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## **Extending Premises Liability beyond the Premises: Encinias and the Expansion of the New Mexico Tort Claims Act**

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# EXTENDING PREMISES LIABILITY BEYOND THE PREMISES: *ENCINIAS* AND THE EXPANSION OF THE NEW MEXICO TORT CLAIMS ACT

Taylor Zangara\*

## INTRODUCTION

In *Encinias v. Whitener Law Firm, P.A.*, Joe Robert Encinias, a student at Robertson High School (“RHS”) in Las Vegas, was attacked on a street adjacent to his school by one or two of his classmates,<sup>1</sup> who beat him so badly that he had to be airlifted to the nearest trauma center.<sup>2</sup> Given the fact that student-on-student violence had occurred in this same area before, what could have been done, and by whom, to prevent this tragedy?<sup>3</sup> Because all of the parties involved in the attack were students at Robertson High School, one might suggest that the school district should have hired someone to supervise the area.<sup>4</sup> It is unlikely that many readers would have found fault with the way in which the school maintained its premises. However, the New Mexico Supreme Court held, in its review of *Encinias*, that the victim of the assault had a claim against the school district for negligent maintenance or operation of its building<sup>5</sup>—even though the attack did not occur on school premises and was arguably the result of the school’s failure to supervise, not of its failure to maintain the premises.<sup>6</sup>

Historically, the government, including RHS, was immune from suits by private citizens because it was thought, “the king could do no wrong.”<sup>7</sup> The Tort Claims Act (“TCA”) grants certain waivers of sover-

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1. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 2, 310 P.3d 611.

2. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003, ¶ 3, 294 P.3d 1245.

3. *Encinias*, 2013-NMSC-045, ¶ 13.

4. *See Encinias*, 2013-NMCA-003, ¶ 11.

5. *Encinias*, 2013-NMSC-045, ¶ 18.

6. *See Encinias*, 2013-NMCA-003, ¶ 13 (“We agree with Whitener that Encinias’s claim, although couched in terms of a failure to follow a safety policy, is solely a claim for negligent supervision.”).

7. Jamie McAlister, *The New Mexico Tort Claims Act: The King Can Do “Little” Wrong*, 21 N.M. L. REV. 441, 442 (1991).

eign immunity, one of which is Section 41-4-6 for “negligent operation or maintenance of a building.”<sup>8</sup> This waiver has been deemed a “building waiver.”<sup>9</sup> In *Encinias*, the New Mexico Supreme Court held that a school district’s recognition of and subsequent failure to address a pattern of student violence in a particular area could fall within the building waiver of sovereign immunity.<sup>10</sup> Importantly, the school district had policies in place that required a teacher or administrator to supervise the area because it was deemed by RHS’s vice principal, Margarita Larranaga,<sup>11</sup> to be a “hot zone” for student violence.<sup>12</sup> The area where the attack took place was not part of the physical premises of the school building.<sup>13</sup>

In concluding that *Encinias*’s cause of action fell within the building waiver of immunity, the supreme court relied on two trends in New Mexico case law of expanding the building waiver.<sup>14</sup> First, it followed the trend of expanding the definition of the term “negligent maintenance or operation” to include a failure to supervise the users of a building if the supervision is directly tied to the operation of the building.<sup>15</sup> The supreme court heavily emphasized Ms. Larranaga’s affidavit where she deemed the area a “hot zone” for student violence.<sup>16</sup> It concluded that, “a school’s failure to address a pattern of student violence in a particular area might create an unsafe condition on the premises.”<sup>17</sup> In fact, the only piece of evidence that the court cited in finding a dangerous condition was the affidavit by Ms. Larranaga.<sup>18</sup> This affidavit revealed nothing about the frequency or severity of fights in the area and was held insufficient by the

8. NMSA 1978, § 41-4-6 (2007).

9. *Cobos v. Dona Ana Hous. Auth.*, 1998-NMSC-049, ¶ 9, 126 N.M. 418.

10. *Encinias*, 2013-NMSC-045, ¶ 18.

11. Brief for Petitioner at 4, *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003 (Aug. 2, 2010) (No. 30,106).

12. *Encinias*, 2013-NMSC-045, ¶ 13.

13. *Id.* ¶ 2 (noting that “[t]he alleged attack itself took place outside of the school property”).

14. *Id.* ¶ 10 (“Like common-law premises liability, the waiver in Section 41-4-6(A) is not limited to injuries occurring on the defendant’s property.”) (citing *Bober v. New Mexico State Fair*, 1991-NMSC-031, ¶ 27, 111 N.M. 644); *id.* (“The waiver applies to more than the operation or maintenance of the physical aspects of the building, and includes safety policies necessary to protect the people who use the building.”) (citing *Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-040, ¶ 9, 140 N.M. 205).

15. *Id.*

16. *Id.* ¶ 13.

17. *Id.* ¶ 14.

18. *Id.* ¶ 18.

court of appeals to raise a genuine issue of material fact as to the dangerousness of the area.<sup>19</sup>

The second expansion of the building waiver upon which *Encinias* relied extended premises liability off of the physical premises of a government building.<sup>20</sup> Potential defendants, under this line of cases, can be held liable for accidents that occur beyond the boundary of their premises if the defendant created the dangerous condition or was in control of the area where the accident occurred.<sup>21</sup> *Encinias* expands off-premises governmental liability further by holding that building waivers will be granted against governmental defendants when an injury occurs off of the premises, even if the defendant neither created the condition nor was in control of the area.<sup>22</sup> A student who had been suspended attacked *Encinias* off of the premises of the school building.<sup>23</sup> It can hardly be argued that the school created the condition of student violence in this area, and the briefs do not support such an interpretation.<sup>24</sup> The area was also not under the control of RHS because the rope was merely intended to limit motor vehicle traffic so as to protect student pedestrians.<sup>25</sup> It was not intended to restrict access to the area by the general public or to keep students from leaving the area.<sup>26</sup>

19. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003, ¶ 17, 294 P.3d 1245 (“Even viewing the evidence in the light most favorable to *Encinias*, a mere statement that the area was a ‘hot zone for trouble,’ without more, is insufficient to support a conclusion that a condition existed on the premises, so as to require supervision to make it safe.”).

20. *See Castillo v. Cnty. of Santa Fe*, 1988-NMSC-037, ¶ 7, 107 N.M. 204 (“By the legislature’s inclusion of both buildings and parks within the waiver provision, we discern no intent to exclude from that waiver liability for injuries arising from defective or dangerous conditions on the property surrounding a public building.”); *Bober v. New Mexico State Fair*, 1991-NMSC-031, ¶ 12, 111 N.M. 644 (“[T]he duty of a landowner to exercise ordinary care to avoid creating, or permitting an unreasonable risk of harm to others is not determined by . . . the happenstance that the accident and resulting injury occur inside or outside the property boundary.”).

21. *See Bober*, 1991-NMSC-031, ¶ 12.

22. *See Encinias*, 2013-NMSC-045, ¶ 10.

23. Brief for Respondent at 4, *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003 (Nov. 12, 2010) (No. 30,106).

24. *Id.* at 18–19 (citing *Sugg v. Albuquerque Pub. Sch. Dist.*, 1999-NMCA-111, ¶ 17, 128 N.M. 1 for the proposition that schools do not have a “special relationship” with students that creates a duty to protect students from attacks by other students).

25. Brief for Petitioner, *supra* note 11, at 4–5.

26. *See id.*

The implications of the broad expansion of the building waiver have ramifications for potential plaintiffs and defendants alike.<sup>27</sup> Under *Encinias*, plaintiffs will have a viable cause of action in almost all circumstances where their briefs plead notice of a dangerous condition by a governmental entity.<sup>28</sup> For potential plaintiffs, almost any evidence of notice will be enough to raise a claim from negligent supervision to negligent operation or maintenance.<sup>29</sup> And the government will have to take additional measures to protect itself from liability, possibly resulting in tax hikes for citizens.<sup>30</sup> The government will also be subject to suit in a wider array of situations.<sup>31</sup> Even if the suits are not successful, the litigation costs to the public treasury should not be ignored.<sup>32</sup>

Part I of this Note will discuss the facts of *Encinias* and the precedent upon which it relied. Part II will argue that the expansion of the TCA under *Encinias* significantly lowers the evidentiary standard required to plead notice, thereby increasing the amount of building waivers that will be granted. It also asserts that this expansion does not conform with the plain meaning of the TCA or its legislative intent and will prescribe a recommendation that New Mexico courts should either narrow their expansionist reading of the building waiver or the legislature should step in. Finally, part III will discuss the implications of these expansions.

## I. BACKGROUND

### A. *The Facts*

In September of 2004, Joe Robert Encinias, a student at RHS in Las Vegas, was brutally beaten by one or two of his fellow students.<sup>33</sup> The

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27. See generally *Encinias*, 2013-NMSC-045 (extending a government defendant's duty to protect students from injuries that occur as a result of a failure to supervise students even if the injury occurred beyond the boundary of the premises).

28. See *id.* ¶ 14 (explaining that Ms. Larranaga's affidavit was sufficient to raise a genuine issue of material fact as to the inherent dangerousness of the area in question).

29. See *id.*

30. See Caren I. Friedman, *Torts—Sovereign Immunity: Caillouette v. Hercules*, 23 N.M. L. REV. 423, 423 (1993) (discussing the purpose of sovereign immunity as "leaving public funds available for their intended purposes rather than being used to satisfy judgments against the state").

31. *Id.*

32. See Martha Neil, *Litigation too Costly, E-Discovery a 'Morass,' Trial Lawyers Say*, ABA JOURNAL, (Sept. 9, 2008), [http://www.abajournal.com/news/article/litigation\\_too\\_costly\\_e\\_discovery\\_a\\_morass\\_trial\\_lawyers\\_say/](http://www.abajournal.com/news/article/litigation_too_costly_e_discovery_a_morass_trial_lawyers_say/) (noting the high costs of discovery even if cases do not make it to trial).

33. *Encinias*, 2013-NMSC-045, ¶ 2.

student who perpetrated the attack had been suspended before the time of the attack.<sup>34</sup> Then fourteen years of age, Encinias suffered severe injuries, requiring him to be airlifted to Albuquerque for emergency medical treatment.<sup>35</sup> Injuries to his abdomen, kidneys, pancreas, liver, and lungs were potentially fatal and have permanent consequences for his health.<sup>36</sup>

The attack took place during the “open campus” lunch hour, where students are free to come and go to and from campus during lunch,<sup>37</sup> on a street adjacent to the high school where students could patronize food vendors.<sup>38</sup> Although RHS had roped off the area,<sup>39</sup> this area was open to the general public.<sup>40</sup> The rope was intended to limit motor vehicle traffic in order to protect student-pedestrians from heavy traffic and harassment from the public driving by.<sup>41</sup> The rope was not intended to restrict access by students or pedestrians to the public street.<sup>42</sup>

No member of the school’s faculty was monitoring the area at the time of the attack.<sup>43</sup> The court of appeals noted, “It is disputed whether, pursuant to a school safety policy, a member of the school personnel was supposed to be watching the area where the attack occurred during the lunch period.”<sup>44</sup> Encinias contends that the school failed to implement and follow its own safety program by failing to have personnel present at a known “hot zone” for violence, especially at a time, the lunch hour, which is explicitly known by school personnel to be dangerous.<sup>45</sup> “Hot zones” are locations where students congregate and where there has been a history of problems, including fights.<sup>46</sup> Encinias offered testimony by RHS’ vice principal, Ms. Larranaga, to the effect that “hot zones” are

34. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003, ¶ 9, 294 P.3d 1245.

35. *Id.* ¶ 3; Brief for Petitioner, *supra* note 11, at 1.

36. Brief for Respondent, *supra* note 23, at 5 (explaining that Christopher Chavez attacked Encinias during the school’s lunch hour after being suspended from school earlier that same day for failing to have one of his required textbooks with him and for defiance during in school suspension).

37. *Id.* at 2.

38. *Encinias*, 2013-NMCA-003, ¶ 3.

39. Brief for Respondent, *supra* note 23, at 4.

40. *See Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 2, 310 P.3d 611 (“The alleged attack itself took place outside of the school property, on a street that the school had cordoned off so that students could patronize food vendors there.”). *See also* Brief for Petitioner, *supra* note 11, at 4–5.

41. Brief for Petitioner, *supra* note 11, at 4–5.

42. *Id.* (noting that “the area [where the attack occurred] was roped off with caution tape to protect the students from vehicles, altercations, and harassment”).

43. *Encinias*, 2013-NMCA-003, ¶ 3.

44. *Id.*

45. Brief for Petitioner, *supra* note 11, at 1, 4.

46. *Id.* at 4.

considered by the school to be areas where fights may erupt.<sup>47</sup> The affidavit made no mention of why attacks occur more frequently in “hot zones” or of the frequency in relation to any other area of the school.<sup>48</sup>

## B. *The Cases*

### 1. Tort Claims Act Case Against RHS

In January of 2006, Encinias and his parents retained defendants Russell Whitener and the Whitener Law Firm (“the Firm”) to represent Encinias in a possible suit against RHS.<sup>49</sup> Encinias and his parents contacted the Firm because they were “enticed by Russell Whitener’s [television] advertisements.”<sup>50</sup> The record suggests that the Firm never filed a complaint in the case.<sup>51</sup> In April of the same year, the Encinias family called to ask about the status of their case and the Firm asked the family to resubmit its original paperwork.<sup>52</sup> Encinias alleges that the Firm had lost the documents that Encinias had submitted when he first retained the Firm and that they had done no work on the case.<sup>53</sup> The Encinias family, in the fall of 2006, called the Firm again over concerns that the statute of limitations would run out, thus barring any potential claims Encinias may have had against the school district.<sup>54</sup> The statute of limitations expired that fall, two years after the attack.<sup>55</sup> An attorney at the Firm testified that he and his colleagues were aware of the statute of limitations, but had allowed it to run because they were “concerned about the strength of the case and thought that they could get around the statute.”<sup>56</sup> In August 2007, the Firm realized the case was barred because of its failure to file suit within the statute of limitations.<sup>57</sup> In February of 2008, in the face of sanctions for an earlier attempt to file a complaint after the statute of limitations had run, the Firm decided not to make any further efforts to

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47. *Encinias*, 2013-NMCA-003, ¶ 9; Brief for Petitioner, *supra* note 11, at 4.

48. *Encinias*, 2013-NMCA-003, ¶ 17.

49. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 3, 310 P.3d 611.

50. Brief for Petitioner, *supra* note 11, at 9.

51. *Encinias*, 2013-NMSC-045, ¶ 3 n.1 (explaining that the record offers no support for the contention that a complaint was ever filed and New Mexico court records do not reflect that any complaint was filed).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (quoting NMSA 1978, § 41-4-15(A) (2007) (stating that TCA suits must be “commenced within two years after the date of occurrence resulting in loss, injury, or death”), *held unconstitutional on other grounds as recognized by Jaramillo v. Heaton*, 2004-NMCA-123, ¶ 4, 136 N.M. 498).

56. *Id.* ¶ 3.

57. *Id.*

pursue the potential claim.<sup>58</sup> The Firm did not inform the Encinias family until the spring of 2008 that their claim was barred because of the Firm's failure to file suit within the statute of limitations.<sup>59</sup>

## 2. Malpractice Case Against the Whitener Firm

Encinias filed suit against the Whitener Law Firm for legal malpractice and misrepresentation, among other things, in October 2008.<sup>60</sup> The district court granted summary judgment for the Firm on all claims.<sup>61</sup> Based on the unviability of Encinias's underlying claim against RHS, the New Mexico Court of Appeals affirmed the district court's grant of summary judgment in favor of the Firm.<sup>62</sup> The New Mexico Supreme Court reversed the holding, finding that Encinias could have had a viable cause of action against RHS.<sup>63</sup>

In order for the plaintiff to prevail in a legal malpractice claim, the plaintiff must demonstrate: "(1) the employment of the defendant attorney; (2) the defendant attorney's neglect of a reasonable duty; and (3) the negligence resulted in and was the proximate cause of loss to the [plaintiff-client]."<sup>64</sup> The only element in dispute in Encinias' case is the third.<sup>65</sup> Under New Mexico case law, Encinias must prove by a preponderance of the evidence that he would have prevailed in his claim against RHS in order to have a viable cause of action for legal malpractice.<sup>66</sup>

## C. *The Law*

### 1. Sovereign Immunity and the Tort Claims Act

Generally, the state, including RHS and the school district, are granted immunity from torts suits.<sup>67</sup> New Mexico courts recognized com-

58. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003, ¶ 1, 294 P.3d 1245.

59. *Encinias*, 2013-NMSC-045, ¶ 3.

60. *Id.* ¶ 4.

61. *Id.*

62. *Encinias*, 2013-NMCA-003, ¶ 2.

63. *Encinias*, 2013-NMSC-045, ¶ 1.

64. *Sharts v. Natelson*, 1994-NMSC-114, ¶ 10, 118 N.M. 721.

65. *Encinias*, 2013-NMSC-045, ¶ 8.

66. *Richardson v. Glass*, 1992-NMSC-046, ¶ 12, 114 N.M. 119 ("Plaintiff had the burden of not only proving her counsel's negligence, but also that she would have recovered at trial in the underlying action."); *George v. Caton*, 1979-NMCA-028, ¶¶ 46-47, 93 N.M. 370 ("In a malpractice action . . . the measure of damages is the value of the lost claims, i.e., the amount that would have been recovered by the client except for the attorney's negligence."). See also *Andrews v. Saylor*, 2003-NMCA-132, ¶ 15, 134 N.M. 545 (stating that the preponderance-of-the-evidence standard is applicable to legal actions).

67. *Encinias*, 2013-NMSC-045, ¶ 9.

mon law sovereign immunity from the beginning of statehood until 1975.<sup>68</sup> New Mexico's "judicial acceptance of . . . immunity . . . [was] substantially based on reluctance to permit invasion of the public coffers from the satisfaction of liability judgments instead of for the public purpose for which they were appropriated."<sup>69</sup> In 1975, the New Mexico Supreme Court, in *Hicks v. State* abolished common law sovereign immunity for tort actions against the state government.<sup>70</sup>

The same year, the state legislature responded to *Hicks v. State* by enacting the TCA.<sup>71</sup> The legislature enacted the TCA because the state was unwilling to be exposed to the possibility of unlimited government liability, posed by the abolition of sovereign immunity.<sup>72</sup> The TCA reinstated sovereign immunity because "the area within which the government has the power to act for the public good is almost without limit and government should not have the duty to do everything that might be done."<sup>73</sup> Impliedly, the legislature enacted the TCA to shield the public treasury from liability judgments.<sup>74</sup>

However, the legislature recognized the "inequitable results which occur in the strict application of the doctrine of sovereign immunity."<sup>75</sup> The TCA exempts eight categories of behavior from the general rule of sovereign immunity.<sup>76</sup> One of these waivers of immunity, and the waiver claimed by Encinias, is negligence in the "operation and maintenance of buildings, public parks, machinery, equipment and furnishings."<sup>77</sup> As noted by the New Mexico Supreme Court, this provision was adopted to ensure the safety of the general public by imposing a duty on the government to keep its buildings safe.<sup>78</sup> The TCA does not, however, grant a waiver for negligent supervision of those using the buildings, such as a failure to supervise students at a public school.<sup>79</sup>

68. Ruth L. Kovnat, *Torts: Sovereign and Governmental Immunity in New Mexico*, 6 N.M.L. Rev. 249, 249 (1976).

69. *Id.* at 249–50.

70. *See generally* *Hicks v. State*, 1975-NMSC-056, 88 N.M. 588.

71. NMSA 1978, §§ 41-4-1 to -29 (2007).

72. McAlister, *supra* note 7, at 443 (quoting NMSA 1978, § 41-4-2 (1989)).

73. NMSA 1978, § 41-4-2(A) (2007).

74. *See* NMSA 1978, § 41-4-17(B) (2007).

75. NMSA 1978, § 41-4-2(A) (2007).

76. *See* NMSA 1978, §§ 41-4-1 to -29 (2007).

77. NMSA 1978, § 41-4-6(A) (2007).

78. *Castillo v. Cnty. of Santa Fe*, 1988-NMSC-037, ¶ 7, 107 N.M. 204.

79. *See, e.g., Espinoza v. Town of Taos*, 1995-NMSC-070, ¶ 9, 120 N.M. 680 (noting that NM case law has found no waiver when the injury resulted from a school's failure to supervise a student); *Pemberton v. Cordova*, 1987-NMCA-020, ¶ 3, 105 N.M. 489 (holding that the TCA does not provide a waiver in cases where an injury was caused by negligent supervision); *Upton v. Clovis Municipal Sch. Dist.*, 2006-

a. To Trigger the Building Waiver, the Negligent Operation Must Make the Premises Dangerous to the Public or a Class of Users

New Mexico case law has held that a dangerous condition is not limited to merely physical defects on the premises of a building.<sup>80</sup> But, in order for a building waiver to be granted, the negligence in question must make the premises dangerous for all users of the building, not just for the particular plaintiff.<sup>81</sup> For example, in *Castillo v. County of Santa Fe*, a young boy suffered injuries after being bit by dogs running loose in the common areas of his housing project.<sup>82</sup> The supreme court held that, given the right circumstances, loose-running dogs could represent an unsafe condition, for which the government waives its immunity.<sup>83</sup> The court went on to specify that if an owner or occupier of land has constructive knowledge of the dangerous condition, then it has a duty to correct the condition or warn of it.<sup>84</sup> The pivotal fact for a finding of a waiver of immunity in *Castillo* was that the dogs posed a risk for everyone who used the housing project, not just for the particular plaintiff.<sup>85</sup> Similarly, in *Callaway v. New Mexico Department of Corrections*, the court of appeals held that a prison was negligent in allowing known gang members to roam around the common area of the prison with inadequate supervision, where there were potential weapons.<sup>86</sup> The court emphasized the fact that

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NMSC-040, ¶ 16, 140 N.M. 205 (noting that a failure to supervise does not rise to the level of a dangerous condition necessary for a waiver under 41-4-6).

80. *See, e.g.*, *Bober v. New Mexico State Fair*, 1991-NMSC-031, ¶ 27, 111 N.M. 644 (holding that a broader view of 41-4-6 is the correct view); *Castillo*, 1988-NMSC-037, ¶ 10 (espousing the broader view upon which *Bober* relies).

81. *See, e.g.*, *Archibeque v. Moya*, 1993-NMSC-079, ¶ 11, 116 N.M. 616 (noting that reading the building waiver “to waive immunity every time a public employee’s negligence creates a risk of harm for a single individual would subvert the purposes of the Tort Claims Act, which recognizes that government, acting for the public good, ‘should not have the duty to do everything thing that might be done’” (quoting Section 41-4-2(a))); *Callaway v. New Mexico Dep’t of Corr.*, 1994-NMCA-049, ¶ 19, 117 N.M. 637 (holding that a dangerous condition existed as to all prison inmates when known gang members were allowed to roam in an area with potential weapons); *Leithead v. City of Santa Fe*, 1997-NMCA-041, ¶ 8, 123 N.M. 353 (finding that a failure to have lifeguards on duty at a public pool created a dangerous condition for all users of the pool).

82. *Castillo*, 1988-NMSC-037, ¶ 4.

83. *Id.* ¶ 9. *See also* *Rhabb v. New York City Hous. Auth.*, 359 N.E.2d 1335 (N.Y. 1976) (holding that the defendant could be liable for a dog bite injury on a public housing project playground if the defendant had constructive knowledge that dogs had roamed this playground before).

84. *Castillo*, 1988-NMSC-037, ¶ 10.

85. *Id.*

86. *Callaway*, 1994-NMCA-049, ¶ 19.

the gang members were a foreseeable threat to the entire prison population.<sup>87</sup>

The court of appeals, in *Upton v. Clovis Municipal School District*, further expanded the building waiver when it held that the school's failure to follow through on safety policies was an act of negligence in the operation of the school.<sup>88</sup> In *Upton*, a child died after she was forced to run laps by a substitute physical education teacher even after the school had been informed that she had asthma.<sup>89</sup> The parents and school had agreed to an Individualized Education Plan ("IEP"), specifying that the plaintiff could stop exercising when she became uncomfortable.<sup>90</sup> When she later collapsed, the school failed to call emergency personnel for almost fifteen minutes.<sup>91</sup> The court held that if the only negligence alleged was the school's failure to adequately supervise the student during her physical education class, that negligence would come much closer to the kind held inadequate in *Espinoza v. Town of Taos*.<sup>92</sup> In *Espinoza*, the supreme court held that the failure, by government agents, to supervise children on a playground did not constitute operation or maintenance of the playground because it did not place all those who used the playground at risk.<sup>93</sup> In finding a dangerous condition, the *Upton* court reasoned that the school's failure to call emergency personnel placed everyone who used the building at risk because every student could face an emergency.<sup>94</sup>

By contrast, in *Archibeque v. Moya*, the supreme court determined that negligent classification of the prisoner plaintiff did not constitute operation and maintenance of the prison's physical premises because classification was an administrative function.<sup>95</sup> In *Archibeque*, a plaintiff was assaulted by one of his known enemies in prison after being assured that his attacker was not in the prison.<sup>96</sup> The court reasoned that although the plaintiff was "put at risk, the negligence did not create an unsafe condition on the premises as to the general prison population."<sup>97</sup> It emphasized

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87. *See id.*

88. *Upton v. Clovis Mun. Sch. Dist.*, 2006-NMSC-040, ¶ 24, 140 N.M. 205.

89. *Id.* ¶ 18.

90. *Id.*

91. *Id.* ¶ 5.

92. *Id.* ¶ 21 (noting that, in *Espinoza*, the failure of summer camp personnel to supervise students on a playground at a public park did not rise to the level necessary to constitute negligent maintenance or operation of a building).

93. *Espinoza v. Town of Taos*, 1995-NMSC-070, ¶ 14, 120 N.M. 680.

94. *Upton*, 2006-NMSC-040, ¶ 13.

95. *Archibeque v. Moya*, 1993-NMSC-079, ¶ 11, 116 N.M. 616.

96. *Id.* ¶ 2.

97. *Id.* ¶ 11.

the discrete character of the classification decision and determined that this specific negligent act was unlikely to affect anyone else.<sup>98</sup>

#### b. Immunity is not Waived for Negligent Supervision

There is no waiver of sovereign immunity for negligent supervision alone.<sup>99</sup> In *Pemberton v. Cordova*, the plaintiff, a student who was attacked by another student in her school's hallway, asked the court of appeals to expand the premises liability waiver to include negligent supervision of students using the school building.<sup>100</sup> The court declined to do so, saying that it had no authority to read language into the statute that was not there.<sup>101</sup> It went on to say that consent by the government to be sued must come within one of the exceptions to the TCA and cannot be implied.<sup>102</sup>

Historically, however, the "TCA waiver under Section 41-4-6 has been interpreted broadly to protect private citizens from the consequences of dangerous conditions created by the negligence of public employees in the operation or maintenance of public buildings."<sup>103</sup> Operation or maintenance refers to more than correcting or warning about defects in the physical premises of the building; it also includes the safety policies necessary to protect the people who use the building.<sup>104</sup> Because of the inclusion of safety policies, it can be difficult to distinguish between negligent operation or maintenance, on one hand, and negligent

98. *Id.* ¶ 17 (Ransom, C.J., specially concurring).

99. *See, e.g.,* *Leithead v. City of Santa Fe*, 1997-NMCA-041, ¶ 8, 123 N.M. 353 (holding that although negligent supervision is not a viable cause of action under the TCA, "Plaintiffs' complaint was not restricted to a claim of negligent supervision"); *Espinoza v. Town of Taos*, 1995-NMSC-070, ¶ 14, 120 N.M. 680 (holding that negligent conduct itself that does not create the unsafe conditions does not give rise to viable causes of action); *Upton*, 2006-NMSC-040, ¶ 13 (holding that a school's failure to implement adequate emergency procedures was actionable under the building waiver).

100. *Pemberton v. Cordova*, 1987-NMCA-020, ¶¶ 2, 5, 105 N.M. 476.

101. *Id.* ¶ 5. *See also* *Begay v. State*, 1985-NMCA-117, ¶ 12, 104 N.M. 483 (stating that to allow plaintiffs to sue under any of the causes of action which they assert would be to read language into the statute that is not there); *Methola v. Cnty. of Eddy*, 1980-NMSC-145, ¶ 25, 95 N.M. 329 ("The right to sue and any recovery under the New Mexico Tort Claims Act is limited to the rights, procedures, limitations and conditions prescribed in that Act.").

102. *Pemberton*, 1987-NMCA-020, ¶ 6. *See also* *Redding v. City of Truth or Consequences*, 1984-NMCA-132, ¶ 3, 102 N.M. 226 (holding that in order for a cause of action to exist, the conduct must fall within a waiver of immunity under the TCA).

103. *Upton*, 2006-NMSC-040, ¶ 9 (citing *Bober v. New Mexico State Fair*, 1991-NMSC-031, ¶ 27, 111 N.M. 644).

104. *Id.*

supervision, on the other. The key point is that the negligence must be of a kind that makes the premises dangerous, or potentially so, to the affected public, the consumers of the service, or the users of the building in order to fit within the category of negligent maintenance or operation.<sup>105</sup> In *Espinoza*, the supreme court held that a failure to supervise did not negate the town's immunity because the playground where the plaintiff was injured was essentially safe: "There were no gangs threatening the children, no free-roaming dogs, no influx of traffic, no improperly maintained equipment."<sup>106</sup> Conversely, the prison recreation room in *Callaway* was an area of the prison that required supervision if it was to be operated in a way that was safe for the general prison population.<sup>107</sup> The court of appeals, in *Leithead v. City of Santa Fe*, also found that a swimming pool requires supervision in order to be safe and, therefore, the defendant's failure to supervise in that case met the building waiver of sovereign immunity.<sup>108</sup>

### c. A Waiver of Immunity is Not Limited to Injuries Occurring on the Physical Premises of a Building

A waiver of immunity, under the building waiver, can also be found where an injury occurs off the physical premises of the building.<sup>109</sup> The supreme court in *Bober v. New Mexico State Fair* found a duty where a dangerous condition on a landowner's premises spilled over into the property of another.<sup>110</sup> A person leaving a heavily attended rock concert at Tingley Coliseum on the State Fair grounds attempted to make a left turn on Louisiana Boulevard when she struck the plaintiff's car, causing property damage and injuries.<sup>111</sup> The supreme court held that a premises

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105. *Espinoza v. Town of Taos*, 1995-NMSC-070, ¶ 14, 120 N.M. 680. *See also* *Leithead v. City of Santa Fe*, 1997-NMCA-041, ¶ 8, 124 N.M. 353 (emphasis added) (holding that a city's failure to have lifeguards on duty created a dangerous condition as to all users of the city's pool); *Upton*, 2006-NMSC-040, ¶ 8 (noting that New Mexico case law establishes that "for the waiver to apply, the negligent 'operation or maintenance' must create a dangerous condition that threatens *the general public or a class of users of the building*"); *Castillo v. Cnty. of Santa Fe*, 1988-NMSC-037, ¶ 9, 107 N.M. 204 (holding that a waiver of immunity could apply because the condition posed a danger to the residents of the housing project and their invitees and remanding for further factual development as to whether owners knew of dogs).

106. *Espinoza*, 1995-NMSC-070, ¶ 14.

107. *Callaway v. N.M. Dep't. of Corr.*, 1994-NMCA-049, ¶ 14, 117 N.M. 637.

108. *Leithead*, 1997-NMCA-041, ¶ 8.

109. *See, e.g., Mitchell v. C & H Transp. Co.*, 1977-NMSC-045, ¶ 30, 90 N.M. 471; *Bober v. New Mexico State Fair*, 1991-NMSC-031, ¶ 7, 111 N.M. 644.

110. *Bober*, 1991-NMSC-031, ¶ 7.

111. *Id.* ¶ 2.

liability waiver did apply, reasoning that an owner or occupier of land has a duty to avoid creating an unreasonable risk of harm to persons outside of the land.<sup>112</sup> It found, specifically, that the fair had a duty to direct the heavy stream of traffic out of Tingley Coliseum so as to avoid injury to those using the adjacent roadway.<sup>113</sup>

It is against this backdrop that the courts assessed whether Encinias’s claim could proceed against RHS.

*D. The Outcomes*

1. District Court Ruling

The district court held that Encinias’s claim against RHS and the Las Vegas School District would have been barred by sovereign immunity because it did not fall within the building waiver.<sup>114</sup> It therefore necessarily held that Encinias’s malpractice and misrepresentation claims were not viable.<sup>115</sup>

2. Court of Appeals Opinion and Rationale

The court of appeals held that the seemingly broad rule about the building waiver does not extend to Encinias’ cause of action.<sup>116</sup> Therefore, the court necessarily held that his legal malpractice claim must fall.<sup>117</sup> It affirmed the district court’s dismissal of Encinias’ claims.<sup>118</sup>

a. The School Did Not Waive Its Immunity Under the TCA

With respect to the particulars of the court of appeals’ decision, the first issue that the court analyzed was whether or not RHS’ failure to protect Encinias from the attack constituted a waiver of immunity under the building waiver.<sup>119</sup> The relevant inquiry in determining this issue, the court acknowledged, was whether the negligent operation or maintenance of a building created a “dangerous condition that threatens the general public or a class of users of the building.”<sup>120</sup> Encinias argued in his

112. *Id.* ¶ 16.

113. *Id.* ¶ 20.

114. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003, ¶ 1, 294 P.3d 1245.

115. *See id.* (“When sued for malpractice . . . Whitener ran for the cover of our malpractice law that holds that a case for legal malpractice cannot lie where the underlying action would not be viable.”).

116. *Id.* ¶ 2 (citing *Upton v. Clovis Municipal Sch. Dist.*, 2006-NMSC-040, ¶ 15, 140 N.M. 205).

117. *See id.*

118. *Id.*

119. *Id.* ¶ 7.

120. *Id.* ¶ 8 (citing *Upton*, 2006-NMSC-040, ¶ 15).

brief that the school's negligent failure to follow its own safety procedures endangered all of the students in the food vendor area and resulted in his injury, thus waiving the school's immunity from suit under the TCA.<sup>121</sup> The Whitener Firm argued that the school safety procedures that Encinias faulted the school for not having followed would have done nothing more than require that a faculty member supervise the area at the time of the attack.<sup>122</sup> The court of appeals agreed with the Firm.<sup>123</sup>

Having established that Encinias's claim was, at its core, a claim for negligent supervision, the court of appeals went on to address whether this failure to supervise was directly tied to the operation of the building so as to bring it within the building waiver.<sup>124</sup> The court distinguished *Encinias* from *Upton* in concluding that a waiver of immunity does not apply in Encinias's case.<sup>125</sup> In *Upton*, the failure by the school to respond to a medical emergency "created . . . a dangerous condition . . . for every student at the school."<sup>126</sup> Furthermore, its subsequent indifference to the student's special medical needs made it likely that all students with special medical needs would be similarly treated and thereby placed at risk of harm.<sup>127</sup> However, in *Encinias*, the court of appeals found that Ms. Larranaga's affidavit was insufficient to show that the school's failure to supervise created a dangerous condition as to all students at the school.<sup>128</sup> "Although we could imagine a situation where an area on campus was so inherently dangerous as to require supervision to make the area safe, Encinias failed to provide any evidence that this was the case."<sup>129</sup> The court emphasized that the vice principal's testimony would not have been enough to survive summary judgment under case law at the time.<sup>130</sup> The court of appeals thus found that Encinias had stated a claim for negligent

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121. *Id.* ¶ 10.

122. *Id.* ¶ 13.

123. *Id.*

124. *Id.* ¶ 14 (citing *Upton*, 2006-NMSC-040, ¶ 23); *Callaway v. New Mexico Dep't of Corr.*, 1994-NMCA-049, ¶ 19, 117 N.M. 637; *Leithead v. City of Santa Fe*, 1997-NMCA-041, ¶ 8, 123 N.M. 353).

125. *Encinias*, 2012-NMCA-003, ¶ 8.

126. *Upton*, 2006-NMSC-040, ¶ 24.

127. *Id.*

128. *Encinias*, 2013-NMCA-003, ¶ 14.

129. *Id.* ¶ 16.

130. *Id.* ¶ 17 ("Even viewing the evidence in the light most favorable to Encinias, a mere statement that the area was a 'hot zone for trouble,' without more, is insufficient to support a conclusion that a condition existed on the premises, so as to require supervision to make it safe.").

supervision, not negligent operation or maintenance of a building, and was therefore ineligible for a building waiver.<sup>131</sup>

### 3. Court of Appeals Dissent and Rationale

The dissent, written by Judge Sutin, emphasized the testimony by RHS' vice principal, suggesting "this evidence imputes knowledge on the part of the school that the area where Encinias was attacked was an unsafe area requiring security."<sup>132</sup> It goes on to say that it is not helpful to convert Encinias' claims into a claim for negligent supervision: "the case now before us should stand or fall as a negligent operation or maintenance case, not a negligent supervision case."<sup>133</sup> Judge Sutin would have held that the imputed knowledge of the dangerous condition by the school district raises a genuine issue of material fact as to notice of the condition, thus making summary judgment in favor of Whitener improper.<sup>134</sup>

### 4. Supreme Court Opinion and Rationale

The supreme court reversed the judgment of the court of appeals, finding that Encinias could have brought a building waiver claim and that he therefore had a viable cause of action for legal malpractice against Whitener.<sup>135</sup>

#### a. Waiver of Immunity

The court first addressed the fact that the injury to Encinias did not occur on the premises of the school building.<sup>136</sup> It noted that, like common-law premises liability, the building waiver is not limited to injuries occurring on the defendant's property.<sup>137</sup> The court also observed that, like common law premises liability, the waiver is not limited to only physical defects on the property.<sup>138</sup> Therefore, the safety policies of RHS are an appropriate subject of the building waiver if they created a dangerous

131. *Id.* ¶¶ 11, 13.

132. *Id.* ¶ 37 (Sutin, J., dissenting).

133. *Id.* ¶ 40.

134. *Id.* ¶ 42.

135. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 1, 294 P.3d 1245.

136. *Id.* ¶ 10.

137. *Id.* (citing *Bober v. New Mexico State Fair*, 1991-NMSC-031, ¶ 27, 111 N.M. 644).

138. *Id.* ¶ 10 (citing *Castillo v. Cnty. of Santa Fe*, 1997-NMCA-041, ¶ 3, 123 N.M. 353).

condition as to the student population, even if they were safety policies that addressed an area off the premises of the school.<sup>139</sup>

The court continued its discussion of common law premises liability, stating that both *Espinoza* and *Pemberton* limit the building waiver.<sup>140</sup> *Espinoza* does so by holding that negligent supervision of the users of a public building is not actionable and *Pemberton* does so by holding that a school does not waive its immunity by failing to prevent one student from attacking another.<sup>141</sup> However, the court concluded that neither *Espinoza* nor *Pemberton* precludes a waiver of immunity in Encinias's case.<sup>142</sup> The central premise of *Pemberton*, the court determined, is that a failure to rectify a dangerous condition could be negligent maintenance or operation, but a single incidence of student-on-student violence does not render the premises unsafe.<sup>143</sup> The court relied heavily on the affidavit from RHS' vice principal regarding the area's status as a "hot zone" for violence.<sup>144</sup> It reasoned that a school's "failure to address a pattern of student violence in a particular area might create an unsafe condition on the premises."<sup>145</sup> New Mexico case law, it added, has been clear that a failure to address a history of violence is not merely failure to supervise.<sup>146</sup>

#### b. Holding

The supreme court therefore held that Encinias had brought a viable cause of action under the building waiver and reversed the grant of summary judgment in favor of Whitener.<sup>147</sup>

## II. ARGUMENT

*Encinias* represents the high-water mark of judicial expansion of the building waiver. First, following the trend in building waiver jurisprudence, *Encinias* lowers the evidentiary barrier for pleading negligent operation or maintenance of a building, as compared to negligent

139. *Id.*

140. *Espinoza v. Town of Taos*, 1995-NMSC-070, ¶ 16, 120 N.M. 680; *Pemberton v. Cordova*, 1987-NMCA-020, ¶ 5, 105 N.M. 476.

141. *Espinoza*, 1995-NMSC-070, ¶ 16; *Pemberton*, 1987-NMCA-020, ¶ 5.

142. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 13, 310 P.3d 611.

143. *Id.*

144. *Id.*

145. *Id.* ¶ 14.

146. *Id.*

147. *Id.* ¶ 18.

supervision.<sup>148</sup> After *Encinias*, plaintiffs have only to make some showing of actual or constructive notice of a dangerous condition on the part of the government defendant to convert a claim of negligent supervision into a claim for negligent operation or maintenance of a building.<sup>149</sup>

*Encinias* also expands the situations in which a governmental defendant can be held liable for injuries that occur off of its premises.<sup>150</sup> Under common law concepts of premises liability, a defendant can be held liable for injuries that are the result of a condition that the defendant created<sup>151</sup> or that happen on an area of land that the defendant controls.<sup>152</sup> *Encinias* imposed potential liability on a school that failed to supervise an area that was not part of its physical premises even though the school neither created the dangerous condition nor controlled the area.<sup>153</sup>

When taken together, these expansions impose potential liability upon a governmental defendant, when the defendant had notice of danger in a particular area off of its premises, if the defendant negligently supervised the area.<sup>154</sup> After *Encinias*, notice of the dangerous condition operates as the only limiting principle for the finding of a building

148. See, e.g., *Callaway v. New Mexico Dep't of Corr.*, 1994-NMCA-049, ¶ 19, 117 N.M. 637 (holding that a dangerous condition existed as to all prison inmates when known gang members were allowed to roam in an area with potential weapons); *Leithead v. City of Santa Fe*, 1997-NMCA-041, ¶ 8, 123 N.M. 353 (finding that a failure to have lifeguards on duty at a public pool created a dangerous condition for all users of the pool); *Encinias*, 2013-NMSC-045, ¶ 18 (“The assistant principal’s statement that the area where the attack occurred was a ‘hot zone’ for student violence would not be enough, taken alone, to support a finding of liability, but it *is* enough to raise questions about the degree of student violence and the school’s efforts to discover and prevent student violence in that area.”).

149. See *Encinias*, 2013-NMSC-045, ¶ 18.

150. *Id.*

151. See *Acosta v. City of Santa Fe*, 2000-NMCA-092, ¶ 30, 129 N.M. 632 (“A property owner may incur off-premises tort liability if the owner has created a hazard on a public sidewalk that causes a tort.”). See also *Stetz v. Skaggs Drug Centers, Inc.*, 1992-NMCA-104, ¶ 7, 114 N.M. 465 (suggesting that a property owner may be held liable in tort if the property owner created the condition that gave rise to the tort); UJI 13-1316 NMRA (“The [owner occupant] of property abutting a public sidewalk is under a duty to exercise ordinary care not to create an unsafe condition which would interfere with the customary and regular use of the sidewalk.”).

152. See *Torres v. Piggly Wiggly Shop Rite Foods, Inc.*, 1979-NMCA-093, ¶ 6, 93 N.M. 408 (“The common law rule is well settled that where a landlord fully parts with the possession of the premises and retains no control or right of control over them, and does not thereafter assume control, he is . . . not chargeable with liability for defects not made by him or under his direction for failure to make repairs.”). See also *Mitchell v. C & H Transp. Co., Inc.*, 1977-NMSC-045, ¶ 19, 90 N.M. 471.

153. *Encinias*, 2013-NMSC-045, ¶ 18.

154. See generally *id.*

waiver.<sup>155</sup> Whether the defendant created the dangerous condition or had control over the area are no longer the requisite inquiries.<sup>156</sup> Such sweeping results cannot be what the legislature intended in enacting the TCA and certainly do not comport with the plain meaning of the statute.<sup>157</sup>

### A. Prescriptive Remedy

New Mexico courts should accord more deference to the plain meaning of the building waiver and to the intent of the legislature when it enacted the TCA. If courts continue to expand the building waiver beyond its plain meaning and legislative intent, the legislature should step in to clarify what it meant when it wrote the statute.<sup>158</sup> Courts are required by rules of statutory construction to limit themselves to the plain meaning of the words in the TCA unless the statute is ambiguous.<sup>159</sup> In case of ambiguity, the court must discern the intent of the legislature, considering the competing goals of the TCA.<sup>160</sup> According to rules of statutory construction, the most important thing for a court to consider is the intent of the legislature.<sup>161</sup> The intent of the legislature in drafting the TCA was to reinstate sovereign immunity.<sup>162</sup> Although the legislature recognized “the inequitable results that flow from a strict application of sovereign immunity,” it noted that the area within which the government has the power to act is without limit and government “should not have the duty to do everything that might be done.”<sup>163</sup> Impliedly, one of the goals of the TCA was to shield the public coffers, which are filled by taxpayer dollars, from liability judgments.<sup>164</sup>

### B. Other Jurisdictions Rely on the Plain Meaning of the Statute and the Legislative Intent

Other jurisdictions with statutes similar to the New Mexico TCA rely heavily on the plain meaning of the words in the statute in determin-

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155. *Id.*

156. *See id.*

157. *See* NMSA 1978, § 41-4-2(A) (2007).

158. *See id.*

159. *Keller v. City of Albuquerque*, 1973-NMSC-048, ¶ 19, 85 N.M. 134, *overruled on other grounds by* *Green v. Kase*, 1992-NMSC-004, 113 N.M. 76.

160. *Id.*

161. *Id.*

162. *See* NMSA 1978, § 41-4-2(A) (2007).

163. *Id.*

164. *See* Friedman, *supra* note 30, at 423.

ing whether to grant a waiver of immunity.<sup>165</sup> In *Reardon v. Department of Mental Health*, the Supreme Court of Michigan noted, “the parameters of sovereign immunity are governed by statute. Our duty is to interpret the statutory language in the manner intended by the Legislature.”<sup>166</sup> In fulfilling that duty, the *Reardon* court devotes seven full paragraphs to a discussion of the exact language of the statute and ultimately concludes that the waiver only applies when there is a physical defect of the building.<sup>167</sup>

Similarly, the Maine Supreme Judicial Court held that a school’s failure to address the dangerous condition of allowing the school wrestling team to conduct running drills in the school’s hallway was not “operation” of the building because it did not involve a physical defect of the building itself.<sup>168</sup> Colorado courts have also consistently held that the owners of a public building or vehicle cannot be held liable for injuries that do not directly result from physical defects of a government building itself.<sup>169</sup>

Other jurisdictions also look to the declared intent of the legislature more closely than do New Mexico courts in ruling on the viability of a waiver of immunity.<sup>170</sup> For example, in *Castillo*, the court relied on Michigan precedent in finding a waiver of immunity because of the absence of any such precedent in New Mexico at the time.<sup>171</sup> However, this Michigan precedent was later overturned, with the overturning court holding “We are persuaded that the Legislature did not intend this exception to the broad grant of governmental immunity to apply in such circumstances [a trip and fall on a defective sidewalk abutting public property].”<sup>172</sup> The Michigan court combined a close reading of the statute with an examination of the legislative intent to limit governmental immunity to injuries

165. See, e.g., *Reardon v. Dep’t. of Mental Health*, 424 N.W.2d 248, 252 (Mich. 1988); *Stockwell v. Regional Transp. Dist. of Denver*, 946 P.2d 542, 544 (Colo. App. 1997).

166. *Reardon*, 424 P.2d at 252 (citing *Hyde v. Univ. of Michigan Regents*, 393 N.W.2d 847 (1986)).

167. *Id.*

168. *Lightfoot v. Sch. Admin. Dist. No. 35*, 816 A.2d 63, 66–67 (Me. 2003).

169. See e.g. *Stockwell*, 946 P.2d at 543–44 (holding that security on public buses is not a primary feature of the operation of the buses and therefore does not come within a waiver of immunity); *Stanley v. Adams Cnty. Sch. Dist.*, 942 P.2d 1322, 1324 (Colo. App. 1997) (holding that sand, gravel, and water on a school walkway did not fall under a waiver of immunity because it was not a physical defect of the building).

170. See, e.g., *Horace v. City of Pontiac*, 575 N.W.2d 762 (Mich. 1998); *Ross v. Consumers Power Co.*, 363 N.W.2d 641, 660 (Mich. 1984).

171. *Castillo v. Cnty. of Santa Fe*, 1988-NMSC-037, ¶ 7, 107 N.M. 204.

172. *Horace*, 575 N.W.2d at 763.

that occur as a direct result of the building itself, not its surrounding property, in overturning this case.<sup>173</sup> The court also noted that the legislature expressly intended to reinstate sovereign immunity when it passed the Michigan Tort Claims Act.<sup>174</sup> As such, the Michigan judiciary will not extend relief to plaintiffs suing the government unless their causes of action fall expressly within one of the strictly construed waivers of immunity.<sup>175</sup>

### *C. Encinias Lowers the Evidentiary Barrier for Pleading Operation or Maintenance of a Building*

In response to Whitener's motion for summary judgment, Encinias had the burden of demonstrating that a genuine issue of material fact existed as to whether supervision of the "hot zone" was directly tied to the operation of the building.<sup>176</sup> Although summary judgment in New Mexico is viewed with disfavor,<sup>177</sup> the party opposing summary judgment must demonstrate a genuine issue of material fact with evidence in the record.<sup>178</sup> An issue of fact is considered genuine when reasonable minds could differ as to the proper interpretation of the fact.<sup>179</sup>

*Encinias* lowers the evidentiary barrier for pleading a dangerous condition, as compared to negligent supervision.<sup>180</sup> Other building waiver cases in which summary judgment in favor of the governmental defendants was denied have relied on more evidence to prove the inherently

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173. *See id.*

174. *Ross*, 363 N.W.2d at 660.

175. *Id.*

176. *See Dow v. Chilili Coop. Ass'n.*, 1986-NMSC-084, ¶ 13, 105 N.M. 52 (explaining that a party opposing summary judgment may not simply argue that such facts might exist, nor may it rest upon the allegations in the complaint).

177. *Woodhull v. Meinel*, 2009-NMCA-015, ¶ 7, 145 N.M. 533 ("We are mindful that summary judgment is a drastic remedial tool which demands the exercise of caution in its application, and we review the record in the light most favorable to support a trial on the merits.").

178. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396 ("Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.").

179. *Romero v. Philip Morris, Inc.*, 2009-NMCA-022, ¶ 12, 145 N.M. 658 (noting an issue of fact is genuine "if the evidence before the court considering a motion for summary judgment would allow a hypothetical fair-minded fact-finder to return a verdict favorable to the non-movant on that particular issue of fact").

180. *See Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 9, 310 P.3d 611 (explaining that Ms. Larranaga's affidavit was sufficient to raise a genuine issue of material fact as to the dangerousness of the area).

dangerous aspect of the areas in question.<sup>181</sup> For example, in *Callaway*, the facts adduced to demonstrate that the area was dangerous included: the plaintiff's attackers each weighed between 220 and 290 pounds, they were known gang members with a history of violence, there were areas in the recreation room shielded from direct observation by the prison guards, and there were potential weapons, such as weight bars and pool cues in the recreation room.<sup>182</sup> Furthermore, only two prison guards were assigned to the entire two-story recreation room.<sup>183</sup> Similarly, in *Leithead*, the court of appeals held that lifeguards are so inextricably linked to the operation of a swimming pool, that a failure to have lifeguards at a pool is a dangerous condition of a building.<sup>184</sup> Conversely, the *Espinoza* court found that the negligent conduct by supervisors of a summer day camp did not create the dangerous condition of the plaintiff falling from a slide.<sup>185</sup> The playground, it emphasized, was not unsafe for the children who used it.<sup>186</sup>

In *Encinias*, an area where students ate lunch was held to be closer to a prison recreation room filled with gang members than to a playground, in terms of its level of inherent danger.<sup>187</sup> The court of appeals specifically noted that Ms. Larranaga's affidavit was inadequate to demonstrate that the area was dangerous without supervision.<sup>188</sup> The affidavit revealed nothing about the frequency of student violence in the area or the reason why violence might be more pervasive in this area than in any other area of the school.<sup>189</sup> The court of appeals properly cited *Leithead* for the proposition that "it is not enough to show that public employees negligently supervised persons in their care and that the resulting injury occurred on public property."<sup>190</sup> Nevertheless, the supreme court held that the affidavit was enough to demonstrate a genuine issue of material fact as to the inherent danger of the lunch area.<sup>191</sup>

181. See, e.g., *Callaway v. N.M. Dep't. of Corr.*, 1994-NMCA-049, ¶ 4, 117 N.M. 637; *Leithead v. City of Santa Fe*, 1997-NMCA-041, ¶ 15, 123 N.M. 353.

182. *Callaway*, 1994-NMCA-049, ¶ 4.

183. *Id.*

184. *Leithead*, 1997-NMCA-041, ¶ 15 ("[L]ifeguard services are so essential to the safety of a swimming pool that they seem akin to other kinds of safety equipment.").

185. *Espinoza v. Town of Taos*, 1995-NMSC-070, ¶ 14, 120 N.M. 680.

186. *Id.*

187. See *id.*

188. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMCA-003, ¶ 17, 294 P.3d 1245.

189. See *id.*

190. *Id.* ¶ 11 (citing *Leithead v. City of Santa Fe*, 1997-NMCA-041, ¶ 7, 123 N.M. 353).

191. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 14, 310 P.3d 611.

The lowered evidentiary standard of *Encinias* means that governmental defendants will have a harder time obtaining summary judgment under the building waiver.<sup>192</sup> If plaintiffs make any evidentiary showing of notice, it will be extremely difficult for defendants to obtain summary judgment.<sup>193</sup> Even if plaintiffs do not prevail under this waiver more often, more cases will go to trial because fewer cases will be dismissed at the summary judgment stage.<sup>194</sup> The litigation costs alone will result in increased costs to the government, which might be passed on to citizens.<sup>195</sup> Furthermore, the legislative declaration of the TCA is effectively nullified by lowering the evidentiary barrier to the point that *Encinias* does.<sup>196</sup> If summary judgment in favor of defendants is denied whenever plaintiffs plead notice of the potential for danger in an area, the goals of limiting when the government has the duty to act and protecting the public coffers from liability judgments are substantially circumscribed.<sup>197</sup>

#### *D. The Second Expansion: Boundaries of a Premises*

Traditionally, under the common law of New Mexico, an owner of a premises can be held liable for dangerous conditions off of their premises that they create or that occur on an area of land over which they exercise control.<sup>198</sup> Unlike earlier building waiver cases that found a waiver when an injury occurred off of the premises of a building,<sup>199</sup> *Encinias* does not rest on traditional common law concepts of premises liability.<sup>200</sup> The *En-*

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192. *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396 (“Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.”).

193. *Id.*

194. *Id.*

195. *See Friedman, supra* note 30, at 423 (discussing the purpose of sovereign immunity as “leaving public funds available for their intended purposes rather than being used to satisfy judgments against the state”).

196. *See* NMSA 1978, § 41-4-2 (2007).

197. *See id.*

198. *See Stetz v. Skaggs Drug Centers, Inc.*, 1992-NMCA-104, ¶ 8, 114 N.M. 465, (citing SCRA 1986, 13-1309) (“The foundation of premises liability is that owners, occupiers, or possessors of premises have responsibility only for hazards arising from or on their premises.”); *Torres v. Piggly Wiggly Shop Rite Foods, Inc.*, 1979-NMCA-093, ¶ 11, 93 N.M. 408 (indicating that if a defendant had control over the area where an injury occurred, it could be held liable for the injury).

199. *See e.g., Bober v. New Mexico State Fair*, 1991-NMSC-031, ¶ 27, 111 N.M. 644, 808 P.2d 614.

200. *See Stetz*, 1992-NMCA-104, ¶ 8 (citing SCRA 1986, 13-1309) (“The foundation of premises liability is that owners, occupiers, or possessors of premises have responsibility only for hazards arising from or on their premises.”); *Torres*, 1979-NMCA-093, ¶ 11.

*cinias* court held RHS liable for an attack perpetrated by a suspended student, which occurred off the premises of the school.<sup>201</sup> The attack was not a condition that the school created nor did it occur on an area of land over which the school exercised control.<sup>202</sup>

The attack on Encinias by a suspended student was not a dangerous condition that the school created. *Bober* is the quintessential example of a case where the dangerous condition created by the defendant “spilled over” into the adjoining roadway, causing injuries and property damage to a user of the adjacent roadway.<sup>203</sup> Another example is *Alamo National Bank v. Kraus*, a Texas case where an owner of property was held liable for negligent demolition when a collapsing wall caused the death of a motorist in an adjoining street.<sup>204</sup> Similarly, a Wyoming case held the owner and operator of an oil treatment facility subject to a duty to avoid harm to motorists in an adjoining roadway when the facility created artificial fog conditions.<sup>205</sup> What these cases share is that the defendants actually created the condition that led to the injuries for which they were held liable. RHS did not create the condition of student violence; indeed, the student who perpetrated the attack had been suspended earlier that day.<sup>206</sup> Critics may assert that RHS allowed students to congregate in this area, thus increasing the probability that violence would erupt. However, given the limited nature of the evidence adduced to demonstrate that the area was actually dangerous, it seems unreasonable to assert that RHS created the condition of student violence.

The area where the attack occurred was a public street and was not under the control of the defendant at the time of the attack.<sup>207</sup> Control, for purposes of premises liability, is usually defined as a right to “enter to make repairs.”<sup>208</sup> The school had roped the area off so that RHS students could be safe from motor vehicle traffic.<sup>209</sup> The roping off was not in-

201. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 14, 310 P.3d 611.

202. *See id.*

203. *Bober v. New Mexico State Fair*, 1991-NMSC-031, ¶ 16, 111 N.M. 644.

204. *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981).

205. *Timmons v. Reed*, 569 P.2d 112, 123 (Wyo. 1977).

206. Brief for Respondent, *supra* note 23, at 5.

207. *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 2, 310 P.3d 611.

208. *See, e.g., Torres v. Piggly Wiggly Shop Rite Foods, Inc.*, 1979-NMCA-093, ¶ 23, 93 N.M. 408 (holding that the issue of who had control of the parking lot is properly resolvable by determining who has had the primary responsibility for maintaining the parking lot); *Mitchell v. C & H Transp. Co., Inc.*, 1977-NMSC-045, ¶ 20, 90 N.M. 471 (a reservation of a right to enter to make repairs extends the duty of a landlord to the traveling public to maintain premises in a way to avoid harm to the traveling public).

209. Brief for Petitioner, *supra* note 11, at 4–5.

tended to keep students in or keep the general public out.<sup>210</sup> The school had no authority to keep pedestrians off a public street.<sup>211</sup>

The waivers of immunity of the TCA “shall be based upon traditional tort concepts of duty and the reasonably prudent person’s standard of care in the performance of that duty.”<sup>212</sup> *Encinias* abrogates this declared legislative intent by granting a waiver of immunity where the negligence alleged would not be actionable under common law concepts of premises liability.

### III. IMPLICATIONS

It may be interesting to practitioners that notice is the only limiting principle in *Encinias* for finding a building waiver.<sup>213</sup> Before *Encinias*, it was necessary to demonstrate the existence of a genuine issue of material fact as to the actual danger posed by a condition of a building or a policy employed by the operators of the building.<sup>214</sup> After *Encinias*, a showing of notice is sufficient to raise a claim from negligent supervision to negligent maintenance or operation of the building.<sup>215</sup> This lowered barrier implies that potential plaintiffs should focus their resources on obtaining some evidence that the defendant knew about a dangerous condition. They should also undoubtedly plead notice of the dangerous condition. Indeed, if the plaintiff in *Espinoza* had brought her cause of action after *Encinias*, she would only have had to plead that the town knew that children had been injured on the playground before the time of the accident in order to convert her claim for negligent supervision into one of negligent maintenance or operation.<sup>216</sup>

### CONCLUSION

The legislature should step in to clarify what it meant when it wrote the building waiver of sovereign immunity. *Encinias* marks the point

210. Brief for Respondent, *supra* note 23, at 4.

211. *See id.*

212. NMSA 1978, § 41-4-2(B) (2007).

213. *See Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 18, 310 P.3d 611.

214. *See Callaway v. New Mexico Dep’t of Corr.*, 1994-NMCA-049, ¶ 19, 117 N.M. 637.

215. *See Encinias*, 2013-NMSC-045, ¶ 18.

216. *See id.* (“The assistant principal’s statement that the area where the attack occurred was a ‘hot zone’ for student violence would not be enough, taken alone, to support a finding of liability, but it *is* enough to raise questions about the degree of student violence and the school’s efforts to discover and prevent student violence in that area.”).

where New Mexico jurisprudence has tipped the balance too far towards plaintiffs to still be in accordance with the declared intent of the legislature. The lowered evidentiary barrier for pleading a dangerous condition and the conclusion that an injury need not occur on the physical premises combine to make the government more vulnerable to suit under the building waiver than the legislative declaration would suggest that the legislature intended it to be.

