meaning of § 41-4-6, and the State therefore is liable for the injuries Plaintiffs allegedly suffered while participating in the privately-run program. As noted by the Court of Appeals in Armijo v. Dep't of Health & Environment, supra, 108 N.M. at 618, 775 P.2d at 1335, such a theory of liability "would circumvent the

very grant of immunity provided by the Tort Claims Act[.]" (quoting Martinez v. Kaune Corp., supra); accord, Caillouette v. Hercules, Inc., supra, 1992-NMCA-008 ¶ 29, 113 N.M. at 499, 827 P.2d at 1313 (language of Section 41-4-6 "indicates an intent not to extend liability to all activities supervised or inspected by the state").

Apart from the fact that nothing in the language of the statute itself or in any prior case supports the expansive, limitless interpretation of § 41-4-6 pressed by the Plaintiffs, public policy, too, weighs heavily against it.

III. THE REQUESTED DISCOVERY WAS IRRELEVANT TO THE LEGAL ISSUE OF WAIVER OF IMMUNITY, AND WOULD HAVE BEEN FUTILE.

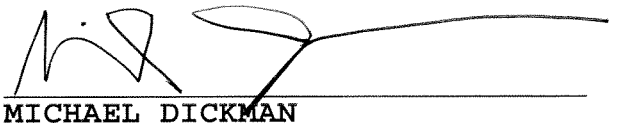
Alternatively, Plaintiffs argue that the trial court should have allowed them to conduct "full discovery" in order to learn "the entire extent of the State's involvement and relationship with and knowledge of the ongoing abuse and neglect" taking place at the TBR's youth program, "including the State's decision to provide taxpayer dollars to the program[.]" See B-in-C, at 13, 53-54. However, nothing in such discovery would, or possibly could, establish that there is a waiver of sovereign immunity for the acts and omissions alleged in the Complaint: the alleged failure to "enforce and execute New Mexico labor laws including those regulating hours of labor, employment of minors, minimum wage laws, payment of wages, and overtime labor" (see R.P. 239, ¶ 66), or the alleged failure by CYFD to license the youth program, and/or investigate alleged abuse and neglect, and/or to take enforcement, regulatory and/or corrective action against the program (see R.P.

240-241, ¶¶ 67-77). These are purely questions of law and jurisdictional issues, and the well-established case law is that Section 41-4-6 NMSA 1978 does not waive immunity for any of the acts and omissions alleged by the Plaintiffs in their complaint.

CONCLUSION

For the foregoing reasons, the Court of Appeals should affirm the trial court's grant of summary judgment in favor of the State as to Count VI of the Complaint.

Respectfully submitted,



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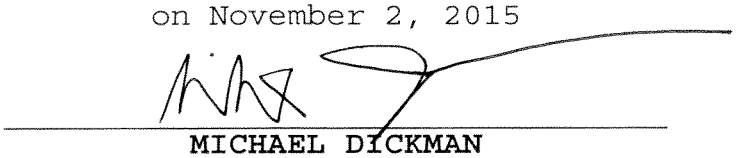

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