

COPY

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

OCT 22 2010

Ben M. Martinez

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 BRIEF IN CHIEF

Pursuant to Rule 12-214(B)(1), Appellant respectfully requests oral argument in this matter. This is a case of first impression in the State of New Mexico, and it presents a significant question of law of substantial public interest. Therefore, it would be essential to provide this Court the opportunity to question counsel further regarding the matters briefed and to allow for elaboration on the issues presented.

David J. Jaramillo
Maria E. Touchet
Gaddy ♦ Jaramillo
2025 San Pedro NE
Albuquerque, NM 87110
(505) 254-9090
(505) 254-9366 facsimile

Rachel E. Higgins
509 Roma Ave NW
Albuquerque, NM 87102-2124
(505) 247-9339
(505) 243-9882 facsimile

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

Table of Authorities.....iii

Statement of the Issues.....1

Summary of Proceedings.....2

 I. Nature of the Case.....2

 II. Facts Relevant to the Issue Presented on Appeal.....2

 III. Proceedings and Disposition of the Court Below.....6

Standard of Review.....9

Introduction to the Argument.....10

Argument.....11

 I. The 911 dispatchers here are subject to the waiver of immunity for law enforcement officers under § 41-4-12.....11

 a. Given this critical law enforcement role played by the 911 dispatchers in this case and in directing the activities of uniformed law enforcement officers, this Court must find that the 911 dispatchers in this case come within the waiver provision of § 41-4-12.....11

 b. The trial court erred in not allowing Plaintiff to conduct additional discovery on factual issues related to the 41-4-12 waiver.....16

 II. 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”.....18

 a. By its ordinary meaning the 911 telephone/dispatch system is equipment and/or machinery under the TCA.....20

b. Even if the statute were not plain on its face, principles of statutory construction compel the conclusion that Plaintiff’s claims under Section 41-4-6 survive.....23

III. The addition of a detailed immunity provision in the Enhanced 911 Act confirms that pre-existing, non-enhanced 911 systems, like the one at issue here, was not intended to be immune for suit under the TCA.....24

Conclusion.....26

STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), undersigned counsel certifies this brief was prepared in 14-point Times typeface using Microsoft Word, and the body of the brief contains 6,790 words.

TABLE OF AUTHORITIES

New Mexico Cases

Abalos v. Bernalillo County District Attorney's Office, 105 N.M. 554, 734 P.2d 794 (Ct.App.1987).....14

Anchondo v. Corrections Department, 100 N.M. 108, 666 P.2d 1255 (1983).....13, 15, 16

Baptiste v. City of Las Cruces, 115 N.M. 178, 848 P.2d 1105 (Ct.App. 1993).....9, 11, 12, 17, 18

Blackburn v. State, 98 N.M. 34, 644 P.2d 548 (Ct. App. 1982).....20

Bober v. New Mexico State Fair, 111 N.M. 644, 808 P.2d 614 (1991).....18, 22

Castillo v. County of Santa Fe, 107 N.M. 204, 755 P.2d 48 (1988).....20

Coyazo v. State, 120 N.M. 47, 897 P.2d 234 (Ct.App.1995)13

Dunn v. McFeeley, 1999-NMCA-084, 127 N.M. 513, 984 P.2d 760.....13

Godwin v. Mem'l Med. Ctr., 2001-NMCA-033, 130 N.M. 434, 25 P.3d 273.....9

Limacher v. Spivey, 2008-NMCA-163, 145 N.M. 344, 198 P.3d 370.....9, 13, 17

McCurry v. City of Farmington, 97 N.M. 728, 731, 643 P.2d 292, 295 (Ct. App. 1982).....19

Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980).....14

Rickerson v. State of N.M. and City of Roswell, 94 N.M. 473, 476, 612 P.2d 703, 706 (Ct.App.), *cert. denied*, 94 N.M. 675, 615 P.2d 992 (1980).....19

RMD v. McBrayer, 2000-NMCA-104, 129 N.M. 778, 14 P.3d 43, *cert denied* 130 N.M. 17, 16 P.3d 442 (2000).....23

<i>Shaw v. H.S. Pickerell Co.</i> , 106 N.M. 683 (Ct. App. 1987).....	2
<i>State v. Davis</i> , 2003-NMSC-022, ¶ 12, 134 N.M. 172, 74 P.3d 1064.....	23
<i>State v. Johnson</i> , 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d 863.....	21
<i>State v. Rhea</i> , 94 N.M. 168, 169, 608 P.2d 144, 145 (1980).....	14
<i>State v. Rivera</i> , 2004-NMSC-001, ¶ 13, 26, 134 N.M. 768, 82 P.3d 939.....	25
<i>State v. Martinez</i> , 1998-NMSC-023, ¶ 9, 126 N.M. 39, 966 P.2d 747.....	23
<i>State v. Smith</i> , 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022.....	25
<i>Truong v. Allstate Ins. Co.</i> , 2010-NMSC-009, ¶ 37, 147 N.M. 583, 227 P.3d 73.....	21
<i>Weinstein v. City of Santa Fe</i> , 121 N.M. 646, 650, 916 P.2d 1313, 1317 (1996).....	14, 15
<i>Williams v. Central Consol. Sch. Dist.</i> , 1998-NMCA-006, ¶ 14, 124 N.M. 488, 952 P.2d 978, <i>cert. denied</i> , 124 N.M. 311, 950 P.2d 284 (1997).....	18, 19, 22, 23
<i>United Rentals Northwest, Inc. v. Tearout Mechanical, Inc.</i> , 2010-NMSC-030, 148 N.M. 426, 237 P.3d 728, 735.....	25, 26

Statutes

The Enhanced 911 Act (NMSA 1978 Section 63-9D-1, <i>et seq.</i> 1989).....	23, 24, 25, 26
New Mexico Tort Claims Act (NMSA 1978, §§ 41-4-1, <i>et seq.</i>).....	passim
Public Safety Telecommunicator Training Act. (NMSA 1978, §§ 26-7C-1 to 29- 7C-9 (2003)).....	12, 13
Uniform Statute and Rule Construction Act (NMSA 1978, § 12-2A-19 (1997)).....	21, 22

Other Authorities

Merriam-Webster's Collegiate Dictionary (rev. ed. 2005).....22

STATEMENT OF THE ISSUES

1. Whether the Torrance County 911 dispatchers are subject to the waiver of immunity for law enforcement officers under § 41-4-12, NMSA 1978.
2. If the pleadings were not sufficient to establish the § 41-4-12 waiver, whether the trial court erred in not allowing Plaintiff to conduct additional discovery on factual issues related to the § 41-4-12 waiver of immunity.
3. Whether the Torrance Country 911 dispatchers are subject to the waiver of immunity provision of § 41-4-6.
4. Whether the later enactment of the Enhanced 911 Act (Section 63-9D-1 *et seq.*, NMSA 1978 (1989)) confirms that the Legislature did not intend the basic 911 personnel in this case to be immune from suit under the Tort Claims Act.

SUMMARY OF PROCEEDINGS

I. Nature of the Case

This case involves a wrongful-death action brought by Plaintiff, Bruce E. Thompson, as the Personal Representative of the Estate of Richard Brown against Defendants under the New Mexico Tort Claims Act. The principal issue presented in this appeal, however, is whether there are waivers of immunity contained within the New Mexico Tort Claims Act (NMSA 1978, §§ 41-4-1, *et seq*) that apply to Plaintiff's claims for wrongful death against Defendants as a result of the negligence of its 911 dispatchers in their handling and responding to the 911 emergency telephone call that is the subject of this lawsuit.

II. Facts Relevant to the Issue Presented on Appeal

The issue presented here derives from a Rule 1-012(b)(6) motion to dismiss for failure to state a claim, therefore the well-pleaded facts in the complaint, as well as all reasonable inferences there from, must be accepted as true. *Shaw v. H.S. Pickerell Co.*, 106 N.M. 683 (Ct. App. 1987).

In the early morning hours of September 25, 2007 Diana Willis, the young mother of 15-month-old Richard Brown, was traveling through New Mexico while in the midst of a complex paranoid delusional state brought on as a result of her paranoid schizophrenia. [RP 5, 207]. Ms. Willis had not experienced a psychotic episode of this type prior to September 25, 2007. [RP 5, 207]. While driving

westbound on U.S. Highway 285, in the immediate vicinity of the town of Encino, located in Torrance County, Ms. Willis became convinced that spiders were chasing her and her son on the highway. [RP 5, 207]. She then had the somatic delusional experience that spiders were crawling all over her body and biting her. [RP 5, 207]. Fearing for her life and that of her son, she pulled her vehicle over onto the shoulder of the highway, removed her son from his car seat, and ripped off all of her clothes as well as those of her son. [RP 5, 207]. A “spirit” then told her to follow the moon. Confused and cold, Ms. Willis began walking down the highway away from her vehicle with her child in her arms. [RP 5, 207].

A few minutes before 3:39 a.m., a passing family travelling westbound on U.S. Highway 285 saw Ms. Willis naked and carrying her infant son down the highway. [RP 5, 208]. Fearing for Ms. Willis’s and her son’s safety, the motorists continued four miles further until they reached Encino, NM and had cell phone reception and called 911 for assistance. [RP 5-6, 208]. Defendant Jeanine Arnold, the dispatcher on duty that morning, took the call. The 911 caller told Defendant Arnold that she and her family saw an unclothed woman, walking with a baby on U.S. 285 westbound, about four miles north of Encino, NM. [RP 6, 208]. Defendant Arnold then dispatched the call to State Police Dispatcher, Defendant Sharon Doe, but mistakenly identified the location as four miles north of Vaughn, NM instead of four miles north of Encino, NM. [RP 6, 208]. Vaughn, New Mexico is approximately

sixteen miles southeast of the location where the 911 caller reported to Defendant Arnold she had seen Ms. Willis and her baby. [RP 6, 208].

Calls received by dispatchers at Torrance County, such as the call received by Defendant Arnold, are recorded, and are immediately available for playback by the dispatchers, yet nobody played the call back to confirm the location. [RP 6, 208].

Although Arnold accurately described the obvious danger to life and safety occasioned by the reported circumstances, NMSP Dispatcher Defendant Sharon Doe coded the priority for service as a “welfare check” and dispatched only one NMSP officer, Defendant Coley, to the erroneous location. [RP 7, 208]. Defendant Coley drove to the erroneously given location near Vaughn, New Mexico, and patrolled the area near Vaughn of U.S. 258 westbound to mile marker 260, and eastbound to mile marker 196. [RP 7, 208]. Seeing nothing, Defendant Coley ceased his search for Ms. Willis and Defendant Brown at 4:17 a.m., and did nothing further to seek additional information or assistance. [RP 7, 208-209]. The search for Ms. Willis and Decedent Brown lasted approximately thirty-five minutes. [RP 7, 209].

At approximately 8:30 a.m. on September 25, 2007, Ms. Willis walked into a New Mexico Highway Department building in Encino, New Mexico, naked, disoriented, and hypothermic. [RP 9, 209]. Ms. Willis told Highway Department

workers that her son was lost, and very very cold, and she begged them to help her find him. [RP 9, 209]. Highway Department employees initiated an emergency call at approximately 8:30 a.m., and Encino Fire and Rescue Department responded. [RP 10, 209]. Ms. Willis told Encino Rescue workers, and others present, that she last saw her son south of Highway Department building, across the railroad tracks. [RP 10, 209]. She pointed out the direction, and the direction corresponded to the entrance of the building Ms. Willis had initially approached. [RP 10, 209]. During the critical minutes and hours between 3:39 a.m. and 11:00 a.m. of September 25, 2007, no individual defendant or entity defendant was taking action to prevent harm or death to Decedent Brown. [RP 10, 209].

At approximately noon on September 26, 2007, Torrance county deputies went to Kaseman Hospital to interview Ms. Willis about the location where she last recalled seeing her son. [RP 11, 209]. Based on Ms. Willis' description, the area of the search was revised to focus on the area southwest of the Highway Department building, toward the railroad tracks. [RP 11, 209]. At approximately 1:39 p.m. on September 26, 2007 Ms. Willis' son was found dead, in the area described by Ms. Willis to Highway Department workers and Encino Rescue workers at 8:00 am on the previous day. [RP 11, 209]. Decedent Brown died of exposure to the elements. [RP 11, 209].

III. Proceedings and Disposition of the Court Below

On October 13, 2009, Plaintiff Eda Gordon¹ as Personal Representative of the Wrongful Death Estate of Richard Brown filed her complaint against Torrance County Board of Commissioners, and the relevant individual county officials (the Torrance County Defendants), and The State of New Mexico/State Police, and the relevant individual state officials (the State Defendants). Plaintiff alleged dispatcher negligence; negligent policies, training, and supervision; negligence in the search for Richard Brown; and law enforcement negligence. [RP 1-18]. In the complaint, Plaintiff sought damages for wrongful death.

On February 18, 2010 the Torrance County Defendants filed a motion to dismiss Counts I and II pursuant to NMRA 1-012(B)(6) or in the alternative 12(C) [RP 173-180]. Given that Plaintiff was responding to a motion to dismiss and had not been given the opportunity to conduct discovery, Plaintiff sought leave to conduct discovery with regard to the Section 41-4-12 waiver. [RP 243-246]. The request for leave to conduct discovery was denied by the Court. [RP 372-375].

In ordering dismissal of Count I of Plaintiff's Complaint, the Court found that:

1. The determination of whether dispatchers are law enforcement officers under Section 41-4-3(d) is a question of law.

¹ Bruce E. Thompson was substituted as Personal Representative of the Wrongful Death Estate on 11/12/2009, and Eda Gordon was removed. [RP 99-100].

2. Dispatchers are admittedly part of the law enforcement team as talked about in the *Dunn* case, but they are not law enforcement officers that go out in the public and carry out normal duties of an officer.
3. Dispatchers, as a matter of law, pursuant to Section 41-4-3(d), are not law enforcement officers.
4. The Court did not consider the affidavits submitted by Defendants in response to the Rule 56 Affidavit submitted by Plaintiff.

[RP 373].

In ordering dismissal of Count II of Plaintiff's Complaint, the Court found that:

1. The present case is not a premises liability case in any respect.
2. There is not an allegation that the telephone somehow caused some injury because it was used improperly. The dispatcher gave incorrect information to the law enforcement officer and dispatched him to the wrong location. This could have just as easily been done in person. The use of the phone was just incidental and was not negligent. The transmission of information received over the telephone to law enforcement officers was allegedly negligent.
3. Therefore, there is no waiver of immunity under Section 41-4-6(A) in the present case.

[RP 373].

On similar grounds, the trial court dismissed Counts IV and VI against the State Police dispatcher, Sharon Doe.² [RP 373-374].

² No Rule 1-012(B)(6) Motion to Dismiss was filed as to the Sharon Doe, State Police dispatcher. However, in order to have the waiver of immunity issue for 911 dispatchers decided at once, the State Police Dispatcher, Sharon Doe, was included in the form of order.

Recognizing the importance of the issue, however, and the fact that this issue continues to confound the trial courts of the state, the trial court made the requisite findings under NMSA 1978 Rule 12-203 (2000) to permit an interlocutory appeal from its ruling, entered on June 21, 2010 [RP 372-375].

Noting that the trial court's order was equivalent to a final judgment against the 911 dispatcher defendants, this Court construed the application for interlocutory appeal as a notice of appeal, allowing this appeal to be docketed as an appeal of right. [RP 376-377] It now presents for resolution whether there are waivers of immunity contained within the New Mexico Tort Claims Act (NMSA 1978, §§ 41-4-1, *et seq*) that apply to Plaintiff's claims as a result of the negligence of the 911 dispatchers in their handling and responding to the 911 emergency telephone call. Judge Kevin Swaezea has stayed the remainder of the case pending resolution of the appellate issues.

STANDARD OF REVIEW

The standard of review for determining whether governmental immunity under the Tort Claims Act (“TCA”) bars a tort claim is a statutory construction question that is reviewed de novo, e.g., *Godwin v. Mem'l Med. Ctr.*, 2001-NMCA-033, ¶ 23, 130 N.M. 434, 25 P.3d 273, although the application of a statute may involve the determination of operative facts, and thus the question here is a mixed question of law and fact. *Baptiste v. City of Las Cruces*, 115 N.M. 178, 180, 848 P.2d 1105, 1107 (Ct.App. 1993); *Limacher v. Spivey*, 2008-NMCA-163, 145 N.M. 344, 346, 198 P.3d 370, 372.

INTRODUCTION TO THE ARGUMENT

The issue in this case centers on the procedures used by Torrance County, the New Mexico State Police, and their 911 dispatchers in appropriately handling and responding to a 911 dispatch call so as to prevent injury or death to members of the public. The two relevant provisions of the TCA involved here are: Section 41-4-6, which waives immunity for “damages resulting from bodily injury, wrongful death or property damage caused by the negligence of public employees while acting within the scope of their duties in the operation or maintenance of any building, public park, machinery, equipment or furnishings;” and Section 41-4-12 which permits a cause of action for personal injury, bodily injury or wrongful death resulting from “... deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.” Plaintiff contends that the trial court erred in its analysis in denying his claims under these two provisions.

ARGUMENT

I. The 911 dispatchers here are subject to the waiver of immunity for law enforcement officers under § 41-4-12

- a. Given this critical law enforcement role played by the 911 dispatchers in this case and in directing the activities of uniformed law enforcement officers, this Court must find that the 911 dispatchers in this case come within the waiver provision of § 41-4-12**

It is beyond dispute that the role of 911 dispatchers in receiving and transmitting information to patrol officers, in prioritizing phone calls for dispatch and in ordering law enforcement units to respond to reported criminal activity, is a vital law enforcement function and one which is intimately involved in the core functions of law enforcement. Section 41-4-3(D) of the TCA defines a “law enforcement officer” as “any full-time salaried public employee of a governmental entity whose principal duties under law are to hold in custody any person accused of a criminal offense, to maintain public order or to make arrests for crimes” (emphasis added). This statutory language has been construed to be disjunctive. *Baptiste*, 115 N.M. at 180, 848 P.2d at 1107. That is, for a governmental employee to fall within the law enforcement exception, their principal duties under law must be any of those enumerated. *Id.*

It is a 911 dispatcher's statutorily-defined duty and responsibility to maintain public order. Pursuant to NMSA 1978 §29-7C-2(F)³, a "telecommunicator" means an employee or volunteer of a safety agency who:

- (1) receives calls or dispatches the appropriate personnel or equipment in response to calls for police, fire or medical services; and (2) makes decisions affecting the life, health or welfare of the public or safety employees.

NMSA 1978 §29-7C-2(F).

A 911 dispatcher is engaged in 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). The New Mexico law enforcement academy is charged with developing and adopting the training program for 911 dispatcher certification. *See* NMSA 1978 §29-7C-4(2003). The New Mexico law enforcement academy board is charged with refusing to issue or suspending or revoking a 911 dispatcher's certification. *See* NMSA 1978 §29-7C-9(2003).

The majority of a 911 dispatcher's time is spent in direct contact with the public, preserving the public order. The Tort Claims Act does not define the phrase "maintain public order." *Baptiste*, 115 N.M. at 180, 848 P.2d at 1107. This Court has noted, however, that the statutory definition of law enforcement officer

³ Chapter 29 "Law Enforcement" of the New Mexico Statutes Annotated is Article 7C, the "Public Safety Telecommunicator Training Act." *See* 26-7C-1 to 29-7C-9 NMSA 1978 (2003).

distinguishes between the duty “to maintain public order” and the duty “to make arrests for crimes.” *Id.* citing Section 41-4-3(D). “[T]his distinction clarifies that the task of maintaining public order can be accomplished without the power to arrest.” *Id.* Thus, 911 dispatchers constitute an important and indispensable component of the law enforcement function.

When deciding whether a particular employee is a law enforcement officer as defined in Section 41-4-3(D), the court must first look to the statutory definition of that particular employee's duties and then determine whether the employee's primary duties match any of the statutory criteria. *See Limacher v. Spivey*, 2008-NMCA-163, 145 N.M. 344, 347, 198 P.3d 370, 373. The employee's primary duties are the crux of the inquiry. *Id.* The courts look at the character of the principal duties in order to determine whether those duties involve traditional law enforcement activities. *Anchondo v. Corrections Department*, 100 N.M. 108, 110, 666 P.2d 1255 (1983). The duties “include preserving the public peace, preventing and quelling public disturbances, [and] enforcing state laws ...” *Id.* at 116.

Although an exhaustive list of what constitutes traditional law enforcement does not exist, it requires a fact specific determination “informed by a practical, functional approach as to what law enforcement entails today.” *Coyazo v. State*, 120 N.M. 47, 51, 897 P.2d 234, 238 (Ct.App.1995); *see also, Dunn v. McFeeley*, 1999-NMCA-084, ¶18, 127 N.M. 513, 520, 984 P.2d 760, 767 (“our case law . . .

has unduly narrowed the concept of law enforcement under the Tort Claims Act.”) (Bustamante, J., concurring).

New Mexico courts have found non-police employees of the state to fit the law enforcement exception of the NMTCA. In *Methola v. County of Eddy*, 95 N.M. 329, 622 P.2d 234 (1980), this Court held that a county sheriff, his deputies, and jailers at the county jail were law enforcement officers within the meaning of the Tort Claims Act because their “principal duties under law are to hold in custody any person accused of a criminal offense, [or] to maintain public order.” *Id.* at 332, 622 P.2d at 237; *see also State v. Rhea*, 94 N.M. 168, 169, 608 P.2d 144, 145 (1980)(“[a] jailer is an officer in the public domain, charged with the duty to maintain public order”).

In *Abalos v. Bernalillo County District Attorney's Office*, 105 N.M. 554, 734 P.2d 794 (Ct.App.1987), a woman brought suit against the director of the Bernalillo County Detention Center (BCDC), alleging his responsibility for her rape by an individual that he negligently released from the BCDC. The court determined that there was a close parallel between jail administrators and sheriffs, *id.* at 560, 734 P.2d at 800, in that the director of the BCDC is no different than a county sheriff and that his principal duties were to hold in custody persons accused of criminal offenses. *Id.*; *see also Weinstein v. City of Santa Fe*, 121 N.M. 646,

650, 916 P.2d 1313, 1317 (1996) (adopting and applying the *Anchondo* “principal duties” analysis).⁴

911 dispatchers are responsible for determining the nature and location of the emergency, prioritizing the emergency, dispatching units as needed and in accordance with established procedures. They are responsible for maintaining effective and efficient communications with the police officers, outside emergency and law enforcement agencies and the public. 911 dispatchers are often the first people the public contacts when emergency assistance is required. These are all traditionally law enforcement functions, and the 911 dispatchers are undeniably charged with maintaining the public order.

The instant case demonstrates that 911 dispatchers’ primary duties and responsibilities are of a traditional law enforcement nature and involve maintaining the public order. Defendant Arnold received and processed an emergency call reporting a naked woman with a baby walking on the side of a highway in the middle of the night. [RP 6, 208]. Defendant Arnold was responsible for determining the nature of the emergency as well as the location of the caller. She was responsible for prioritizing the emergency and dispatching units as needed and in accordance with established procedures. Defendant Arnold dispatched the call to State Police

⁴ Unlike the police “secretaries and couriers,” who the *Weinstein* Court indicated would not meet the definition of a “law enforcement officer” because their principal duties do not include making arrests or keeping the peace,” *id.* at 649-650 and fn. 2, the 911 dispatchers involved here are very much involved in “keeping the peace” on a daily basis.

Dispatcher, Defendant Sharon Doe, but mistakenly identified the location as four miles north of Vaughn, NM instead of four miles north of Encino, NM. [RP 6, 208]. NMSP Dispatcher Defendant Sharon Doe was also responsible for prioritizing the emergency and dispatching units as needed and in accordance with established procedures. [RP 7, 208].

Given the critical peace-keeping and protection-of-the-public roles played by the 911 dispatchers in directing the activities of uniformed law enforcement 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. The trial court erred in not allowing Plaintiff to conduct additional discovery on factual issues related to the 41-4-12 waiver

If the allegations of the complaint were not sufficient to allow the trial court to find that the conduct of the 911 dispatchers met the *Anchondo* “principal duties” test, then the trial court erred in not allowing Plaintiff to conduct additional discovery on factual issues related to the Section 41-4-12 waiver. Given that Plaintiff was responding to a motion to dismiss or, in the alternative, motion for summary judgment and had not been given the opportunity to conduct discovery, Plaintiff sought leave to conduct discovery with regard to the 911 dispatchers’ principal duties as they relate to the Section 41-4-12 waiver. [RP 243-246]. That request was denied. [RP 372-375]

The trial court held that the question of whether dispatchers are law enforcement officers under Section 41-4-12 is a question of law and not of fact, [RP 373], when the issue was a mixed question of law and fact, requiring that the essential facts be before the court before it ruled. *Baptiste*, 115 N.M. at 180, 848 P.2d at 1107; *Limacher*, 2008-NMCA-163, 145 N.M. at 346, 198 P.3d 370 at 372.

In *Baptiste*, the Plaintiff sued the City of Las Cruces and its animal control officer (ACO) for false imprisonment and false arrest. *Id.* at 179, 848 P.2d at 1106. Defendants sought dismissal of the complaint pursuant to Rule 1-012(B)(6). *Id.* Finding that the ACO was not a law enforcement officer, the district court dismissed the complaint. *Id.* This Court reversed because, on the present record, there was a genuine issue of fact regarding whether a Las Cruces ACO is a law enforcement officer under the Act:

Thus, Exhibit 1 by itself cannot tell us whether a Las Cruces ACO comes within the definition of “law enforcement officer” in the Tort Claims Act. Two questions remain. First, how much time does the ACO devote to the various duties? An ACO is a “law enforcement officer” only if the majority of the ACO’s time is devoted to the duties of maintaining public order... Second, insofar as a duty of an ACO involves maintaining public order, is the duty one traditionally performed by law enforcement officers? If the duty is not a traditional duty of law enforcement officers, it does not come within the meaning of “maintaining public order” in the statutory definition of “law enforcement officer.” *See id.* For example, responding to complaints of barking or biting dogs is not “maintaining public order” under the statute unless law enforcement officers traditionally have engaged in that activity. Although we assume that they have, we have found no definitive literature and the record in this case is silent on the matter.

In sum, on the record before us, we cannot determine whether duties with respect to the maintenance of public order constitute the principal duties of a Las Cruces ACO. Because the sole evidence on the issue (the stipulated exhibit) is inadequate to establish that a Las Cruces ACO is not a law enforcement officer within the meaning of the Tort Claims Act, we must reverse the district court's dismissal and remand for further proceedings.

Id.

The request for leave to conduct discovery was erroneously denied by the trial court. [RP 372-375]. Therefore if the essential argument that the pleading was sufficient, *see* Point I (a), does not adequately cover the issue, then, upon remand, Plaintiff must be allowed an opportunity to conduct discovery with respect to the Section 41-4-12 waiver provision.

II. 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”

As the Supreme Court noted in *Bober v. New Mexico State Fair*, 111 N.M. 644, 653, 808 P.2d 614, 623 (1991), § 41-4-6 is not simply a “premises liability statute”; rather, the presence of the words “machinery” and “equipment” has the effect of broadening the statute beyond physical premises. *See id.* at 653, 808 P.2d at 623 (“that section is not limited to claims caused by injuries occurring on or off a certain ‘premises,’ as the words ‘machinery’ and ‘equipment’ reveal. Moreover, liability . . . arises from the ‘operation’ of any such property. We reject any narrower view of the applicability of the statute . . .”). *See also Williams v.*

Central Consol. Sch. Dist., 1998-NMCA-006, ¶ 14, 124 N.M. 488, 952 P.2d 978 (noting that following *Bober* “Section 41-4-6 now waives tort immunity for a wider variety of negligent acts.”), *cert. denied*, 124 N.M. 311, 950 P.2d 284 (1997).

Particularly on point is *McCurry v. City of Farmington*, 97 N.M. 728, 731, 643 P.2d 292, 295 (Ct. App. 1982), where this Court held that firemen using their trucks and equipment in a training exercise came within the waiver for operation of machinery, equipment and furnishings. The defendants were using machinery and equipment of the Fire Department, which consisted of old automobiles, to train their firefighters to put out fires they had set themselves. *Id.* Plaintiff got ill after years of breathing the fumes from the burned automobiles. *Id.* In holding that the burning of old automobiles was the operation of machinery, equipment, or furnishings under Section 41-4-6, the Court ruled:

“Equipment, machinery and furnishings” are to be given their ordinary meaning. We believe that the fire trucks and all the pertinent equipment could be included in the phrase “machinery, equipment and furnishings.”

Id. at 731, 643 P.2d at 295. *See also Rickerson v. State of N.M. and City of Roswell*, 94 N.M. 473, 476, 612 P.2d 703, 706 (Ct.App.), *cert. denied*, 94 N.M. 675, 615 P.2d 992 (1980) (this section applies to “the operation or maintenance of any . . . equipment or furnishings,” and holding that a single stop sign was traffic “equipment.”).

In another closely parallel case, this Court in *Blackburn v. State*, 98 N.M. 34, 644 P.2d 548 (Ct. App. 1982) held that:

[T]raffic signals are equipment; and the placement of a left turn signal, or the lack thereof, concerns maintenance of equipment. Plaintiff also alleged a failure of the defendants to place signs or markings. This concerns the question of inadequate controls, and under *Rickerson* is deemed maintenance; therefore defendants are not immune.

Id. at 36, 644 P.2d at 550.

Thus, Section 41-4-6 expresses the legislative intent that public employees fulfill their duties to operate machinery and/or equipment in such a way to keep the public safe. *Cf. Castillo v. County of Santa Fe*, 107 N.M. 204, 207, 755 P.2d 48, 51 (1988). The harm flowing from the use of governmental equipment is the kind of conduct that should give rise to a judicial remedy under the TCA. The public policy behind the Tort Claims Act supports this kind of suit against government actors to be tried in a court of law.

a. By its ordinary meaning the 911 telephone/dispatch system is equipment and/or machinery under the TCA

By its ordinary meaning, the 911 telephone/dispatch system used is equipment and/or machinery. A basic 911 system is a telephone service that automatically connects a person dialing the emergency three-digit number 911 to a designated public safety answering point. The equipment and/or machinery are embedded in and essential to the system.

The trial court erred in ruling that the use of the telephone/dispatch system was merely incidental in this case. In fact, the negligent use of the equipment was critical in this case. Defendant Arnold fielded the 911 call using the telephone/dispatch system. Contrary to Judge Swaezea's ruling, she could not have fielded this information "just as easily...in person." [RP 373]. It is the telephone/dispatch system that is essential for the operation of a 911 Dispatch call center. Calls come in from users utilizing the three-digit emergency contact number, and then appropriate public safety personnel are dispatched.

Further, contrary to Judge Swaezea's ruling, Plaintiff did make allegations that the misuse of the telephone caused injury. [RP 373]. Plaintiff alleged that the failure to replay the 911 call to verify the location of the call, was negligent and a cause of Richard Brown's death. [RP 6, 208].

The first guiding principle in statutory construction dictates that we look to the wording of the statute, recognizing that "[w]hen a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." " *Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 37, 147 N.M. 583, 227 P.3d 73 (alteration in original) (citation omitted); *State v. Johnson*, 2009-NMSC-049, ¶ 10, 147 N.M. 177, 218 P.3d 863 ("The primary indicator of legislative intent is the plain language of the statute."). The Legislature itself has codified the plain meaning rule in the Uniform Statute and

Rule Construction Act: “The text of a statute or rule is the primary, essential source of its meaning.” NMSA 1978, § 12-2A-19 (1997).

When a term is not defined by statute, it is appropriate for this court to interpret the words in accordance with its ordinary meaning. *McCurry*, 97 N.M. at 731, 643 P.2d at 295. The *Merriam-Webster's Collegiate Dictionary* (rev. ed. 2005) defines “equipment” as “the set of articles or physical resources serving to equip a person or thing as (1): the implements used in an operation or activity.” The telephone/dispatch equipment here is quintessentially the articles or physical resources by which a 911 dispatcher is equipped. Further, 911 telephone/dispatch equipment is the implement used in an operation or activity; the operation or activity being front-line communication with the public during emergencies and direction of officers to the emergency for public safety.

A plain reading of the words “machinery” and “equipment” make it obvious that 911 telephone/dispatch services are included. Just as old fire trucks, stop signs, a left turn signal, and an electric wire brush have been interpreted to be machinery or equipment under the TCA, so too is the 911 telephone/dispatch system. Any other such interpretation would be a narrow interpretation of the statute, expressly rejected by the Supreme Court in *Bober*. See *Bober*, 111 N.M. at 653, 808 P.2d at 623; *Williams*, 1998-NMCA-006, ¶¶ 11-14, 124 N.M. 488, 952 P.2d 978 (acknowledging that Supreme Court in *Bober* expressly rejected restrictive

interpretation in these cases, stating that, “We believe the time is ripe to correct any continuing misapprehension regarding the import of that case law.”). *See also RMD v. McBrayer*, 2000-NMCA-104, 129 N.M. 778, 14 P.3d 43, *cert denied* 130 N.M. 17, 16 P.3d 442 (2000) (also rejecting a narrow interpretation of the words contained in the non-waiver provisions of the Act).

b. Even if the statute were not plain on its face, principles of statutory construction compel the conclusion that Plaintiff’s claims under Section 41-4-6 survive

Where a plain language analysis does not provide a clear interpretation, we can “look to other statutes in *pari materia* in order to determine legislative intent.” *State v. Martinez*, 1998-NMSC-023, ¶ 9, 126 N.M. 39, 966 P.2d 747. Statutes related to the same subject matter have great probative force. *State v. Davis*, 2003-NMSC-022, ¶ 12, 134 N.M. 172, 74 P.3d 1064.

If there were any doubt that a 911 emergency reporting system involves the use of governmental equipment to protect public safety, that doubt was put to rest by the enactment of the Enhanced 911 Act, Section 63-9D-1 *et seq.*, NMSA 1978 (1989). That Act only applies to an “enhanced 911 emergency reporting systems to be operated under shared state and local governmental management and control,” §63-9D-2 NMSA 1978 (2005), which does not include the basic 911 system involved here. Nonetheless, its description of the equipment used in a 911 system is applicable to all 911 systems:

[A] landline or wireless system consisting of network switching equipment, . . . and on-premises equipment that uses the single three-digit number 911 for reporting police, fire, medical or other emergency situations . . .”.

NMSA 1978 §63-9D-3(J)(2005)(emphasis added).

Thus, even if the plain meaning of the words contained in § 41-4-6 were not abundantly clear, this *pari materia* statute 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.

III. The addition of a detailed immunity provision in the Enhanced 911 Act confirms that pre-existing, non-enhanced 911 systems, like the one at issue here, were not intended to be immune for suit under the TCA.

In passing the Enhanced 911 Act, the Legislature also provided a specific immunity section for negligence related to the Enhanced 911 systems, demonstrating that the Legislature understood that the pre-existing, traditional 911 dispatchers were not already subject to the immunity provisions of the TCA. The specifics of that legislation could not be clearer. In its initial form the immunity (except for intentional, wanton or willful conduct) applied to all 911 systems. *See* Section 63-9D-10, NMSA 1978 (2001). That provision was amended, however, in 2005, and the amended provision only applies to “Enhanced 911 systems.” *See* Section 63-9D-10, NMSA 1978 (2005), leaving traditional, “basic” 911 systems like that involved in this case without the benefit of the new immunity.

It is a well-accepted principle of statutory construction that “if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from which it was omitted.” *United Rentals Northwest, Inc. v. Tearout Mechanical, Inc.*, 2010-NMSC-030, 148 N.M. 426, 237 P.3d 728, 735, citing *Howard Jarvis Taxpayers Ass'n v. City of Salinas*, 98 Cal.App.4th 1351, 121 Cal.Rptr.2d 228, 232 (2002) (alteration in original) (internal quotation marks and citation omitted). Express omission of basic 911 service from the immunity waiver section meant that the Legislature intended to prohibit only negligence based upon Enhanced 911 Systems. *See State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022 (“This Court has rejected a formalistic and mechanical statutory construction when the results would be absurd, unreasonable, or contrary to the spirit of the statute.”). When interpreting statutes, our primary goal is “to facilitate and promote the legislature's ... purpose.” *Id.* at ¶ 8. In determining legislative policy and intent, “a statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.” *State v. Rivera*, 2004-NMSC-001, ¶ 13, 26, 134 N.M. 768, 82 P.3d 939. Thus, in passing this specific immunity section, the Legislature made clear that the 911 dispatchers were not already subject to the immunity provisions of the TCA.

Finally, by specifically excluding basic 911 services from the immunity section, the Legislature could not have intended to give more protection to basic 911 dispatchers than to enhanced 911 dispatchers. Pursuant to NMSA Section 63-9D-10, suits are still allowed for “willful or wanton negligence or intentional acts” based on Enhanced 911 Systems. Therefore any finding that basic 911 dispatchers are completely immune from liability, even for willful, wanton, or intentional acts, would lead to the inconceivable result of providing basic 911 dispatchers with greater protection than enhanced 911 dispatchers. *Cf. United Rentals Northwest, Inc.*, 2010-NMSC-030, ¶28, 148 N.M. 426, 237 P.3d 728, 735.

If the Legislature had intended for basic 911 dispatchers to be immune from suit, it would not have amended the Enhanced 911 Act to specifically exclude basic 911 dispatchers. The Legislature’s removal of basic 911 systems from the immunity provisions is compelling evidence that the Legislature meant to waive immunity for the negligence of basic 911 dispatchers.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant urges that this Court 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:



David J. Jaramillo
Maria E. Touchet
GADDY ♦ JARAMILLO
2025 San Pedro Dr., NE
Albuquerque, NM 87110
(505) 254-9090
Fax (505) 254-9366

-and-

Rachel E. Higgins
509 Roma NW
Albuquerque, NM 87102-2124
505-247-9339
Fax: 505-246-2668

Attorneys for Appellant

CERTIFICATE OF SERVICE

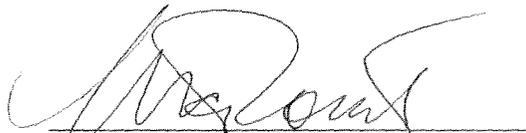
I HEREBY CERTIFY that on October 22, 2010 the foregoing was served via mail as required by 12-307 NMRA to the following:

Dennis K. Wallin and Brandon Huss
Wallin & Briones Law Firm, LLC
8500 Menaul Blvd. NE
Albuquerque, NM 87112
Fax: 505-832-2206

Mary Torres
Beall & Biehler
6715 Academy NE
Albuquerque, NM 87109
Fax: 505-828-3900

James P. Sullivan and Christina L.G. Brennan
128 East DeVargas
Santa Fe, NM 87501
Fax: 505-995-9710

Rachel E. Higgins
509 Roma NW
Albuquerque, NM 87102-2124
505-247-9339
Fax: 505-246-2668



Maria E. Touchet