IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

DENNIS P. MURPHY, Personal Representative of the ESTATE OF TIFFANY STONE, Deceased,

Plaintiff-Respondent,

vs. No. S-1-SC-40191

SHAHRIAR ANOUSHFAR, D.O.,

Defendant-Petitioner,

and JAMES R. LASH, D.O., JOHN DOES 1-5,

Defendants.

On Writ of Certiorari to the Court of Appeals of New Mexico
(Ct. App. No. A-1-CA-39628)

BRIEF IN CHIEF

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ORAL ARGUMENT REQUESTED

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Introduction

This appeal asks the Court to clarify the showing that must be made on summary judgment in order for a private corporation that contracts with a governmental entity to perform a function of the government itself to be considered a governmental entity and its employees public employees under the New Mexico Tort Claims Act (TCA), NMSA 1978, §§ 41-4-1 through -27 (1976, as amended).

Petitioner Shahriar Anoushfar, D.O., is a physician who was employed by Artesia General Hospital ("AGH"), a New Mexico nonprofit corporation and wholly owned subsidiary of VHA Southwest Community Hospital Corporation ("CHC"), a Texas nonprofit corporation. The physical assets of the hospital are owned by the Artesia Special Hospital District ("District"). As authorized by the Special Hospital District Act, NMSA 1978, § 4-48A-9 (2005), the District leased the hospital to AGH and entered into an operating agreement with CHC under which CHC, through its subsidiary AGH, operated the hospital. The district court determined on summary judgment that AGH was a governmental entity, Dr. Anoushfar was a public employee, and Plaintiff-Respondent's medical malpractice claim against Dr. Anoushfar was barred by the two-year limitations provision of the TCA.

The Court of Appeals reversed the summary judgment. It held that, under

the analysis adopted in *Memorial Medical Center, Inc. v. Tatsch Construction, Inc.*, 2000-NMSC-030, 129 N.M. 677, Dr. Anoushfar had not made a prima facie showing that AGH, his employer, was a governmental entity.

The Court of Appeals erred in its understanding and application of *Memorial Medical Center*. The summary judgment record and this Court's precedents establish that AGH is an instrumentality or alter ego of the District and hence a governmental entity under the TCA. The decision of the Court of Appeals is detrimental to governmental entities that desire to accomplish their public purposes through engagement with private corporations – particularly where, as here, the governmental purpose involves the management and operation of a public hospital facility pursuant to the Special Hospital District Act.

This Court should reverse the Court of Appeals and hold that AGH was a governmental entity under the TCA and, consequently, Petitioner was a public employee. The Court should remand this matter to the Court of Appeals to determine, as it has yet to do, whether any reason advanced by Plaintiff would prevent the TCA statute of limitations from barring Plaintiff's claim.

Summary of Facts and Proceedings

Facts Relating to Artesia General Hospital's Status as a Governmental Entity and Dr. Anoushfar's Status as a Public Employee

The District was created in 1978 pursuant to the Special Hospital District Act. It constructed a public hospital facility in Artesia, New Mexico, and began

operating the hospital in 1981. Beginning in November 1999, the District ceased directly operating the hospital. Instead, the District leased the hospital to AGH, a New Mexico nonprofit corporation. AGH was a wholly owned subsidiary of CHC, a Texas nonprofit corporation organized to acquire, lease, manage, and operate health care facilities. At the same time, the District entered into an operating agreement with CHC to maintain and operate the hospital through its subsidiary, AGH. (1 RP 166, 193.)[1] The hospital provides for the health care needs of all inhabitants of the District without regard to race, color, creed, national origin, or ability to pay. (2 RP 367 ¶ 5.)[2]

Property owners within the District pay a mill levy tax authorized by the Special Hospital District Act. Revenues from the mill levy are passed through to AGH by the District to fund the operation of the hospital. (1 RP 166.) Mill levy

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[1] After the time period material to this mater, CHC transferred its sole corporate membership in AGH to the District and began a process of transitioning the management of AGH to the District. (1 RP 194.)

[2] As discussion of the course of proceedings, *infra*, will reveal, in their arguments below the parties did not always clearly distinguish the corporation, the facility, or the special hospital district when referring to "Artesia General Hospital." The result can be confusing. In this brief, except in describing arguments made below, "Artesia General Hospital" refers to the domestic nonprofit corporation of that name, which also is referred to as "AGH." The physical improvements constituting the hospital facility are referred to as the "hospital." The Artesia Special Hospital District, which owns the hospital and leased it to AGH, is referred to as the "District." VHA Southwest Community Hospital Corporation, a Texas nonprofit corporation that is the parent of AGH, is referred to as "CHC."

revenues account for approximately 15.4% of the operating budget of AGH. (2 RP 367 ¶ 4.)

Under the lease agreement between the District and AGH, the District retained ownership of and proprietary control over the physical assets of the hospital. (2 RP 366 ¶ 3, 367-68 ¶ 9.) AGH was required to maintain the premises in good condition and promptly make all necessary repairs and replacements. (2 RP 388.)

Under the operating agreement between the District and CHC, AGH was subject to oversight and governance by CHC. CHC's oversight of hospital organizations within its system was carried out through daily management of the hospitals and through the reservation by CHC of certain powers, such as changing the activities, philosophy, mission, or purpose of the hospital organization, that could be exercised only with the approval of CHC. (1 RP 192.)

The operating agreement recites the desire of the parties that CHC lease and operate the hospital through AGH as provided in the operating agreement and lease. (2 RP 370.) It specifies that the board of directors of CHC shall be comprised of no fewer than nine members, at least six of whom are members of the District. (*Id.*) It reserves CHC's powers of oversight and overall direction of the operations of AGH and provides that, subject to that oversight and direction, AGH's board shall be responsible for day-to-day management of AGH. (*Id.*)

AGH had sole responsibility for managing the hospital's medical staff. (2 RP 371.) CHC had the power to appoint the hospital administrator, chief operations officer, and chief financial officer, but the District had to approve the appointments. (2 RP 371.) The District also had to approve any change in the type or level of services provided by the hospital. (2 RP 371.) AGH was permitted use the District's mill levy funding only for the operation and maintenance of the hospital. (2 RP 372.) Similarly, any revenue stemming from hospital operations had to be used for the operational and capital expenses of the hospital. (2 RP 373.) CHC was required to cause AGH to maintain and invest in the facilities of the hospital to the extent reasonably necessary to provide and meet the health care needs of the community. (2 RP 373.) AGH was obligated to replace any hospital equipment or furnishings that became technologically or economically obsolete. (*Id.*) The District had the power to terminate the operating agreement upon a breach of the agreement or the lease if the default was not cured after notice. (2 RP 374.) The District has the statutory duty to adopt rules and regulations for the management and operation of the hospital facilities. NMSA 1978, § 4-48A-10(D) (1978).

The District itself does not employ physicians. (1 RP 167.) Dr. Anoushfar was employed by AGH at all material times – i.e., during the time he provided the medical care that gave rise to Plaintiff's claim against him. (1 RP 103-29.)

Proceedings in the District Court

This lawsuit alleging wrongful death as a result of medical negligence initially was filed in the First Judicial District Court in March 2016 against Dr. Anoushfar and Artesia General Hospital, which was identified in the Complaint as "a domestic nonprofit corporation." (*See* 1 RP 28.) Plaintiff personal representative alleged that Dr. Anoushfar was negligent in failing to act on a laboratory test result that allegedly became available in September 2013, which indicated the cause of the decedent's ultimately fatal mesenteric ischemia. (*See generally* 1 RP 29-34.) That suit was voluntarily dismissed without prejudice – "due to venue considerations," according to Plaintiff (1 RP 142 ¶ 21) – in December 2016. (*See* 2 RP 449 (motion); 1 RP 101 (order)).

By that time, the present action had been commenced in the Fifth Judicial District Court in September 2016 against Dr. Anoushfar and "Artesia General Hospital, a Hospital District." (1 RP 1.) Plaintiff added another physician, James R. Lash, D.O., as a defendant. (*Id.*)[3] The Complaint alleged that both Dr. Anoushfar and Dr. Lash were qualified health care providers under the New Mexico Medical Malpractice Act (MMA), NMSA 1978, §§ 41-5-1 through -29 (1976, as amended). (*Id.*) In his Answer, Dr. Anoushfar denied Plaintiff's allegations of negligence (1 RP 70-76) and asserted, as affirmative defenses, the

[3] Dr. Lash was dismissed based on Plaintiff's unreasonable delay in serving him with process. (3 RP 734.) The claims against Dr. Lash are no longer at issue.

statutes of limitations under the TCA, NMSA 1978, § 41-4-15(A) (1977), and the MMA, NMSA 1978, § 41-5-13 (2021) (1 RP 77-78 ¶¶ 12-14).

In response to the Complaint, Artesia General Hospital filed a motion to dismiss, asserting that it was owned by the District, a governmental entity under the TCA, and that the two-year TCA statute of limitations for claims against governmental entities had run. (1 RP 21-27.) Plaintiff subsequently stipulated to dismissal with prejudice of the claims against Artesia General Hospital. (1 RP 68, 82, 132.)

After answering, Dr. Anoushfar filed a motion to dismiss or for summary judgment. The motion argued that Dr. Anoushfar was employed by Artesia General Hospital, which was owned by the District, and that the District was a governmental entity under the TCA. Consequently, the motion argued, Dr. Anoushfar was a public employee entitled to invoke the two-year TCA statute of limitations, which barred the suit against him. (1 RP 84-91.) The motion was supported by a copy of Dr. Anoushfar's employment agreement with AGH. (1 RP 103-29.)[4] In a multi-pronged response to the motion, Plaintiff presented various materials it had obtained containing information regarding the relationship between AGH and the District. These materials included references to the nonprofit corporate status of AGH and CHC, the District's lease of the hospital to AGH, and

[4] Two agreements were included, covering the full period during which the decedent was under Dr. Anoushfar's care.

the management agreement between the District and CHC. (1 RP 159-98.) Plaintiff argued that Dr. Anoushfar could not be considered a public employee because he was employed by AGH rather than the District and because AGH and its parent, CHC, were state-chartered nonprofit corporations that were not governmental entities. At the least, Plaintiff argued, questions of fact existed that precluded summary judgment and required additional discovery. (1 RP 148-52.)

Plaintiff also advanced, to a greater or lesser extent, a series of reasons why the TCA statute of limitations arguably would not bar the suit, even if Dr. Anoushfar were held to be a public employee. These reasons included contentions that (1) equitable tolling or equitable estoppel prevented the limitations period from expiring, because Dr. Anoushfar allegedly failed to disclose the decedent's laboratory test result and because by all appearances Dr. Anoushfar was an employee of a private, nonprofit corporation and a qualified health care provider under the MMA (1 RP 143-46); (2) regardless of the TCA statute of limitations, the suit was timely filed within the limitations period of the MMA (*id.* at 146-48); (3) applying the TCA statute of limitations in the circumstances of this case would purportedly violate equal protection and due process (*id.* at 152-53); (4) Dr. Anoushfar allegedly was equitably estopped from claiming protection from suit under the TCA because he had invoked the protections of the MMA, or he waived the TCA by invoking the MMA (*id.* at 153-54, 155-56); (5) the TCA limitations

period did not begin to run until late 2014 when Plaintiff's counsel claimed to have become aware of the allegedly overlooked laboratory test result (*id.* at 154-55); and (6) public policy purportedly required that Plaintiff be afforded a remedy for alleged medical malpractice (*id.* at 156-57). (*See also* 1 RP 208 (reply in support of motion), 2 RP 317 (surreply in opposition to motion).)

The district court (Hon. Raymond L. Romero) held a hearing on Dr. Anoushfar's motion to dismiss or for summary judgment and denied the motion. (Tr. 9/14/17.) In its written order, the court concluded that Dr. Anoushfar had established a prima facie case that he was employed by Artesia General Hospital but had not made a prima facie showing that Artesia General Hospital was a governmental entity. (2 RP 347-50 ¶¶ 8, 14.)

Several months later, Dr. Anoushfar renewed his motion for summary judgment, relying again on the argument that his employment by Artesia General Hospital, which was owned by the District, made him a public employee entitled to rely on the TCA statute of limitations. (2 RP 351-61.) The renewed motion relied on the prior record as well as newly submitted materials consisting of an affidavit of the chairman of the District's board of trustees, the operating agreement between the District and CHC, and an audit report containing information about the District. (2 RP 366-94.) The argument included an analysis of factors from *Memorial Medical Center* tending to show that AGH, though a private corporation,

should be considered to be a "political subdivision" or "local public body" so intertwined with the District as to fall within the scope of the TCA. (2 RP 357-60.)

Plaintiff argued in opposition to the renewed motion that, under the operating agreement, CHC had reserved powers so that it, rather than the District, controlled AGH and that, as private entities, neither CHC nor AGH should be considered political subdivisions of the state. (2 RP 433-35.) Plaintiff contended that Dr. Anoushfar therefore was not employed by a governmental entity or, alternatively, that questions of fact remained to be resolved. (2 RP 439-42.) Plaintiff again cited the need for additional discovery. (2 RP at 427, 441). Plaintiff also reiterated the additional reasons raised in response to the original motion, *see supra* pp. 8-9, why the TCA statute of limitations arguably should not be applied even if Dr. Anoushfar were deemed to be a public employee. (2 RP 435-39, 442-45.) (*See also* 3 RP 564 (reply in support of renewed motion).)

The district court heard the renewed motion (Tr. 5/24/18) and granted a continuance of the motion (3 RP 635). The court ordered that the matter should be continued to permit Plaintiff to conduct discovery "regarding the actual day-to-day relationship between [the District] and AGH, and [the District's] actual exercise of control over AGH." (3 RP 637-39 ¶ 18.)

Several months later, Dr. Anoushfar filed a supplement to his renewed motion for summary judgment. (4 RP 798.) The supplement added to the record

the District's responses to discovery requests by Plaintiff. (4 RP 800-863.)

District Court's Decision

The continued hearing on Dr. Anoushfar's renewed motion was held in the district court before a newly assigned district judge (Hon. Eileen P. Riordan). (Tr. 1/25/21.) The summary judgment record at that point consisted of the evidentiary materials that had been submitted in connection with the original motion and afterwards, as previously set out. The parties argued the points that had been briefed, with reference to the augmented record. (Tr. 1/25/21.) At the close of the hearing the court announced its view that the defense was "correct" that AGH "does come under the New Mexico Tort Claims Act and therefore that time line does apply." (Tr. 1/25/21 10:07:10-10:07:25.) The court granted summary judgment to Dr. Anoushfar. (5 RP 1104.) The summary judgment order does not further articulate the basis for the court's decision.

Plaintiff's Appeal

Plaintiff then commenced the present appeal. (5 RP 1107, 1111.) In briefs filed in the Court of Appeals, Plaintiff argued that the record did not establish that AGH was a governmental entity or that Dr. Anoushfar was a public employee entitled to invoke the TCA statute of limitations. (BIC in Court of Appeals, Issues 2 & 5.) Plaintiff also brought forward the arguments made in the district court as to why the TCA limitations period should not bar Plaintiff's lawsuit even if Dr.

Anoushfar were to be considered a public employee. (Issues 3, 4, 6-10.) Dr. Anoushfar argued that AGH was an alter ego and instrumentality of the District and a governmental entity under the TCA, with particular reference to factors drawn from *Memorial Medical Center*, and that Dr. Anoushfar's employment by AGH made him a public employee. (AB in Court of Appeals, Points II, V.) Dr. Anoushfar also refuted the other arguments advanced by Plaintiff. (Points I, III, IV, VI-IX.)

Court of Appeals Decision

The Court of Appeals reversed the summary judgment that had been granted to Dr. Anoushfar. *Murphy v. Lash*, 2024-NMCA-031, 545 P.3d 1169, *cert. granted*, No. S-1-SC-40191 (N.M. March 7, 2024). The court held that Dr. Anoushfar failed to make out a prima facie case that AGH was a governmental entity because, although Dr. Anoushfar presented evidence regarding the relationships among AGH, CHC, and the District, "the law requires evidence of actual day-to-day interactions between the entities, regardless of how much potential control [the District] may have over AGH." *Id.* ¶ 8.

The Court of Appeals began with the premise that "a private entity may be considered a governmental entity . . . by virtue of the particular relationship between the private entity and the government." *Id.* ¶ 12. Referring to this Court's decisions, the Court of Appeals noted that "a private corporation may be so

organized and controlled, and its affairs so conducted, as to make it merely an instrumentality or adjunct of a municipality under the terms of the TCA." *Id.* (quoting *Cole v. City of Las Cruces*, 1983-NMSC-007, ¶ 19, 99 N.M. 302 (alteration omitted)). It observed that *Memorial Medical Center* calls for a showing that "under the totality of the circumstances the government entity is so intertwined with the private entity that the private entity has become an alter ego of the public entity." *Id.* (quoting *Memorial Medical Center*, 2000-NMSC-030, ¶ 35). In conducting the analysis, "courts must . . . examine both the potential relationship created by the legal contract that binds the entities and the actual day-to-day relationship among them." *Id.* § 15 (quoting *Memorial Medical Center*, 2000-NMSC-030, ¶ 35) (internal quotation marks omitted).

The court concluded that Dr. Anoushfar "provided no evidence concerning [the District's] ongoing, day-to-day interactions with AGH or CHC. . . . Our review of the record also indicates that the only evidence pertaining to [the District's] and AGH's relationship is the operating agreement with CHC and information about [the District's] finances. . . . [T]hese facts alone fail to establish the type of actual relationship between the entities necessary to demonstrate that AGH is an alter ego of [the District.]" *Id.* ¶ 16. The Court of Appeals reversed the district court on this basis and did not consider or rule upon Plaintiff's claims of equitable tolling, equitable estoppel, or any of the other arguments Plaintiff had

advanced for reversal of the summary judgment. *See id.*

This Court granted a writ of certiorari to consider the following question:

Whether a New Mexico nonprofit corporation that leases a hospital from a New Mexico Special Hospital District and operates the hospital under a contract between its parent corporation and the District, under the District's control as specified in the lease and operating agreement, acts as an instrumentality or alter ego of the District and hence is a governmental entity, such that the Tort Claims Act statute of limitations applies to a claim against an employee of the nonprofit corporation?

Argument

The Court of Appeals Erred in Denying Dr. Anoushfar the Protections Afforded to a Public Employee Under the Tort Claims Act

In reversing summary judgment and depriving Dr. Anoushfar of recourse to the TCA statute of limitations, the Court of Appeals erred in two respects. First, it adopted a too-narrow view of the evidence in the record. The evidence is sufficient to establish that Artesia General Hospital, although a private nonprofit corporation, was an instrumentality or alter ego of the District and that Dr. Anoushfar, as an employee of AGH, was a public employee under the Tort Claims Act. The record sets out facts concerning the relationships among AGH, CHC, and the District that are not in dispute; what is disputed is the legal effect of those facts. Second, when considering the legal effect of the undisputed facts, the Court of

Appeals adopted a too-stringent interpretation of the standard that must be met under *Cole* and *Memorial Medical Center* to determine whether AGH and Dr. Anoushfar fall within the scope of the TCA. This Court therefore should reverse the Court of Appeals.

Standard of Review: "Summary judgment is reviewed on appeal de novo." *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Id.* (internal quotation marks & citation omitted). "If the facts are not in dispute, and only the legal significance of the facts is at issue, summary judgment is appropriate." *Rummel v. Lexington Ins. Co.*, 1997-NMSC-041, ¶ 16, 123 N.M. 752.

Preservation of Issue: The issues on appeal were preserved by Dr. Anoushfar's original and renewed motions for summary judgment based on the TCA statute of limitations and the district court's ruling on the motions. *See supra* pp. 6-11.

A. The Tort Claims Act applies to claims against governmental entities, including political subdivisions of the state and their instrumentalities, as well as to the employees of governmental entities.

The TCA – and, specifically, the two-year limitations provision of concern in this case – applies to "governmental entit[ies]" and to "public employee[s]." NMSA 1978, § 41-4-15 (1977); *see generally id.* § 41-4-4 (2001). As defined in

the TCA, a governmental entity includes "any local public body." *Id.* § 41-4-3(B) (2015). A local public body includes "all political subdivisions of the state and their . . . instrumentalities." *Id.* § 41-4-3(C) (2015). A public employee, with limited exceptions not applicable here, includes "an . . . employee . . . of a governmental entity." *Id.* § 41-4-3(F) (2015). AGH and Dr. Anoushfar fall within these definitions.

B. The Artesia Special Hospital District is a governmental entity because it is a political subdivision of the state.

The Special Hospital District Act authorizes counties in New Mexico to establish special hospital districts to operate public hospitals for the benefit of the district's inhabitants. NMSA 1978, § 4-48A-3(A) (1978). Special hospital districts are established by a vote of the electors of the district and governed by an elected board of trustees. *See id.* §§ 4-48A-5 (1990), 4-48A-6 (2019). They have the power to issue bonds to construct, acquire, or equip hospital facilities. *Id.* §§ 4-48A-12 (1978), 4-48A-20 (1981). They may receive the proceeds of mill levy taxes for the maintenance and operation of such facilities. *Id.* § 4-48A-16 (2018).

The District was formed pursuant to the Special Hospital District Act in 1978. (1 RP 166.) Its creation and actions were subsequently ratified by a statute pertaining specifically to the District. *See* NMSA 1978, § 4-48A-3.1 (1989).

A special hospital district is a political subdivision of the state. *See Gibbany v. Ford*, 1924-NMSC-038, ¶ 7, 29 N.M. 621 (describing political subdivision as "a

division of the parent entity for some governmental purpose . . . formed or maintained for the more effectual or convenient exercise of political power within certain boundaries or localities, to whom the electors residing therein are, to some extent, granted power to locally self-govern themselves"); *Memorial Med. Ctr.*, 2000-NMSC-030, ¶¶ 28-29 (suggesting that political subdivision may be interpreted more broadly today in light of "the changing relationship between private corporations and government entities"); *cf. Tomkins v. Carlsbad Irrig. Dist.*, 1981-NMCA-072, 96 N.M. 368 (holding irrigation district is political subdivision of state). The Legislature recognizes special hospital districts as political subdivisions. *See* NMSA 1978, § 4-48B-3(A) (2003) (provision of Hospital Funding Act stating that where that statute refers to "another political subdivision," the term includes "a special hospital district organized under the Special Hospital District Act"). The District, as a political subdivision, thus is a local public body and a governmental entity under the TCA. *Supra* pp. 15-16.

C. Artesia General Hospital, despite being a private corporation, also qualified as a governmental entity under the Tort Claims Act as an instrumentality or alter ego of the District.

Because the District qualifies as a governmental entity by virtue of being a political subdivision of the state, its "instrumentalities" also are governmental entities. NMSA 1978, § 41-4-3(C); *see supra* p. 16. An instrumentality is defined in law as "[a] means or agency through which a function of another entity is

accomplished." *Gebler v. Valencia Reg'l Emergency Commc'ns Ctr.*, 2023-NMCA-070, ¶ 12, 535 P.3d 763 (quoting Black's Law Dictionary (11th ed. 2019)). Under the District's lease of its hospital to AGH and the District's agreement with CHC to operate the hospital through AGH, AGH functioned as an instrumentality of the District.

A special hospital district's functions include "constructing, acquiring, operating and maintaining one or more public hospital facilities for the benefit of the inhabitants of the district." NMSA 1978, § 4-48A-3(A). In the Special Hospital District Act, the Legislature authorized hospital districts to enter into contracts, including contracts to "lease a hospital to any person, corporation or association for the operation and maintenance of the hospital." NMSA 1978, § 4-48A-9(C), (M) (2005). The Legislature thus created a statutory means whereby a hospital district is able, through contractual arrangements with a private entity, "to fulfill the[ ] most basic responsibility [of local governments]: protecting the health and safety of their citizens." *Gebler*, 2023-NMCA-070, ¶ 9. In doing so, the Legislature doubtless had in mind the benefits that would accrue to both the public and the government by allowing hospital districts to take advantage of specialized expertise available through the private sector. *See State ex rel. Toomey v. City of Truth or Consequences*, 2012-NMCA-104, ¶ 26, 287 P.3d 364 ("Today, traditional public functions such as fire protection, transportation, jails, after-school programs,

and health care are routinely delegated to private entities.").

Just such an arrangement existed in this case. The District originally constructed and began operating the hospital in Artesia, but beginning in 1999 it leased the facility to AGH and contracted with AGH's parent corporation, CHC, to operate the hospital through AGH. (1 RP 166.) By delegating its basic obligation of providing for the public health to AGH with respect to the operation of the hospital, the District made AGH its instrumentality in carrying out this public function.

As the Court of Appeals noted, however, this Court's two most applicable precedents add a level of governmental control as a factor in determining whether a private entity acting as an instrumentality of the government may be considered to be a governmental entity. *See supra* pp. 12-14. In the first of those cases, *Cole v. City of Las Cruces*, this Court recognized that "a private corporation may be so organized and controlled, and its affairs so conducted, as to make it merely an instrumentality" of a municipality. 1983-NMSC-007, ¶ 19. While *Cole* recognizes this concept, the Court did not have occasion to apply it. In *Cole* a private utility natural gas association contracted for the City of Las Cruces to "operate and maintain the [a]ssociation's entire natural gas transmission and distribution system." *Id.* ¶ 19 (internal quotation marks omitted). The Court held that the association was "not the type of 'instrumentality' contemplated within the context

of" the TCA and hence was not a governmental entity. *Id.* ¶ 19. But that is not surprising, because in *Cole* the City was functioning as an instrumentality of the association – a situation exactly the reverse of the one here. *See id.* ¶ 17. Because the association did not step in to perform a governmental function of the City, there would have been no reason to ascribe governmental characteristics to the association.

In the second case, *Memorial Medical Center*, the Court articulated a concept similar to that recognized in *Cole*: a private entity may become "so intertwined with a public entity that the private entity becomes an alter ego of the public entity." 2000-NMSC-030, ¶ 1. But, the Court held, "substantial government involvement" in the affairs of the private entity is not a sufficient basis for the private entity to attain governmental status. *Id.* ¶ 33. The private organization must be "so affiliated with a public entity that as a matter of fairness it must be considered the same entity." *Id.* ¶ 34. The determination whether a private entity is entitled to governmental status must be based on "the totality of the circumstances," considering "both the potential relationship created by the legal contract that binds the entities and the actual day-to-day relationship among them." *Id.* ¶ 35. The governmental entity must not only possess but also exercise its authority "so as to make the private entity a conduit through which the government acts." *Id.* ¶ 36.

The Court of Appeals erred in interpreting and applying *Cole* and *Memorial Medical Center* in arriving at its holding in the present case. The summary judgment record, viewed in its totality, is more than sufficient to demonstrate that AGH acted as the District's instrumentality and alter ego in operating the hospital pursuant to the lease and operating agreement. AGH was the conduit through which the District fulfilled its governmental responsibilities. The actual, ongoing relationship between AGH and the District was one of identity: the two were functionally indistinguishable. The District and AGH were so intertwined that as a matter of fairness AGH should be recognized as a governmental entity under the TCA.

At the outset, the Court of Appeals viewed the evidence in the record too narrowly. The evidence extends well beyond "the operating agreement with CHC and information about [the District's] finances." *Murphy*, 2024-NMCA-031, ¶ 16. The evidence as a whole shows that AGH, through its lease of the hospital from the District and under CHC's oversight and direction as provided in the operating agreement between CHC and the District, fully undertook the District's function of maintaining and operating a public hospital to serve the District's residents. *See supra* pp. 2-5, 18-19. In doing so, AGH was led by executive officers approved by the District and governed by a board with a majority of members drawn from the District. *Supra* pp. 4-5. And in exercising its oversight of AGH, CHC was subject

to the District's requirements: to maintain a facility adequate to meet the community's health care needs, to expend its revenues, including substantial public funds, to that end, and to provide the type and level of hospital services desired by the District. *Supra* p. 5. In addition, the District is required by statute to adopt rules and regulations for the management and operation of the hospital. *See supra* p. 5.

The Court of Appeals also erred in its understanding of *Memorial Medical Center*. For one thing, the Court of Appeals determined that *Memorial Medical Center* requires "evidence of actual day-to-day interactions between the entities." *Murphy*, 2024-NMCA-031, ¶ 8. *See supra* p. 12. But this Court in fact referred to the need to consider the public and private entities' "actual day-to-day *relationship*." 2000-NMSC-030, ¶ 35 (emphasis added). The terms are not the same, and the difference matters. Since the Court of Appeals considered the question before it to be "what facts are required to demonstrate that a private entity is a governmental entity under the TCA," *Murphy*, 2024-NMCA-031, ¶ 14 (emphasis omitted), the court's misunderstanding of *Memorial Medical Center* derailed its analysis. The summary judgment record here has more to do with what actually is relevant – the ongoing relationship among the District, AGH, and CHC – than it does with any particular interactions among individuals from the various entities. And, as a practical matter, it is likely that a private entity seeking to

establish TCA coverage would find it far less burdensome to compile a documentary record that illustrates its continuing relationship with its government partner than it would be to uncover evidence of relevant day-to-day personal interactions between the public and private entities.

Additionally, the Court of Appeals translated the standard from *Memorial Medical Center* wholesale to the present case, while noting but failing to account for the fact that *Memorial Medical Center* involved two other statutes – the Public Works Minimum Wage Act, NMSA 1978, §§ 13-4-10 to -17 (1963, as amended), and the Procurement Code, NMSA 1978, §§ 13-1-28 through -199 (1984, as amended) – and did not involve the TCA at all. While some of the statutory language at issue in *Memorial Medical Center* is quite similar to that of the TCA, *see* 2000-NMSC-030, ¶ 24, the Court made clear that the result in that case was based on its construction of those particular statutes, *id.* ¶ 21; *see also id.* ¶ 24, and that not only the language but also the purpose of the legislation must factor into the governmental entity analysis, *id.* ¶¶ 22, 35.

The purposes of the Minimum Wage Act and the Procurement Code, *see* 2000-NMSC-030, ¶¶ 25, 26, differ from those of the Tort Claims Act. Consequently, determining whether a private entity that engages contractually with the government should be treated as a governmental entity within the meaning of the TCA may require a court to consider different factors, or to give the same

factors different weights, than would apply in deciding whether the private entity is subject to a minimum wage for public works or is bound by the requirements of the Procurement Code.

"The Tort Claims Act seeks not only to protect the government, but to insure that there will be some recovery for those injured by negligent government employees." *Boradiansky v. State Farm Mut. Auto. Ins. Co.*, 2007-NMSC-015, ¶ 16, 141 N.M. 387. This balance is reflected in the TCA's partial waiver of sovereign immunity along with the specification that governmental entities and public employees "shall only be liable within the limitations of the [TCA]." NMSA 1978, § 41-4-2(A) (1976). The partial waiver "protect[s] the public treasuries" and also "enables the government and its various subdivisions to function unhampered by the threat of time and energy consuming legal actions which would inhibit the administration of traditional state activities." *Garcia v. Albuquerque Pub. Schs. Bd. of Educ.*, 1980-NMCA-081, ¶ 8, 95 N.M. 391.

The evident purpose of the TCA's inclusion of "instrumentalities" of a political subdivision within the definition of a governmental entity, NMSA 1978, § 41-4-3(C), *see supra* p. 16, is to afford the benefits and protections that the TCA provides to entities of the government also to those private entities that stand in the shoes of and undertake to fulfill the responsibilities of the government. The statute should be construed "in light of its purpose and interpret[ed] . . . to accomplish the

ends sought to be accomplished by it." *Flores v. Herrera*, 2016-NMSC-033, ¶ 8, 384 P.3d 1070. It makes sense, therefore, that in determining whether a private corporation falls within the scope of the TCA, the primary consideration should be whether the corporation functions as an instrumentality of a political subdivision or other governmental entity. *Cole* – which, unlike *Memorial Medical Center*, actually construes the TCA in this context – phrases the standard in terms of whether the private entity is an "instrumentality" controlled to a sufficient degree by a governmental entity and does not refer at all to day-to-day interactions or relationships.

In this case there is no question that AGH actually functioned under the lease and operating agreement entirely as an instrumentality of the District in operating the hospital, subject to the District's control as set forth in those contractual relationships. *Supra* pp. 2-5, 19, 21-22. As Dr. Anoushfar pointed out in the district court, "AGH is [the District's] sole means of carrying out its legislated purpose under the Special Hospital District[ ] Act." (3 RP 565.) Characterizing AGH as a governmental entity in the circumstances of this case is fully consistent with the Legislature's intent to protect instrumentalities of government as expressed in the TCA. It follows that AGH should be held to be a governmental entity under the TCA.

Memorial Medical Center does not indicate precisely how its test for

governmental entity status should be implemented. When the issue is raised on summary judgment, it is reasonable to adopt the ordinary burden-shifting framework that New Mexico courts apply to summary judgment motions. *See, e.g., Romero*, 2010-NMSC-035, ¶ 10 ("By a prima facie showing is meant such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. Once this prima facie showing has been made, the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits."). Thus, once a defendant claiming TCA coverage makes a prima facie showing that the defendant functioned as the instrumentality of a governmental entity, the burden should shift to the opposing party to present specific evidence that creates a genuine issue as to whether the defendant's role was in fact one of mere appearance rather than substance. Such an approach best comports with the Legislative purpose to make the TCA's protections available to private entities that are able to present evidence that they acted as instrumentalities of the government.

Such an approach also comports with the legal presumption "that public officials perform their duties until the contrary is shown." *City of Alamogordo v. McGee*, 1958-NMSC-078, ¶ 15, 64 N.M. 253 (internal quotation marks & citation omitted). That presumption itself would support an inference that the District exercised the control over AGH that the governing contractual relationships

allocated to it. *See State v. Mata y Rivera*, 1993-NMCA-011, ¶ 29, 115 N.M. 424 (indicating that presumption would support inference that government agency did its job), *abrogated on other grounds as recognized by State v. Murillo*, 2015-NMCA-046, ¶ 7, 347 P.3d 284.

In this case the evidence establishes, at the very least, a prima facie case that AGH functioned as the District's instrumentality and alter ego with respect to operation of the hospital under the lease and operating agreement. None of the evidence or arguments advanced by Plaintiff provided specific facts calling that showing genuinely into question. Summary judgment therefore was appropriate on the issue of AGH's status as a governmental entity.

D. Dr. Anoushfar, as an employee of Artesia General Hospital, was a public employee under the Tort Claims Act.

In support of summary judgment, Dr. Anoushfar presented evidence in the form of employment agreements establishing that he was employed by AGH at all times pertinent to his treatment of Plaintiff's decedent. *Supra* p. 7. Plaintiff did not counter with evidence sufficient to create a genuine issue of fact on this point. Indeed, Plaintiff appears to have conceded the point. (*See* BIC in Court of Appeals at 10 ("[I]t is undisputed Dr. Anoushfar was working for AGH.").)

Because the summary judgment record established that AGH was a governmental entity under the TCA, *supra* Point C, Dr. Anoushfar also was entitled to summary judgment regarding his status as a public employee. *See*

NMSA 1978, § 41-4-3(F) (generally defining public employee as employee of governmental entity). *See supra* p. 16.

E. Properly determining when a private entity qualifies as an instrumentality or alter ego of a governmental entity is a matter of great importance to governmental entities and their private partners.

The decision by the Court of Appeals that AGH did not qualify as a governmental entity under the TCA deprives Dr. Anoushfar of a deserved defense. If left to stand, it also would establish an undesirable precedent on a matter of substantial public interest. The TCA provides robust protections to public employees against tort liability. Public employees share the state's broad sovereign immunity. *See* NMSA 1978, § 41-4-4 (2001). Even in areas where sovereign immunity has been waived – including medical malpractice, *see id.* § 41-4-10 (1978) – a two-year limitations period applies, *see id.* § 41-4-15 (1977), and a public employee is protected from individual liability unless the employee has acted fraudulently or with intentional malice, *see id.* §§ 41-4-17(A) (1982) & -23 (2001).

These protections are important to the recruitment of personnel to perform the government's work in any case in which a governmental entity seeks to accomplish its functions through a private instrumentality. By raising the evidentiary threshold for employees of private corporations to qualify as public employees, the decision of the Court of Appeals discourages individuals, such as

those in Dr. Anoushfar's position, from accepting employment with corporations, like AGH, that in practice operate as instrumentalities of governmental entities. The decision thus makes it more difficult for governmental entities to fulfill their essential public duties through engagement with private enterprise.

This concern is especially acute in the case of special hospital districts, which are tasked with maintaining and operating public hospital facilities for the benefit of the district's inhabitants and must recruit health care providers to staff those facilities. *See* NMSA 1978, §§ 4-48A-3(A), 4-48A-9(O). The record shows that the hospital in Artesia has been designated a sole community hospital provider by the New Mexico Human Services Department and that the City of Artesia has been designated by the United States Department of Health and Human Services as medically underserved. (1 RP 166.) That is just one manifestation of a well-documented shortage of physicians and other health care providers in New Mexico, particularly in rural areas. *See, e.g.*, Cicero Institute, *New Mexico Physician Shortage Facts*, https://ciceroinstitute.org/research/new-mexico-physician-shortage-facts/#:~:text=New%20Mexico%20is%20projected%20to%20be%20short%202%2C118%20doctors.&text=Primary%20care%20alone%20is%20projected,will%20practice%20out%20of%20state (stating that 32 of 33 New Mexico counties, with a total population of over 1 million persons, are federally designated Health Professional Shortage Areas and that New Mexico's physician-

to-patient ratio is 16% worse than the national average); *see generally* New Mexico Health Care Workforce Committee, *Annual Report (2023)*, https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1010&context=nmhc_workforce (reporting numbers of primary care physicians, specialists, and other health care providers practicing in New Mexico versus benchmark figures on county-by-county basis). By correcting the Court of Appeals and clarifying that the Legislature intended private organizations that serve as instrumentalities of government, and their employees, to be considered governmental entities and public employees under the TCA, this Court will play an appropriate role in addressing that problem.

F. After reversing the Court of Appeals, this Court should remand.

Dr. Anoushfor petitioned for, and this Court granted, a writ of certiorari to address a single, critical issue: the Court of Appeals' misunderstanding and incorrect application of *Memorial Medical Center* that deprived Dr. Anoushfar of any recourse to the TCA statute of limitations. This Court should reverse the Court of Appeals and hold that AGH qualified as a governmental entity and Dr. Anoushfar was a public employee within the meaning of the TCA.

In the district court, Plaintiff raised equitable tolling, equitable estoppel, and other arguments which, Plaintiff contended, provided reasons why Plaintiff's claim against Dr. Anoushfar should proceed even if Dr. Anoushfar were considered to be

a public employee. *Supra* pp. 8-9. By granting summary judgment the district court necessarily rejected those arguments, but it did not express its reasoning for doing so. Plaintiff raised the same arguments again in the Court of Appeals, which did not consider them because it reversed the district court's summary judgment on the erroneous ground that Dr. Anoushfar was not covered by the TCA. *Supra* pp. 12-14. This Court therefore lacks the benefit of any analysis of Plaintiff's additional arguments by either of the courts below.

Dr. Anoushfar has not asked this Court to address Plaintiff's additional arguments in what would be, in essence, the first instance. Instead, the Court should reverse the Court of Appeals insofar as it held that Dr. Anoushfar did not establish on summary judgment that he was a public employee within the scope of the TCA. The Court should remand to the Court of Appeals to consider the additional arguments raised by Plaintiff on appeal. *Cf. Summers v. Ardent Health Servs., L.L.C.*, 2011-NMSC-017, ¶¶ 8, 9, 23, 150 N.M. 123 (remanding where lower courts had addressed only one of four elements that hospital was required to establish on summary judgment to qualify for statutory immunity).

Conclusion

For the foregoing reasons, this Court should (1) reverse the Court of Appeals and reinstate the grant of summary judgment to Dr. Anoushfar, to the extent of holding that AGH was an instrumentality of the District and therefore a

governmental entity under the TCA and Dr. Anoushfar, as an employee of AGH, was a public employee under the TCA and (2) remand this matter to the Court of Appeals to consider Plaintiff's equitable tolling, equitable estoppel, and other arguments that, in Plaintiff's view, would prevent Dr. Anoushfar from relying on the TCA statute of limitations to bar this lawsuit.

Statement Regarding Oral Argument

Petitioner believes that oral argument may be of assistance to the Court in apprehending and evaluating the arguments of the parties and may facilitate the decisional process. Petitioner therefore requests oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We certify that the foregoing pleading was filed through the Odyssey File-and-Serve electronic filing system, which caused a copy to be served automatically on all counsel of record this 17th day of May, 2024.

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