

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 12/28/2018 10:04 AM

2 Opinion Number: _____

3 Filing Date: December 28, 2018



Mark Reynolds

4 **No. A-1-CA-35800**

5 **MARIA CUMMINGS, Individually**
6 **and as Personal Representative of**
7 **the ESTATE OF SHAUN MICHAEL**
8 **CHAVEZ; JANA VALLEJOS, Individually**
9 **and as Personal Representative of the**
10 **ESTATE OF DONOVAN VALLEJOS; and**
11 **LEON SALAZAR, Individually, on behalf**
12 **of themselves and all others similarly**
13 **situated,**

14 Plaintiffs-Appellants,

15 v.

16 **BOARD OF REGENTS OF THE**
17 **UNIVERSITY OF NEW MEXICO, a**
18 **body corporate of the State of New Mexico,**
19 **for itself and its public operations, including**
20 **UNIVERSITY OF NEW MEXICO HEALTH**
21 **SCIENCES CENTER, and its components, THE**
22 **UNIVERSITY OF NEW MEXICO HOSPITAL,**
23 **and UNIVERSITY OF NEW MEXICO**
24 **SCHOOL OF MEDICINE,**

25 Defendants-Appellees.

26 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
27 **Alan M. Malott, District Judge**

28 Vigil Law Firm, P.A.
29 Jacob G. Vigil
30 Albuquerque, NM

- 1 Freedman Boyd Hollander Goldberg Urias & Ward, P.A.
- 2 Joseph Goldberg
- 3 Frank T. Davis
- 4 Albuquerque, NM

- 5 for Appellants

- 6 Rodey, Dickason, Sloan, Akin & Robb, P.A.
- 7 Edward Ricco
- 8 Leslie McCarthy Apodaca
- 9 Andrew G. Schultz
- 10 Nelson Franse
- 11 Albuquerque, NM

- 12 Walz & Associates
- 13 Jerry Walz
- 14 Albuquerque, NM

- 15 for Appellees

OPINION

VIGIL, Judge.

{1} Plaintiffs, Maria Cummings, individually and as personal representative of the estate of her son Shaun Michael Chavez, brought a class action complaint for medical and other negligence against Defendants (UNMH) resulting from treatment provided to pediatric cancer patients at UNMH. Plaintiffs appeal from an order of the district court dismissing their claims on grounds that UNMH did not receive notice of Plaintiffs' claims as required by the Tort Claims Act (TCA), NMSA 1978, Section 41-4-16 (1977). We conclude that Plaintiffs provided UNMH with written notice of their claims in compliance with the TCA and reverse. Because we reverse on this basis, we do not address Plaintiffs' remaining arguments.

BACKGROUND

I. The UNMH Investigation of Its Pediatric Oncology Program

{2} In 1987, after a review of UNMH's pediatric cancer program conducted by physicians from the Dana-Farber Cancer Institute and Harvard Medical School, UNMH received a letter stating that UNMH was not employing standard protocols in treating its pediatric cancer patients and "[s]trongly encourage[d] that all children with cancer be treated on protocols if at all possible." On March 3, 1997, Dr. Jami Frost, a physician in the pediatric cancer program at UNMH, wrote a letter to the Chair of the Department of Pediatrics, Dr. John Johnson, expressing concern about UNMH's treatment of pediatric cancer patients. The letter states:

1 Dr. Winter and I have identified several of our patients who are
2 presently receiving non-standard treatment for their high risk ALL.
3 This treatment, known as LSA2L2, was standard therapy for children
4 in the 1970s. Since that time, several research trials have proven that
5 this treatment is not as effective in providing long-term disease-free
6 survival for children with high risk leukemia. . . . It appears that children
7 treated at UNM Pediatric Oncology Program have been treated on this
8 same protocol for many years, without any changes made in regard to
9 availability of more effective therapy.

10 I have contacted two nationally recognized experts in the treatment of
11 childhood leukemia. . . . Both of these consultants agree that this
12 treatment is substandard. Both agreed that it is not medically ethical to
13 continue these patients on this protocol[.]

14 {3} On May 13, 1997, Dr. Frost followed up with a memorandum addressed to
15 Dr. Johnson and other UNMH administrators, including the Dean of the University
16 of New Mexico Medical School, Paul Roth, discussing the findings of her
17 investigation into the treatment of pediatric cancer patients at UNMH between
18 approximately 1980-1997. Dr. Frost's memorandum indicated that the survival rate
19 for these patients was "well below published national rates." Dr. Frost's
20 memorandum was accompanied by a list of 217 pediatric cancer patients whose
21 treatment was reviewed and who were currently receiving treatment, with an
22 acknowledgment that the list may not be exhaustive of all pediatric cancer patients
23 treated at UNMH between 1980 and 1997. Shaun is not on the list.

24 {4} In response to Dr. Frost's letter and memorandum, UNMH began an internal
25 investigation into the treatment of pediatric cancer patients by Dr. Marilyn Duncan,
26 M.D. for acute lymphoblastic leukemia (ALL). On April 9, 1998, UNMH notified

1 at least two of its patient health insurance carriers that Dr. Duncan had been placed
2 on extended leave and was no longer seeing patients while UNMH conducted an
3 investigation into her treatment of pediatric cancer patients, which “apparently was
4 not a treatment recommended by national pediatric oncology clinical trials groups.”
5 UNMH emphasized that “we are sending you this notice, because you need to be
6 aware of [Dr. Duncan’s] status in the event that [you] receive[] calls regarding
7 her. . . . [UNMH] is presently conducting a comprehensive investigation of this
8 matter and is attempting to determine its implications for both our patients and our
9 institution.”

10 {5} Dr. Cristina Beato, the Assistant or Associate Dean of UNMH, stated that as
11 part of UNMH’s investigation, she “instructed employees of UNMH to call certain
12 patients treated for ALL by Dr. Duncan, as well as families of patients so treated,
13 and inform them that they or their children may not have received the recommended
14 treatment for their ALL.” Ms. Cummings was not contacted.

15 {6} In making these calls, Dr. Beato instructed the callers to “complete a
16 ‘telephone work sheet’ ” or script. These scripts are marked “ATTORNEY-CLIENT
17 PRIVILEGED[.]” One script dated March 29, 1998, titled “Child has died script[.]”
18 prompts the caller to say “[w]e are contacting families of children treated for
19 leukemia here, because it now appears that at least some of the children did not
20 receive all of the treatment that was recommended at the time the children were

1 being seen.” The script includes “possible appropriate answers” to patients’ families
2 concerning the physician who treated their child, which are limited to “I’m sorry I
3 don’t have any first-hand knowledge about that” and “I’m not in administration and
4 I just don’t have any first-hand information about that.” The script also contains a
5 section titled “WHAT NOT TO TALK ABOUT[.]” The points under this heading
6 direct:

- 7 1. Do not volunteer anything about who was prescribing or
8 supervising the treatment.
- 9 2. Don’t get into the specifics of which protocols were or were not
10 followed.
- 11 3. Don’t make any statements about what effect the problems may
12 or may not have caused in the treatment of children—there are
13 too many variables of treatment to even attempt this fairly at this
14 point.
- 15 4. Don’t say anything about how the problem was uncovered—you
16 have no first-hand information about that, and that the matter is
17 under internal investigation and [is] the subject of a personnel
18 action.

19 {7} Similarly, another script titled “Script 2b – Child who was in remission, but
20 has suffered a relapse and is currently in treatment” states that “[t]he physician who
21 made the decisions on how to treat pediatric oncology patients at UNM for many
22 years and who was responsible for selecting the treatment to be provided to your
23 child, is now on extended leave and is no longer seeing patients. However, we have
24 learned that this physician did not select treatment for your child that was the

1 treatment recommended at that time by a national clinical trials group supported by
2 the National Cancer Institute [called the Pediatric Oncology Group (POG)].” The
3 script goes on to state:

4 UNM is in the process of investigating why your child and
5 certain others with ALL did not receive the treatment recommended by
6 POG. In August 1996, two new pediatric oncologists . . . joined our
7 staff. As they became more familiar with the treatments that had been
8 provided in the past, they, along with nurses, pharmacists and social
9 workers of the pediatric oncology team, began to raise concerns about
10 therapy choices for children with ALL, which led us to reexamine the
11 treatment given to your child.

12 Although the physician who chose the treatment for your child
13 did not select the POG-recommended treatment, even though that
14 physician was a member of POG and very knowledgeable about its
15 recommended treatment protocols, the physician apparently believed
16 the treatment being prescribed for your child would be equally
17 effective. We do not know if that treatment was equally effective for
18 your child.

19 **II. The Litigation Against UNMH**

20 {8} On February 27, 2001, the estate of Steven Lawrence Lovato filed a class
21 action complaint against UNMH, which we refer to as the *Lovato* class action,
22 grounded on the alleged negligence of Dr. Duncan in her evaluation, care, and
23 treatment of pediatric cancer patients at UNMH. On June 1, 2001, a second class
24 action complaint was filed by the estate of Christopher Joseph Sedillo against
25 UNMH, which we refer to as the *Sedillo* class action. The *Sedillo* class action was
26 grounded on the same alleged negligence of Dr. Duncan.

1 {9} On December 3, 2001, the *Lovato* class action plaintiffs filed a motion to
2 allow Plaintiffs to be joined as plaintiffs and additional class representatives. The
3 moving papers assert that the named plaintiff in the *Lovato* class action and Shaun
4 were both pediatric leukemia patients of Dr. Duncan and members of the putative
5 class. The motion was granted. For reasons not pertinent to the appeal, the *Lovato*
6 plaintiffs were later dismissed from the *Lovato* class action, and the caption was
7 amended to reflect that Plaintiffs were henceforth the plaintiffs in the *Lovato* class
8 action. The operative complaint in this appeal is the third amended *Lovato* class
9 action complaint in which Plaintiffs are named as plaintiffs and class representatives.

10 {10} UNMH subsequently filed a motion to dismiss Plaintiffs' complaint, alleging
11 that Plaintiffs failed to provide notice of their claims as required by the TCA. After
12 Plaintiffs responded, the district court granted the motion to dismiss on the basis that
13 Plaintiffs are "unable to establish that UNM[H] was ever given timely notice by
14 Plaintiff Cummings, on her own behalf or on behalf of Shaun Cummings, that there
15 was a likelihood of litigation stemming from the pediatric oncology facility's
16 conduct." Plaintiffs filed a motion to reconsider, which the district court denied. In
17 denying the motion to reconsider, the district court explained its reasoning was that
18 "regardless of when the time period for purposes of [TCA] notice began to run,"
19 Plaintiffs "failed to establish that UNM[H] was ever provided appropriate notice."

20 {11} Initially, we observe that the district court used an incorrect standard in

1 granting UNMH's motion to dismiss. The burden was not on Plaintiffs to prove
2 proper notice under the TCA—it was UNMH's burden to prove inadequate notice.
3 *Dutton v. McKinley Cty. Bd. of Comm'rs*, 1991-NMCA-130, ¶ 7, 113 N.M. 51, 822
4 P.2d 1134 (“[U]nder the [TCA] defendants have the burden of proving that the notice
5 requirement was not met.”). Plaintiffs appeal.

6 **III. Facts Relating to Notice**

7 {12} Shaun was born on January 1, 1978. He was diagnosed with ALL when he
8 was eighteen months old, and was treated at UNMH by Dr. Duncan. In 1980, Shaun
9 moved with his family to Cleveland, Ohio for about six months while Shaun's ALL
10 was in remission, and then returned to New Mexico, where he relapsed. Shaun
11 continued treatment at UNMH, where he was placed on a LSA2L2 chemotherapy
12 regimen in December 1981. Shaun passed away on September 29, 1983, from
13 complications of ALL.

14 {13} In early January 2001, Ms. Cummings retained counsel to represent her in a
15 potential case against UNMH relating to Shaun's care and treatment. When she met
16 with counsel, Ms. Cummings did not know what treatment protocols Shaun had
17 received at UNMH. At no time, while Shaun was being treated at UNMH, or after
18 he passed away, did UNMH notify Ms. Cummings that it had not followed nationally
19 recognized, proper treatment protocols when treating Shaun for ALL.

1 {14} On February 22, 2001, counsel requested a complete copy of Shawn’s medical
2 records from UNMH. When the medical records were produced, they revealed that
3 Shaun was treated with a LSA2L2 protocol which, Ms. Cummings declared in an
4 affidavit, “was the subject of a class action case brought against UNMH by the
5 Sedillo family,” and “was the first time I learned that Shaun did not receive the
6 proper ALL treatment at UNMH.”

7 {15} Shortly after receiving Shaun’s medical records, Ms. Cummings signed an
8 affidavit under the caption of the *Sedillo* class action on July 24, 2001, which was
9 filed in the *Lovato* class action on July 26, 2001. The affidavit was filed in support
10 of a motion to consolidate the *Sedillo* class action into the *Lovato* class action. We
11 refer to this affidavit as the “notice affidavit” which we discuss in greater detail
12 below. The motion to consolidate was denied, but has no bearing on our analysis.

13 **DISCUSSION**

14 {16} To maintain a claim of damages against a governmental agency, the TCA
15 requires that the agency have notice of the claim. *See* Section 41-4-16. Among the
16 ways in which the notice requirement may be satisfied is by “written notice” that is
17 presented “to the risk management division for claims against the state” which stated
18 “the time, place and circumstances of the loss or injury.” Whether the district court
19 properly dismissed Plaintiffs’ claims for failing to comply with the TCA’s notice
20 requirement presents an issue of law, which we review de novo. *See Herald v. Bd.*

1 of *Regents of Univ. of N.M.*, 2015-NMCA-104, ¶¶ 21, 48-51, 357 P.3d 438 (applying
2 de novo review to order dismissing TCA claims for failing to comply with TCA
3 notice requirement); *Smith v. State ex rel. N.M. Dep't of Parks & Recreation*, 1987-
4 NMCA-111, ¶ 15, 106 N.M. 368, 743 P.2d 124 (“[W]hether written notice is
5 sufficient is a question for the court.”). We discuss whether UNMH received written
6 notice as required by the TCA, then address whether that notice was timely.

7 **IV. Sufficiency of the Written Notice**

8 {17} In the notice affidavit, Ms. Cummings states: Shaun was diagnosed with ALL
9 when he was one and one-half years old; he was diagnosed and treated at UNMH on
10 the LSA2L2 regimen; it was Dr. Duncan who treated him; and Shaun died on
11 September 29, 1983. Ms. Cummings further states in the notice affidavit that she and
12 Shaun’s estate are members of the *Lovato* and *Sedillo* class actions, “and as such,
13 have an interest and are parties to the lawsuits.”

14 {18} When the notice affidavit was filed in July 2001, the pending *Lovato* and
15 *Sedillo* class action complaints included allegations that Dr. Duncan was negligent
16 in her evaluation, consultation, care, and treatment of children suffering from cancer
17 from the time she commenced working at UNMH until she stopped practicing at
18 UNMH; that Dr. Duncan’s negligence resulted in the children suffering injuries and
19 death as well as damages to the parents of the children; that UNMH was vicariously
20 liable for Dr. Duncan’s negligence, as well as liable for its own negligence. Ms.

1 Cummings individually, and as representative of Shaun's estate, clearly falls within
2 the class described in the *Lovato* class action complaint which is described as
3 including "parents or other affected family members of a Duncan/UNMH patient"
4 as well as:

5 Any person who was seen by or whose medical care involved Dr.
6 Marilyn Duncan for the purpose of evaluation, consultation, treatment
7 and/or care for a medical condition involving any form of childhood
8 cancer from the first year she practiced medicine, or was employed
9 and/or had privileges to practice medicine at UNMH as a physician
10 specializing in the evaluation, consultation, care and treatment of
11 children suffering from cancer until the time she ceased to practice
12 medicine at UNMH.

13 Shaun's estate is also included within the class described in the *Sedillo* class action
14 as including:

15 All patients diagnosed with ALL or AML [acute myleoblastic
16 leukemia] who Marilyn Duncan/UNMHSC actually treated with
17 chemotherapy for purposes of notice only.

18 {19} Counsel for UNMH, which Plaintiffs describe as "UNM's (and its risk
19 management's) litigation attorney," both accepted service of the *Lovato* class action
20 complaint and was served with the notice affidavit in the *Lovato* class action.

21 {20} The *Lovato* class action complaint, filed on February 27, 2001, clearly
22 provided UNMH with notice of claims against it arising from allegations of fact that
23 Dr. Duncan was negligent in evaluating, consulting, care, and treating all of her
24 pediatric cancer patients during the entire time she was employed by UNMH, and
25 that the survival rate of pediatric cancer patients of Dr. Duncan between 1981 and

1 1983 is well below published national rates. The *Lovato* class action complaint also
2 gave UNMH notice of claims against it for its own alleged negligence. No
3 allegations have ever been made that UNMH was unable to investigate the claims
4 made in the original *Lovato* class action complaint, and in fact, the record
5 demonstrates that UNMH conducted a thorough investigation before the *Lovato*
6 class action complaint was filed and concluded that Dr. Duncan's treatment of her
7 pediatric cancer patients "apparently was not a treatment recommended by national
8 pediatric oncology clinical trial groups." These facts demonstrate that UNMH was
9 aware of the time, place, and circumstances of Dr. Duncan's and its own alleged
10 negligence, together with the fact that it was in fact sued for the alleged negligence.

11 {21} The purpose of the TCA notice requirement "is to ensure that the agency
12 allegedly at fault is notified that it may be subject to a lawsuit" and to "reasonably
13 alert the agency to the necessity of investigating the merits of the potential claim
14 against it." *Herald*, 2015-NMCA-104, ¶ 50 (alteration, internal quotation marks, and
15 citations omitted). The notice affidavit gave UNMH notice that Plaintiffs actually
16 intended to make claims against UNMH for their losses and injuries allegedly caused
17 by the negligence alleged in the *Lovato* and *Sedillo* class action complaints. As
18 Plaintiffs point out, the notice affidavit identifies Ms. Cummings and Shaun's estate
19 by name; it states that Shaun was diagnosed and treated by Dr. Duncan at UNMH;
20 that Shaun died on September 29, 1983; and that Ms. Cummings considers herself

1 and Shaun's estate to be members of the classes in the *Lovato* and *Sedillo* class
2 actions. In addition, when the notice affidavit was filed, UNMH had already
3 conducted investigations into the alleged negligence of Dr. Duncan, and notified at
4 least two of its patient health insurance carriers of the investigations. Under the
5 circumstances, we fail to see how UNMH can seriously argue that it was not given
6 "written notice stating the time, place and circumstances of the loss or injury"
7 suffered by Ms. Cummings and Shaun's estate. *See* Section 40-4-16(A). All of the
8 reasons for giving written notice under the TCA were satisfied.

9 {22} For the foregoing reasons, we conclude that UNMH was given written notice
10 of the time, place and circumstances of the alleged loss or injury suffered by
11 Plaintiffs as required by Section 41-4-16(A) of the TCA. We note that UNMH does
12 not argue that delivery of the notice affidavit to UNMH's attorneys fails to satisfy
13 the TCA under the circumstances. *See Martinez v. City of Clovis*, 1980-NMCA-078,
14 ¶ 18, 95 N.M. 654, 625 P.2d 583 (applying common rules of agency to conclude that
15 proper notice was given arising from negotiations between the plaintiff's attorneys
16 and the agency's insurer). Moreover, there is no material distinction between giving
17 notice through an affidavit attached to a pleading and sending a letter with the same
18 affidavit attached. The only remaining question is whether the notice was timely,
19 and we now turn our attention to that question.

1 **V. Timeliness of the Notice**

2 {23} Section 41-4-16(C) of the TCA provides that in a claim for wrongful death,
3 “the required notice may be presented by, or on behalf of, the personal representative
4 of the deceased person . . . within six months after the date of the occurrence of the
5 injury which resulted in the death.” The notice requirement under the TCA “accrues
6 when the plaintiff knows or should know the relevant facts, whether or not the
7 plaintiff also knows that these facts are enough to establish a legal cause of action”
8 *Maestas v. Zager*, 2007-NMSC-003, ¶¶ 20-21, 141 N.M. 154, 152 P.3d 141.

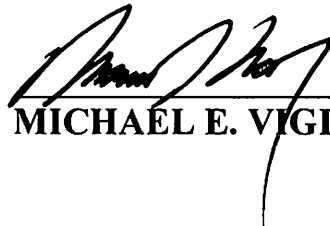
9 {24} Under *Maestas*, we conclude UNMH received timely notice. The undisputed
10 facts show that Shaun’s death on September 29, 1983, followed his receipt of a
11 LSA2L2 chemotherapy regimen. Ms. Cummings did not discover the facts relevant
12 to her claim against UNMH until she retained counsel to investigate her potential
13 wrongful death claim against UNMH arising from the hospital’s treatment of Shaun
14 and received Shaun’s full medical records, which occurred, at the very earliest, on
15 the same day Ms. Cummings’ counsel requested Shaun’s full medical records from
16 UNMH on February 22, 2001. This conclusion is supported by the affidavit filed by
17 Ms. Cummings in response to UNMH’s motion to dismiss, in which she stated that
18 at no time during Shaun’s treatment did UNMH inform her that it did not follow
19 nationally recognized standard protocols for treatment of ALL; at no time between
20 when Shaun passed away in September, 1983 to the present has UNMH notified her

1 that it failed to follow nationally recognized protocols for ALL in treating Shaun;
2 and that no one from UNM ever called, wrote, or otherwise contacted her about
3 Shaun's treatment at UNMH. Five months and five days passed between February
4 22, 2001, and the date on which Cummings filed the notice affidavit—on July 26,
5 2001. Therefore, by the time the six-month period for giving UNMH notice under
6 the TCA expired on August, 22, 2001, the hospital had already received notice of
7 Plaintiffs' claims.

8 **CONCLUSION**

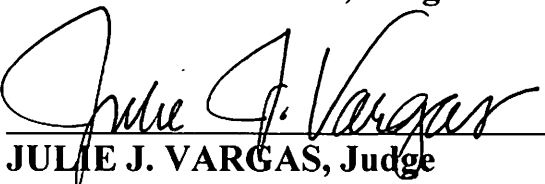
9 {25} The order dismissing Plaintiffs' claims and entering judgment in favor of
10 UNMH on grounds that notice of Plaintiffs' was not provided to UNMH as required
11 by the TCA is reversed.

12 {26} **IT IS SO ORDERED.**

13
14 
MICHAEL E. VIGIL, Judge

15 **WE CONCUR:**

16 
17 **J. MILES HANISEE, Judge**

18 
19 **JULIE J. VARGAS, Judge**