IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRUCE E. THOMPSON, as Personal Representative of the Wrongful Death Estate of RICHARD BROWN

Plaintiff-Appellants,

vs.

Court of Appeals Case No: 30537

TORRANCE COUNTY BOARD OF COMMISSIONERS, SHERIFF CLARENCE GIBSON, DOROTHY GIBSON, JEANINE ARNOLD, MICHAEL STACK, JAMES LEDBETTER, and DEPUTY JOH DOE, individually and as Torrance County Sheriffs officers and employees, and THE STATE OF NEW MEXICO, NEW MEXICO STATE POLICE, a division of the NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, FARON SEGOTTA, CHIEF OF POLICE, SHARON DOE DISPATCHER, And OFFICER CHRIS COLEY, Individually and as New Mexico State Police Officers and employees,

Defendants-Appellees.

ON APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT
TORRANCE COUNTY, NEW MEXICO
HON. JUDGE KEVIN R. SWEAZEA

APPELLANT'S REPLY BRIEF

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), undersigned counsel certifies this brief was prepared in 14-point Times New Roman typeface using Microsoft Word, and the body of the brief contains 3,510 words.

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INTRODUCTION

In his Brief-in-Chief, Appellant fairly assumed that the dispatchers in this case were not operating under an "enhanced" dispatch system, and therefore not subject to the law governing "Enhanced 911" systems, since there was nothing in the record to indicate otherwise. On that state of the record, Appellant's Brief-in-Chief merely suggested that the 2005 amendment to the Enhanced 911 Act supported his argument that the legislature did not intend absolute immunity for 911 dispatchers. *See* BIC at 24-26. In response, and without any support in the record below, Appellees contend that the Enhanced 911 law does apply to the Torrance County dispatcher in this case—a fact which they seek to prove in this Court by the attachment of documents to their Answer Brief, contrary to the Appellate Rules.[1] If, in fact, Torrance County has deployed enhanced 911 technology, Appellant's claim that the legislature did not intend absolute TCA immunity for 911 dispatchers is strengthened, *see* BIC at 24-26, because there

[1] In support of the declaration that the 911 Dispatch Systems at issue in this case are "Enhanced" Systems, Appellees attach for the first time on appeal voluminous exhibits. Rule 12-213(F)(4) NMRA explicitly prohibits attachments to appellate brief because "[i]t is improper to attach to a brief documents which are not part of the record on appeal." *In re Mokiligan*, 2005-NMCA-021,137 N.M. 22, 24-25, 106 P.3d 584, 586-87; *Jemko, Inc. v. Liaghat,* 106 N.M. 50, 54, 738 P.2d 922, 927 (Ct.App.1987). The documents should be stricken and counsel, no stranger to proper appellate process, sanctioned for the willful disregard.

would have been no need for the Enhanced 911 Act's grant of qualified immunity[2] if, as Appellees contend, there was already absolute immunity under the TCA.

In any event, whether or not Torrance County was a part of the Enhanced 911 system at the time of the events in this case becomes directly relevant only once the TCA issues are resolved in Appellant's favor and the case is returned to the trial court for a trial on the merits. At that juncture, the trial court, as the proper fact-finder, must determine the factual question of whether the Enhanced 911 Act applies, in order to determine the standard of proof which applies to a determination of dispatcher liability--i.e., whether ordinary negligence under the TCA or the standard under the Enhanced 911 Act, requiring proof of "willful or wanton negligence or intentional acts." § 63-9D-10, NMSA 1978.[3]

The only question before this Court is whether the trial court erred in its finding that 911 dispatchers do not fall within a waiver of immunity under the TCA, and in failing to allow further discovery on certain factual questions. On

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[2] NMSA 1978 § 63-9D-10 (2005) of the Enhanced 911 Act provides a limited immunity, "except for willful or wanton negligence or intentional acts."

[3] Thus, Appellees' substantive Point IV based on the Enhanced 911 Act, *see* AB at 6-11, is both not relevant and inappropriate in the absence of district court fact-finding. It is also patently incorrect because that Act does not provide the absolute immunity that Appellees are claiming under the TCA. Also, Appellees' so-called "public policy" argument in Point III, *see* AB at 4-6, is also misplaced because whatever the budgetary difficulties that may currently be confronting the State do not answer the questions presented here. Our Tort Claims Act does not mean one thing in a period of economic growth and another in a period of economic downturn.

those points, as the following argument makes clear, Appellees' contentions are not well founded.

ARGUMENT

I. Appellees have identified no evidence sufficient to support their claim that 911 dispatchers do not come within the waiver provision of section 41-4-12

a. 911 dispatchers' principal duties are to maintain public order

Appellant established in his Brief-in-Chief that by statutory definition, 911 dispatchers' principal duty is to "maintain the public order" by making "decisions affecting the life, health or welfare of the public or safety employees." NMSA 1978 §29-7C-2(F). Appellant further established that by statute 911 dispatchers are regularly engaged in activities related to police protection and constitute an important and indispensable component of the law enforcement function. Appellant established in his Brief-in-Chief that 911 dispatchers "directly impact public order." *Dunn v. McFeeley,* 1999-NMCA-084, ¶25, 127 N.M. 513, 520, 984 P.2d 760, 767.

In response, Appellees relied upon an unpublished Federal District of New Mexico opinion. In that opinion, Judge C. LeRoy Hansen acknowledged that "[n]either party has alerted the Court to any New Mexico case that addresses whether police dispatchers or 911 operators are law enforcement officers under the Act, and the Court has found none..." *Garrison* at pp. 29-30. Thus, Judge Hansen

made an "Erie"[4] guess as to how the New Mexico appellate courts would rule on the issue. Judge Hansen's opinion is neither binding nor persuasive authority, and his analysis is incorrect.

911 dispatchers are not "secretaries or administrative assistants," as he believed, and are not analogous to any of the other officials discussed in the other cases cited by Appellees. *See* AB at 24-26. Rather, 911 dispatchers are licensed and trained by the New Mexico law enforcement academy. *See* 26-7C-1 to 29-7C-9 NMSA 1978 (2003). They are engaged in frontline activities relating to police protection by processing emergency calls and dispatching emergency services provided by public safety agencies, *see* NMSA 1978 §29-7C-2(F), thereby providing an essential part of police services. *See* §§ 26-7C-1 to 29-7C-9 NMSA 1978 (2003).

As explained in the BIC, at 10-14, unlike all the other officials that Appellees erroneously analogize to, 911 dispatchers fit squarely within the definition of Law Enforcement Officers for whom TCA immunity has been waived under § 41-4-12 because their principal duties are essential to maintaining public order in ways that others in the cases cited by Appellees are not. For example, this case is factually distinguishable from *Coyazo v. State*, 120 N.M. 47, 897 P.2d 234 (Ct. App. 1995) and *Dunn,* 1999-NMCA-084, 127 N.M. 513, 984 P.2d 760. In

[4] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)

finding that the district attorneys in their prosecutorial role were not law enforcement officers under the statute, the court in *Coyazo* focused on the fact that the district attorneys performed traditionally "lawyerly" activities:

> We can assume, for purposes of this opinion, that district attorneys and their lawyer assistants are primarily involved in lawyerly activities concerning the prosecution of criminal offenses being brought and argued in a judicial forum.

Coyazo, 120 N.M. at 50, 897 P.2d at 237. Similarly, in *Dunn* the court focused on the fact that the medical investigator performed a physician/educator role:

> The complaint does not allege any duties of McFeeley that could be construed as maintaining public order. Indeed, the only duties of McFeeley mentioned in the complaint are performing autopsies and supervising or training those who do.

Dunn, 127 N.M. at 519, 984 P.2d at 766.

Appellant established that the 911 dispatchers are trained, certified, licensed, and suspended by the New Mexico law enforcement academy board. They have statutorily-defined duties related to police protection, thereby providing an essential part of police services. *See* §§ 26-7C-1 to 29-7C-9 NMSA 1978 (2003). The majority of a 911 dispatcher's time is spent in direct contact with the public, preserving the public order. Their duties are of a traditional law enforcement nature.

The only reason for calling 911 is to report something that is directly affecting public order or to report a crime. The importance of the maintaining-the-

public-order function of 911 is demonstrated in the fact that it is a crime for any person to knowingly dial 911 for the purpose of reporting a false alarm. NMSA 1978 §63-9D-11.1. 911 dispatchers play an essential peace-keeping and protection-of-the-public role.

911 dispatchers are the first contact the public makes with emergency services. The dispatcher receives the calls, determines the nature of the emergency, questions caller to determine the nature of the problem and type and number of personnel and equipment needed, follows established guidelines, scans status charts and computer screens to determine units available, and then dispatches the appropriate emergency centers. After dispatch, the dispatcher monitors and continues communication with all units. When needed the dispatcher will contact and dispatch other support organizations. 911 dispatchers are responsible for maintaining effective and efficient communications with the police officers, outside emergency and law enforcement agencies and the public. These are all traditionally law enforcement functions, and the 911 dispatchers are undeniably charged with maintaining the public order.[5]

Given the critical peace-keeping and protection-of-the-public roles played by the 911 dispatchers in directing the activities of uniformed law enforcement

[5] Indeed, the Enhanced 911 Act makes clear that 911 dispatchers exist "for reporting police, fire, medical or other emergency situations," NMSA 1978 § 63-9D-3(J) (2005), and defines 911 equipment as "the public safety answering point equipment." *Id.* at § 63-9D-3(K).

officers, this Court must find that the 911 dispatchers in this case come within the waiver provision of § 41-4-12 and are subject to suit under that provision.

b. If any questions of fact remain as to whether the 911 dispatchers' duties are of a "traditional law enforcement" nature, Appellant should have been allowed to conduct additional discovery

Without support, Appellees state throughout their answer brief that the duties of the 911 dispatchers are not "even remotely similar to the traditional law enforcement duties." This is precisely the area of inquiry about which Appellant sought discovery. By way of example and not limitation, these are areas about which Appellant sought discovery:

- Are the 911 dispatchers hired by and supervised by law enforcement officers?
- What are the essential functions of the job?
- According to Torrance County policies, do dispatchers have the ability to order patrol officers to respond to calls? Would such orders have the full force and effect of any order by any other law enforcement supervisor?
- According to Torrance County policies, must dispatchers obtain NCIC certification and complete the New Mexico Police Dispatcher Academy?
- Do dispatchers work with patrol officers to effect arrests?
- By whom were these functions traditionally performed? Uniformed law enforcement officers? If so, why and when was the change made?

[RP 243-246]. The request for leave to conduct discovery was erroneously denied by the trial court. [RP 372-375].

c. Appellees have identified no evidence sufficient to support their claim that 911 dispatchers do not come within the waiver provision of section 41-4-6

a. 911 dispatcher equipment is statutorily defined as governmental "equipment" used to protect public safety

In his Brief-in-Chief, Appellant established that the 911 dispatchers are subject to the waiver of immunity provision of section 41-4-6 because their actions involve the "operation of ...machinery...or equipment". Appellant established in his Brief-in-Chief that the 911 dispatch equipment is far more than just a telephone; it is statutorily defined as "equipment." *See* BIC pp. 18-23. In response, Appellees misconstrue Appellant's argument to state that Appellant seeks to destroy immunity by extending the waiver provisions to include the use of any telephone by any public employee. Clearly, Appellant does not seek such a broad extension of the waiver provisions.

Appellant does not seek to "void," "eviscerate," or "destroy" the Tort Claims Act by seeking a ruling from this Court that the "use of a telephone alone" is sufficient use of equipment for purposes of the building and equipment waiver as represented by Appellees.[6] 911 dispatch systems are elaborate equipment designed

[6] Appellees' posturing is not limited to "the sky is falling" claims of imminent governmental demise should the court find a waiver here. *See* AB at 4-6. Indeed, Appellees begin their argument with a wholly irrelevant and factually erroneous claim that current economic conditions demand a *legal* determination that the government should be immune for its conduct here. Appellees also improperly direct their ire toward the unfortunate and severely mentally ill mother of Richard Brown, *see* AB at 4, 6, suggesting that she seeks to profit from her son's tragic death. Appellees' offensive and erroneous claims reflect a deep-rooted cynicism and

to protect the safety, health and welfare of the people of New Mexico. NMSA 1978 §63-9D-2.

The 911 dispatch equipment is far more than just "any telephone." The equipment allows dispatchers to perform multiple functions aimed at protecting the safety, health and welfare of the people of New Mexico. None of those functions were utilized in this case, and the failure to utilize these functions was a negligent operation of the equipment. The 911 equipment displays on the dispatch monitors and screens an accurate Global Position System ("GPS") location of 911 caller displayed on a road map. The GPS location would have been stored in the 911 center's computer where it could be accessed at a later time. None of the dispatcher defendants acknowledged or took any action or made any record of the 911 caller's GPS location. The 911 equipment has the capability of automatically displaying the name address and telephone number of the incoming 911 caller on a video monitor. None of the dispatcher defendants took any action to contact the 911 caller to verify the location of the emergency. The 911 equipment has the capability of being played back to verify the location of the emergency as reported by the 911 caller. The call would have been stored in the 911 center's computer where it could have been accessed at a later time. None of the dispatcher

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mistrust of our juries and the civil justice system in general. Our civil system is designed to weed out frivolous claims through multiple procedural checks, and juries have a fine-tuned sense of justice and injustice. The catastrophic events predicted by Appellees quite simply reflect the same tired, rhetorical excesses that our Supreme Court has repeatedly rejected for the past 25 years.

defendants acknowledged or took any action to replay the 911 call. All supervisory personnel failed to intercede and ensure the location was verified.

Contrary to the arguments made by Appellees, Appellant has sufficiently alleged negligent operation of equipment.[7] For example, Appellant alleged:

- Defendants Arnold, Stack and Ledbetter breached their duty by negligently and recklessly failing to convey accurate information over dispatch channels, and by negligently failing to take any action subsequent to receiving Susan Cohn's call to ensure that Decedent's welfare was being determined. Such breach constituted negligence. [RP 12-13]

- Defendants Arnold, Stack and Ledbetter had the duty, as public employees, to exercise reasonable care when operating as dispatchers in the Torrance County dispatch center. This included the duty to convey accurate information concerning Decedent's location, as reported by Susan Cohn, and to screen, classify, and prioritize incoming 911 calls. The conduct of the Operators, described above, resulted in wrongful death caused by the actions of public employees while acting in the scope of their duties in the operation or maintenance of a building, machinery and/or equipment. [RP 12].

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[7] Without support, Appellees ask this Court to "move away from mere notice pleading requirement and require enough specificity such that Defendants know how the Plaintiff claims a waiver under the Act." *See* AB at p. 2. While Appellant's Complaint is actually very detailed and comprehensive, *see* RP 1-19, no such requirement exists under New Mexico law. *See* Rule 1-008(A) NMRA 1997 (requiring notice pleading); *Weiss v. New Mexico Bd. of Dentistry,* 110 N.M. 574, 581, 798 P.2d 175, 182 (1990) (holding that the NCA "serves the same function as a complaint in a civil case, affording notice to the party against whom relief is sought of the facts alleged to justify the relief, but not going into extensive evidentiary detail in support of those facts"). *See generally Farmers, Inc. v. Dal Mach. & Fabricating, Inc.,* 111 N.M. 6, 9, 800 P.2d 1063, 1066 (1990) ("The pleadings, however, are not dispositive of the issues, and recovery may be founded on other grounds not specifically stated in the complaint."); *Malone v. Swift Fresh Meats Co.,* 91 N.M. 359, 362, 574 P.2d 283, 286 (1978) ("It is only necessary that the pleading generally indicate the type of litigation that is involved and give a summary of the case that affords fair notice."). Consequently, this Court should reject Appellees' challenge to the sufficiency of the notice afforded them.

- Defendants Stack and Ledbetter's negligent failure to play back Susan Cohn's 911 call, or to take any action to ensure the welfare of Decedent Brown, was also the result of inadequate policies, training and supervision. [RP 14].

- The conduct of Defendant Sharon Doe Dispatcher as described above, resulted in wrongful death caused by the actions of public employees while acting in the scope of their duties in the operation or maintenance of a building, machinery and/or equipment. This included the duty to double check the accuracy of the location given to her by Defendant Arnold of Ms. Willis and Decedent Brown's whereabouts. [RP 15-16].

- Defendant Sharon Doe Dispatcher knew or reasonably should have known that failure to review 911 call information and verify the location of Decedent Brown under circumstances such as these could result in imminent harm or death. [RP 16].

Appellees' argument that Appellant's allegation "is not one of negligent operation of equipment, rather, it is an allegation of simple individual negligence, specifically the failure to convey information" is simply not supported by the record. *See* AB at p. 12.

b. There is no support for the position that claims under §41-4-6 are limited to claims occurring on or in the immediate vicinity of governmental equipment

Appellees have misconstrued the "immediate vicinity" requirement as it relates to interpretation of §41-4-6. Appellees cite numerous cases for the proposition that §41-4-6 requires physical connection between the equipment and the injury. However, the cases cited by Appellees involve the interpretation of §41-

4-6 as it applies to buildings as a "premises liability" statute.[8] Those cases are clearly inapplicable here.

The Supreme Court in *Bober v. New Mexico State Fair*, 111 N.M. 644, 653, 808 P.2d 614, 623 (1991) noted that the presence of the words "machinery" and "equipment" in Section 41-4-6 had the effect of broadening the statute beyond only premises. Appellant established in his Brief-in-Chief that the negligent operation of 911 dispatch equipment falls under the waiver for operation of equipment under §41-4-6 because under the ordinary meaning of the word 911 dispatch equipment is "equipment" and because the Enhanced 911 Act looked at in *pari materia* demonstrates the legislative intent to include 911 equipment within the meaning of the § 41-4-6 waiver of immunity for operation of machinery or equipment. It is the negligent maintenance or operation of the equipment that is the essential element. As the Court in *Rutherford v. Chaves County*, 133 N.M. 756, 760 (NM 2003) acknowledged:

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[8] *See, e.g., Leithead v. City of Santa Fe*, 1997-NMCA-041, 123 N.M. 353, 355, 940 P.2d 459, 461, cited by Appellees at Answer Brief p. 18; *Castillo v. County of Santa Fe*, 107 N.M. 204, 207, 755 P.2d 48, 51 (1988), cited by Appellees at Answer Brief p. 19; *Callaway v. New Mexico Dept. of Corrections*, 117 N.M. 637, 642, 875 P.2d 393, 398 (Ct. App. 1994), cited by Appellees at Answer Brief p. 19; *Baca v. State*, 1996-NMCA-021, 121 N.M. 395, 911 P.2d 1199, cited by Appelles at Answer Brief p. 19; *Seal v. Carlsbad Indep. Sch. Dist.*, 116 N.M. 101, 105, 860 P.2d 743, 747 (1993), cited by Appellees at Answer Brief p. 19; *Johnson v. Holmes*, 377 F. Supp. 2d 1069, 1078-81 (D.N.M. 2004), cited by Appellees at Answer Brief p. 20; *Cobos v. Dona Ana County Housing Auth.*, 1998-NMSC-049, 126 N.M. 418, 970 P.2d 1143, cited by Appellees at Answer Brief p. 20; *Pemberton v. Cordova*, 105 N.M. 476, 478, 734 P.2d 254, 256 (Ct. App. 1987), cited by Appellees at Answer Brief p. 20; *Williams v. Central Consol. Sch. Dist.*, 1998-NMSC-006, 124 N.M. 488, 952 P.2d 978, cited by Appellees at Answer Brief p. 20-21.

> Section 41-4-6 deals with immunity as it relates to buildings, public parks, machinery, equipment, and furnishings. As such, it was important for the Legislature to use the words "operations or maintenance" because buildings and public parks are maintained, but machinery and equipment are both maintained and operated.

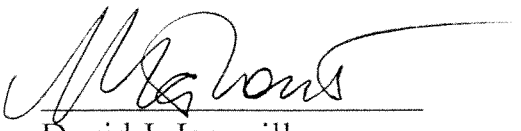
Id. at 760.

There is no requirement that the injury occur in close proximity to the equipment. The issue is one of duty and foreseeability. "If it is found that a plaintiff, and injury to that plaintiff, were foreseeable, then a duty is owed to that plaintiff by the defendant." *Ramirez v. Armstrong*, 100 N.M. 538, 541, 673 P.2d 822, 825 (1983). Appellant is clearly a foreseeable direct victim, and a duty was owed to him by Appellees.

CONCLUSION

For the reasons articulated here and in the Brief-in-Chief, Appellant respectfully asks this Court to reverse the judgment of the district court, and remand the Torrance County defendants and the State Dispatcher defendants to be placed back on the trial docket with the defendants currently remaining in the district court. Defendants' Motion to Dismiss was inappropriate under the facts and controlling law of this case. Plaintiff-Appellant respectfully request that the lower court's decision be overturned.

Respectfully Submitted By:



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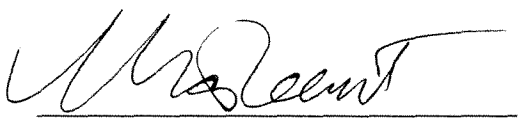

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