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

2 **DAVID WATERMILLER and CAROLYN**
3 **WATERMILLER, Individually and as**
4 **Personal Representatives for the ESTATE**
5 **OF LEROY MCCANDLESS, Deceased,**

Court of Appeals of New Mexico
Filed 7/23/2024 10:04 AM


Ramon J. Maestas
Chief Clerk

6 Plaintiffs-Appellants,

7 v.

No. A-1-CA-41145

8 **ALBUQUERQUE POLICE DEPARTMENT,**
9 **CITY OF ALBUQUERQUE, LIEUTENANT**
10 **K. JOHNSTON, SERGEANT ANDREW**
11 **HERPOLSHEIMER, OFFICER LEA LOPEZ,**
12 **OFFICER BRADLEY AGNER, OFFICER**
13 **CARLOS SCHMID, OFFICER KEVIN BEEM,**
14 **and OFFICER MATTHEW CHAVEZ,**

15 Defendants-Appellees.

16 **APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY**
17 **Benjamin Chavez, District Court Judge**

18 Fadduol, Cluff, Hardy & Conaway, P.C.
19 Carlos Sedillo
20 Albuquerque, NM

21 Harrison & Hart, P.C.
22 Nicholas T. Hart
23 Albuquerque, NM

24 for Appellants

25 City of Albuquerque
26 Lauren Keefe, City Attorney
27 Kristin J. Dalton, Managing City Attorney
28 Albuquerque, NM

1 **MEMORANDUM OPINION**

2 **DUFFY, Judge.**

3 {1} Plaintiffs appeal the district court’s order granting Defendants’ Rule 1-
4 012(B)(6) NMRA motion to dismiss Plaintiffs’ complaint with prejudice. For the
5 reasons that follow, we affirm.

6 **BACKGROUND**

7 {2} Plaintiffs filed the underlying lawsuit against the City of Albuquerque, the
8 Albuquerque Police Department, and seven individual officers (collectively
9 Defendants), alleging that Defendants mishandled their response to a call for help
10 involving a person who was threatening suicide. In lieu of an answer, Defendants
11 filed a Rule 1-012(B)(6) motion to dismiss for failure to state a claim, arguing that
12 (1) the law enforcement waiver in the Tort Claims Act (TCA), NMSA 1978, § 41-
13 4-12 (2020), does not waive immunity for negligence alone; and (2) the decedent’s
14 suicide was an independent intervening cause. In response, Plaintiffs argued that
15 “the Tort Claims Act authorizes claims based upon negligent breaches of a statutory
16 duty,” and contended the officers had breached two statutory duties of law
17 enforcement officers. First, citing to the definition of “law enforcement officer”
18 found in NMSA 1978, Section 41-4-3(D) (2015) of the TCA, Plaintiffs claimed that
19 the officers breached a statutory duty to maintain public order. Second, Plaintiffs
20 claimed that the officers had breached a statutory duty to involuntarily commit the

1 decedent under NMSA 1978, Section 43-1-10(A)(3) (2013) (stating that “[a] peace
2 officer may detain and transport a person for emergency mental health evaluation
3 and care in the absence of a legally valid order from the court” in certain
4 circumstances).

5 {3} In conjunction with their response, Plaintiffs filed an amended complaint that
6 included one additional paragraph expressly identifying their statutory claims.
7 Defendants again filed a motion to dismiss in lieu of an answer, which specifically
8 focused on Plaintiffs’ statutory theories and argued that neither of the statutory
9 sections created a duty for the officers. Defendants maintained that “[b]ecause
10 Plaintiffs’ [a]mended [c]omplaint has not sufficiently pled a violation of a statutory
11 duty by Defendants or any other waiver of immunity pursuant to the TCA, they have
12 failed to state a claim upon which relief can be granted.” After reviewing the motions
13 and conducting a hearing, the district court granted Defendants’ motion and
14 dismissed Plaintiffs’ amended complaint with prejudice.

15 **DISCUSSION**

16 **Standard of Review**

17 {4} “A district court’s decision to dismiss a case for failure to state a claim under
18 Rule 1-012(B)(6) is reviewed de novo.” *Delfino v. Griffo*, 2011-NMSC-015, ¶ 9, 150
19 N.M. 97, 257 P.3d 917 (internal quotation marks and citation omitted). A Rule 1-
20 012(B)(6) motion “tests the legal sufficiency of the complaint, not the factual

1 allegations.” *Walsh v. Montes*, 2017-NMCA-015, ¶ 6, 388 P.3d 262 (internal
2 quotation marks and citations omitted). “On review, we accept all well-pleaded
3 factual allegations in the complaint as true and resolve all doubts in favor of [the]
4 sufficiency of the complaint.” *Id.* “Under Rule 1-012(B)(6), dismissal is appropriate
5 only if the non-moving party is not entitled to recover under any theory of the facts
6 alleged in their complaint.” *Walsh*, 2017-NMCA-015, ¶ 6 (internal quotation marks
7 and citation omitted).

8 {5} Plaintiffs argue that they alleged viable claims under the TCA and the district
9 court improperly dismissed their complaint. Because Defendants are governmental
10 entities and employees, they are immune from actions in tort unless Plaintiffs’ claims
11 fall within a waiver of immunity specified in the TCA. *Upton v. Clovis Mun. Sch.*
12 *Dist.*, 2006-NMSC-040, ¶ 8, 140 N.M. 205, 141 P.3d 1259 (citing NMSA 1978,
13 § 41-4-4 (2001)). In this case, Plaintiffs rely on the law enforcement waiver in
14 Section 41-4-12, which was amended in 2020 and provides that

15 [t]he immunity granted pursuant to Subsection A of Section 41-4-4 . . .
16 does not apply to liability for personal injury, bodily injury, *wrongful*
17 *death* or property damage resulting from assault, battery, false
18 imprisonment, false arrest, malicious prosecution, abuse of process,
19 libel, slander, defamation of character, violation of property rights, the
20 independent tort of negligent spoliation of evidence or the independent
21 tort of intentional spoliation of evidence, *failure to comply with duties*
22 *established pursuant to statute or law* or any other deprivation of any
23 rights, privileges or immunities secured by the constitution and laws of
24 the United States or New Mexico when caused by law enforcement
25 officers while acting within the scope of their duties. For purposes of
26 this section, “law enforcement officer” means a public officer or

1 employee vested by law with the power to maintain order, to make
2 arrests for crime or to detain persons suspected of or convicted of
3 committing a crime, whether that duty extends to all crimes or is limited
4 to specific crimes.

5 (Emphasis added.) Citing the portions of the waiver italicized above, Plaintiffs
6 contend that this case involves a wrongful death caused by law enforcement officers’
7 “failure to comply with duties established pursuant to statute or law.” *See id.* In
8 particular, Plaintiffs contend that Defendants (1) failed to comply with a common
9 law duty of ordinary care, (2) breached their duty to maintain public order, and (3)
10 had a duty to intervene because their actions created a special relationship with the
11 decedent. Although Plaintiffs offer cogent arguments in their briefing, these
12 arguments were not preserved below.

13 **I. Breach of the Duty of Ordinary Care**

14 {6} Plaintiffs first argue that Defendants breached a common law duty to exercise
15 ordinary care. *See Cross v. City of Clovis*, 1988-NMSC-045, ¶ 6, 107 N.M. 251, 755
16 P.2d 589 (stating that “a law enforcement officer has the duty in any activity actually
17 undertaken to exercise for the safety of others that care ordinarily exercised by a
18 reasonably prudent and qualified officer in light of the nature of what is being
19 done”). Having reviewed the record with care, we conclude this claim was not
20 preserved.

21 {7} Plaintiffs did not raise the common law duty of care as an independent basis
22 for Defendants’ liability. In the district court, Plaintiffs argued that Defendants

1 breached two *statutory* duties under Section 41-4-3(D) and Section 43-1-10(A)(3).
2 While Plaintiffs assert that they preserved their common law claims in addition to
3 their statutory claims based on discussion throughout their briefing on Defendants’
4 motions to dismiss, Plaintiffs’ claims were consistently and solely framed as
5 statutory in nature. Plaintiffs’ citation to *Cross and Weinstein v. City of Santa Fe ex*
6 *rel. Santa Fe Police Dep’t*, 1996-NMSC-021, 121 N.M. 646, 916 P.2d 313, appear
7 in support of those statutory claims. As such, it does not appear that common law
8 liability was preserved, and we decline to consider it for the first time on appeal. *See*
9 *Ferebee v. Hume*, 2021-NMCA-012, ¶¶ 25-26, 485 P.3d 778 (declining to consider
10 an argument not raised below because the opposing party did not have a fair
11 opportunity to respond to the argument below and the district court did not have an
12 opportunity to address it); *Vill. of Angel Fire v. Bd. of Cnty. Comm’rs*, 2010-NMCA-
13 038, ¶¶ 14-18, 148 N.M. 804, 242 P.3d 371 (same); *see also Woolwine v. Furr’s,*
14 *Inc.*, 1987-NMCA-133, ¶ 20, 106 N.M. 492, 745 P.2d 717 (“To preserve an issue
15 for review on appeal, it must appear that appellant fairly invoked a ruling of the trial
16 court on the same grounds argued in the appellate court.”).

1 **II. Breach of Duty Under Section 41-4-3(D)**

2 {8} Plaintiffs next argue that the officers in this case breached their duty under
3 Section 41-4-3(D) to maintain public order.¹ Plaintiffs raised the duty to maintain
4 public order below, but their arguments have changed on appeal.

5 {9} Below, Plaintiffs argued that Defendants breached a statutory duty to maintain
6 public order under Section 41-4-3(D), which defines the term “law enforcement
7 officer” as used in the TCA. *See* § 41-4-3(D) (stating that “‘law enforcement officer’
8 means a full-time salaried public employee of a governmental entity, or a certified
9 part-time salaried police officer employed by a governmental entity, whose principal
10 duties under law are to hold in custody any person accused of a criminal offense, to
11 maintain public order or to make arrests for crimes”). *But see* § 41-4-12 (including
12 another definition of “law enforcement officer” for purposes of that section). In their
13 briefing on appeal, Plaintiffs do not appear to advocate that Section 41-4-3(D)
14 creates a statutory duty and have not offered any argument to explain how Section

¹Plaintiffs did not offer any argument concerning Section 43-1-10 in their brief in chief, and only mention this section in a single sentence in their reply brief. They do not appear to have renewed their contention that Defendants breached a statutory duty to detain the decedent under Section 43-1-10. To the extent Plaintiffs suggest that the officers were under a common law duty to exercise their authority to involuntarily commit the decedent, this argument suffers from the same problem described in this section with respect to Section 41-4-3(D): Plaintiffs did not invoke a ruling on the common law standard in the district court.

1 41-4-3(D), a definitional provision, establishes a duty for purposes of the law
2 enforcement waiver in Section 41-4-12.

3 {10} Instead of arguing that Defendants breached a *statutory* duty to maintain
4 public order, as they did below, Plaintiffs now contend that officers by definition
5 have a duty to maintain public order, which is informed by the standard of ordinary
6 care articulated in *Cross*, 1988-NMSC-045, ¶ 6. As described, Plaintiffs’
7 characterization of Defendants’ failure to comply with a duty to maintain public
8 order is now grounded in the common law, rather than in statute. This particular
9 argument was not raised below, and the district court was not given an opportunity
10 to rule on this issue on the same grounds presented here. We decline to review it on
11 that basis. *See Vill. of Angel Fire*, 2010-NMCA-038, ¶ 15.

12 **III. Special Relationship**

13 {11} Finally, Plaintiffs contend that Defendants had a duty to intervene and aid the
14 decedent because their actions created a special relationship with the decedent. *See*
15 *Johnstone v. City of Albuquerque*, 2006-NMCA-119, ¶ 7, 140 N.M. 596, 145 P.3d
16 76 (“To impose a duty [to protect another from harm], a relationship must exist that
17 legally obligates [the d]efendant to protect [the p]laintiff’s interest. Absent such a
18 relationship, there exists no general duty to protect others from harm.” (citations
19 omitted)). Here, too, Plaintiffs’ argument has changed.

1 {12} In the district court, Plaintiffs did not argue the existence of a special
2 relationship as an independent basis for holding Defendants liable. They instead
3 advanced the existence of a special relationship in an effort to counter Defendants'
4 argument that the decedent's suicide was an independent intervening cause. Now,
5 Plaintiffs attempt to expand what was a defensive argument below into an offensive
6 one on appeal. For a number of reasons, we decline to reverse the district court on
7 this basis.

8 {13} First, to the extent New Mexico has recognized that a special relationship may
9 exist between one who takes custody over another, *see Johnstone*, 2006-NMCA-
10 119, ¶ 14, Plaintiffs have not alleged any facts establishing that the decedent was in
11 the custody of Defendants while they were present at the decedent's residence; at
12 the time of the decedent's suicide, all Defendants had left the area and had been gone
13 for some time pursuant to the decedent's admonitions that they, in essence, leave
14 him alone.

15 {14} Rather than establishing that a custodial relationship had been formed,
16 Plaintiffs alleged that Defendants had a duty to take the decedent into custody but
17 failed to do so. Below, Plaintiffs specifically alleged that Defendants were under a
18 statutory duty to take the decedent into custody—an argument the district court
19 rejected given the permissive nature of Section 43-1-10(A). On appeal, Plaintiffs
20 now additionally contend Defendants were under a common law duty to act

1 reasonably—a claim not presented to the district court. *See Vill. of Angel Fire*, 2010-
2 NMCA-038, ¶ 16. Plaintiffs would have this Court expand the special relationship
3 doctrine beyond the focus of jail, prison, or other forms of direct detention, but have
4 provided no justification or authority for doing so. *Elane Photography, LLC v.*
5 *Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 (stating that an appellate court will not
6 make arguments on behalf of the appellant). Without a record created in the district
7 court and arguments developed in this Court that could legally and factually justify
8 such an expansion, we decline to consider the matter further. As the case was
9 developed in the district court, Plaintiffs’ allegations do not sufficiently allege a
10 special relationship that could give rise to TCA liability.

11 **CONCLUSION**


12 {15} Based on the foregoing, we affirm.

13 {16} **IT IS SO ORDERED.**

14 
15 _____
MEGAN P. DUFFY, Judge

16 **WE CONCUR:**

17 
18 _____
GERALD E. BACA, Judge

19 
20 _____
KATHERINE A. WRAY, Judge