

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Received

JOSE LUIS LOYA,

Plaintiff,

JUN 17 2014

vs.

No. 34,447

GLEN GUTIERREZ,
Commissioned Officer
of Santa Fe County,

Defendant/Third-Party Plaintiff/Petitioner,

vs.

COUNTY OF SANTA FE,

Third-Party Defendant/Respondent.

RESPONDENT'S ANSWER BRIEF

Appeal from First Judicial District Court

County of Santa Fe

Honorable Barbara J. Vigil, D.J.

PROCEEDINGS ON WRIT OF CERTIORARI TO COURT OF APPEALS

SUPREME COURT OF NEW MEXICO
FILED

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JUN 16 2014



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SUMMARY OF ARGUMENT

The trial court and the Court of Appeals were correct: in enacting the Tort Claims Act, the legislature did not intend to waive sovereign immunity so as to require the State and its political subdivisions to defend and indemnify employees of a sovereign Indian nation. A Sheriff's grant of commission to a tribal police officer simply provides the latter with a jurisdictional tool with which to maintain peace, law and order within the reservation boundaries, for the primary benefit of the tribe and its members. A commission does not transform a tribally-employed policeman into a "public employee" of the county, nor does his or her use of the commission do so. In arguing to the contrary, Petitioner has misinterpreted the Tort Claims Act, ignored settled canons of statutory construction and twisted the plain words of the statute. Petitioner in effect seeks a result--a form of strict, vicarious liability--that is unintended by the legislature and unreasonable.

SUPPLEMENTAL SUMMARY OF PROCEEDINGS¹

Supplemental Summary of Facts Relevant to Issues on Certiorari

The evidence below, on which the trial court made its ruling and the Court of Appeals affirmed, was largely undisputed.

The County of Santa Fe is a political subdivision of the State of New Mexico and the Santa Fe County Sheriff's Department is an

¹ For clarity and consistency, Petitioner in this brief will use the same nomenclature as used in the Brief-in-Chief, to wit: Defendant/Third-Party-Plaintiff/Petitioner Glen Gutierrez will be referred to as "**Officer Gutierrez**" and Third-Party Defendant and Respondent County of Santa Fe will be referred to as "**the County.**"

agency of the County of Santa Fe. The Pueblo of Pojoaque is a sovereign Indian tribe. See R.P. 113, ¶¶ 1-3; R.P. 142, ¶¶ 1-3.

Officer Gutierrez does not dispute the trial court's finding, affirmed by the Court of Appeals, that as a sovereign entity, the pueblo is not a "governmental entity" and is not subject to the Tort Claims Act. See R.P. at 255; see COA Op. at ¶ 9 ("governmental entity" does not include sovereign Indian pueblos and tribes).

At all of the material times, Officer Gutierrez was employed by the Pueblo of Pojoaque Tribal Police Department as a full-time, salaried law enforcement officer, holding the rank of Detective/Sergeant. At all material times, the Pueblo of Pojoaque paid the entirety of Officer Gutierrez's salary as well as his employment benefits. Neither the County nor any of its agencies, including the Santa Fe County Sheriff's Department, ever employed Officer Gutierrez or ever paid any part of his salary or his employment benefits. See R.P. 113, ¶¶ 4-6; R.P. 142, ¶¶ 4-6.

Neither the County of Santa Fe nor any of its agencies, including the Santa Fe County Sheriff's Department, trained or supervised Officer Gutierrez or assigned Officer Gutierrez's work, or controlled or otherwise directed the manner or means of his performance as a law enforcement officer, nor did the Sheriff have the right to promote, demote, discipline or discharge him from employment, nor was Officer Gutierrez subject to any of the County's or the Santa Fe Sheriff's Department's rules, regulations, policies or procedures. The Santa Fe County Sheriff had the

authority to revoke the commission issued to Officer Gutierrez. See R.P. 116-117, ¶¶ 19-22; R.P. 145, ¶¶ 19-22.²

On January 24, 2005, the Santa Fe County Sheriff wrote to the Pueblo of Pojoaque Tribal Police Department Chief, in which the Sheriff memorialized "the scope of authority conferred to members of your department by virtue of [the Sheriff] having commissioned them as Deputy Sheriffs." Regarding the "financial responsibility" for liability stemming from acts of their "respective employees," the letter stated as follows:

Liability for the actions of commissioned tribal officers rests with the Pueblo of Pojoaque, not Santa Fe County. In other words, if a tribal officer is sued for actions taken while effecting an arrest or pursuing a suspect, the Pueblo of Pojoaque is responsible for defending the lawsuit and paying any damages. This is true regardless of whether the conduct giving rise to the lawsuit occurred within or outside the boundaries of the Pueblo of Pojoaque. Conversely, the County is responsible for the actions of the Sheriff's Department employees, even when they are acting within the Pueblo in response to requests for help by tribal officers.

² In his summary judgment response filed in district court, Officer Gutiérrez attempted to "dispute" a few facts proffered by the County in its motion below and supported by sworn affidavit; Officer Gutiérrez's brief below stated that "to his knowledge, ...the Sheriff's Department...has at all times had the right to control his activities in the use of his commission." See R.P. 145, ¶ 21. However, Officer Gutiérrez failed to support the foregoing statement of counsel made in a brief with any evidence; thus, the County's supported fact is deemed to be undisputed. See Rule 1-056(D)(2) NMRA; see also, Trujillo v. Puro, 101 N.M. 408, 411, 683 P.2d 963, 966 (Ct.App.), cert. denied, 101 N.M. 362, 683 P.2d 44 (1984) (statements of counsel are not evidence for purposes of summary judgment); accord Mosier v. Maynard, 937 F.2d 1521, 1525 (10th Cir. 1991) (statements in a brief do not constitute evidence in a summary judgment proceeding).

See R.P. 117, ¶¶ 23-24; R.P. 146, ¶¶ 23-24.³

The Tribal Police Department Chief did not object in any way, verbally or in writing, to the statement of liability contained in the January 24, 2005 letter or any other aspect of the letter, nor did the Sheriff ever receive any response or objection from the Pueblo Governor, Lieutenant Governor, Tribal Council or any commissioned tribal officer. See R.P. 117, ¶ 25; R.P. 146, ¶ 25.

The evidence is undisputed that, from his perspective, the Santa Fe County Sheriff intended the January 24, 2005 letter to apply to all Deputy Sheriff commissions that were issued to all Pojoaque Pueblo Tribal Police Department officers, including commissions already in existence as well as commissions issued after January 24, 2005. See R.P. 117-118, ¶ 26; R.P. 146, ¶ 26.

On or about June 23, 2008, the Santa Fe County Sheriff issued a commission to Officer Gutierrez, appointing him as a deputy of Santa Fe County. From the Sheriff's perspective, the commission was intended to be subject to the terms and conditions of the January 2005 letter. See R.P. 118, ¶ 27; R.P. 146, ¶ 27.

It is undisputed that from the Sheriff's perspective, the fact that he commissioned Officer Gutierrez for the purposes of enforcing the state traffic and criminal statutes was not intended by the Sheriff to create an obligation on the part of the County to defend or indemnify Officer Gutierrez in future civil lawsuits

³ In granting summary judgment in favor of Santa Fe County, the trial court concluded that the January 24, 2005 letter was "consistent" with the pertinent provisions of the Tort Claims Act. See R.P. 255.

brought against the latter based upon his individual acts and omissions. The Sheriff's intent, in fact, was the opposite, as explained in his letter. See R.P. 118, ¶ 28; R.P. 147, ¶ 28.

On September 5, 2009, Officer Gutierrez made a traffic stop of Plaintiff's vehicle. The traffic stop occurred on U.S. 84/285, within the exterior boundaries of the Pojoaque Pueblo reservation. At the time, Officer Gutierrez was on official duty for the Pojoaque Pueblo Tribal Police Department; dressed in his full tribal police uniform; displaying his tribal badge of office; driving his official tribally-issued, marked police vehicle; and being paid the whole of his salary and employment benefits by the Pueblo of Pojoaque. See R.P. 113-114, ¶¶ 4, 5, 8-11; see R.P. 144, ¶¶ 4, 5, 8-11.

Ultimately, Officer Gutierrez (assisted by tribal officers) arrested Plaintiff for the misdemeanor of reckless driving and took Plaintiff to the Tribal Police Department for processing. Then, Plaintiff was transported to the Santa Fe County jail by another tribal officer. See R.P. 114, ¶¶ 12, 14; R.P. 144, ¶¶ 12, 14.⁴ At the time, all of the tribal officers were on official duty for the Pueblo of Pojoaque Tribal Police Department; dressed in their tribal uniforms; displaying their tribal badges of office; and utilizing tribally-issued police vehicles. See R.P. 114, ¶ 14; R.P. 144, ¶ 14.

⁴ In his amended complaint, Plaintiff Loya alleged that Appellant "violently attacked Plaintiff" during the incident, pinned him by his neck to his vehicle and kicked him, causing him to suffer neck spasms and injuries. See R.P. 14-15, ¶¶ 13-21.

Apart from the fact that the tribal officers held commissions, it is undisputed that neither the Sheriff himself nor any of his employed officers were involved in any way in the subject incident, nor were any Sheriff's officers or supervisors notified about the incident or Plaintiff's arrest, before, during or after the arrest. The Sheriff's Department first learned about the September 5, 2009 incident when Plaintiff filed his action against Officer Gutierrez. See R.P. 115, ¶ 16; R.P. 144, ¶ 16.

The evidence also is undisputed that Officer Gutierrez's own contemporaneous description of the material incident (as set forth in his Incident Report, see R.P. 139), underscore the point that he was acting as a tribally-employed police officer: he did not mention the fact that Plaintiff (whom he stopped and arrested) was a non-Indian, nor did the officer mention, directly or indirectly, his Deputy Sheriff commission or his authority to act against a non-Indian pursuant to such commission.

The Pueblo of Pojoaque maintains liability insurance coverage for its tribal officers. See R.P. 119, ¶ 33; R.P. 147, ¶ 33.

The undisputed evidence reflected that, in addition to Pueblo of Pojoaque tribal police officers, the Sheriff also has commissioned officers from Torrance County Sheriff's Department, the Pueblo of Tesuque, the Los Alamos Police Department, the Edgewood Police Department, the United States Forest Service, the Bureau of Land Management, the Bureau of Indian Affairs, the Northern Pueblo Agency, and the City of Santa Fe Police Department. See R.P. 118, ¶ 30; R.P. 147, ¶ 30.

STANDARD OF REVIEW

The County agrees with Officer Gutierrez that the applicable standard of review is de novo. See Brief-in-Chief at 7 (cases); Solorzano v. Bristow, 2004-NMCA-136, ¶ 7, 136 N.M. 658, 660, 103 P.3d 582, 584, cert. quashed, 137 N.M. 767 (2005).

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND AND CONCLUDED THAT SANTA FE COUNTY DOES NOT HAVE A DUTY TO DEFEND AND/OR INDEMNIFY A TRIBAL LAW ENFORCEMENT OFFICER NOT EMPLOYED BY THE COUNTY

The trial court, Court of Appeals and both parties agree that the issue (whether the County must defend and potentially indemnify Officer Gutierrez) is governed by the New Mexico Tort Claims Act.

But for the Tort Claims Act, with its express, limited waivers of sovereign immunity, the State of New Mexico and the state's political subdivisions such as the County could be immune from every tort under every theory of liability, with no obligation to defend or indemnify anybody. See Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975). Under the Tort Claims Act, enacted by the legislature in response to Hicks, "governmental entities" and their "public employees" are immune from liability for all torts except as immunity is expressly waived in the statute. Waiver of immunity is "limited to and governed by" the Tort Claims Act which constitutes the "exclusive remedy." See §§ 41-4-2(A), 41-4-4(A), 41-4-17 NMSA 1978. In addition to express, limited waivers of sovereign immunity as to enumerated torts, the Tort Claims Act also imposes notice requirements, a short statute of limitations, maximum liability, and other limits including limits on whom government will defend and indemnify. The Tort Claims Act is valid

and constitutional. See Ferguson v. New Mexico State Highway Comm'n, 99 N.M. 194, 656 P.2d 244 (Ct.App. 1982), cert. denied, 99 N.M. 226 (1983); Jaramillo v. State, 111 N.M. 722, 809 P.2d 636 (Ct.App. 1991). A claim for defense and/or indemnification (i.e., the expenditure of public monies) is subject to sovereign immunity, except as waived. See NMSA 1978, § 41-4-4.

The parties (and the trial court and Court of Appeals) agree that interpretation of the Tort Claims Act must seek to determine and give effect to the intent of the legislature, based primarily on the statutory language. See State ex rel. Kline v. Blackhurst, 106 N.M. 732, 735, 749 P.2d 1111, 1114 (1988); California First Bank v. State, 111 N.M. 64, 68, 801 P.2d 646, 650 (1990) (court should "strictly construe" the Tort Claims Act with the "primary purpose" of "determin[ing] the Legislature's intent" by "look[ing] first to the language used"). And in construing the Tort Claims Act, the Supreme Court has been "reluctant" to "infer" a waiver of sovereign immunity. See Cockrell v. Bd. of Regents, 2002-NMSC-009, ¶ 20, 132 N.M. 156, 165, 45 P.3d 876, 885 (2002).

Here, the issue turns on the Tort Claims Act's requirement that "governmental entities" must provide for the defense of torts and violations of civil rights committed by "public employees" while acting within their scope of duties, and pay any settlement or judgment entered against them. See NMSA 1978, § 41-4-4, Subsections (B), (C), (D). The statute expressly excludes "independent contractors" from the definition of public employee.⁵

⁵ There is no issue in this case whether Officer Gutierrez was acting within his scope of duty as a tribal police officer.

As relevant to the issue at bar, the Tort Claims Act defines "public employee" as follows:

an officer, employee or servant of a governmental entity, excluding independent contractors ... and including ... (2) law enforcement officers; [and] (3) persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation[.] See § 41-4-3(F) NMSA 1978.

The term "law enforcement officer" is further defined in the Tort Claims Act as follows, in pertinent part:

"law enforcement officer" means a full-time salaried public employee of a governmental entity, or a certified part-time salaried police officer employed by a governmental entity[.] (NMSA 1978, § 41-4-3(D))

The dispositive question is whether or not Officer Gutierrez is a "public employee" within the definition and meaning of the Tort Claims Act. Both the trial court and the Court of Appeals concluded that he was not, and the courts were correct.

First, on its face, based on the undisputed evidence applied to the plain, unambiguous words of the statute, Officer Gutierrez was not "an officer, employee or servant of a governmental entity." A "governmental entity" is defined as the State of New Mexico and its agencies, and local public bodies and their agencies; as noted, it is undisputed that sovereign Indian pueblos and tribes--one of which employed Officer Gutierrez and paid the entirety of his salary and employment benefits--is not a "governmental entity." See NMSA 1978, § 41-4-3(F). It would be anomalous, if not absurd, to hold that a tribal employee is a county employee.

Second, as both the trial court and the Court of Appeals held, the operative category is "law enforcement officer" as defined by the Tort Claims Act. Although Officer Gutierrez unquestionably was

acting as a law enforcement officer when he stopped and arrested the Plaintiff, the Tort Claims Act makes abundantly clear that it is only "law enforcement officers" who are employed by a "government entity" (the State or its political subdivisions), either full or part time, who are "public employees" entitled to defense, indemnification and the other protections and limitations set forth in the Tort Claims Act. See NMSA 1978, § 41-4-3(D); see Williams v. Bd. of County Comm'rs of San Juan County, 125 N.M. 445, 451, 963 P.2d 522, 528 (Ct.App), cert. denied, 125 N.M. 654 (1998) (Navajo Nation police officer's commission as deputy sheriff does not "in itself" make him a "public employee" of the county that commissioned him, for purposes of the Tort Claims Act). The Court of Appeals noted that our courts have construed the definition of "law enforcement officer" strictly. See COA Op. ¶ 11 (cases).

Officer Gutierrez concedes that he does not constitute a "law enforcement officer" within the Tort Claims Act definition, and does not challenge the trial court and Court of Appeals in that respect. He argues, however, that the operative category of the Tort Claims Act is not the "law enforcement officer" definition of public employee, but instead is the section of the statute that defines public employee to include "persons acting on behalf of or in service of a governmental entity in any official capacity, whether with or without compensation." See § 41-4-3(F)(3), which the Supreme Court has held to include "volunteers" and "uncompensated persons." See Celaya v. Hall, 2004-NMSC-005, ¶ 8-9, 135 N.M. 115, 118, 85 P.3d 239, 242 (2004).

Officer Gutierrez's argument ignores a well-established rule

of statutory construction: that "specific provisions of a statute generally should be construed to prevail over more general provisions which may touch on the same subject." See Cordova v. Taos Ski Valley, Inc., 121 N.M. 258, 265, 910 P.2d 334, 341 (Ct.App. 1995); accord, Production Credit Ass'n v. Williamson, 107 N.M. 212, 213, 755 P.2d 56, 57 (1988) ("when one statute deals with a subject in general terms and another deals with a part of the same subject more specifically, the more specific statute ... will apply"); New Mexico Bureau of Revenue v. Western Elec. Co., 89 N.M. 468, 469, 553 P.2d 1275, 1276 (1976) ("conflicts between general and specific statutes are resolved by giving effect to the specific statute"); State v. Spahr, 64 N.M. 395, 398, 328 P.2d 1093, 1096 (1958) ("where a statute deals with a subject in general terms and another deals with a part of the same subject in a more definite way, the special statute governs").

It is not disputed that, in the words of the Court of Appeals, "Officer Gutierrez was performing traditional law enforcement duties when he stopped and arrested Loya." See COA Op. at ¶ 15. Therefore, the "law enforcement officer" section of the statute clearly is more specific to the situation than is the broad section dealing with uncompensated volunteers. The Court of Appeals pointed out that "Officer Gutierrez seeks the benefit of a defense and/or indemnification for claims involving the conduct of a law enforcement officer" (COA Op. ¶ 10) and concluded that:

...Officer Gutierrez cannot claim that he was acting in his capacity as a law enforcement officer yet disclaim that he must fit within the TCA's definition for conduct involving a law enforcement officer.

See COA Op. ¶ 19. The Court of Appeals found such a claim to be

"illogical" and not intended by the legislature. Id.

Put differently, where law enforcement officers performing law enforcement work are the persons and acts involved (as is indisputably the case here), such persons must meet the legislature's definition of "law enforcement officer" to be subject to and covered by the New Mexico Tort Claims Act.

The Court of Appeals also pointed out that the legislature could have, but did not, define "law enforcement officer" in the Tort Claims Act to expressly include commissioned tribal officers; the Court in that regard noted a recent legislative amendment to that same definitional section of the Tort Claims Act, adding "certified part-time salaried police officer[s] employed by a governmental entity." See COA Op. at ¶ 19; NMSA 1978, § 41-4-3(D); see Laws 2009, ch. 249, § 2 (approved April 7, 2009). Based on the original language and later amendment of Section 41-4-3(D), it seems clear that the legislature intended the Tort Claims Act to cover only those "law enforcement officers" who are employed in some way by a governmental entity.

The legislative intent to exclude police officers employed by tribes or pueblos who also are commissioned as deputies from the definition of "law enforcement officer" (so as to exclude them from the protections of the State's sovereign immunity) is underscored and corroborated by another statute.

In 1972 (four years before enactment of the Tort Claims Act), the legislature expressly authorized the issuance of commissions by the Chief of the New Mexico State Police to Navajo police officers. The legislature subsequently amended the statute several times, and

in 2005 authorized Sheriffs to issue commissions to police officers employed by Indian tribes. See § 29-1-11(G) NMSA 1978, as enacted by Laws 2005, ch. 290, § 1 (authority of County Sheriffs to appoint as deputies "employees of a police or sheriff's department of an Indian nation, tribe or pueblo in New Mexico"); cf. State v. Ryder, 98 N.M. 453, 455, 649 P.2d 756, 758 (Ct.App.), aff'd, 98 N.M. 316, 648 P.2d 774 (1982); and compare Laws 1972, ch. 8, § 1 to Laws 1976, ch. 58, § 1 (Tort Claims Act). Clearly, the legislature was aware that tribally-employed police officers were being commissioned by County Sheriffs in order to provide them with the jurisdiction to enforce state criminal and traffic laws against non-Indians on the reservations. Yet in enacting and amending the Tort Claims Act, the legislature repeatedly has failed to include such commissioned but tribally-employed law enforcement officers within the definition of law enforcement officer, so as to require the State and local public bodies to defend and indemnify them. See Citation Bingo, Ltd. v. Otten, 121 N.M. 205, 211, 910 P.2d 281, 287 (1995) (in construing statutes, presumption that legislature is aware of existing statutes and common law).⁶

Conceding that he does not fit within the statutory definition of law enforcement officer, Officer Gutierrez argues that he fits under the definition of "persons acting on behalf or in service of a governmental entity in any official capacity, whether with or

⁶ According to the history as set forth in NMSA 1978, the legislature has amended § 41-4-3 of the Tort Claims Act ("Definitions"), the section in which the legislature defined the term "public employee" for purposes of coverage, seventeen times since enactment in 1976. Yet the legislature never has seen fit to add commissioned, tribally-employed law enforcement officers to the definitions of "law enforcement officer" or "public employee."

without compensation." Apart from the specific vs. general rule, however, Officer Gutierrez does not comfortably fit here, either.

Officer Gutierrez relies on the case of Celaya v. Hall, supra. In Celaya, the Court addressed the status under the Tort Claims Act of an ordained minister who served as a "volunteer chaplain" for the Bernalillo County Sheriff's Department; his duties included, *inter alia*, counseling sheriff's deputies, presiding over ceremonies like weddings and graduations (presumably involving members of the Sheriff's Department) and providing support services at Sheriff's Department crime scenes. The Sheriff provided its volunteer chaplain with a take-home vehicle equipped with a sheriff's radio, a pager, and business cards that identified him as "the [Sheriff's] Department chaplain." He was on call to the Sheriff's Department twenty-four hours per day, seven days a week. See Celaya v. Hall, supra, 2004-NMSC-005, ¶ 3. The case involved an accident that occurred while the chaplain was driving his department-provided motor vehicle, which, according to the facts, he drove "only in connection with his official chaplain duties" on behalf of the Sheriff's Department. Id.

Under these facts, the Court found that while driving the department-owned vehicle for his official duties, the chaplain was a "public employee" under the Tort Claims Act. The Court found that under the totality of the circumstances, the chaplain constituted a "volunteer[] acting on behalf of the government" and an "uncompensated person working on behalf of the government" so as to fit within the statutory definition of "public employee" under Section 41-4-3(F)(3) ("persons acting on behalf or in service of a

governmental entity in any official capacity, whether with or without compensation"). Here, the Court of Appeals noted that Celaya did not involve the issue of whether the volunteer chaplain constituted a "law enforcement officer" under the TCA. See COA Op. ¶ 20 ("Consequently, Celaya has no bearing on this case.").⁷

On the undisputed facts here, in contrast, Officer Gutierrez was at all material times on routine patrol within the boundaries of the reservation, dressed in his full tribal police uniform, displaying his tribal badge, and driving his tribally-issued, tribally-marked police vehicle. See R.P. 113-114, ¶¶ 4, 5, 8-11; R.P. 144, ¶¶ 4, 5, 8-11; see R.P. 139 (Officer's Incident Report); COA Op. at ¶ 2. He was "acting on behalf or in service of" the Pueblo of Pojoaque, maintaining peace, law and order within the reservation boundaries, and was not serving the County of Santa Fe. His deputy sheriff commission was nothing more than a jurisdictional tool which allowed him to charge non-Indians who entered onto the pueblo's territory with violations of state law, in addition to or in lieu of tribal law, thereby enhancing the ability of tribal officers to maintain public order. See COA Op. ¶ 22 (commission as a deputy "did not make Officer Gutierrez a "public employee" of the County but merely conferred upon him jurisdiction to act lawfully when enforcing state and local laws.")

⁷ Although he testified that he customarily drove the Sheriff's Department vehicle only for his official duties, the chaplain conceded that the accident occurred while he was making a "personal errand" to Wal-Mart; he was unable to remember what he had been doing prior to his trip to Wal-Mart. Ultimately--although held to be a "public employee"--the Supreme Court remanded the case for trial on the issue of whether, in fact, he had been acting within the scope of his official duties at the time of the accident. Celaya v. Hall, supra, 2004-NMSC-005, ¶¶ 3-4, 28.

In fact, the argument made by Officer Gutierrez rests upon a fundamentally false premise: that in using a deputy commission to enforce a state traffic or criminal statute against a perpetrator who commits an offense within the reservation, Officer Gutierrez was "work[ing]...for the County" and "act[ing] in the line of duty for the County." See B-in-C at 12-13, 27.

It is undisputed that neither the Sheriff himself nor any of his employed officers or supervisors were involved in any way in the subject incident, nor were any Sheriff's employed officers or employed supervisors notified about the incident itself or Plaintiff's arrest until the instant lawsuit was filed by the Plaintiff long after the fact. See R.P. 115 ¶ 16; R.P. 144 ¶ 16.⁸ When he arrested Plaintiff and charged him with a state misdemeanor committed within the boundaries of the pueblo, Officer Gutierrez was acting on behalf of his employer, Pojoaque Pueblo, no less than if he charged him with a tribal or a federal crime, and was in no way "acting on behalf or in service of" the County of Santa Fe within any ordinary, usual meaning of those words. See State v. Juan, 148 N.M. 747, 759, 242 P.3d 314, 326 (2010) (courts should give statutory words their ordinary meaning).

On the undisputed facts of this case, Officer Gutierrez's argument at bar flies in the face of the very rationale for imposing respondeat superior liability under the Tort Claims Act:

⁸ Although Officer Gutierrez in his summary judgment brief purported to "dispute" these facts, which the County supported by sworn affidavit, Officer Gutierrez offered no contrary evidence, but instead merely put forth unsworn statements by his counsel. This does not suffice to create a genuine dispute of material fact. See n. 2, supra; Rule 1-056(D)(2) NMRA; Trujillo v. Puro, supra.

the government entity's exercise of supervision, direction and control over its employees. See Silva v. State, 106 N.M. 472, 477, 745 P.2d 380, 385 (1987) (Tort Claims Act waives immunity of governmental entity employer for the acts of its employees based on respondeat superior "only when the public entity is itself acting through its employee with the right to control the manner in which the details of work are to done" and "only when a public employee is acting within the scope of his employment" because "[t]he public entity can act only through its employees") ("When the act of the employee is the act of the public entity, let the master answer"); Ortiz v. State Police, 112 N.M. 249, 250, 814 P.2d 117, 118 (Ct.App. 1991); Quezada v. County of Bernalillo, 944 F.2d 710, 719 (10th Cir. 1991) (Sheriff is not immune under Tort Claims Act "for negligently failing to train or supervise his employees" and thus governmental entity employer, the County, also not immune under doctrine of respondeat superior) (emphasis added); Narney v. Daniels, 115 N.M. 41, 846 P.2d 347 (Ct.App. 1992), cert. denied, 114 N.M. 720, 845 P.2d 814 (1993) (City, City's Commissioners and City Police Chief were potentially liable for negligent hiring, training and retention of police officer employed by City); Weinstein v. City of Santa Fe, 121 N.M. 646, 651, 916 P.2d 1313, 1318 (1996) (Police Department liable for acts by police officers who are employed by department); and see also, Methola v. County of Eddy, 95 N.M. 329, 622 P.2d 234 (1980) (respondeat superior liability of government entity employers for law enforcement officer-employees); California First Bank v. State, supra (Board of Commissioners of County of McKinley may be responsible under

respondeat superior for acts of McKinley County Sheriff's deputies employed by Sheriff). The New Mexico courts have rejected governmental liability where defendant is not a "public employee" of the governmental entity under the Tort Claims Act, even where such defendant is, in fact, a law enforcement officer employed by a non-governmental entity. See Williams v. Bd. of County Comm'rs of San Juan County, supra (tribal police officer employed by tribe, albeit commissioned as Deputy Sheriff, is not a "public employee" under Tort Claims Act); Giron v. Corrections Corp. of America, 14 F.Supp.2d 1245, 1251-52 (D.N.M. 1998) (correctional officer employed by private corporation operating prison on behalf of the State of New Mexico is not a "public employee" within the meaning of Tort Claims Act); cf. also V.P. Clarence v. Colgate, 115 N.M. 471, 474, 853 P.2d 722, 725 (1993) (legislature presumed to know relevant case law).

In his Brief-in-Chief, Officer Gutierrez spends a great deal of time speculating about what the Sheriff "could have done" and, in his opinion, should have done, regarding the imposition of supervisory control over commissioned, tribally-employed officers. See B-in-C, pp. 31-35. Putting aside such conjectures, however, the undisputed evidence reflects that, in fact, neither the County nor the Sheriff had any authority to supervise Officer Gutierrez or control the manner or means of his performance as an employee of the sovereign Pueblo of Pojoaque, nor did they have the right to discipline, demote, or discharge him from his tribal employment. Officer Gutierrez was in fact not subject to the County's or the Sheriff's Department's rules, regulations, policies or procedures.

See R.P. 116-117, ¶¶ 19-22; R.P. 145, ¶¶ 19-22; see also, fn. 2, supra. The Sheriff's sole option was to revoke the commission. Id., R.P. 116, ¶ 21; R.P. 145, ¶ 21; see Affidavit of Gutierrez, R.P. 166-169 (no evidence in support of R.P. 145 ¶ 21, which includes an unsupported statement in a brief by his counsel that "the Sheriff's Department ... has at all times had the right to control [Gutierrez's] activities in the use of his commission").

It is not clear exactly how (even if deemed to be desirable) the County of Santa Fe could have imposed or forced any terms or conditions upon the employees of a sovereign Indian nation.⁹ In authorizing the issuance of deputy commissions by Sheriffs to tribally-employed police officers, moreover, the legislature has not seen fit to require the supervisory conditions suggested by Officer Gutierrez here. The deliberateness of such omission is underscored by the legislative imposition of other conditions, requiring that in order to be commissioned by a County Sheriff, tribal law enforcement officers must be duly commissioned state or federally certified officers who are employees of an Indian nation, tribe or pueblo within New Mexico, and who are neither under indictment nor generally known as notorious bad characters or as disturbers of the peace. See §§ 29-1-11(G), 4-41-8 NMSA 1978.

Officer Gutierrez's argument might have greater plausibility under a different set of facts, which facts, however, are not before the Court. For instance, if the Sheriff expressly had

⁹ The legislature has expressly stated that the statute authorizing the State Police Chief and County Sheriffs to commission tribal law enforcement officers does not impair or affect the sovereignty of the Indian nations, tribes or pueblos. See § 29-1-11(D) NMSA 1978.

requested him as a commissioned deputy to leave the reservation and assist the Sheriff's Department in crowd control during Zozobra, or in manning a DWI checkpoint, he might--while acting under the Sheriff's command with the "right to control the manner in which the details of work are to done," Silva v. State, supra--have been "acting on behalf of or in service of" the County of Santa Fe, within the meaning of Section 41-4-3(F)(3), for those acts taken under the Sheriff's direction, supervision and control. However, those facts are purely hypothetical to the record at bar, and the Court should not render an advisory opinion on hypothetical facts. See Weddington v. Weddington, 2004-NMCA-034, ¶¶ 13, 18, 135 N.M. 198, 202, 203, 86 P.3d 623, 627, 628 ("[a]dvisory opinions are those that resolve a hypothetical situation that may or may not arise") (advisory opinions do not involve "actual controversy" which is necessary for court to have subject matter jurisdiction).¹⁰

A recent case from the United States District Court squarely held that a commissioned tribal officer enforcing state law pursuant to his commission is not a "public employee" under the Tort Claims Act. See Memorandum Opinion and Order, Segura v. Colombe, No. 11-CV-926 (D.N.M. 2012), a copy of which has been made

¹⁰ Likewise, Officer Gutierrez's hypothetical situation might apply to those categories of county deputies which possibly would not fit under the statutory definition of "law enforcement officer" such as officers employed part time by a governmental entity who are not yet certified. See Brief-in-Chief, at pp. 14-15. Again, however, those are not the concrete, actual facts that were and are before the trial court, the Court or Appeals, or this Court.

part of the record on appeal.¹¹ The opinion in Segura v. Colombe is directly on point, with similar facts: a tribal police officer who was hired, trained, supervised and employed by the pueblo (in that case, the Pueblo of Tesuque Police Department); wearing his tribal uniform and tribal badge of office while on patrol duty as a tribal officer; paid by the tribe, rather than by the county; commissioned by the Santa Fe County Sheriff as a deputy sheriff; who arrested a non-Indian plaintiff on a state-maintained road located within the exterior boundaries of the tribal reservation; and whose arrest of the plaintiff, jurisdictionally, was based upon his commission as a deputy sheriff. See Memorandum Opinion and Order, Segura v. Colombe, pp. 1-3. Ultimately, the court in Segura reached the same conclusion as the trial court and Court of Appeals did here, based on the same sections of the Tort Claims Act.¹²

In his Brief-in-Chief, as he did before the Court of Appeals, Officer Gutierrez discusses the Federal Tort Claims Act and various federal cases interpreting it. But as the Court of Appeals held, that statute is not relevant to whether the State of New Mexico waived its sovereign immunity under the New Mexico Tort Claims Act

¹¹ The Segura v. Colombe opinion was issued September 24, 2012 and therefore was not available to the trial court below, which entered its Judgment in Favor of County of Santa Fe (R.P. 254-256) on August 7, 2012. However, a copy of the opinion was made part of the record before the Court of Appeals, although not discussed by the Court of Appeals in its Opinion. See Unopposed Motion to Supplement Record on Appeal, filed February 25, 2013.

¹² The procedural posture in Segura v. Colombe was different from the case at bar, although the difference is not material to the rulings. Officer Gutierrez claims to be a "public employee" of a "governmental entity" (Santa Fe County) in order to force the County to defend and potentially indemnify him. In Segura v. Colombe, the plaintiff made the same claim but with the goal of holding the County liable to plaintiff under respondeat superior.

so as to compel the state and its political subdivisions to defend and indemnify a tribal employee whenever he or she utilizes the jurisdictional tool of a commission to maintain law and order within the boundaries of the reservation. See COA Op. at ¶ 21.

Finally, the two New Mexico cases cited by Officer Gutierrez are irrelevant to the issues here. In Dunn v. State, 116 N.M. 1, 859 P.2d 469 (Ct.App. 1993), the Court of Appeals found that the Director of the State of Mexico Motor Vehicle Division--an employee of the state--was a "public employee" (obviously), even though he did not meet the definition of a "law enforcement officer." Dunn would be pertinent if Officer Gutierrez was a state employee, rather than a tribal employee. And in Scull v. State, 236 F.3d 588 (10th Cir. 2000), the Tenth Circuit Court of Appeals followed longstanding New Mexico law to hold that a jailer employed by the County of Bernalillo was a "law enforcement officer" and therefore subject to the waiver of immunity imposed by the Tort Claims Act.

II. ALTERNATIVELY, OFFICER GUTIERREZ WAS NOT A "PUBLIC EMPLOYEE" WITHIN THE MEANING OF THE TORT CLAIMS ACT BECAUSE THE UNDISPUTED EVIDENCE ESTABLISHED THAT HE WAS AN "INDEPENDENT CONTRACTOR"

The opinion of the United States District Court for the District of New Mexico discussed *infra*, in which the federal court reached the same conclusion as the trial court here, also reached its conclusion on an alternative basis: that the tribal officer was not a "public employee" because he was an "independent contractor" within the meaning of the Tort Claims Act. See Memorandum Opinion, Segura v. Colombe, Case No. 11-CV-926 (D.N.M. 2012), at pp. 9-13.

The Segura court was correct in its holding regarding the tribal officer's status as an "independent contractor" which

expressly is excluded from the Tort Claims Act's definition of "public employee." That alternative holding, too, supports the trial court's ruling in the case at bar. See Maralex Res., Inc. v. Gilbreath, 2003-NMSC-023, ¶ 13, 134 N.M. 308, 76 P.3d 626 (appellate court "will affirm the district court if it is right for any reason and if affirmance is not unfair to the appellant").

The Segura court, relying on the New Mexico Supreme Court's decision in Celaya v. Hall, supra, extensively analyzed the factors that the New Mexico courts traditionally use to determine whether a person is an employee rather than an independent contractor. See Memorandum Opinion, Segura v. Colombe, (D.N.M. 2012), at pp. 10-14. The Segura court's conclusion--that "the facts viewed in Plaintiff's favor suggest that [the tribal officer] was acting as an independent contractor and therefore is excluded from the Act's definition of public employee"--is equally applicable to the undisputed evidence in the case at bar:

The Plaintiff, however, has presented no evidence that the County Defendants had the right to control [the tribal police officer] other than the fact that the County could revoke his commission as a Deputy Sheriff at any time. Rather, the undisputed evidence shows that the County Defendants had no right to supervise, oversee, promote, demote, discipline, or fire [the tribal officer], that [the tribal officer] was not subject to the Sheriff Department's rules, regulations, policies, or procedures, that the Santa Fe County Sheriff's Department did not assign work to [the tribal officer] or control the manner or means of his performance as a law enforcement officer, and that the Santa Fe County Sheriff's Department did not provide, pay for, or facilitate any training of [the tribal officer].
Id., Memo.Op. at 9-10.

So, too, regarding Officer Gutierrez. The undisputed material facts of the two cases, as summarized above by the Segura court,

are identical. See R.P. 113, ¶¶ 4-6; 116-117, ¶¶ 19-22; compare with R.P. 142, ¶¶ 4-6; R.P. 145, ¶¶ 19-22.

III. PUBLIC POLICY CONSIDERATIONS SUPPORT THE RULINGS BELOW

If the Supreme Court were to reverse--to hold that a commissioned police officer becomes the equivalent of an employee of the agency that commissioned him or her, albeit without the agency's right or ability to hire, train, discipline, supervise or fire him or her, or assign or oversee his or her day-to-day work, or make him or her subject to the agency's policies, rules and regulations--the Court would, in practical effect, create a form of strict, vicarious liability. If sanctioned by the Court, such a theory of liability likely would result in the termination of the practice of commissioning officers employed by Indian nations, tribes and pueblos, the federal government and other jurisdictions. The expanded potential liability of various governmental entities, without a concomitant ability to hire, fire, supervise and control, would make such commissions far too risky.

And there is no reason for the Court to do so. Apart from reaching a result unintended by the legislature and adding unforeseen risks to the public fisc, it is undisputed that the Pueblo of Pojoaque maintains liability insurance coverage for its tribally-employed police officers like Officer Gutierrez, and it is inexplicable why the Pueblo refuses to avail itself of its policy. See R.P. 119, ¶ 33; R.P. 147, ¶ 33.

REQUEST FOR ORAL ARGUMENT

In its Order, the Supreme Court has called for oral argument, and the County agrees that the issues in this case are significant.

CONCLUSION

For the reasons set forth herein, the trial court and the Court of Appeals were correct in ruling that the County of Santa Fe was not required to defend or indemnify Officer Gutierrez in the underlying action. The Supreme Court should affirm.

Respectfully submitted,



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Attorney for

Third-Party Defendant-Appellee

County of Santa Fe

CERTIFICATE OF SERVICE

I certify that I mailed true copies of this brief to

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MICHAEL DICKMAN

Judy Tixier

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Sent: Friday, June 27, 2014 1:21 PM
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Cc: cbrogers@nmlawgroup.com
Subject: FW: Loya, Jose Luis v. Gutierrez, Glen, D-101-CV-2010-3854; Supreme Ct. No. 33,447
Attachments: 06.19.14 Ltr to counsel re Amicus Curiae Brief.pdf; 13 NMAC Mtn for Leave to file Amicus Brief (06.19.14).pdf; 14 NMAC Amicus Brief (06.19.14).pdf

Folks,

Please see the attached. It has not been accepted by the NM Supreme Court yet. Per the rule, if the Court issues an order accepting the brie, we will have a period of time to respond to it.

Thanks, Judy

From: C. Bryant Rogers [mailto:cbrogers@nmlawgroup.com]
Sent: Friday, June 20, 2014 9:14 AM
To: 'Judy Tixier'
Subject: FW: Loya, Jose Luis v. Gutierrez, Glen, D-101-CV-2010-3854; Supreme Ct. No. 33,447

From: Kristina Bainbridge [mailto:kristina@roblesrael.com]
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Subject: Loya, Jose Luis v. Gutierrez, Glen, D-101-CV-2010-3854; Supreme Ct. No. 33,447

Dear Counsel:

Please see attached for the following documents regarding the above-referenced matter:

1. A letter from Frank Apodaca dated June 19, 2014;
2. Motion for Leave to file Brief of Amicus Curiae New Mexico Association of Counties; and
3. Brief of Amicus Curiae New Mexico Association of Counties.

Copies of these documents are also being sent to you via U.S. Mail. If you have any questions, please let me know. Thank you for your attention to this matter.

Sincerely,

Kristina M. Bainbridge
Paralegal
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Judy Tixier

m: Kahn,Michael I <MKAHN@travelers.com>
Sent: Friday, June 27, 2014 1:09 PM
To: Judy Tixier
Subject: RE: Loya Reply Brief

Judy,

Not sure if an amicus brief was actually prepared and/or filed by the county association. If so, kindly forward me a copy of it. It may have been submitted but perhaps not ruled on yet in terms of whether the NM Supreme Court would accept it.

Thanks - Michael

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Cc: cbrogers@nmlawgroup.com
Subject: Loya Reply Brief

Folks,

Attached is a draft of the Loya Reply Brief. This draft is 4,422 words. We have a 4,400 word limit. I have some more work to do on record references and brief references and some of the citations. Ray has not yet seen this draft, but I decided to go ahead and circulate it to everyone because of the time constraints involved. Please get me any suggested edits or changes by Wednesday of next week. I want to get this thing finished and filed on Friday of next week if at all possible, but I could wait until Monday, July 7. I am flying out of state on July 8th for several days. I will send later redlines with updates based on the above work as those emerge. The sooner I can get input from all of you, the better.

Until we know if the Court is going to accept the County association's amicus brief, our clock will not start to run on the time to respond to that amicus brief.

Bryant

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