IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40162

KATE FERLIC, as the Personal Representative of the Wrongful Death Estate of LB-R, a deceased minor, CARISSA BREALEY, individually, and as the Guardian and Next Friend of K.B.R., a minor, JAMES ROOD, individually and AIDAN BREALEY-ROOD, individually,

Plaintiffs,

v.

MESILLA VALLEY REGIONAL DISPATCH AUTHORITY, DANIEL GUTIERREZ, DAVID WOODARD and QUINN PATTERSON, individually and as Mesilla Valley Regional Dispatch officers and employees, DONA ANA COUNTY BOARD OF COUNTY COMMISSIONERS, ARTURO HERRERA, individually and as Dona Ana County officer and Employee, ADRIAN HERRERA, individually and as Dona Ana County officer and employee, NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, and CITY OF LAS CRUCES,

Defendants.

REPLY BRIEF

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ARGUMENT

A. 911 Dispatchers may only be sued for intentional acts.

Plaintiffs argue that "[a] plain language reading of the Enhanced 911 Act's immunity provision unambiguously provides that immunity applies only to *contracting* or *infrastructure* related to the provision of enhanced 911 systems, not to dispatchers." Plaintiff's Answer Brief Question for Certification From the United States District Court for the District of New Mexico, at 31. (Emphasis in original). Plaintiffs misconstrue the language of the immunity provision itself, NMSA 1978, § 63-9D-10 (1989, as amended through 2017), as well as the stated intent of the Enhanced 911 Act.

The Enhanced 911 Act was enacted in 1989. The "findings and purpose" for the statute are set forth in Section 63-9D-2 (1989, as amended through 1993). As set forth in Subsection B:

> B. It is the purpose of the Enhanced 911 Act [63-9D-1 NMSA 1978] to further the public interest and protect the safety, health and welfare of the people of New Mexico by enabling the development, installation and **operation** of enhanced 911 emergency reporting systems to be operated under shared state and local governmental management and control.

(Emphasis added). Section 63-9D-2 clearly contemplates that the infrastructure of a 911 system is meaningless unless operated. Dispatcher consoles, by themselves,

cannot further the "safety, health and welfare of the people of New Mexico." They require the individuals who participate in their "operation." This point is similarly made clear in the definition of an enhanced 911 system:

> M. "enhanced 911 system" means, regardless of the technology used, a landline, wireless, NG-911 or ESInet system consisting of network switching equipment, database, mapping and on-premises equipment, or the functional equivalent thereof, that uses the single three-digit number 911 for reporting police, fire, medical or other emergency situations, thereby enabling a caller to reach a public safety answering point to report emergencies by dialing 911, and includes the capability to:
> (1) selectively route incoming 911 calls to the appropriate public safety answering point operating in a 911 service area;
> (2) automatically display the name, address and telephone number of an incoming 911 call on a video monitor at the appropriate public safety answering point;
> (3) provide one or more access paths for communications between users at different geographic locations through a network system that may be designed for voice, text or data, or any combination of these, and may feature limited or open access and may employ appropriate analog, digital switching or transmission technologies;
> (4) relay to a designated public safety answering point a 911 caller's number and base station or cell site location and the latitude and longitude of the 911 caller's location in relation to the designated public safety answering point; and
> (5) manage or administer the functions listed in paragraphs (1) through (4) of this subsection.

NMSA 1978, § 63-9D-3 (M) (1989, as amended through 2017). Again, a "system" is not complete until it is managed or administered, as the Legislature made clear in Subsection (M)(5). And the fact that the Legislature considered an enhanced 911 system to be more than either contracting or infrastructure may be seen in the enabling provision:

> **A.** A local governing body or a consortium of local governing bodies may incur costs for the purchase, lease, installation or maintenance of enhanced 911 equipment and training necessary for the establishment of an enhanced 911 system and may pay such costs through disbursements from the fund; provided that the local governing body has employed properly trained staff in its public safety answering point pursuant to the Public Safety Telecommunicator Training Act [29-7C-1 NMSA 1978].

NMSA 1978, § 63-9D-4(A) (1989, as amended through 2005).

With this background and context, the text of the immunity provision is clearly understood. Section 63-9D-10 (1989, as amended through 2017), notes that "Enhanced 911 systems are within the governmental powers and authorities of the local governing body or state agency in the provision of services for the public health, welfare and safety."[1] As noted above, the term "systems" includes management and administration. Part of that management and administration includes making sure the system is staffed. And staffing ensures that the system can be operated, as shown by the immunity provision itself:

> In contracting for such services or the provisioning of an enhanced 911 system, except for intentional acts, the local governing body, public agency, equipment supplier, communications service provider and their officers, directors, vendors, employees and agents are not liable for damage resulting from installing, maintaining or providing enhanced 911 systems or transmitting 911 calls.

Id. Of first import, the immunity provisions apply to the "officers, directors, vendors, employees and agents" of the 911 systems, that is, from those in charge of

[1] On page 13 of their Answer Brief, Plaintiffs assert that MVRDA removed its mission statement from its website. That is simply incorrect. The website was revamped on April 5, 2024, but the mission statement was retained. *See*, Home Page, MVRDA.org.

the system to those employees and agents involved in operations. Second, the final "or" of the last sentence of the immunity provision makes clear that "transmitting 911 calls" is an act subject to the grant of immunity. Were the installation of infrastructure or the contracting of services the only immunized activities, the last four words of the section would not be necessary and would be superfluous. *GandyDancer, LLC v. Rock House CGM, LLC,* 2019-NMSC-021, ¶ 22, 453 P.3d 434.

This matter is before this Court because it presents "an unsettled issue of New Mexico law." Memorandum Opinion and Order Sua Sponte Certifying Question to the New Mexico Supreme Court and Denying Pending Motions Without Prejudice, RP, Vol. III, 184. Despite this, Plaintiffs assert that this Court "does not need to examine any non-binding authority," a reference to the cases of *Wilson ex rel. Manzano v. City of Jersey*, 209 N.J. 558, 39 A.3d 177 (S.Ct. 2012) and *Burns v. City of Terre Haute*, 744 N.E.2d 1038 (Ct. App. Ind., 1st Dt. 2001) cited in Defendants' Brief in Chief at 11-14. Plaintiffs make no effort to distinguish either case, and simply hope that the Court ignores both cases. But the cases provide clear guidance as to how other appellate courts have addressed the immunity issues presented here.

And the Court in *Wilson* demonstrated the absurdity of any conclusion that a grant of statutory immunity would apply only to infrastructure, when it noted the

potential result that "[t]he careless design and implementation of 9-1-1 software and hardware, even the insertion of a plug in the wrong socket to turn on the system, receives the shield of immunity but the 9-1-1 operator who is working under the high stress of receiving a frantic call and who must act decisively in a matter of seconds does not." *Wilson, supra*, at 585-586, 39 A.3d at 193-194. As this Court has previously noted, statutes are to be construed to avoid an absurd result. *State ex rel. Helman v. Gallegos,* 1994-NMSC-023, ¶ 19, 117 N.M. 346, 871 P.2d 1352, *citing, Fierro v. Stanley's Hardware*, 1985-NMCA-085, ¶ 30, 104 N.M. 401, 722 P.2d 652, *rev'd on other grounds,* 1986-NMSC-022, 104 N.M. 50, 716 P.2d 241 ("If the language of a statute renders its application absurd or unreasonable, it will be construed according to its obvious spirit or reason.").

Plaintiffs contend that "Defendants concede 'the Legislature . . . intended to subject all emergency services providers to Tort Claims Act liability as of 1983'" then 'agree the Emergency Medical Services Act waives immunity for dispatchers.'" Answer Brief, at 28. Such "agreeing" ignores the fact that the immunity question must be guided by the Legislature's latest pronouncement on the issue. While NMSA 1978, § 24-10B-8 (1983, as amended through 1993), addresses claims under the Tort Claims Act for other emergency medical services personnel, the enactment of the Enhanced 911 Act in 1989 supersedes the earlier statute with respect to claims against dispatchers. Section 63-9D-10 clearly limits

suits arising from 911 calls to instances involving intentional acts. As this Court has previously noted,

> In ascertaining legislative intent, the provisions of a statute must be read together with other statutes in pari materia under the presumption that the legislature acted with full knowledge of relevant statutory and common law. . . . Thus, two statutes covering the same subject matter should be harmonized and construed together *when possible*, in a way that facilitates their operation and the achievement of their goals.

Public Serv. Co. v. N.M. PUC, 1999-NMSC-040, ¶ 23, 128 N.M. 309, 992 P.2d 860 (emphasis in original), *quoting, State ex rel. Quintana v. Schnedar,* 1993-NMSC-033, ¶ 4, 115 N.M. 573, 855 P.2d 562.

B. The waiver of immunity under Section 41-4-6 does not apply.

Plaintiffs' argument that "[t]he 'Findings and Purpose' clause of the Enhanced 911 Act provides irrefutable evidence that the Act is focused only on enhanced 911 systems," Answer Brief, at 30, while flawed, actually cuts against their argument that immunity is waived in this case under NMSA 1978, § 41-4-6 (1976, as amended through 2007). If, as Plaintiffs posit, immunity "applies only to contracting or infrastructure," Answer Brief at 31, it would be incongruous to conclude that the infrastructure itself is immune from suit, but a claim could still be maintained for the operation or maintenance of the building itself. *Gebler v. Valencia Reg'l Emergency Communs. Ctr.*, 2023-NMCA-070 (Filed July 13,

2023), did not reach the issue of immunity under Section 63-9D-10, as that argument was abandoned by the plaintiff on appeal. But the Court of Appeals found, on facts similar to those presented here, that the employee negligence alleged by the plaintiff did not result in a waiver of immunity under Section 41-4-6. *Gebler, supra,* at ¶ 32.

Nor are Plaintiff's references to a "cascade of failures," Answer Brief, at 23, or a "cascade of bad decisions," *id.* at 26, apropos to the immunity issue at hand.[2] The New Mexico Tort Claims Act grants immunity to governmental entities and public employees except where immunity has been specifically waived. NMSA 1978, § 41-4-4 (A) (1976, as amended through 2001). It does not create a scorecard system of determining when immunity is waived. It does not grant immunity for one act, but deny it for two or more acts. More importantly, the Tort Claims Act, and more particularly Section 41-4-6, addresses claims for "negligence." The Enhanced 911 Act has rejected any notion that claims can be brought as a result of negligent conduct, but instead has limited actionable claims

[2] Plaintiffs intimate at page 23 of their Answer Brief that the case of *Upton v. Clovis Mun. School Dist.,* 2006-NMSC-040, 140 N.M. 205, 141 P.3d, involves claims against dispatchers: "As discussed above, similar to the facts at issue in this wrongful death case, the Supreme Court has previously found that, where there is a cascade of failures, when dispatchers fail to abide by established protocols and negligently use equipment, the cease to afford "the health and safety services that [citizens] have been promised, and upon which [citizens] have relied," thus their immunity is waived under Section 41-4-6. *Upton* is not a dispatcher case, but involved claims against school personnel.

to those involving intentional acts only. *See*, NMSA 1978, § 63-9D-10 (1989, as amended through 2017).

C. Dispatchers are not law enforcement officers.

Plaintiffs take great pains to identify Defendants Gutierrez, Woodward, and Patterson as "dispatchers."[3] Plaintiffs then suggest that because dispatchers are "public employees," their immunity has been waived. Answer Brief, at 16. This ignores the entire premise of the Tort Claims Act----all public employees have immunity from suit unless that immunity has been specifically waived.

Plaintiffs' attempt to conflate dispatchers with law enforcement officers fails. They deride Defendants' suggestion than any number of public employees can be said to have a part in maintaining public order, including "food inspectors" and "ticket takers." Answer Brief, at 14. Interestingly, they fail to mention a comparator from the same source, "crossing guards," presumably because they realize that any number of individuals play a role in maintaining public order, but are not classified as law enforcement (or police) officers. RP, Vol. III, 129. A clear example appears in the Detoxification Reform Act, NMSA 1978, §§ 43-2-1.1 to (1949, as amended through 2019). Section 43-2-19, (1973, as amended through

[3] It is unclear from the Answer Brief whether or not Plaintiffs are actually pursuing claims against the DPS dispatchers. The Summary of Facts, Answer Brief, at 3-8, refers to the DPS dispatchers, but does not suggest how their acts were negligent, much less intentional.

2005) of the Act affords immunity for "assault, false imprisonment, or other alleged torts or crimes on account of reasonable measures taken under authority of [the Act] if such measures were, in fact reasonable and did not involve use of excessive or unnecessary force." Such immunity is afforded to "peace officers" and "public service officers." One can hardly imagine a task more in line with promoting "public order" than those individuals tasked with taking intoxicated individuals into protective custody. Yet even with such clear duties, "public service officers" are not considered "peace officers" in the statute.

New Mexico's appellate courts have looked at numerous positions to determine whether the principal duties of the position are consistent with that of a law enforcement officer. *See, e.g., Rayos v. State ex rel. Dep't of Corrs*, 2014-NMCA-103, 336 P.3d 428 (probation and parole officer): *Dunn v. State ex rel. Taxation & Revenue Dep't, Motor Vehicle Div.*, 1993-NMCA-059, 116 N.M. 1, 859 P.2d 469 (Director of MVD); *Silva v. State,* 1987-NMSC-107, 106 N.M. 472, 745 P.2d 380 (Secretary of Corrections); *Begay v. State*, 1985-NMCA-117, 104 N.M. 483, 723 P.2d 252, *rev'd on other grounds, Smialek v. Begay*, 1986-NMSC-049, 104 N.M. 375, 721 P.2d 1306 (Medical Investigator). Defendants are unaware of any reported decision that has unequivocally held that dispatchers come within the definition. *Cf., Thompson v. Torrance County Bd. of Comm'rs,* 2011 N.M. Unpub. LEXIS 352. Conversely, at least two federal courts have specifically found that

dispatchers are not law enforcement officers. *See, Leyba v. City of Santa Fe*, 198 F. Supp. 3d 1254 (D.N.M. 2016); *Garrison v. Polisar,* 1999 U.S. Dist. LEXIS 25331, **44-45 (D.N.M. 1999) ("Applying this practical approach, it is clear that APD radio dispatchers and operators are not engaged in the same activities as the officer on patrol. Rather, their duties are mor analogous to those of secretaries or administrative assistants and, as such they are not 'law enforcement officers.'"). Yet even if there were such a finding in this case, the dispatchers would still be afforded immunity from negligent acts pursuant to NMSA 1978, § 63-9D-10 (1989, as amended through 2017).

CONCLUSION

For the reasons set forth in their Brief in Chief and in the foregoing Reply, the MVRDA and NMDPS Defendants respectfully request that this Court conclude that 911 dispatchers may only be sued for intentional acts and are immune from liability for negligence under the New Mexico Tort Claims Act. Defendants further request this Court answer the certified question in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was filed via the Odyssey system on this 6TH day of June 2024 and that the following counsel were served by the system by electronic mail as follows:

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