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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: _____

Court of Appeals of New Mexico
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3 Filing Date: **July 13, 2023**

4 **No. A-1-CA-39570**



Mark Reynolds

5 **CANDI A. GEBLER,**

6 Plaintiff-Appellant,

7 v.

8 **VALENCIA REGIONAL EMERGENCY**
9 **COMMUNICATIONS CENTER, BOARD**
10 **OF DIRECTORS OF VALENCIA REGIONAL**
11 **EMERGENCY COMMUNICATIONS CENTER,**
12 **SHIRLEY VALDEZ, DOES 1-5, EMPLOYEES**
13 **ON DUTY 1-5, and ENTITIES, CORPORATIONS,**
14 **PARTNERSHIPS 1-5,**

15 Defendants-Appellees.

16 **APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY**
17 **James A. Noel, District Court Judge**

18 Rios Law Firm, P.C.
19 Linda J. Rios
20 Michael G. Solon
21 Albuquerque, NM

22 for Appellant

23 Montgomery & Andrews, P.A.
24 Randy S. Bartell
25 Kaleb W. Brooks
26 Santa Fe, NM

27 for Appellees

1 **OPINION**

2 **BUSTAMANTE, Judge, retired, sitting by designation.**

3 {1} Plaintiff Candi Gebler appeals from the dismissal by summary judgment of
4 her personal injury action, contending that the district court erred when it concluded
5 that Defendants were immune from suit under the New Mexico Tort Claims Act
6 (TCA), NMSA 1978, §§ 41-4-1 to -27 (1976, as amended through 2020). Plaintiff
7 argues that Defendant Valencia Regional Emergency Communications Center (the
8 VRECC) is not a “local public body” within the meaning of Section 41-4-3(C) of
9 the TCA, and thus, its employees are not public employees within the meaning of
10 Section 41-4-3(F). Alternatively, Plaintiff argues that if the TCA applies, she can yet
11 maintain her action under Section 41-4-6. We affirm.

12 **BACKGROUND**

13 {2} Pursuant to the Joint Powers Agreements Act, NMSA 1978, §§ 11-1-1 to -7
14 (1961, as amended through 2009), the City of Belen, the Village of Los Lunas, the
15 Village of Bosque Farms, and Valencia County signed a joint powers agreement to
16 form the VRECC. The VRECC was created pursuant to the New Mexico Enhanced
17 911 Act, NMSA 1978, §§ 63-9D-1 to -11.1 (1989, as amended through 2017) to
18 provide enhanced 911 emergency communications functions for an area that
19 includes the “incorporated boundaries of the [m]unicipalities and the [c]ounty of
20 Valencia, excluding the Pueblo of Isleta.”

1 {3} This case arises from a dispatch issued from the VRECC after Selena Lucero
2 (Mother) made a nonemergency call around 4:00 p.m. to the VRECC regarding her
3 son, Mark Lucero (Lucero). During the phone call, Mother spoke to three separate
4 employees of the VRECC. Mother informed the VRECC employees that Lucero had
5 just gotten out of jail and that he was outside his home beating animals. That
6 information was documented in the computer-aided dispatch system (CAD) and was
7 available to the officers dispatched to the scene. Mother also gave information to the
8 VRECC employees that was *not* documented in the CAD and *not* available to the
9 officers. She told them that Lucero had “mental challenges,” he was without his
10 medications, he needed his medications because he did not function well without
11 them, and she asked that he be taken to the hospital. Mother also told them that
12 Lucero was getting into a vehicle trying to leave, his brother-in-law was trying to
13 stop him from leaving, he was a danger to himself and others, and that she was
14 scared.

15 {4} Based on the call, the VRECC dispatched the Valencia County Sheriff’s
16 Office to the address provided by Mother. Plaintiff was one of the four officers
17 dispatched to the scene. Upon Plaintiff’s arrival, Lucero got into his car, hit one of
18 the other officer’s vehicles with his car, drove off, turned around, and drove at a high
19 rate of speed into the vehicle that Plaintiff was sitting in. The collision pushed
20 Plaintiff’s vehicle into an embankment, inflicting physical injuries on Plaintiff.

1 {5} Plaintiff initially filed suit against the Villages of Los Lunas and Bosque
2 Farms (collectively, the Villages), Valencia County, the VRECC, the board of
3 directors of the VRECC, Shirley Valdez, Employees on Duty 1-5, and others no
4 longer involved in the case for personal injuries stemming from Defendants’ alleged
5 negligence. The Villages were dismissed from the action based on the district court’s
6 conclusion that “the facts alleged in the complaint do not come within the scope of
7 the waiver of sovereign immunity of [Section] 41-4-6 relied upon by Plaintiff.”
8 Valencia County was dismissed from the action with prejudice by stipulated order.
9 The Villages and Valencia County are not involved in this appeal.

10 {6} Defendants left in the case after the Villages and Valencia County were
11 dismissed filed a motion for summary judgment, arguing that the district court’s
12 decision concerning Section 41-4-6 was equally applicable to them and mandated
13 dismissal. Plaintiff responded arguing—for the first time in the action—that the
14 VRECC was not a governmental entity immune from suit under the TCA and, even
15 if it was, the building waiver pursuant to Section 41-4-6 applied to these
16 circumstances. After a hearing, the district court determined that the VRECC was a
17 governmental entity for purposes of the TCA and Section 41-4-6 did not waive
18 Defendants’ immunity. The district court granted Defendants’ motion for summary
19 judgment and dismissed all remaining claims with prejudice. Plaintiff appeals.

1 **DISCUSSION**

2 **I. The VRECC Is a “Governmental Entity” Under the TCA**

3 {7} In both her initial and amended complaints, Plaintiff alleged that the VRECC
4 and its board of directors were “a government municipality/entity created under the
5 laws of the State of New Mexico.” Despite that assertion, in response to Defendants’
6 motion for summary judgment, Plaintiff argued in conclusory fashion that the
7 VRECC did not meet the definition of a local public body under Section 41-4-3(C)
8 of the TCA, and thus it was not a governmental entity granted immunity from
9 liability in tort under Section 41-4-4(A). Plaintiff also noted that the VRECC was
10 not among the entities granted immunity by Section 63-9D-10 of the Enhanced 911
11 Act. The district court rejected both contentions. On appeal, Plaintiff abandons her
12 argument based on Section 63-9D-10 and we do not address it further.

13 {8} Section 41-4-4(A) of the TCA grants immunity from liability in tort to a
14 “governmental entity and any public employee while acting within the scope of
15 [their] duty.” A “governmental entity” is defined in Section 41-4-3(B) of the TCA
16 as “the state or any local public body as defined in Subsections C and H of this
17 section.” No one contends that the VRECC is a “state” entity, thus the only question
18 is whether it meets the definition of a “local public body.” Section 41-4-3(C) defines
19 “local public body,” in pertinent part, to include “all political subdivisions of the
20 state and their agencies, instrumentalities and institutions.” Resolution of the case

1 requires us to address a question of first impression in New Mexico: whether the
2 VRECC is an agency, instrumentality, or institution of one or more political
3 subdivisions of the state under Section 41-4-3(C). To answer this question, we must
4 interpret Section 41-4-3(C), the Joint Powers Agreements Act, and the Enhanced
5 911 Act. Thus, our standard of review is de novo. *See Cooper v. Chevron U.S.A.,*
6 *Inc.*, 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61 (noting that construction of
7 statutes presents a legal question that we review de novo).

8 {9} The purpose of the Enhanced 911 Act is “to further the public interest and
9 protect the safety, health and welfare of the people of New Mexico by enabling the
10 development, installation and operation of enhanced 911 emergency reporting
11 systems to be operated under shared state and local governmental management and
12 control.” Section 63-9D-2(B). Driving the point home, the Legislature specifically
13 noted that local governing bodies could use joint powers agreements to create
14 separate entities to provide enhanced 911 services. Section 63-9D-4(B). Thus the
15 Legislature has determined that combined 911 services are a critical component of
16 the ability of local governments to fulfill their most basic responsibility: protecting
17 the health and safety of their citizens.

18 {10} The Joint Powers Agreements Act provides the fiscal and administrative
19 framework for the creation and management of the contractual agreements between
20 public agencies by which they can “jointly exercise any power common to the

1 contracting parties.” Section 11-1-3. The term “public agency” specifically includes
2 counties and municipalities. Section 11-1-2(A). There is no question that the parties
3 to the VRECC joint powers agreement had the authority to enter into the agreement.
4 Once created in an approved agreement, the entity “shall possess the common power
5 specified in the agreement.” Section 11-1-5(C). Thus the entity—here, the
6 VRECC—possesses the same duty and power to provide the 911 emergency
7 communications services as the Villages and Valencia County.¹

8 {11} The agreement establishing the VRECC reflects this purpose and reality. And,
9 the VRECC agreement reflects its intent to create a public entity. The board of
10 directors of the VRECC is composed of the top administrators and law enforcement
11 officials of the Villages and Valencia County. The term of office for members of the
12 board is coincident with their term of office at the Villages and Valencia County.
13 The VRECC board meetings are required to be held in accordance with the Open
14 Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (1974, as amended through 2013).

15 {12} In short, the VRECC is an entity created pursuant to statute to provide basic
16 safety and health services on behalf of the Villages and Valencia County. The
17 VRECC is controlled by the Villages and Valencia County, and it possesses their
18 same powers and duty with regard to the health and welfare of their citizens. In this

¹As we noted above, the City of Belen is also part of the VRECC. However, as it is not part of this litigation, we do not reference it in our analysis.

1 context, it would be—colloquially speaking—weird not to deem the VRECC an
2 instrumentality of the Villages and Valencia County. We hold that it is an
3 instrumentality under the TCA. Finally, we note that our conclusion agrees with the
4 *Black’s Law Dictionary* definition of “instrumentality”: “[a] means or agency
5 through which a function of another entity is accomplished, such as a branch of a
6 governing body.” *Instrumentality, Black’s Law Dictionary* (11th ed. 2019).

7 **II. Section 41-4-6 Does Not Waive Immunity in This Context**

8 {13} In her amended complaint, Plaintiff alleged that Defendants’ “failure to
9 properly maintain communication log books” and “failure to relay information
10 regarding . . . Lucero’s criminal history, behavior, and/or mental/emotional state to
11 Plaintiff . . . amounted to negligent operation and maintenance of the dispatch system
12 and/or center.” Plaintiff did not allege that the physical facilities of the dispatch
13 center were defective in any manner. Her focus throughout has been on assertions
14 that the call from Mother was mishandled by the dispatchers.

15 {14} Section 41-4-4(A) of the TCA grants blanket immunity to governmental
16 entities and public employees from liability in tort except as waived by Sections
17 41-4-5 through 41-4-12. *See Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-040, ¶ 8,
18 140 N.M. 205, 141 P.3d 1259. Given Plaintiff’s allegations of negligence, only
19 Section 41-4-6 is implicated in this case. Commonly referred to as the “building
20 waiver,” *Cobos v. Doña Ana Cnty. Hous. Auth.*, 1998-NMSC-049, ¶ 1, 126 N.M.

1 418, 970 P.2d 1143, Section 41-4-6(A) allows suits seeking recompense for “bodily
2 injury . . . caused by the negligence of public employees . . . in the operation or
3 maintenance of any building, public park, machinery, equipment or furnishings.”

4 {15} Section 41-4-6 has been the subject of considerable judicial attention since its
5 enactment. The earliest cases limited the reach of Section 41-4-6 to instances where
6 injury was caused by a physical defect in the building. *Wittkowski v. Corrs. Dep’t*
7 *of N.M.*, 1985-NMCA-066, ¶ 17, 103 N.M. 526, 710 P.2d 93, *overruled on other*
8 *grounds by Silva v. State*, 1987-NMSC-107, ¶ 15, 106 N.M. 472, 745 P.2d 380;
9 *Pemberton v. Cordova*, 1987-NMCA-020, ¶¶ 5, 6, 105 N.M. 476, 734 P.2d 254,
10 *abrogated on other grounds as recognized by Williams v. Cent. Consol. Sch. Dist.*,
11 1998-NMCA-006, 124 N.M. 488, 952 P.2d 978; *Martinez v. Kaune Corp.*, 1987-
12 NMCA-131, ¶¶ 6, 7, 106 N.M. 489, 745 P.2d 714; *Gallegos v. State*, 1987-NMCA-
13 150, ¶ 8, 107 N.M. 349, 758 P.2d 299. New Mexico courts began to retreat from that
14 narrow reading of the statute in *Castillo v. County of Santa Fe*, 1988-NMSC-037,
15 107 N.M. 204, 755 P.2d 48. There, our Supreme Court decided that the property
16 surrounding a public building was covered under the concept of “building” as used
17 in Section 41-4-6. *Castillo*, 1988-NMSC-037, ¶ 7. The Court also held that the
18 concept of “maintenance” could encompass a duty to exercise reasonable care to
19 react to and guard against conditions not connected to the physical condition of the
20 building and surrounding grounds. *Id.* ¶¶ 7-10. In *Castillo* the condition was loose

1 roaming dogs. *Id.* ¶ 4. The Court held that the complaint stated a claim upon which
2 relief could be granted. *Id.* ¶ 10.

3 {16} The retreat from the narrow “physical defect” view of Section 41-4-6 was
4 completed in *Bober v. New Mexico State Fair*, 1991-NMSC-031, ¶¶ 25-29, 111
5 N.M. 644, 808 P.2d 614 (holding that the State Fair had a duty to run its operations
6 in a manner that would not create unsafe conditions on adjoining streets). Our
7 Supreme Court in *Bober* first noted that under Section 41-4-2(B), “[l]iability for acts
8 or omissions under the [TCA] shall be based upon the traditional tort concepts of
9 duty and the reasonably prudent person’s standard of care in the performance of that
10 duty.” *Bober*, 1991-NMSC-031, ¶ 25 (internal quotation marks and citation
11 omitted). *Bober* then emphasized that liability under Section 41-4-6 was not limited
12 to “maintenance” of public property, but “also arises from the ‘operation’ of any
13 such property.” *Bober*, 1991-NMSC-031, ¶ 27. It is the emphasis on the term
14 “operation” that set the analysis in *Bober* apart from prior cases. *See Callaway v.*
15 *N.M. Dep’t of Corrs.*, 1994-NMCA-049, ¶ 15, 117 N.M. 637, 875 P.2d 393. *Bober*’s
16 reference to operations also set the stage for a series of difficult, sometimes
17 contradictory, cases—some concluding that Section 41-4-6 applies to allow an
18 action to continue; some refusing to find Section 41-4-6 applicable. Our task is to
19 determine where Plaintiff’s action lies on the spectrum.

1 {17} The first significant case to analyze the scope of Section 41-4-6 following
2 *Bober* was *Archibeque v. Moya*, 1993-NMSC-079, 116 N.M. 616, 866 P.2d 344.
3 There, an inmate in a New Mexico prison was assaulted on his first night in the
4 facility. *Id.* ¶ 2. He sued in federal court asserting that the department of corrections
5 was negligent when it released him into the general population without appropriately
6 checking the printout of current inmates for “known enemies.” *Id.* ¶¶ 2, 3. Upon
7 certification, our Supreme Court—citing *Wittkowski*, 1985-NMCA-066—stated
8 broadly that “operation and maintenance of the penitentiary premises” did “not
9 include the security, custody, and classification of inmates.” *Archibeque*, 1993-
10 NMSC-079, ¶ 8 (internal quotation marks omitted). Our Supreme Court seemed to
11 narrow this broad language when it noted that the administrator was merely
12 “performing an administrative function associated with the operation of the
13 corrections system.” *Id.* Later in the opinion, our Supreme Court also noted that the
14 misclassification that led to the assault did not in and of itself “create an unsafe
15 condition on the prison premises as to the general prison population.” *Id.* ¶ 11. Our
16 Supreme Court noted its concern that waiving immunity for every act of negligence
17 that created a “risk of harm for a single individual would subvert the purposes of the
18 [TCA].” *Id.*

19 {18} Chief Justice Ransom specially concurred, cautioning against the potential
20 effects of the majority’s broader language, but agreeing with the result because the

1 negligent “discrete administrative decision” did “not change the condition of the
2 premises.” *Id.* ¶ 17 (Ransom, C.J., specially concurring).

3 {19} This Court considered a prisoner’s claim against the department of corrections
4 a few months later in *Callaway*, 1994-NMCA-049. In *Callaway*, the plaintiff was
5 also beaten by other inmates on the first day he was transferred to the facility. *Id.*
6 ¶ 4. In contrast to the factual allegations in *Archibeque*, the plaintiff alleged that the
7 prison was “negligent in allowing the known and dangerous gang members loose to
8 victimize the general prison population.” *Callaway*, 1994-NMCA-049, ¶ 18. This
9 Court concluded that there was a substantive distinction between the two fact-
10 patterns, and held that the claim was actionable under Section 41-4-6. *Callaway*,
11 1994-NMCA-049, ¶¶ 19, 20. The difference in outcome was driven by the nature
12 and impact of the negligent acts alleged. *Id.* ¶ 19. In *Archibeque* the negligence was
13 a single act of improper review of records. 1993-NMSC-079, ¶¶ 2, 11. There was no
14 indication that there was a more widespread problem with record review. *Id.* ¶ 11.
15 In *Callaway* the negligence alleged involved violent, armed, “roaming gang
16 members,” who “created a dangerous condition on the premises of the penitentiary”
17 and foreseeable danger to other inmates. 1994-NMCA-049, ¶ 19. From this we
18 discern that Section 41-4-6 waives immunity if the alleged negligence involves a
19 problem that implicated the core of how the prison was being run or—in the words
20 of the statute—operated. *Callaway*, 1994-NMCA-049, ¶ 18.

1 {20} The next case decided after *Bober* involving Section 41-4-6 and its
2 “operations” waiver was *Espinoza v. Town of Taos*, 1995-NMSC-070, 120 NM 680,
3 905 P.2d 718. In *Espinoza* a child was hurt when he fell off a slide in a public
4 playground while participating in a summer day camp program run by the
5 municipality. *Id.* ¶¶ 2, 3. Plaintiffs alleged that the accident occurred because the
6 supervisors assigned to the camp were negligent in supervising the child’s activities.
7 *Id.* ¶¶ 2, 4, 6. Citing *Seal v. Carlsbad Independent School District*, 1993-NMSC-
8 049, 116 N.M. 101, 860 P.2d 743, the plaintiffs argued that the absence of adequate
9 supervision of children when using government recreational equipment was an
10 “unsafe, dangerous or defective condition for which sovereign immunity ha[d] been
11 waived.” *Espinoza*, 1995-NMSC-070, ¶ 6 (internal quotation marks and citation
12 omitted). Our Supreme Court disagreed. *Id.* ¶ 14. First, the Court noted that *Seal* did
13 not involve a claim of negligent supervision. *Espinoza*, 1995-NMSC-070, ¶ 6.
14 Rather *Seal* turned on allegations that appropriate lifelines had not been installed and
15 that lifeguards were not “present and acting as such” while the pool was being used.
16 *Espinoza*, 1995-NMSC-070, ¶ 6. Thus, the Court asserted that it had not addressed
17 the issue of negligent supervision in *Seal*. *Espinoza*, 1995-NMSC-070, ¶ 6. Second,
18 the Court held unequivocally that Section 41-4-6 “does not grant a waiver for claims
19 of negligent supervision.” *Espinoza*, 1995-NMSC-070, ¶ 8. *Espinoza* relied in part
20 on pre-*Bober* cases such as *Pemberton*, 1987-NMCA-020. *Espinoza*, 1995-NMSC-

1 070, ¶ 8. It also relied on *Archibeque*, which it characterized as holding that Section
2 41-4-6 did not “waive immunity for negligent performance of an employee’s duties.”
3 *Espinoza*, 1995-NMSC-070, ¶ 12. Our Supreme Court summarized the cases the
4 plaintiffs relied on as involving “negligent conduct that itself created unsafe
5 conditions for the general public.” *Id.* ¶ 14. In sum, our Supreme Court opined that
6 there was nothing wrong with the playground; the only thing that would give rise to
7 a duty was the “day camp undertaking.” *Id.* By separating the town’s activity from
8 the physical object, our Supreme Court decided that Section 41-4-6 simply did not
9 apply. *Espinoza*, 1995-NMSC-070, ¶ 14; *see also Baca v. State*, 1996-NMCA-021,
10 ¶ 12, 121 N.M. 395, 911 P.2d 1199 (acknowledging “candidly” that “the distinctions
11 drawn in the cases in the area of waiver of immunity are exceedingly fine”).

12 {21} In *Leithead v. City of Santa Fe*, 1997-NMCA-041, 123 N.M. 353, 940 P.2d
13 459, the endeavor to distinguish negligent supervision from negligent operation
14 continued. This Court considered a claim that the city’s failure to provide
15 appropriate lifeguard services had caused a child to nearly drown. *Id.* ¶¶ 2, 3. The
16 city asserted that the case was no more than a claim for negligent supervision, and
17 thus controlled by the holdings in *Espinoza* and *Archibeque*. *Leithead*, 1997-NMCA-
18 041, ¶ 7. Relying on *Seal*, this Court disagreed and imposed essentially a per se rule
19 that a “swimming pool without an adequate number of trained lifeguards creates a
20 dangerous condition on the physical premises which affects the swimming public at

1 large.” *Leithead*, 1997-NMCA-041, ¶ 15. In doing so, *Leithead* wove together the
2 *Bober* concept of “operation” of a facility that is not tied to any physical defect with
3 the idea from *Archibeque* that negligence of public employees under Section 41-4-6
4 had to create an unsafe or dangerous condition for a larger population than just the
5 plaintiff in any given case. *Leithead*, 1997-NMCA-041, ¶¶ 9-16.

6 {22} The concepts of operation, negligent supervision, and threats to a larger
7 population under Section 41-4-6 arose again in two cases in the public setting, but
8 involving very different factual patterns, *Encinias v. Whitener Law Firm, P.A.*, 2013-
9 NMSC-045, ¶¶ 2-4, 310 P.3d 611 and *Upton*.

10 {23} *Encinias* presented a Section 41-4-6 issue in an odd procedural posture. The
11 primary case was a legal malpractice case based on a missed statute of limitations.
12 *Encinias*, 2013-NMSC-045, ¶¶ 3, 4. The defendant law firm asserted that the claim
13 should be dismissed because the case was not viable on the merits. *Id.* ¶ 1. The
14 underlying case involved an incident in which a student at a high school was badly
15 beaten by classmates at a location off of—but near to—the school campus. *Id.* ¶ 2.
16 The student asserted that the high school was negligent in failing to protect him from
17 the attack. *Id.* ¶ 7. The student’s malpractice action was dismissed by the district
18 court and this Court affirmed, concluding that the TCA did not waive the school’s
19 immunity. *Id.* ¶ 4.

1 {24} Our Supreme Court reversed, relying on *Bober*, *Castillo*, and *Upton* (which
2 we will discuss shortly), to emphasize that Section 41-4-6 waived immunity when
3 public employee negligence results in an injury that can be ascribed to an “unsafe,
4 dangerous, or defective condition on property owned and operated by the
5 government.” *Encinias*, 2013-NMSC-045, ¶ 10 (internal quotation marks and
6 citation omitted). The Court observed that given the holdings in *Bober*, *Castillo*, and
7 *Upton*, negligence could take many forms, including the “safety policies necessary
8 to protect the people who use the building.” *Encinias*, 2013-NMSC-045, ¶¶ 10-11
9 (internal quotation marks and citation omitted).

10 {25} Our Supreme Court cautioned, however, that there are limits to the Section
11 41-4-6 waiver. *Encinias*, 2013-NMSC-045, ¶ 12. It noted the holding in *Espinoza*
12 that there is no waiver for negligent supervision as such. *Encinias*, 2013-NMSC-
13 045, ¶ 12. It also noted that in the school context “a single act of student-on-student
14 violence does not render the premises unsafe.” *Id.* ¶ 13 (citing *Pemberton*, 1987-
15 NMCA-020). Our Supreme Court thus concluded that the result in *Pemberton* was
16 correct—not based on the discredited rationale that Section 41-4-6 was limited to
17 physical defect, but because there was no allegation or evidence in *Pemberton* that
18 the school was on notice of a potentially dangerous condition portending student
19 violence. *Encinias*, 2013-NMSC-045, ¶ 13. Ultimately our Supreme Court reinstated
20 the plaintiff’s malpractice action in *Encinias* because the record showed that the

1 school was aware that the area where the attack occurred was a “hot zone” for student
2 violence. *Id.* ¶ 18.

3 {26} The cases we have so far discussed teach that the “operations” aspect of
4 Section 41-4-6 will apply when a factual scenario can be fairly deemed to include
5 either—or both—of the following characteristics. First, an operational failure to
6 respond to or discover conditions which can pose a danger to a class of persons
7 involved in or affected by an activity on the property. *Castillo* and *Encinias* are
8 examples of this type of scenario. Second, a failure to create and/or to implement
9 reasonably appropriate safety policies and operational procedures to make public
10 properties safe for the public who use them. *Leithead* and, more recently, *Prewitt v.*
11 *Los Lunas Board of Education*, A-1-CA-37641, mem. op. ¶¶ 7-16 (N.M. Ct. App.
12 June 9, 2020) (nonprecedential) are examples of this scenario.

13 {27} The second pertinent post-*Bober* case involving operation, negligent
14 supervision, and threats to a larger population, *Upton*, 2006-NMSC-040, does not fit
15 easily into either general category. Because, however, *Upton* provides the closest
16 potential fit to Plaintiff’s case, it is important to accurately assess its place in
17 jurisprudence of Section 41-4-6. *Upton* arose from the tragic death of a teenage
18 student who had suffered from asthma since early childhood. 2006-NMSC-040,
19 ¶¶ 2, 5. The student’s parents informed the school of her condition and made
20 apparently satisfactory arrangements with the physical education teacher to limit the

1 student's activities if they appeared to be triggering an attack. *Id.* ¶ 2. The parents
2 also gave permission for the school to contact medical personnel in the event of an
3 attack. *Id.* And the student's condition was noted on her individualized education
4 plan with the school. *Id.*

5 {28} On the day of the student's death, a substitute teacher was in charge of the
6 physical education class. *Id.* ¶ 3. The teacher required exercises that were more
7 rigorous than usual. *Id.* The student reacted badly and asked for permission to stop.
8 *Id.* The substitute teacher refused the request. *Id.* After the physical education class,
9 the student went to her next class and, shortly after class began, collapsed at her
10 desk. *Id.* ¶ 4. The school staff attempted to administer two inhaler treatments. *Id.*
11 The school secretary checked the student's vital signs and asked the front office to
12 call 911. *Id.* The student was then placed in a wheelchair and taken to the hallway.
13 *Id.* No one administered CPR or other emergency protocols. *Id.* Fifteen minutes after
14 she was placed in the hallway, a police officer saw the student and called 911
15 immediately. *Id.* ¶ 5. Evidence suggested this was the first time a 911 call had been
16 placed. *Id.* By the time medical personnel arrived, the student was no longer
17 breathing, and she died that afternoon. *Id.*

18 {29} It is fair to say that the student's death occurred as a result of a cascade of bad
19 decisions, acts, and failures to act on the part of a number of school personnel. *Id.*
20 ¶¶ 2-5. That said, however, it is difficult to equate their errors with either an

1 operational failure to respond to dangerous conditions that affect a general class of
2 persons or a failure to implement operational procedures to keep the school safe for
3 the public who use the building. Our Supreme Court recognized as much when it
4 acknowledged “that a school building is not as inherently dangerous as a swimming
5 pool” and refused to apply the kind of categorical rule adopted in *Leithead. Upton*,
6 2006-NMSC-040, ¶ 19.

7 {30} In addition, *Upton* does not present a case in which a public entity has failed
8 to recognize the need for—and actually implement—safety protocols. Appropriate
9 protocols were in place. *Id.* ¶¶ 2, 14. The school simply failed to follow them in that
10 instance. *Id.* ¶ 14.

11 {31} Recognizing the problem, our Supreme Court used *Archibeque* and *Callaway*
12 as illustrations of the “discrete administrative decision” versus “general condition”
13 spectrum. *Upton*, 2006-NMSC-040, ¶¶ 20, 21 (internal quotation marks and citations
14 omitted). Our Supreme Court decided that *Upton* fell on the general condition side
15 based on the extraordinary “chain of events that both preceded and followed the
16 specific decisions of the hapless substitute teacher.” *Id.* ¶ 18. As the Court put it, the
17 plaintiffs “challenge[d] far more than a single failure of oversight by one overworked
18 teacher.” *Id.* While we are not in a position to disagree with our Supreme Court’s
19 decision to reverse for trial, we are sympathetic to Justice Minzner’s observation in

1 dissent that the “opinion expands our case law without acknowledging it is doing
2 so.” *Id.* ¶ 31 (Minzner, J., dissenting).

3 {32} With that lengthy exegesis in mind, we turn to consider how the facts in this
4 case fall within the Section 41-4-6 spectrum that we have outlined. Plaintiff’s
5 briefing in this Court recites in some detail the information that was not provided to
6 her by the VRECC’s dispatchers. The information was not provided either because
7 it was not gathered by the dispatchers, or because it was not conveyed even though
8 available to them. Defendants do not dispute that the information was not provided,
9 or that the information would have been useful to Plaintiff in conducting the
10 encounter with Lucero. Defendants’ briefing can also be read as not contesting that
11 the dispatchers were negligent in their handling of the call. The question for us boils
12 down to whether the failure was caused by simple dispatcher error or by operational
13 factors relating to dangerous conditions and/or policies and procedures that affect
14 public users. If the former, *Archibeque* controls; if the latter, *Callaway*, *Castillo*, and
15 *Encinias* control. Or does this case implicate *Upton* and the principle of cascading
16 failures to follow procedures? We conclude that the errors alleged by Plaintiff are
17 most appropriately deemed simple employee negligence for which Section 41-4-6
18 does not waive immunity.


19 {33} Plaintiff has not submitted any evidence that raises a question of fact as to any
20 broad problems with how the VRECC was run. She has presented nothing, for

1 example, to establish the inadequacy of the training provided to the dispatchers.
2 Plaintiff also does not assert that the VRECC failed to maintain the physical plant
3 and equipment appropriately. And, Plaintiff does not assert that the procedures and
4 protocols in place for handling calls and dispatches were inadequate. Plaintiff does
5 assert that the VRECC was understaffed at the time of this incident, but does not
6 provide any evidence to create a fact question as to how, or even whether, the
7 understaffing contributed to the errors committed that day. As described in the
8 record, the dispatchers did not fully memorialize the information provided during
9 the 911 call. This scenario is materially different from the one in *Upton* where the
10 defendants first failed to follow the safety protocols in place for the student and
11 thereafter repeatedly failed to follow safety protocols in place for all students
12 suffering medical distress. The errors committed by the dispatchers do not rise to the
13 level of the torrent of mistakes committed by the school personnel in *Upton*. Plaintiff
14 simply did not receive the information. Thus, Section 41-4-6 does not apply in these
15 circumstances.

16 **CONCLUSION**

17 {34} For the reasons stated above, we affirm the district court.

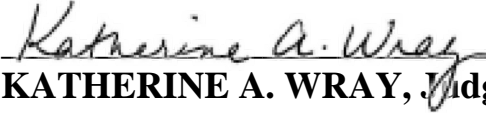
18 {35} **IT IS SO ORDERED.**

19 
20 _____
21 **MICHAEL D. BUSTAMANTE, Judge,**
retired, sitting by designation.

1 **WE CONCUR:**

2 

3 **ZACHARY A. IVES, Judge**

4 

5 **KATHERINE A. WRAY, Judge**