

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

JOHN MARTENS, et al.,
Plaintiffs,

v.

THE CITY OF ALBUQUERQUE,
Defendant.

FILED
2ND JUDICIAL DISTRICT COURT
Bernalillo County
2/8/2021 11:25 AM
CLERK OF THE COURT
Patsy Baca

D-202-CV-2017-05905

MEMORANDUM OPINION AND FINAL ORDER

This matter is before the Court on the issue of whether Defendant had actual notice, as required by the Tort Claims Act (TCA), of the claims brought in this lawsuit. Having considered the evidence and arguments presented at a hearing on September 28, 2020, the Court concludes Defendant did not have actual notice. Plaintiffs' motion to reconsider the summary judgment ruling that Plaintiffs did not satisfy the written notice requirement is **DENIED**. The Court is without jurisdiction and the case must be **DISMISSED**.

I. FACTS AND BACKGROUND

Plaintiffs' *Complaint for Injunctive Relief and Damages* (Complaint) alleges Plaintiffs are the natural grandparents of Victoria Martens. Michelle Martens is the mother of Victoria Martens. On August 24, 2016, Victoria, who was ten years old at the time, was murdered. The Complaint alleges the crime was committed by one of Michelle Martens' boyfriends, Fabian Gonzales, and by Jessica Kelley, while Michelle Martens did nothing to stop it. [Compl. ¶¶ 17–24.]

Plaintiffs have brought this lawsuit alleging Victoria's death in August 2016 is the result of Defendant's negligent failure to investigate a report it received from the Children Youth and Families Department (CYFD) in March 2016. The report alleged that another of Michelle Martens' boyfriends had attempted to kiss Victoria. The duty to investigate that the Abuse and Neglect Act imposes on law enforcement is the basis of Plaintiffs' claim that the TCA waives immunity. [Compl. ¶¶ 97, 105, 119, 129, 139.]

Defendant previously moved for summary judgment on the grounds that Plaintiffs failed to give notice as required by Section 41-4-16 of the TCA. The Court concluded that a November 2016 written notice sent on behalf of Plaintiffs was not sufficient as a matter of law and thus, Plaintiffs failed to satisfy Section 41-4-16(A)'s requirement to give written notice. The Court nevertheless denied summary judgment on the issue of notice because Defendant failed to establish it did not have actual notice of Plaintiffs' claims. [Memo. Op. & Order, filed June 29, 2020.] On September 28, 2020, the Court heard evidence and arguments on the issue of actual notice.

II. DISCUSSION

A. Plaintiffs' Motion for Reconsideration

Plaintiffs move the Court to reconsider its conclusion that the November 2016 notice does not satisfy the TCA's written notice requirement. The reasons the Court found the written notice insufficient are explained in detail in the Court's June 29, 2020 opinion. Stated briefly, the Court found the notice satisfied none of the purposes of written notice set forth in *Ferguson v. New Mexico State Highway Commission*. These purposes are to enable the entity to whom notice must be given to: (1) investigate the matter while the facts are accessible; (2) question witnesses; (3) protect against simulated or aggravated claims; and (4) consider whether to pay the claim or to refuse it. *Ferguson v. N.M. State Highway Comm'n*, 1982-NMCA-180, ¶ 12, 99 N.M. 194.

Plaintiffs assert two reasons for reconsideration. First, they argue the Court now has the benefit of Jeremy Worley's testimony from the September 28, 2020 hearing.

Mr. Worley was Plaintiffs' previous counsel. He testified that he drafted the November 2016 notice. Mr. Worley testified that at the time he drafted the notice the focus was on Fabian Gonzales. Fabian Gonzales was alleged to have been involved in Victoria's death at a time when

he was on probation. Mr. Worley testified that the circumstances of Victoria's death were still being investigated. He therefore drafted the November 2016 notice to provide the facts that were available at the time but also broadly enough to accommodate claims that were as yet unknown.

Mr. Worley's testimony regarding his intent when he drafted the November 2016 notice is not grounds to reconsider. Mr. Worley's testimony establishes the November 2016 notice was intentionally broad so as to accommodate unknown claims, but his testimony does not alter the conclusion that the November 2016 notice fails to satisfy the *Ferguson* factors.

Second, Plaintiffs argue the Court misread the November 2016 notice by overlooking language that is broad enough to encompass claims other than the failure to monitor Fabian Gonzales on probation. However, the issue is not the breadth or narrowness of the November 2016 notice. The reason the written notice fails is that it does not give notice of the claims brought in this lawsuit.

Whether the November 2016 notice is sufficient is a question for the court. *Smith v. State ex rel. Dep't of Parks & Recreation*, 1987-NMCA-111, ¶ 15, 106 N.M. 368. A notice is not adequate merely because it alerts an agency that it might be sued. Some information must be provided that alerts the agency as to *why* it may be sued. The purpose of the TCA notice requirement is to "reasonably alert the agency to the necessity of investigating the merits of the potential claim against it." *Cummings v. Bd. of Regents of Univ. of N.M.*, 2019-NMCA-034, ¶ 21 (citation and quotation marks omitted); *see also City of Las Cruces v. Garcia*, 1984-NMSC-106, ¶ 5, 102 N.M. 25 (written notice must contain information that puts the entity on notice of the alleged tort).

The merits of a claim cannot be investigated unless some information about the factual basis of the claim is provided. *See Powell v. N.M. State Highway & Transp. Dep't*, 1994-NMCA-035, ¶ 18, 117 N.M. 415 (agency must have notice that the particular incident was likely

to result in litigation). The November 2016 notice does not alert the Defendant that it should investigate a potential breach of its duties under the Abuse and Neglect Act, question witnesses with knowledge regarding the March 2016 CYFD referral that is the subject of this lawsuit, that its handling of the March 2016 CYFD referral was likely to result in litigation, or that it should evaluate the merits of a claim based on the duty to investigate reports of child abuse. The November 2016 notice alerts the Defendant it may be sued because it allegedly failed to monitor Fabian Gonzales on probation. That is not the claim that has been brought in this lawsuit. The claims in this case are based on Defendant's alleged failure to perform specific duties imposed by the Abuse and Neglect Act with respect to a particular CYFD referral.

The Court declines to reconsider its conclusion that the November 2016 notice is not sufficient to put Defendant on notice of the claims in this lawsuit. The motion to reconsider is denied.

B. Actual notice

Having determined as a matter of law that Plaintiffs did not give written notice, the Court heard evidence and argument on the issue of actual notice. *See Lopez v. State*, 1996-NMSC-071, ¶¶ 16, 22, 122 N.M. 611 (stating actual notice is a threshold issue to be heard by the court and may require an evidentiary hearing). The Court must determine whether “from the totality of the circumstances known to the government entity charged with fault in the occurrence, a reasonable person would have concluded that the victim may claim compensation.” *Id.* ¶ 16. “The knowledge that a governmental entity must possess in order to satisfy the actual notice requirement is the same as that required to be given in written notice, namely, that it may be subject to a lawsuit.” *Smith*, 1987-NMCA-111, ¶ 15 (citations omitted). Defendant bears the burden of proving inadequate notice. *Cummings*, 2019-NMCA-034, ¶ 11.

The Court concludes Defendant has met its burden of establishing it did not have notice of the claims asserted in this lawsuit. Defendant put on the testimony of Officer Evans. Officer Evans testified that in March 2016, he was a sergeant in the Crimes Against Children unit. In that capacity, Officer Evans reviewed the CYFD intake report that is the subject of this lawsuit. After reviewing the report, he made the decision not to assign it for further investigation.

Officer Evans' decision not to refer the CYFD report for further investigation is the basis of Plaintiffs' claims. According to Plaintiffs, Officer Evans' decision was negligent and a breach of Defendant's duties under the Abuse and Neglect Act. Officer Evans testified he was never notified, prior to the filing of this lawsuit, that Plaintiffs believed his decision was negligent, that it resulted in injury, or that it potentially could be the subject of a lawsuit. Officer Evans was not involved in the subsequent homicide investigation and did not know whether the March 2016 CYFD referral was part of the homicide investigation. The first time he learned of Plaintiffs' allegations was when Defendant's counsel gave him a copy of the Complaint after it was filed. [Sept. 28, 2020 CD 1, 2:00–10:00, 22:00–26:00.]

Defendant also put on the testimony of Detective Joshua Brown. In August 2016, Detective Brown was a detective in the homicide unit and was assigned as the lead detective in the investigation into Victoria's murder. Detective Brown spoke with Plaintiffs during the course of his investigation. He did not testify Plaintiffs told him they were contemplating suing Defendant or that they believed Defendant was responsible for Victoria's death. Detective Brown became aware of Plaintiffs' allegations after this lawsuit was filed, when he saw it on the news. [Sept. 28, 2020 CD 1, 26:00–36:00.]

Plaintiffs have offered no evidence they notified either Officer Evans or Detective Brown, or any person associated with the Defendant, of their claims that the March 2016 CYFD referral was handled incorrectly, that Defendant breached its duty to investigate reports of child

abuse received from CYFD, or that the failure to investigate the referral resulted in injury to Victoria. Instead, Plaintiffs assert that Defendant should have known from the November 2016 written notice that this lawsuit might follow.

The Court previously has determined the November 2016 notice does not suffice as written notice. The Court further concludes it also does not suffice as actual notice.

The TCA “contemplates that the state must be given notice of a likelihood that litigation may ensue, *in order to reasonably alert it to the necessity of investigating the merits of a potential claim against it.*” *Smith*, 1987-NMCA-111, ¶ 12 (italics added; citation omitted). The November 2016 notice does not provide any information that would put Defendant on notice of the necessity to investigate the CYFD referral, the role if any it played in Victoria’s death, or that Plaintiffs (or anyone) might claim compensation for the manner in which Defendant handled the report of alleged child abuse.

Plaintiffs point to the testimony of Mr. Worley who stated the November 2016 notice was broadly worded for the purpose of ensuring that undiscovered or potential claims would not be foreclosed. The conclusion the Court draws from Mr. Worley’s testimony is that the claims Plaintiffs are asserting in this lawsuit were not included in the November 2016 written notice. Mr. Worley testified he included in the November 2016 notice all the significant details he was aware of at the time that would support claims against the entities to whom the notice was directed, and he did not include facts related to the CYFD report or Defendant’s allegedly negligent handling of the report. [Sept. 28, 2020 CD 1, 53:00; CD 2, 00:00–8:30.]

Plaintiffs argue all the governmental entities named in the November 2016 notice knew Victoria had been the subject of a CYFD referral and therefore all had information upon which to base an investigation. The fact that Defendant had knowledge of the March 2016 CYFD referral regarding Victoria is not sufficient to satisfy the TCA notice requirement. Knowledge of the

referral is not knowledge that Plaintiffs believed Defendant to have been negligent with respect to the referral, nor is it knowledge that Plaintiffs believed Defendant's failure to investigate the referral subsequently caused Victoria's death. *See Powell*, 1994-NMSC-035, ¶¶ 16–18 (knowledge of injury is not sufficient where there is nothing to indicate defendant was aware of the cause or that person injured might sue for damages).

The Court finds Defendant did not have actual notice of the claims brought in this lawsuit. Defendant could not reasonably have concluded Plaintiffs would claim compensation for Defendant's handling of the CYFD referral, either from the November 2016 notice or from any of the other facts and circumstances known to it.

III. CONCLUSION

Plaintiffs did not give written notice of the claims asserted in this lawsuit. Defendant did not have actual notice of the claims presented in this lawsuit. No evidence has been presented that Plaintiffs gave notice of the claims, written or actual, prior to filing suit. Therefore, pursuant to NMSA 1978, § 41-4-16(B), the Court is without jurisdiction. *Herald v. Bd. of Regents of the Univ. of N.M.*, 2015-NMCA-104, ¶ 49 (court is jurisdictionally barred from considering the matter unless the public entity was given written notice or had actual notice). The suit hereby is **DISMISSED.**

IT IS SO ORDERED.


The Honorable Denise Barela Shepherd
District Court Judge

This is to certify that the foregoing document was e-filed on Feb. 8, 2021.

By /s/ Amy Ballou
Amy Ballou
Trial Court Administrative Assistant