IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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COPY

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, CHERYL MORGAN, individually, JORDAN ALMANZA, individually, and MARC FLEMING, individually,

Plaintiffs/Appellants,

v.

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 the NEW MEXICO DEPARTMENT OF WORKFORCE SOLUTIONS,

Defendants/Appellees.

Appeal from the First Judicial District Court, Santa Fe County, New Mexico
The Hon. Francis J. Mathew, District Judge, District Court No. D-101-CV-2013-03219

BRIEF-IN-CHIEF OF PLAINTIFFS/APPELLANTS AIMEE BEVAN *ET AL.*

ORAL ARGUMENT IS REQUESTED

Randi McGinn
A. Elicia Montoya
Michael E. Sievers
McGinn, Carpenter, Montoya & Love, PA
201 Broadway Blvd. SE
Albuquerque, NM 87102
505-843-6161
Attorneys for Plaintiffs/Appellants

Michael Dickman
P.O. Box 549
Santa Fe, NM 87504

Attorney for Defendants/ Appellees

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RULE 12-213(G) NMRA STATEMENT OF COMPLIANCE

I HEREBY CERTIFY that this Brief-in-Chief was prepared using proportionally spaced, 14-point, Times New Roman typeface in the Microsoft Word 2010 word-processing program and that, pursuant to the limitations of Rule 12-213(F)(3) NMRA, its body contains 10,848 words according to Microsoft Word 2010's word-count function.

Michael E. Sievers
Attorney for Plaintiffs/Appellants Aimee Bevan et al.

TABLE OF AUTHORITIES

New Mexico Cases

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NATURE OF THE CASE

The Tierra Blanca Ranch High Country Youth Program is a for-profit business owned by Scott and Colette Chandler that operates along with several other individuals and entities (hereinafter "TBR defendants") for the financial benefit of their collective enterprise and the individuals involved. First Am. Compl. ¶¶ 11, 13; Mot. for Leave to File Second Am. Compl. at 2-3 and at Ex. A ¶¶ 12-25, 31 (motion granted by order filed Feb. 5, 2015; Second Am. Compl. filed Feb. 9, 2015). **[RP 230-231; RP 744-745; 754-758]** TBR profits from what the business's owners describe as a residential program to provide schooling, counseling and therapy for troubled youth. First Am. Compl. ¶ 12. **[RP 231]** 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. **[RP 238]** TBR has profited from providing its "services" to dozens of children at a time here in New Mexico, including 13 children during a low point in September 2013, after TBR's business allegedly suffered from the publicity that occurred when an Amber Alert was issued for the boys at TBR. **[RP 721]** Scott Chandler, his employees and the other TBR defendants purport to take "guardianship" over the children during their stay at TBR (by having parents sign a power of attorney and without going through the required process for an actual legal guardianship). First Am. Compl. ¶ 55. **[RP**

237] Some of the children at TBR are placed in the residential program by the New Mexico Children, Youth and Families Department ("CYFD"), or by Juvenile Probation and Parole ("JPPO"), which is a division of CYFD. **[RP 721-722]**

The former TBR residents whose injuries are at issue in this lawsuit – Ryan Morgan, Coulton Quevedo, Marc Fleming, and Jordan Almanza – were enrolled in TBR based on its promises to provide educational and therapeutic services, as TBR specifically advertises it provides services for children and adolescents who have ADD, RAD, ADHD and other problems or disabilities, as well as children and adolescents who are emotionally, mentally or physically damaged or sexually abused, and children and adolescents who are suicidal. First Am. Compl. ¶ 51. **[RP 237]** Plaintiff Jordan Almanza was placed at TBR by Juvenile Probation Division. **[RP 457]** TBR advertises and has admitted in court documents that it works in partnership with state and local governments to provide its services, including CYFD, JPPO, and Deming Public Schools. **[RP 720-722 and, *e.g.*, RP 518-519; 534-537; RP 538-540]**

While residing at TBR, the Plaintiffs were subjected to abuse, neglect, and endangerment at the hands of 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. First Am. Compl. ¶¶ 63, 84-119. **[RP 238-239; 242-246]** 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.

SUMMARY OF PROCEEDINGS

This appeal arises from the District Court's grant of a Motion for Summary Judgment on November 3, 2014, in the early stages of the case, in favor of several entities of the State of New Mexico, based on the Court's finding that the State was entitled to immunity from suit. **[RP 730-731]** Plaintiffs/Appellants filed their First Amended Complaint against TBR, CYFD, CYFD's Licensing and Certification Authority ("LCA"), and the New Mexico Department of Workforce Solutions (collectively the "State" or the "State Defendants") on May 29, 2014, alleging, *inter alia*, that the State Defendants were negligent in the operation and maintenance of the buildings and other property used by TBR in the conduct of its business. First Am. Compl. ¶¶ 153-167. **[RP 253-255]** In the very early stages of the case, the State Defendants moved for summary judgment based on the argument that the New Mexico Tort Claims Act does not waive sovereign immunity for the Plaintiffs' claims. **[RP 347]**

The District Court disagreed with Plaintiffs' argument that immunity is waived for the claims against the State pursuant to NMSA 1978, § 41-4-6(A) (2007) (operation and maintenance of buildings). **[RP 253-255; 452-471; 730-731; Tr. 11/3/14 at 49:10-16]** Plaintiffs/Appellants appeal that issue, as well as

the District Court's decision to grant the motion without allowing Plaintiffs to conduct further discovery. Plaintiffs do not appeal the District Court's grant of summary judgment as to the claim that sovereign immunity is waived under NMSA 1978, § 41-4-12 (1977) (the "law enforcement waiver").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue I: Did the District Court err in granting summary judgment because the waiver of immunity in NMSA 1978, § 41-4-6(A) (2007) applies to the Plaintiffs/Appellants' claims against the State Defendants in this case?

Issue II: At a minimum, if summary judgment would have been appropriate based solely on the evidence that was uncovered without the benefit of full discovery, should Plaintiffs/Appellants have been permitted to conduct full discovery to learn the entire extent of the State's involvement and relationship with and knowledge of the ongoing abuse and neglect occurring at TBR, including the State's decision to provide tax payer dollars to the program, which will inform the inquiry as to whether the State's involvement in the youth program created a duty to operate the premises of TBR and whether the State may be liable in connection with its breaches of that duty?

STANDARD OF REVIEW

The standard of review for an order granting a motion for summary judgment is *de novo*. *Zamora v. Saint Vincent Hosp.*, 2014-NMSC-035, ¶ 9. "In

reviewing an order on summary judgment, we examine the whole record on review, considering the facts in a light most favorable to the nonmoving party and drawing all reasonable inferences in support of a trial on the merits." *Id.* (citing *Handmaker v. Henney*, 1999-NMSC-043, ¶ 18, 128 N.M. 328). Summary judgment is disfavored in New Mexico, where a trial on the merits is preferred, unlike in federal courts. *Zamora*, 2014-NMSC-035, ¶ 9 (quoting *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713).

Likewise, the determinative issue in this case of the existence of a duty is a question of law, which is to be reviewed *de novo* and "answered by reference to legal precedent, statutes, and other principles comprising the law." *Salas v. Mountain States Mut. Cas. Co.*, 2009-NMSC-005, ¶ 12, 145 N.M. 542 (quoting *Azar v. Prudential Ins. Co. of Am.*, 2003-NMCA-062, ¶ 43, 133 N.M. 669).

ARGUMENT

In enacting a statutory grant of sovereign immunity to the State, recognizing "the inherently unfair and inequitable results [that] occur in the strict application of the doctrine of sovereign immunity," NMSA 1978, § 41-4-2 (1976), the Legislature waived sovereign immunity for several categories of state government activities that pose dangers to citizens of New Mexico if not executed properly. *See* NMSA 1978, § 41-4-4 (2001) (granting immunity); and NMSA 1978, §§ 41-4-5 (1977); 41-4-6 (2007); 41-4-7 (1976); 41-4-8 (1976); 41-4-9 (1977); 41-4-10

(1978); 41-4-11 (1991); 41-4-12 (1977) (waiving immunity for certain claims). One of those waivers creates an exception to sovereign immunity for the "negligence of a public employee acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings." § 41-4-6 (the "building waiver"). In this case, the building waiver enables Plaintiffs to pursue their claims, and the Court of Appeals should hold that the Plaintiffs' claims against the State may proceed in the District Court based on the State's negligence in the operation and maintenance of the buildings and other property used by the Tierra Blanca Ranch High Country Youth Program ("TBR").

While there are many ways in which the State breached its duty of care to the children residing at TBR, at the summary judgment stage in a decision on a motion filed in the early stages of the case, the sole question for the District Court was to determine whether a duty existed at all. *See Rodriguez v. Del Sol Shopping Ctr. Assocs., L.P.*, 2014-NMSC-014, ¶¶ 24-25. "It is the responsibility of the court to determine whether the defendant owed a duty to the plaintiff." *Bober v. N.M. State Fair*, 1991-NMSC-031, ¶ 17 n. 4, 111 N.M. 644 (citing *Schear v. Board of Cnty. Comm'rs*, 1984-NMSC-079, 101 N.M. 671).

Meanwhile, "the responsibility for determining whether the defendant has breached a duty owed to the plaintiff entails a determination of what a reasonably prudent person would foresee, what an unreasonable risk of injury would be, and

what would constitute an exercise of ordinary care in light of all the surrounding circumstances." *Bober*, 1991-NMSC-031, ¶ 17. That is "a factual determination or, perhaps, a mixed determination of law and fact, involving as it does the application of precepts of duty to the historical facts as found by the fact finder." *Id.*

I. THE GRANT OF SOVEREIGN IMMUNITY IN THE TORT CLAIMS ACT MUST BE GIVEN A *NARROW* CONSTRUCTION BECAUSE IT IS IN DEROGATION OF NEW MEXICO COMMON LAW, MEANING THAT THE WAIVERS OF IMMUNITY MUST BE GIVEN A *BROAD* CONSTRUCTION.

The Tort Claims Act's grant of sovereign immunity to the State, although it may be a nod to an "ancient principle that predates the United States" **[Tr. 11/3/14 at 3:12-14]**, is in derogation of the common law of New Mexico and therefore must be narrowly construed. *Methola v. Cnty. of Eddy*, 1980-NMSC-145, ¶ 23, 95 N.M. 329. In 1975, our Supreme Court held that "no reasons whatsoever exist for continuing to adhere to the doctrine of governmental immunity," and thus abolished the "archaic" doctrine that represented the remnants of "outmoted medievalisms." *Hicks v. State,* 1975-NMSC-056, ¶¶ 5, 9, 11, 88 N.M. 588 (quoting *Ayala v. Philadelphia Board of Public Education*, 305 A.2d 877, 881-82 (Pa. 1973)). In response to the *Hicks* decision, the Legislature passed the Tort Claims Act, enacted in 1976, thereby legislatively limiting the scope of

government exposure to tort liability. *See generally* NMSA 1978, §§ 41-4-1 *et. seq.*

Since the Tort Claims Act is in derogation of the judicial common law, it must be interpreted narrowly in its grant of sovereign immunity in recognition of the "fundamental" principle in our common law "that one may seek redress for every substantial wrong." *Hicks*, 1975-NMSC-056, ¶ 12 (quoting *Niederman v. Brodsky*, 261 A.2d 84, 85 (Pa. 1970)). *See Estate of Lajeuenesse v. Bd. of Regents*, 2013-NMCA-004, ¶ 7 (noting that "the [Wrongful Death Act] and the TCA are both statutes in derogation of the common law, which generally require strict construction.") (citing *Romero v. Byers*, 1994-NMSC-031, ¶ 15, 117 N.M. 422 and *Methola*, 1980-NMSC-145, ¶ 23). "Since the [Tort Claims] Act is in derogation of petitioner's common law rights to sue respondents for negligence, the Act is to be strictly construed insofar as it modifies the common law." *Methola*, 1980-NMSC-145, ¶ 23 (noting the history of the Act as described above) (citing *State ex rel. Miera v. Chavez*, 1962-NMSC-097, 70 N.M. 289). Because the grant of sovereign immunity must be given a strict, narrow application, the exceptions to sovereign immunity are to be given a broad, expansive interpretation. *See, e.g., Bober*, 1991-NMSC-031, ¶ 27 (embracing a broad view of Section 41-4-6).

In keeping with the requisite broad construction of the Tort Claims Act's waivers of immunity, courts should not interpret literally the phrase "operation or

maintenance of any building" in determining whether immunity may be waived under Section 41-4-6. *See Bober*, 1991-NMSC-031, ¶ 27. The court in *Bober* held that the correct interpretation of Section 41-4-6 is a broad one that "contemplates waiver of immunity where due to the alleged negligence of public employees an injury arises from an unsafe, dangerous, or defective condition on property owned and operated by the government...." *Id.* (quoting *Castillo v. Cnty. of Santa Fe*, 1988-NMSC-037, ¶ 3, 107 N.M. 204). In deciding whether Section 41-4-6 may waive immunity for a particular alleged breach of the duty to operate and maintain a building, courts should decide whether statutory, regulatory or contractual duties require the exercise of ordinary care in that operation and maintenance in relation to the claim. *Cobos v. Doña Ana Cnty. Hous. Auth.*, 1998-NMSC-049, ¶ 7, 126 N.M. 418.

In this case, the District Court's conclusion that the waiver did not apply was based on the premise that Plaintiffs' claims go to "administration" rather than operation or maintenance, with the District Court analogizing this case to *Archibeque v. Moya*, 1993-NMSC-079, 116 N.M. 616. **[Tr. 11/3/14 at 39:20-21; 49:10-16]** The District Court therefore granted the State's Motion for Summary Judgment. **[Tr. 11/3/14 at 49:10-16; RP 730-731]**

As discussed further below, the *Archibeque* decision is not applicable here. That case involved an error by prison administration in the classification of a

prisoner – a discrete administrative decision that affected one prisoner. *See Archibeque*, 1993-NMSC-079, ¶ 2. By contrast, Plaintiffs' claims in this case involve decisions by the State that create a dangerous condition for the public, or that segment of the public that stands to be harmed by residing at TBR's unlicensed multi-service home. *See Callaway v. N.M. Dep't of Corr.*, 1994-NMCA-049, ¶ 18, 117 N.M. 637 (distinguishing *Archibeque*). Thus, the District Court was incorrect that this case involves "administration" rather than operation and maintenance.

The case against the State under this waiver of immunity should have been allowed to proceed, at a minimum, through the conclusion of discovery.

II. THE STATE'S EMPLOYEES OWED A DUTY OF CARE TO THE PLAINTIFFS, AND THE RELEVANT INQUIRY IS ONE REGARDING THAT DUTY, NOT WHETHER THE STATE OWNS THE PROPERTY IN QUESTION OR WHETHER THE INJURIES OCCURRED WITHIN A BUILDING.

Bober, 1991-NMSC-031, and its progeny demonstrate that the relevant inquiry for a court in determining whether Section 41-4-6 may waive immunity for the State's actions is whether state employees owed a duty of care to the plaintiffs. Section 41-4-6 is not bound by the confines of previous appellate decisions that were based on the idea that it waived immunity only for injuries caused by physical defects in buildings. *Cobos*, 1998-NMSC-049, ¶ 10. During oral argument in the District Court, the State relied heavily on the Court of Appeals'

decision in *Martinez v. Kaune Corp.*, 1987-NMCA-131, 106 N.M. 489, which held that the building waiver did not apply because the claims of failure to inspect a cheese manufacturer's operations did not involve any physical defect in a building. *Id.* ¶ 7. **[Tr. 11/3/14 at 8:11-10:3]** The State asserted that the decision in *Martinez* has been "consistently followed." **[Tr. 11/3/14 at 9:25-10:1]** However, *Martinez* is one of several cases that were overruled by the New Mexico Supreme Court in *Bober*, 1991-NMSC-031, ¶ 27, as noted in *Cobos*, 1998-NMSC-049, ¶ 10. *Cobos* pointed out that the New Mexico Supreme Court has "expressed disagreement with a narrow and formalistic interpretation of Section 41-4-6" and clarified that *Bober* rejected "any narrower view of the applicability of [Section 41-4-6] that may be contained in" previous appellate opinions, including *Martinez*. *Cobos*, 1998-NMSC-049, ¶ 10.

A. The applicability of the building waiver does not depend on the location where the Plaintiffs' injuries occurred or whether the premises are owned by the government.

The decision in *Martinez*, 1987-NMCA-131, was premised upon the now-rejected notion that the buildings waiver "covered premises liability situations only." *See id.* ¶ 7. *Bober* expressly rejected that overly narrow interpretation of Section 41-4-6 and observed that "the liability envisioned by that section is not limited to claims caused by injuries occurring on or off a certain 'premises....'" 1991-NMSC-031, ¶ 27. The court in *Bober* explained that "[i]n determining

whether [the alleged tortfeasor] acted reasonably or breached his duty, it may be relevant to the jury that the injury occurred off the premises." *Id.* ¶ 12. However, in making the policy-driven determination regarding the existence of a duty, this Court must keep in mind that "the location of the [injury-causing event] is not relevant...." *Bober*, 1991-NMSC-031, ¶ 12 (quoting *Calkins v. Cox Estates*, 1990-NMSC-044, 110 N.M. 59). Following that reasoning, the Court in *Bober* held it was error for the district court to grant summary judgment in favor of the New Mexico State Fair, even though the injury had occurred outside of any physical "building." 1991-NMSC-031, ¶¶ 1, 18.

Likewise, Section 41-4-6 is not limited to actions arising from conduct occurring on premises owned by the government; actions pursuant to the building waiver can arise from conduct occurring on private premises. *See, e.g., Cobos*, 1998-NMSC-049. As the New Mexico Supreme Court expressly held in *Cobos*, "the Legislature intended the building waiver to apply to *any* building in which public employees owe a duty to operate or maintain exercising ordinary care," regardless of the physical location where the injuries occurred. *Id.* ¶ 1 (emphasis added).

The *Cobos* case arose from a fire that occurred in a privately owned home that was used to provide shelter under a federally funded low-income housing program. *Id.* The waiver in Section 41-4-6 applied despite the fact that the rental

property at issue was privately owned "because the effect of the waiver should not be determined by the legal status of or the title to the real property, ***but should instead be determined by an examination of the public employees' duties***." *Id.* ¶ 7 (emphasis added). "Our Legislature has specifically tied Tort Claims Act waivers to the 'scope of duties' of public employees, not to the ownership status of the real property involved." *Id.* ¶ 8. The Tort Claims Act defines "scope of duties" to mean "any duties that a public employee is ***requested, required, or authorized*** to perform ... regardless of the time and place of performance." NMSA 1978, § 41-4-3(G) (2013) (emphasis added). "Accordingly, the 'building waiver' in Section 41-4-6 on its face excepts immunity for the negligent operation or maintenance of any building by a public employee acting within the scope of duty." *Cobos*, 1998-NMSC-049, ¶ 8.

As *Cobos* acknowledged, the language regarding operation and maintenance of buildings "contrasts with the language immediately following, which waives immunity for negligent operation or maintenance of any "public park.'" (citing Section 41-4-6). Section 41-4-6 also contrasts with language used by other states with similar statutes that specifically refer to public buildings; thus, the Court in *Cobos* concluded that New Mexico's building waiver "manifests no intent to restrict the waiver to publicly-owned buildings." 1998-NMSC-049, ¶ 9. Therefore, the waiver is not limited to injuries occurring on premises in which the

state entity has a real property interest or the duties of a landlord. *Id.* ¶ 9. "Rather, it is clear from our cases that an ownership interest in a building is but one of several ways of proving that a duty to operate or maintain exists." *Id.* ¶ 10.

Based on this guidance from *Cobos*, it is not determinative that (1) TBR consists of multiple buildings, other structures, and land; or that (2) TBR is a privately owned business that benefitted from State taxpayer funding. Instead, the only issue is whether State employees owed a duty of care to the children living at TBR. Based on the facts known when Plaintiffs filed their claims, State employees did owe a duty of care to those children. *See* Section III, *infra*.

B. The Section 41-4-6 waiver of immunity for governmental conduct applies to Plaintiffs' claims in this case because the State and its employees owed a duty of care to the children residing at Tierra Blanca Ranch.

Cobos recognized that, in the context of the building waiver, "the determination of duty in any given situation involves an analysis of the relationship of the parties, the injured plaintiff's interest and the [government entity's] conduct; it is essentially a policy decision based on these factors that the plaintiff's interests are entitled to protection." 1998-NMSC-049, ¶ 11 (quoting *Calkins*, 1990-NMSC-044, ¶ 11). The court in *Cobos* also approved of the principle that "a duty to exercise ordinary care not to injure another ... may arise out of a voluntarily assumed relationship if public policy dictates the existence of such a duty." 1998-NMSC-049, ¶ 11 (quoting *Merrill v. Buck*, 375 P.2d 304, 310 (Cal. 1962)).

Therefore, New Mexico's appellate courts "regularly look to statutes, regulations, and contracts as sources of duties of ordinary care imposed on public employees that may bring them within a Tort Claims Act waiver." *Cobos*, 1998-NMSC-049, ¶ 12. As explained in Section III, *infra*, multiple statutes, regulations and contracts provide the sources of the State's duties of ordinary care in this case.

Like the State Defendants in this case, the housing authority in *Cobos* argued that its relationship with the privately owned home was merely one of regulation and inspection. *Id.* ¶ 15. **[Tr. 11/3/14 at 10:14-18]** The New Mexico Supreme Court disagreed, writing:

> The Legislature created the Authority for the purposes of operating and maintaining housing projects in a decent, safe and sanitary condition. The Housing Authority in Dona Ana County chose to do so by using private property in the manner prescribed by the federal regulations. Thus, the privately-owned home was substituted for publicly-owned low-income housing..., and Defendants' duties under the Municipal Housing Law and Existing Housing Program went far beyond a mere duty to inspect and regulate private conduct.
>
> We emphasize that Defendants' duties in this case do not arise as a consequence of the general regulatory relationship between the government and its citizens. Rather, Plaintiff has shown that Defendants engaged in a ***voluntary undertaking*** to effectuate the policies in [NMSA 1978, § 3-45-2 (1965)] by providing Plaintiff's family with safe housing they could not otherwise obtain. This undertaking gives rise to a more specific relationship among the parties than does general regulation for the public good.

Id. ¶¶ 15-16 (emphasis added). Similarly, the Legislature enacted the Public Health Act provisions regarding residential facilities like TBR for the purposes of

operating and maintaining residential programs for children in a decent, safe and sanitary condition and promoting the health, safety and welfare of the children in those facilities. *See* NMSA 1978, § 24-1-5(B) (2005) (authorizing CYFD to "make inspections and investigations and to prescribe rules it deems necessary or desirable to promote the health, safety and welfare of persons using health facilities").

The State, especially through CYFD and its Licensing and Certification Authority, has engaged in a voluntary undertaking to ensure that children living in residential programs like TBR receive services in a safe environment free from abuse and neglect. *See Cobos*, 1998-NMSC-049, ¶ 11. CYFD has a specific relationship with the residents of TBR – even without living up to its obligations under the applicable statutes and regulations – that is much more extensive than general regulation for the public good. *See id.* ¶ 16. Plaintiffs seek to hold the State accountable not for failing to do "everything that might be done," § 41-4-2(A), but rather doing what CYFD itself recognizes it has a duty to do pursuant to the extensive regulations governing health facilities and residential programs. *See* Section III, *infra.*

III. THE STATE'S RELATIONSHIP WITH TIERRA BLANCA RANCH, ALONG WITH THE STATUTES AND REGULATIONS GOVERNING RESIDENTIAL PROGRAMS LIKE TBR, GAVE RISE TO A DUTY TO OPERATE AND MAINTAIN TBR TO PREVENT THE TYPES OF INJURIES THAT OCCURRED IN THIS CASE.

Although TBR is a privately owned, for-profit[1] sole proprietorship business, the program is intertwined with the State of New Mexico in such a way that it is, at least partially, a creature of the State. Plaintiffs did not receive the benefit of any discovery in this case, and the full extent of the State's relationship with TBR is therefore unknown. **[RP 471]** However, Plaintiffs' preliminary investigation revealed that the State's relationship with TBR has been extensive, and discovery would likely reveal much more. **[RP 565-570]** The owners of TBR themselves acknowledge that the program works in partnership with state and local governments to provide services, and documents obtained even before discovery confirm that this is true. **[RP 720-722; 518-519; 534-537; 538-540]** *See* Section III(A), *infra.* Additionally, a web of statutes, regulations and contracts gave rise to a duty by the State to actively oversee TBR to prevent abuse and neglect, especially in light of the notice the State had of what was occurring in the program. *See Cobos*, 1998-NMSC-049, ¶ 13.

[1] TBR has nonetheless accepted the benefits of a "tax exempt" status in its dealings with at least one supermarket in Truth or Consequences, where it has purchased groceries without paying any gross receipts tax.

This Court should recognize the State's duty to operate and maintain programs like TBR and hold that Section 41-4-6 waives immunity for the Plaintiffs' claims. First, the State has a specific relationship with the children residing at TBR giving rise to a duty to oversee the program to ensure the safety of those children. Second, *existing* New Mexico statutory law and regulations[2] govern facilities like TBR, creating a duty to operate and maintain the premises to prevent injuries to the children residing there.

A. The allocation and use of state funds and taxpayer money to subsidize Tierra Blanca Ranch, CYFD's attempts to license and oversee TBR, and the contracts between TBR and governmental entities for educational "services" provided at TBR show that the State has a specific relationship with the children residing at TBR giving rise to a duty to oversee the program to ensure safety of those children.

Plaintiffs' Response to the State's Motion for Summary Judgment set out just some of the ways in which the State has a specific and ongoing relationship with TBR giving rise to a duty to operate and maintain by providing oversight to protect the children living there. **[RP 456-458]** Those facts were uncovered in the early stages of the case without the benefit of discovery. **[RP 471]** Taken together, the statutes, regulations, contracts, and previous attempts to oversee TBR, which were met with resistance from the TBR defendants, gave rise to a more specific relationship between the State and the residents of TBR than mere general

[2] Multiple media outlets have erroneously reported that a "loophole" in state law allows programs like TBR to operate without a license. There is no such "loophole," as CYFD itself has recognized that TBR is subject to licensing and oversight as a multi-service home. **[RP 490-491]**

regulation for the public good, creating a duty to operate and maintain the program. *See Cobos*, 1998-NMSC-049, ¶ 16. At a minimum, this case should be remanded so that Plaintiffs may conduct discovery to uncover the full extent of the State's relationship with TBR. *See Doe v. Roman Catholic Diocese of Boise, Inc.*, 1996-NMCA-057, ¶ 21, 121 N.M. 738; *see also* Section VII, *infra.*

Plaintiffs' pre-discovery investigation showed, among other things, that:

1. The taxpayers of New Mexico have subsidized TBR in the past, and Plaintiffs do not yet know the full extent of what the State received in exchange for providing public funding. In 1999, the New Mexico Legislature allocated $100,000 to CYFD's Juvenile Justice Division for contractual services with TBR. **[Tr. 11/3/14 at 22:23-25; RP 485]**. It is unknown whether the Legislature has specifically allocated funds to TBR since then, or to what extent TBR profits from State-funded "tuition" payments, both of which discovery would illuminate. **[RP 568]**

2. TBR acknowledges and advertises that it works in partnership with state and local government to provide its services. **[RP 720-722]** That partnership includes working with CYFD, Juvenile Probation and Parole, and courts, which refer children to TBR and whose employees contact Scott Chandler to enroll children in the program, as well as working with Deming Public Schools, in which

the students at TBR are enrolled and which provides the teachers pursuant to a "long-standing, well-established and documented arrangement." **[*Id.*]**

3. It is believed that the State subsidized the "tuition" for an unknown number of children to reside in the custody of TBR in lieu of probation and in lieu of incarceration in juvenile detention centers, referred to TBR by Juvenile Probation and Parole (which is part of CYFD), and New Mexico courts. **[Tr. 11/3/14 at 27:5-6; RP 721; RP 518-519** (indicating placement at TBR is a school district decision made in conjunction with the local JPPO); **RP 474-478]** Plaintiff Jordan Almanza was one of the students JPPO referred to TBR, requiring him to attend the "youth program" in lieu of probation. **[RP 457]**

4. The State was aware of the highly involved relationship between two New Mexico school districts and TBR. **[Tr. 11/3/14 at 28:9-13]** As early as 1999, Deming Public Schools designated TBR as a residential treatment facility for delinquent and neglected children and submitted reports about TBR to the New Mexico Department of Education in relation to Title I funding. **[RP 534-537; RP 474-478]** Similarly, Silver Consolidated Public Schools applied for and received funding to pay 80 percent of the "tuition" for some adolescents to attend TBR. The funding application and quarterly reports described TBR as a "residential treatment program for at risk and troubled youth." **[RP 538-540; RP 518-519; RP**

474-478] CYFD obtained copies of these and other documents through a June 2009 public records request. **[RP 541-543; RP 474-478]**

5. Additionally, the State was aware that Deming Public Schools agreed to provide educational services at TBR through a Memorandum of Understanding with TBR. **[RP 544-562; RP 474-478]**

6. CYFD had extensive ongoing communications with TBR and began the process of licensing the program because it recognized that TBR falls within the definition of "health facility" and "multi-service home." **[RP 490-491; Tr. 11/3/14 at 24:22–25:5]**

In these ways and others likely to be revealed through discovery **[RP 566-569]**, the State has not only outsourced a service that it could otherwise provide, it has enabled the program to continue and provided part of the financial means with taxpayer money for TBR to continue operating. TBR is nothing like the self-sustained, completely private dairy at issue in *Martinez*, 1987-NMCA-131, the key case upon which the State relied in its oral argument. **[Tr. 11/3/14 at 8:11-10:3]** Moreover, as explained below, the precedential value of *Martinez* – to the extent it was not completely overruled by *Bober* and *Cobos* – is questionable in light of the more recent case law. *See* Section II, *supra*. TBR is, instead, essentially a quasi-public program that the State has a duty to operate and maintain to promote the safety and well-being of the vulnerable children who live there.

B. Residential programs like TBR are "health facilities" as defined by New Mexico statutes and regulations and are subject to extensive regulation, demonstrating that the State has a duty to operate and maintain the premises to prevent injuries, including those caused by abuse, neglect, and endangerment.

TBR is a "health facility" under New Mexico law, meaning the State had extensive powers and duties that go far beyond the "discrete administrative" types of activities that have been held to be insufficient for a waiver under Section 41-4-6. *See, e.g., Archibeque*, 1993-NMSC-079. The Legislature has defined "health facility" to include a "boarding home not under the control of an institution of higher learning, child care center, [or] shelter care home." NMSA 1978, § 24-1-2(D) (2007). The Public Health Act provides that a health facility "**shall not be operated without a license issued by [CYFD].**" NMSA 1978, § 24-1-5(A) (2005); (emphasis added); *see also* § 24-1-2(A) (defining the term "department" in the statute to mean CYFD). Although the statute does not further define the terms "boarding home not under the control of an institution of higher learning," "child care center," or "shelter care home," one or more of these terms encompass TBR based on the ordinary meanings of the words. *City of Albuquerque v. Sanchez*, 1992-NMCA-038, ¶ 11, 113 N.M. 721 (noting that "[u]nless the legislature indicates otherwise, we give the words of the statute their ordinary meaning.") (citing *State ex rel. Klineline v. Blackhurst*, 1988-NMSC-015, 106 N.M. 732).

Beyond the ordinary meanings of the terms, the regulations promulgated pursuant to Section 24-1-1 *et seq.* provide guidance as to what types of facilities are included under the umbrella of "health facilities" and "shelter care homes." The State, through CYFD itself, included the following specific definitions in its regulations governing health facilities (titled "Regulations Governing Residential Shelter Care Facilities for Children"):

- **Community home**: "a facility [that] operates twenty-four (24) hours a day providing full time care, supervision and support needed to not more than sixteen (16) resident children in a single residential building and [that] meets the definition incorporated in [NMSA 1978, § 9-8-13 (2007)]. The facility provides parenting, activities and experiences needed by a child to develop and realize their full potential."

- **Multi-service home**: "a facility that provides residential care to children who have been referred by other agencies or parents because of abuse, neglect, delinquency, substance abuse, or other problems."

7.8.3.7 (L), (FF) NMAC. TBR is a facility that provides residential care to children who have been referred by other agencies – such as CYFD's Juvenile Probation and Parole – or parents because of abuse, neglect, delinquency, substance abuse, or other problems, meaning it is a multi-service home, and CYFD has in the past acknowledged as much. **[RP 490-491]** No "loophole" exists in either the statutes or the regulations that would allow facilities like TBR to operate without a license and without any oversight. *See generally* 7.8.3.1 NMAC *et seq.*

(providing no exception for "wilderness programs" or any other descriptive term that would encompass TBR); NMSA 1978, § 24-1-5 (2005) (same).

i. Statutory provisions reflect New Mexico's public policy that the State has a duty to operate and maintain adolescent residential facilities like TBR to prevent injuries and to prevent the needless endangerment of adolescent children in New Mexico.

The Legislature has given CYFD extensive authority over programs and facilities like TBR and has mandated that CYFD oversee these programs and promulgate its own regulations controlling them. *See* NMSA 1978, § 24-1-3(I) (2001); § 24-1-5(B). The "licensing" section of the statute, for one, goes far beyond "administrative" authority to do things like inspect for safety or sanitation. *See generally* Section 24-1-5 (giving CYFD extensive power over "health facilities"). Among the duties assigned to CYFD are the following mandates:

> ... when there are reasonable grounds to believe that a child is in imminent danger of abuse or neglect while in the care of a child care facility, **whether or not licensed**, or upon the receipt of a report pursuant to [NMSA 1978, § 32A-4-3 (2005), imposing a duty upon "every person" to report child abuse], the **department shall consult with the owner or operator of the child care facility. Upon a finding of probable cause, the department shall give the owner or operator notice of its intent to suspend operation of the child care facility** and provide an opportunity for a hearing to be held within three working days, unless waived by the owner or operator. Within seven working days from the day of notice, the secretary **shall** make a decision, and, if it is determined that any child is in imminent danger of abuse or neglect in the child care facility, **the secretary may suspend operation of the child care facility for a period** not in excess of fifteen days....

§ 24-1-5(N) (emphasis added). For facilities operating *without* a license, the Legislature has given CYFD the power to issue and enforce a cease-and-desist order, and for those operating *with* a license, CYFD may revoke or suspend the license or impose an intermediate sanction or civil monetary penalty when a violation has occurred. §§ 24-1-5 (A), (H). The intermediate sanctions available include restricting admissions to the facility and placing CYFD monitors at the facility. NMSA 1978, § 24-1-5.2(A)(1) (2005). The statute also gives the department the option to initiate **receivership proceedings** for a facility being operated without a valid license, NMSA 1978, § 24-1E-3(A)(1) (1996), which would give CYFD the duty to, among other things, perform all acts necessary to:

> (a) correct or remedy each condition on which [CYFD as receiver's] appointment was based;
>
> (b) ensure adequate care and necessary services for each resident or other person in the health facility;
>
> (c) bring the facility into compliance with all applicable state and federal laws, rules and regulations; and
>
> (d) manage and operate the health facility, including closing down, expanding or initiating new operations, hiring and firing officers and employees, contracting for necessary services, personnel, supplies, equipment, facilities and all other appropriate things, purchasing, selling, marshaling and otherwise managing its property and assets, paying the facility's obligations that are directly related to the health facility's operations or for providing adequate care and necessary services to residents or for other persons in the health facility, borrowing money and property and giving security for these and expending funds of the facility ....

NMSA 1978, § 24-1E-5(A) (2007).

These statutory provisions demonstrate that CYFD's responsibilities with respect to facilities like TBR are much more extensive than the simple discrete administrative tasks that may have been insufficient to give rise to a duty of care in cases such as *Archibeque*, 1993-NMSC-079, and *Martinez*, 1987-NMCA-131. The statutes and regulations governing "health facilities" are aimed at protecting the portion of the public that resides in facilities like TBR, and a decision not to follow these statutes creates a dangerous condition for all of the children affected by those facilities. Thus, the State has a duty of care to the children residing in programs like TBR, including a duty to take preventative and corrective measures to protect the children and adolescents residing on the premises of those programs. *See Cobos*, 1998-NMSC-049, ¶ 13. The actions the State should have taken with respect to TBR fall squarely within the State's duty to make safe all of those premises where some of the most vulnerable children in our state reside, and which receive taxpayer funding for services they promise to provide.

ii. CYFD regulations demonstrate that the Department has undertaken the duty that was mandated by the Legislature to operate and maintain facilities like TBR to prevent injuries and to prevent the needless endangerment of adolescent children in New Mexico.

The broad, extensive regulations governing facilities like TBR apply to all residential youth programs that fit within the definition of "health facility" (see

Section III(B), *supra*), whether they are public or private and whether they are profit or non-profit. 7.8.3.2(A) NMAC. These regulations demonstrate that CYFD, in keeping with its statutory duties, has undertaken the duty to oversee programs like TBR that maintain custody over children and adolescents. *See Cobos*, 1998-NMSC-049, ¶ 16 (holding that the "Plaintiff has shown that Defendants engaged in a voluntary undertaking to effectuate the policies in Section 3-45-2 by providing Plaintiff's family with safe housing they could not otherwise obtain," giving rise to a specific relationship between the parties that resulted in liability under Section 41-4-6). The regulations range from those aimed at ensuring the safety of the physical premises where residential programs conduct business (*see, e.g.*, 7.8.3.11 NMAC) to those aimed at preventing abuse and neglect by staff members in those programs. *See, e.g.*, 7.8.3.25 NMAC. These all add up to a duty by the State to conduct a basic level of oversight that would help to prevent the types of dangerous conditions that resulted in the injuries at issue and that needlessly occurred in this case. *See Cobos*, 1998-NMSC-049, ¶ 13.

New Mexico case law confirms that the State can be liable for negligence in the operation of privately owned facilities and programs based on regulations creating a duty to the people affected by those facilities. In *Young v. Van Duyne*, 2004-NMCA-074, ¶ 23, 135 N.M. 695, the court held that the plaintiff should have been allowed to proceed on the merits of his claim based on the allegation that

CYFD "operated" a privately owned foster home within the meaning of Section 41-4-6. The court suggested that statutes and regulations regulating foster homes could result in the State's "operation and maintenance" of a building for purposes of finding a waiver of immunity. *Id.* ¶¶ 22-23. *Young* distinguished between the State's duties pre- and post-adoption of a foster child. *See id.* ¶¶ 18-23 (holding that the plaintiffs' complaint stated a claim for negligent operation of a building in alleging that CYFD failed to disclose a foster child's violent tendencies); and *id.* ¶¶ 24-30 (holding that the complaint did not state a claim in alleging a duty after the child was adopted by the foster family). Before the adoption, CYFD may have been "operating" a private foster home within the meaning of the buildings waiver, based on the regulations governing foster homes. *Young*, 2004-NMCA-074, ¶ 30.

If the statutes and regulations governing foster homes in *Young* were sufficient to create a duty to operate and maintain a private building – a foster home – then the statutes and regulations governing "health facilities" surely give rise to a duty as well. The regulations giving rise to a duty under Section 41-4-6 in *Young* are similar, but in fact less extensive, than the ones regulating multi-service homes like TBR. *Compare* 8.26.4.1 NMAC *et seq.* (regulations governing foster care homes) *to* 7.8.3.1 NMAC *et seq.* (regulations governing facilities like TBR).

The State is in this case "driving the bus" through its regulations, even if it chose to sit back and do nothing while the bus crashed, which would still be

negligence in the operation of the rhetorical bus. *See Young*, 2004-NMCA-074, ¶¶ 20-21; *M.D.R. v. State ex rel. Human Servs. Dep't*, 1992-NMCA-082, ¶ 21, 114 N.M. 187 (Minzner, J., concurring) (observing that CYFD in its regulatory scheme governing foster homes was "for some purposes was 'driving the bus.'") (alluding to *Chee Owens v. Leavitts Freight Serv.*, 1987-NMCA-037, 106 N.M. 512, which involved alleged negligent operation of a school bus). TBR, like the foster home at issue in *Young*, should have been licensed and was required to be licensed under state law, and the regulations illustrate just how extensive the State's duties are with regard to multi-service homes, similar to the State's duties with regard to foster homes. *See Young*, 2004-NMCA-074, ¶ 30.

Moreover, many of CYFD's obligations relate directly to the physical premises used by residential programs like TBR. A facility and enterprise like TBR, which legally may only operate with a license (*see* Section 24-1-5(A)), may only obtain a license to operate if it submits:

- Floor plans to be approved by the Licensing Authority, including the proposed use of each room and interior dimensions of each room;
- Zoning and building approval by the appropriate authority, such as a county;
- Approval by the state fire marshal or other fire authority having jurisdiction at the location;
- Approval by the New Mexico Environment Department for water supply, waste or sewage disposal, and kitchen areas;

- Copy of a drug permit issued by the State Board of Pharmacy for administering prescriptions or modifying medication regimens implemented by licensed physicians.

7.8.3.11 NMAC. The facility's owners must also schedule an initial survey with the Licensing Authority after submitting its application for a license. 7.8.3.11(F) NMAC.

A program subject to licensing as a "health facility" is limited to having 16 children in a single residential building. 7.8.3.24 NMAC. The facility must have a dining room and provide laundry services. 7.8.3.48 NMAC; 7.8.3.49 NMAC. The regulations prohibit the use of mobile homes or trailers to house children (which TBR did). 7.8.3.57 NMAC.

The regulations also include requirements regarding:

- Mandatory provision of medical care and dental care
- Nutrition and food management
- Maintenance of the physical premises and utilities
- Housekeeping
- Water
- Sewage and waste disposal
- Fire safety and fire detection
- Lighting, lighting fixtures, and emergency lighting
- Exits
- Electrical standards and electrical cords
- Heating, ventilation and air conditioning
- Water heaters
- Toilets, sinks and bathing facilities
- Corridors and doors
- Minimum room dimensions and windows
- Floors and walls

- Access requirements for disabled children

7.8.3.54 to 7.8.3.79 NMAC.

Other regulations, going beyond the physical premises and extending to **safety** policies (*cf. Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-040, ¶ 9, 140 N.M. 205, discussed below), relate to health and safety conditions within programs governed as "health facilities." For example, once a program like TBR has obtained licensure and is therefore operating legally under state law, CYFD may suspend or revoke the license, including on an emergency basis if action is necessary to protect human health and safety. 7.8.3.17 NMAC. CYFD also may suspend or revoke a license or impose sanctions for other reasons, such as employment of people convicted of certain crimes. 7.8.3.18 NMAC.

CYFD's Licensing Authority is **required** to investigate complaints against a "health facility" "in which the health, safety, or welfare of a child could be in danger." 7.8.3.23 NMAC. A substantiated complaint can result in a number of sanctions, including the filing of criminal charges. *Id.* A program like TBR is required to report immediately "any serious incident or unusual occurrence which has, or could threaten the health, safety, or welfare of the clients or staff of the facility," including the following types of incidents that are directly relevant to this lawsuit (*see, e.g.*, First Am. Compl. ¶¶ 102, 110, 116-117) **[RP 244-246]**:

...

C. Any human act(s) by staff member(s) or client(s) of the facility which presents or poses possible physical and/or psychological health hazards;

D. Any human act(s) by staff member(s) or client(s) of the facility which results in the serious illness, injury, or physical and/or psychological impairment;

...

F. Any suspected client abuse, neglect or exploitation of a client, as defined in these regulations.

G. Incidents that include acts of physical harm to a client by staff or other clients.

....

7.8.3.25 NMAC.

Other regulations, also directly relevant to this lawsuit, require a "health facility" to have written rules that are "age appropriate and clear and understandable to the children in care." 7.8.3.27 NMAC. The facility must also advise the children and their parents or guardians that they have the right to privacy, the right to humane care and environment, the right to visitors in private at reasonable times, and the right to "written and telephone access, which includes the right to send and receive correspondence unopened by others and the right of private telephone conversations." 7.8.3.28 NMAC. Regarding discipline at a facility like TBR, the regulations impose strict guidelines that prohibit "cruel, severe, unusual or unnecessary punishment," such as the following means of punishment known to have been used at TBR:

(1) Physical exercises such as running laps or performing push-ups, when used solely as a means of punishment.

(2) Requiring or forcing the child to take an uncomfortable position, such as squatting or bending, or requiring or forcing the child to repeat physical movement when used solely as a means of punishment.

(3) Excessive denial of on-grounds program services or denial of any essential program services solely for disciplinary purposes.

(4) Depriving a child necessary food, water, rest, or opportunity for toileting.

(5) Denial of visiting or communication privileges solely as a means of punishment.

(6) Denial of shelter, clothing, or bedding.

(7) Extensive withholding of emotional response or stimulation.

(8) Use of restraints as punishment and for extensive periods of time.

...

(10) Verbal abuse such as shouting, screaming, swearing, name calling or any other verbal activity that is damaging to a child's self respect.

(11) Any form of discipline or punishment which is intended to frighten or humiliate a child.

(12) engaging in aggressive physical contact with a child.

7.8.3.80(F) NMAC.

Furthermore, directors and staff members of programs like TBR are required to meet minimum requirements, including that they have "good moral and responsible character and reputation," "[p]ossess adequate education, training, or

experience to provide for the needs of children," and have the "[p]hysical, emotional, and mental capacity to ensure the health, safety, and welfare of children pursuant to these regulations." 7.8.3.30(C) NMAC. Those directors and staff members must also meet certain training requirements on such subjects as "[a]cceptable behavior management techniques," "[c]risis management," and "[u]se of restraints if used in the facility program." 7.8.3.31(A)(1) NMAC.

Additionally, residential programs like TBR, to obtain the license required to operate legally, must have policies and procedures regarding:

> A. Reporting of suspected child abuse, neglect or exploitation, pursuant to these regulations.
>
> B. Actions to be taken in case of accidents or emergencies involving a child, including death.
>
> C. Disciplinary methods utilized by the facility.
>
> D. Actions to be taken when a child is found to be absent without authorization.
>
> E. The administration and preparation of medication.
>
> F. The handling of children's funds.
>
> G. Confidentiality of the children's records.
>
> H. The use of seclusion rooms and/or restraints, if used by the facility.
>
> I. Maintenance of building(s) and equipment.
>
> J. Fire and evacuation.

K. The handling of complaints received from clients, parents, guardians or any other person.

7.8.3.35 NMAC.

The regulations in 7.8.3 NMAC show conclusively that CYFD has undertaken a duty – at the direction of the Legislature – to operate and maintain residential programs like TBR, to prevent the very types of injuries and the endangerment that occurred in this case. Immunity for liability stemming from CYFD's breach of that duty is waived under Section 41-4-6.

IV. THE STATE OF NEW MEXICO IS LIABLE FOR NEGLIGENCE IN THE OPERATION AND MAINTENANCE OF A BUILDING FOR REASONS INCLUDING ITS FAILURES TO ACT WHEN IT HAD A DUTY TO DO SO.

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. **[RP 253-355]** That failure to act constitutes negligence in the operation and maintenance of a building within the meaning of Section 41-4-6. "Liability for acts or omissions under the Tort Claims Act 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." § 41-4-2(B). A person or entity may be negligent because of an action that should not have been taken or, conversely, a failure to act when an action should have been taken. *See* UJI 13-1601 NMRA (instructing that "[t]he term 'negligence' may relate either to an act or a failure to act."). It is the

latter aspect of negligence that is most relevant to the State's liability in this case, although the State also committed affirmative acts of negligence in placing its stamp of approval on the program despite TBR's failures to comply with state law.

The fact that the State has chosen not to operate and maintain a program does not mean that its duty to do so is nonexistent. *See Cobos*, 1998-NMSC-049, ¶ 7 (concluding that "the Legislature intended the waiver to apply to any building that public employees have a duty to operate or maintain."). The Uniform Jury Instructions provide that "[a] failure to act, to be 'negligence', must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to ... another." UJI 13-1601. Thus, the Court's task is to determine not whether the State has operated and maintained TBR negligently, but rather whether it has a duty to operate and maintain based on the multiple statutes, regulations, contracts, and other points of relationship between the State and TBR, as discussed in Section III, *supra.*, and if so, to remand to allow a jury to decide whether the State breached its duty to operate and maintain. *Bober*, 1991-NMSC-031, ¶ 17 n. 4.

The language in NMSA 1978, Section 41-4-5 is similar to the statute waiving immunity for operation and maintenance of buildings, creating an exception for suits involving "damages ... caused by the negligence of public employees while acting within the scope of their duties in the operation or

maintenance of any motor vehicle, aircraft or watercraft" (the "vehicles waiver"). In *McCurry v. City of Farmington*, 1982-NMCA-055, 97 N.M. 728, the court held there was a genuine issue of material fact as to whether the vehicles waiver applied to claims stemming from a fire department's burning of junk automobiles on private property. *Id.* ¶ 16. It was precisely the fact that the governmental entity had *not* "maintained" the automobiles in question that gave rise to liability and a waiver of immunity, as

> [t]he maintenance of motor vehicles connotes the act of keeping them safe for public use. Certainly, burning of automobiles is inconsistent with this concept. When the plaintiffs allege that the defendants negligently maintained motor vehicles we can interpret this to mean that the burning was the cause of the activities and circumstances that followed.

Id. ¶ 14. Similarly, in this case, it was the State's failure to operate and maintain TBR despite its duty to do so that gives rise to its liability under Section 41-4-6. **[RP 253-355]**

V. PLAINTIFFS' CLAIMS ARE BASED ON OPERATION AND MAINTENANCE, NOT "ADMINISTRATION."

The District Court's decision was based on a distinction – administration versus operation and maintenance – that has largely lost its significance in the evolving case law regarding the building waiver. The district relied on the reasoning in *Archibeque*, 1993-NMSC-079, finding that the claims "go to administration, as opposed to operation and maintenance of buildings...." **[Tr.**

11/3/14 at 39:20-21–40:13; 49:13-16] However, Plaintiffs' claims in this case go far beyond allegations that the State breached discrete "administrative" duties related to the operation of TBR.

New Mexico's appellate courts have not clearly defined the term "administrative" in this context or explained the distinction between an "administrative" duty and a duty involving "operation and maintenance." However, *Archibeque* indicates that if the state entity's alleged duty relates to the safety of a portion of the public affected by the State's actions, the duty is one of operation and maintenance rather than "administration," the latter of which involves decisions that affect an individual rather than a portion of the public. *See Archibeque*, 1993-NMSC-079, ¶ 11. In *Archibeque*, the defendant "failed to check an available printout of current inmates, gave the plaintiff misinformation about his enemy's presence at the penitentiary, and permitted the plaintiff to be released in the general prison population." *Callaway v. N.M. Dep't of Corr.*, 1994-NMCA-049, ¶ 18, 117 N.M. 637 (discussing and distinguishing *Archibeque*). Thus, if the duty relates to the safety of, *e.g.*, one individual like the prisoner in *Archibeque* who alleged he had been misclassified, then the duty is an "administrative" one. *See Archibeque*, 1993-NMSC-079, ¶ 11.

The court in *Archibeque* distinguished *Castillo v. City of Santa Fe*, 1988-NMSC-037, 107 N.M. 204, which held that loose-running dogs could constitute a

dangerous or unsafe condition on land in the context of a government entity's duty to "maintain" the premises of an housing project. 1988-NMSC-037, ¶¶ 9-10. The court in *Archibeque* explained:

> The roaming dogs in *Castillo* presented an unsafe condition for the public generally, or at least that portion of the public residing in or invited to the housing project. In *Castillo*, waiving immunity under Section 41-4-6 was appropriate in light of the statute's purpose to ensure the safety of *the general public*. No similar situation presents itself in the case at bar. While Moya-Martinez's misclassification of Archibeque put him at risk, the negligence did not create an unsafe condition on the prison premises as to the general prison population.

1993-NMSC-079, ¶ 11 (emphasis in original). The Court of Appeals' decision in *Callaway*, 1994-NMCA-049, provides further guidance. In *Callaway*, the facts were similar to those in *Archibeque*, as the claims arose from injuries the plaintiff suffered when he was severely beaten by other inmates in prison who were known gang members. *Id.* ¶ 4. However, the court in *Callaway* held that the plaintiffs stated a claim under Section 41-4-6. *Id.* ¶ 19. The difference in *Callaway* was that the plaintiff alleged it was the gang members who should have been removed from the general population, since they presented a dangerous condition, while in *Archibeque* the allegation was that the plaintiff should have been placed in a different population, and the state entity's mistake resulted in a danger to the plaintiff. *Id.* ¶ 18. *Callaway* noted the significance of the difference "between a 'discrete administrative decision' which does not waive immunity and 'a general condition of unreasonable risk from negligent security practices' which could

waive immunity" and held that the case was distinguishable from *Archibeque* for that reason. *Id.*

In this case, the District Court's reliance on *Archibeque* was misplaced, since this case does not involve a "discrete administrative decision" like the one at issue in *Archibeque* but instead involves failures by the State that endangered each and every child residing at TBR and those who might reside there in the future. This case is more like *Castillo* and *Callaway* than *Archibeque*, as the State's approval of TBR's operation, and its provision of funding, without any oversight or licensing – in direct violation of state law – created a dangerous condition for the general population of the residents of TBR. Therefore, the State's duties were not merely "administrative," and immunity is waived even under the analysis of *Archibeque*. *See Archibeque*, 1993-NMSC-079, ¶ 11.

Moreover, to the extent that the distinction between "administration" and "operation and maintenance" may have depended on whether a plaintiff's injuries were caused by a physical defect in a building, that aspect of *Archibeque* is no longer good law in light of *Cobos*, 1998-NMSC-049. The courts must focus on the duties of public employees and whether a "dangerous condition" may have existed because of the State's negligence, not whether an alleged injury was caused by a physical defect or physical condition on a property. *Callaway*, 1994-NMCA-049, ¶ 19.

If there was any doubt after *Cobos* about the expansive nature of the scope of Section 41-4-6, the Supreme Court put that doubt to rest in *Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-040, 140 N.M. 205, in which the court held the waiver extended to negligence by a school district in implementing and following safety policies meant to protect a girl with asthma. "The waiver applies to more than the operation or maintenance of the physical aspects of the building, and includes **safety policies** necessary to protect the people who use the building." *Id.* ¶ 9 (emphasis added). In *Upton*, the court held that the building waiver applied where the plaintiffs' daughter died as the result of an asthma attack at school. *Id.* ¶ 1. The school's liability stemmed from (1) ignoring information the family had provided about the girl's condition and her special needs during physical activity; and (2) failure to follow proper emergency procedures when the girl had an asthma attack. *Id.* ¶ 21. The court held that "[t]he school's failures, if proven, created a dangerous condition for all special-needs children, and with regard to emergency responsiveness, for every student at the school," and thus the buildings waiver applied, and the Court of Appeals' decision to the contrary was reversed. *Id.* ¶ 24.

Plaintiffs' claims in this case do not arise from a failure to perform a discrete administrative function like the misclassification of a prisoner, as was the case in *Archibeque*, 1993-NMSC-079. Instead, Plaintiffs' claims stem from the State's negligence in the operation and maintenance of the "youth program" and the

premises on which the program conducts business and maintains custody of children, creating a danger for each and every child unfortunate enough to end up in that program. *See* First Am. Compl. ¶¶ 153-167 **[RP 253-254]**. The State's argument that the "basic premise of the Complaint is that CYFD could have and should have regulated and licensed the program" **[Tr. at 5:20-22]** is inaccurate and an understatement of epic proportions. *See* the statutory and regulatory authority discussed in Section III, *supra.*

VI. PUBLIC POLICY MANDATES THE RECOGNITION OF A DUTY OWED BY THE STATE TO THE CHILDREN IN RESIDENTIAL PROGRAMS LIKE TIERRA BLANCA RANCH BECAUSE THE STATE HAD KNOWLEDGE OF TBR'S OPERATION WITHOUT A LICENSE, KNEW OF THE NEEDLESS ENDANGERMENT OF CHILDREN AT TBR, AND BECAUSE TBR RECEIVED TAXPAYER MONEY FROM THE STATE.

The State has been well aware of TBR's dangerous operations and what has occurred there for at least a decade. **[RP 488-489** (CYFD's chronology of events regarding TBR)] Although the State's knowledge is certainly relevant to the factual issue of *breach* of duty, it is also relevant to the *existence* of a duty because it demonstrates the State's own recognition of its obligations and its authority over TBR. *See, e.g., First Nat'l Bank v. Diane, Inc.*, 1985-NMCA-025, ¶ 18, 102 N.M. 548. Part of the timeline that has come to light, through informal investigation alone, is as follows:

In 2005, the Licensing and Certification Authority ("LCA"), a division of CYFD, received a complaint about TBR and found TBR was operating an unlicensed Multi-Service Home in violation of the New Mexico Public Health Act and state regulations governing Residential Shelter Care Facilities for Children. **[RP 488-489; RP 490-491; RP 474-478]**

In 2006, CYFD, through the LCA, attempted to license TBR and prepared comprehensive two-phase plan to bring TBR into compliance with the law. **[RP 492-500; RP 474-478]** Because TBR consistently resisted CYFD's compliance plan, the Department drafted a cease-and-desist letter but never actually issued the letter. Instead, the State backed down, thus effectively providing its stamp of approval on the conditions at TBR. **[RP 488-489]**

On September 23, 2008, a juvenile TBR participant escaped with a satellite phone and called New Mexico State Police to report what was occurring at TBR. State Police officers found the boy several miles from TBR, wearing leg shackles. **[RP 503; RP 474-478]** On September 25, 2008, at the request of State Police, a CYFD official accompanied an officer to TBR to investigate the incident. **[RP 507-508; RP 474-478]**

On an unknown date during a visit to TBR, the LCA determined that children's rights were being violated at TBR. **[RP 511; RP 474-478]**

In spite of these facts, the State has given TBR at least $100,000 of taxpayer money. **[RP 485]** Because the State was dismissed on summary judgment without discovery having taken place, Plaintiffs in this case were not able to determine what the State required in exchange for that money or whether any additional funding was provided. **[RP 565-570]**

Despite all of the State's knowledge, despite at least one instance where the State provided funding, despite the State's placement of students at TBR and payment for their "tuition," and despite the State's own recognition that it had a duty to bring TBR into compliance with state law, the State did nothing to prevent further injuries caused by abuse, neglect, endangerment, and TBR's negligent hiring, training and supervision of employees. Public policy mandates that the Court recognize a duty by the State under Section 41-4-6 to provide an avenue of relief for the State's egregious, continuing failure to do anything to protect the children residing at TBR.

VII. AT A MINIMUM, THIS CASE SHOULD BE REMANDED TO DISTRICT COURT TO ENABLE PLAINTIFFS TO CONDUCT FULL DISCOVERY REGARDING THE EXTENT OF THE STATE'S RELATIONSHIP WITH TIERRA BLANCA RANCH AND WHAT THE STATE RECEIVED IN EXCHANGE FOR PROVIDING SUBSTANTIAL SUMS OF MONEY TO TBR.

As Plaintiffs argued below, summary judgment was inappropriate because Plaintiffs had not even begun discovery in this case and were without much of the

information that would better inform the Court about the sources of the State's duties to the children at TBR. **[RP 566-569; Tr. 11/3/14 at 22:20-22; 38:6-39:19]** *See Cobos*, 1998-NMSC-049, ¶ 12. New Mexico courts recognize that a party must be permitted "a sufficient amount of time to pursue discovery" before granting a dispositive motion. *See Doe v. Roman Catholic Diocese of Boise, Inc.*, 1996-NMCA-057, ¶ 21, 121 N.M. 738 (authorizing discovery before considering a motion to dismiss based on personal jurisdiction); *Marchiondo v. Brown*, 1982-NMSC-076, ¶ 16, 98 N.M. 394 (explaining that the granting of motions to dismiss and motions for summary judgment are generally improper when discovery has not been conducted into matters in the exclusive control of the defendants). TBR itself has acknowledged that it works in partnership with the State in the provision of its "services." This Court should hold that the State owed a duty of care in the operation and maintenance of the premises of TBR and that the Plaintiffs may proceed in their case. However, at a minimum, Plaintiffs respectfully request that this Court hold that the District Court erred in denying Plaintiffs the opportunity to engage in discovery to uncover the full extent of the State's relationship with TBR.

CONCLUSION

The information already available to Plaintiffs demonstrates conclusively that the State owed a duty of care to the children and adolescents residing at TBR. Based on the case law interpreting Section 41-4-6 of the New Mexico Tort Claims

Act, immunity is waived for the State's breach of that duty because the State's negligence created a dangerous condition on the TBR property affecting all of the children residing there.

Even if this Court disagrees that immunity is waived under Section 41-4-6 based on the facts already known, this case should be remanded to enable Plaintiffs to conduct discovery to learn the full extent of the State's involvement in TBR.

REQUEST FOR ORAL ARGUMENT

To this very day, the Tierra Blanca Ranch High Country Youth Program is accepting applications and taking minors into its custody to be taken off into the wilderness or one of its buildings with no access to communication with the outside world. Despite the clear mandate of its own regulations, the State continues to permit TBR to operate without any oversight of any kind. A decision by the Court of Appeals confirming the State's duty to operate and maintain programs like TBR through common-sense regulation and oversight could go a long way toward preventing the type of abuse that the Plaintiffs suffered while enrolled in TBR. Oral argument would be helpful in reaching that end because it would allow for an efficient resolution of any questions or concerns by the Court that may remain after the briefing is completed, thereby ensuring that an opinion can be drafted and filed as quickly as possible. Plaintiffs/Appellants therefore request oral argument pursuant to Rule 12-214(B)(1) NMRA.

Respectfully submitted,

Randi McGinn
A. Elicia Montoya
Katie Curry
Michael E. Sievers
Kevin Holmes
201 Broadway SE
Albuquerque, NM 87102
p/ (505) 843-6161
f/ (505) 242-8227
e/ Mike@McGinnLaw.com

Attorneys for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief-in-Chief was mailed to all counsel of record on this 27th day of August, 2015.

Michael E. Sievers
Attorney for Plaintiffs/Appellants