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)

REPLY BRIEF

HINKLE SHANOR, LLP
Kathleen Wilson
Hari-Amrit Khalsa
7601 Jefferson St. NE, Suite 180
Albuquerque, NM 87109
Telephone: (505) 858-8320
Fax: (505) 858-8321

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
Edward Ricco
P.O. Box 1888
Albuquerque, NM 87103
Telephone: (505) 765-5900
Fax: (505) 768-7395

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases **Page(s)**

New Mexico Statutes and Rules

Argument

Most of Plaintiff's answer brief has nothing to do with the issue that is before this Court for decision. The Court granted a writ of certiorari to determine what factual showing must be made to establish that a private corporation which contracts with a governmental entity to perform a governmental function itself qualifies as a governmental entity subject to the protections of the New Mexico Tort Claims Act ("TCA"). (BIC at 1.) In a time when government is increasingly reliant on private enterprise to fulfill its responsibilities to the public (*see* BIC at 18-19), that is an important question of broad applicability, well deserving of the Court's consideration.

But in the present case it is not the only question which must be addressed to conclude that Petitioner Dr. Anoushfar was a public employee entitled to invoke the limitations provision of the TCA. In the district court and Court of Appeals, Plaintiff advanced equitable and other reasons why Dr. Anoushfar, even if he is considered to be a public employee, might be barred from recourse to the TCA. (*See* BIC at 8-9, 11-12.) The Court of Appeals did not address these issues; they were not raised in the petition; and they are outside the scope of this Court's certiorari review. *See, e.g., Fikes v. Furst*, 2003-NMSC-033, ¶¶ 8-9, 134 N.M. 602 (declining to reach issues not presented by petition for certiorari). If the Court decides that Dr. Anoushfar was a public employee when he provided care for

Plaintiff, the remaining issues should initially be addressed by the Court of Appeals on remand. *See Albuquerque Commons P'ship v. City Council*, 2008-NMSC-025, ¶ 56, 144 N.M. 99 (remanding to Court of Appeals to consider arguments made to Supreme Court that Court of Appeals did not reach in light of its disposition). (BIC at 30-31.)

Nevertheless, Plaintiff devotes a great deal of the answer brief to these undecided issues on which certiorari was neither sought nor granted. Petitioner even addresses the dismissal of original co-defendant James R. Lash, D.O., which was upheld by the Court of Appeals and is now res judicata, as Plaintiff did not petition or cross-petition for review of that ruling. In its issues and arguments, Plaintiff's answer brief might as well have been (and apparently, in substance, largely was) filed in the Court of Appeals when this case was before that court more than two and a half years ago.

Two conclusions follow. First, the answer brief is mostly irrelevant, because it addresses matters that are peripheral to the issue before this Court. Second, the answer brief is largely unhelpful, because it fails to acknowledge, let alone discuss, the argument put forth in Dr. Anoushfar's brief in chief on certiorari .

Dr. Anoushfar's essentially unrebutted argument can be summarized, in streamlined form and without undue repetition, as follows. The TCA provides that a governmental entity includes an "instrumentalit[y]" of any political subdivision

of the state. (BIC at 16; *see* NMSA 1978, § 41-4-3(C) (2015).) The Artesia Special Hospital District is a political subdivision of the state. (BIC at 16-17; *see* NMSA 1978, § 4-48A-1 to -30 (1978, as amended).) Artesia General Hospital ("AGH"), the private corporation, was an instrumentality of the District by virtue of its lease of the hospital facility from the District and the operating agreement between AGH's parent corporation, VHA Southwest Community Hospital Corporation ("CHC"), and the District through which AGH operated the hospital. AGH was an instrumentality of the District because, under the lease and operating agreement, AGH did exactly what the District otherwise would have done: maintain a general public hospital to meet the health care needs of the District's residents. (BIC at 17-19.)

In *Cole v. City of Las Cruces*, 1983-NMSC-007, ¶ 19, 99 N.M. 302, this Court recognized that a private corporation that serves as an instrumentality of a political subdivision of the state is a governmental entity under the TCA. *Cole* virtually dictates the result in the present case. Relatedly, in *Memorial Medical Center, Inc. v. Tatsch Construction, Inc.*, 2000-NMSC-030, 129 N.M. 677, the Court held that where a private entity acts as the "alter ego" of a governmental entity, *id.* ¶ 1, or as a "conduit through which the government acts," *id.* ¶ 36, the private entity becomes a governmental entity in its own right. In both cases the Court looked to the degree of control that the governmental entity exercised over

its private counterpart. In a manner of speaking, control by the government can be seen as the glue that cements the public and private entities into one functionally indistinguishable unit: a governmental entity under the TCA. (*See* BIC at 19-25.)

Plaintiff's bald assertion that the operating agreement "makes it clear that [the District] does not operate or have any control over the day to day business of AGH" (AB at 16-17) disregards everything said in the brief in chief. Plaintiff's claim that there is "no evidence that AGH is anything but a private entity" (AB at 18) is similarly blind to the record. The brief in chief details the various ways in which the District exercised control over the operation of the hospital in Artesia, leading to the conclusion that AGH was a governmental entity and Dr. Anoushfar therefore was a public employee. (BIC at 21-22.) To the extent the answer brief undertakes to address the subject at all, Plaintiff's view of the facts is overly selective or simply incorrect. In every respect in which it mattered – i.e., insofar as AGH leased and operated the hospital in the District's stead – the District exercised control through the lease or operating agreement to ensure that its responsibility to provide adequate public hospital services to the District's residents was fulfilled.

It is simply not true, as Plaintiff contends, that under the operating agreement the District "simply leases the [hospital] building" (AB at 2) or that Dr. Anoushfar contends that "a lease of property . . . automatically created a public

entity" (*id.* at 12). There is more to the relationship between AGH and the District than a simple lease of real estate. The operating agreement between the District and CHC imposes conditions on CHC that it must follow in its oversight of AGH's operation of the hospital. Thus it is wrong for Plaintiff to say that CHC had "sole authority [over] . . . the activities, philosophy, or mission purpose of" AGH. (AB at 2.) Under the operating agreement, CHC could not change the type or level of services provided by the hospital without the District's approval, and 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. (BIC at 5.) It is also incorrect to claim that CHC held "the sole power to engage and remove the hospital administrator." (AB at 3.) The District retained approval authority over CHC's appointment of the hospital administrator, chief operations officer, and chief financial officer. (BIC at 5.)

Plaintiff does not even describe correctly the rationale of the Court of Appeals decision. The Court of Appeals did not hold that "the operating agreement created disputed issues of fact" regarding the governmental status of AGH so as to preclude summary judgment. (AB at 12.) It held that Dr. Anoushfar did not even make out a prima facie case for summary judgment. *See Murphy v. Lash*, 2024-NMCA-031, ¶ 8, 545 P.3d 1169, *cert. granted*, No. S-1-SC-40191 (N.M. March 7, 2024). The difference is significant: the Court of Appeals'

determination that the facts of this case *cannot* establish AGH as a governmental entity, rather than that AGH's status depends on a factfinder's evaluation of conflicting evidence, highlights the divide between the analysis undertaken by the Court of Appeals and the approach required under *Cole* and *Memorial Medical Center*. Plaintiff relies on the same erroneous standard – "ongoing, day-to-day interactions" – employed by the Court of Appeals, *see Murphy*, 2024-NMCA-031, ¶ 16; *see also id.* ¶ 8 ("actual day-to-day interactions"), in arguing that Dr. Anoushfar provided no evidence supportive of AGH's status as a governmental entity. (AB at 15.) But *Cole* makes no mention of such a standard, and *Memorial Medical Center* speaks in terms of an ongoing *relationship*, not interactions. (BIC at 22, 25.)

The answer brief says nothing in response to Dr. Anoushfar's showing that the lease and operating agreement establish an ongoing relationship among CHC, AGH, and the District under which AGH is properly viewed as an instrumentality (or, alternatively, an alter ego) of the District and hence a governmental entity – particularly in light of the unrebutted presumption that public officials perform their duties. (BIC at 26-27.) Consequently, Dr. Anoushfar qualifies as a public employee under the TCA and the district court correctly granted summary judgment on that issue.

Conclusion

This Court should reverse the Court of Appeals and remand as requested in the brief in chief.

Respectfully submitted,

HINKLE SHANOR, LLP
Kathleen Wilson
Hari-Amrit Khalsa
7601 Jefferson St. NE, Suite 180
Albuquerque, NM 87109
Telephone: (505) 858-8320
Fax: (505) 858-8321

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

s/ Edward Ricco
By _____
Edward Ricco
P.O. Box 1888
Albuquerque, NM 87103
Telephone: (505) 765-5900
Fax: (505) 768-7395
Attorneys for Petitioner

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 15th day of July, 2024.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

s/ Edward Ricco
By_____
Edward Ricco