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SENATE BILL 220

**49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010**

INTRODUCED BY

John C. Ryan

AN ACT

RELATING TO PUBLIC LIABILITY; PROVIDING THAT A GOVERNMENTAL ENTITY SHALL NOT PROVIDE A DEFENSE OR PAY A SETTLEMENT OR FINAL JUDGMENT FOR A PUBLIC EMPLOYEE WHEN THE EMPLOYEE IS SUED BY THE STATE OR PURSUANT TO THE FRAUD AGAINST TAXPAYERS ACT; PROTECTING THE SOLVENCY OF THE PUBLIC LIABILITY FUND.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 41-4-1 NMSA 1978 (being Laws 1976, Chapter 58, Section 1, as amended) is amended to read:

"41-4-1. SHORT TITLE.--~~[Sections 41-4-1 through 41-4-27]~~  
Chapter 41, Article 4 NMSA 1978 may be cited as the "Tort Claims Act"."

Section 2. Section 41-4-4 NMSA 1978 (being Laws 1976, Chapter 58, Section 4, as amended) is amended to read:

"41-4-4. GRANTING IMMUNITY FROM TORT LIABILITY--

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1 AUTHORIZING EXCEPTIONS.--

2 A. A governmental entity and any public employee  
3 while acting within the scope of the public employee's duty are  
4 granted immunity from liability for any tort except as waived  
5 by the New Mexico Religious Freedom Restoration Act and by  
6 Sections 41-4-5 through 41-4-12 NMSA 1978. Waiver of this  
7 immunity shall be limited to and governed by the provisions of  
8 Sections 41-4-13 through 41-4-25 NMSA 1978, but the waiver of  
9 immunity provided in those sections does not waive immunity  
10 granted pursuant to the Governmental Immunity Act.

11 B. Unless an insurance carrier provides a defense  
12 and except as provided in Subsection F of this section, a  
13 governmental entity shall provide a defense, including costs  
14 and attorney fees, for any public employee when liability is  
15 sought for:

16 (1) any tort alleged to have been committed by  
17 the public employee while acting within the scope of [~~his~~] the  
18 public employee's duty; or

19 (2) any violation of property rights or any  
20 rights, privileges or immunities secured by the constitution  
21 and laws of the United States or the constitution and laws of  
22 New Mexico when alleged to have been committed by the public  
23 employee while acting within the scope of [~~his~~] the public  
24 employee's duty.

25 C. A governmental entity shall pay any award for

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1 punitive or exemplary damages awarded against a public employee  
2 under the substantive law of a jurisdiction other than New  
3 Mexico, including other states, territories and possessions and  
4 the United States of America, if the public employee was acting  
5 within the scope of [~~his~~] the public employee's duty.

6 D. Except as provided in Subsection F of this  
7 section, a governmental entity shall pay any settlement or any  
8 final judgment entered against a public employee for:

9 (1) any tort that was committed by the public  
10 employee while acting within the scope of [~~his~~] the public  
11 employee's duty; or

12 (2) a violation of property rights or any  
13 rights, privileges or immunities secured by the constitution  
14 and laws of the United States or the constitution and laws of  
15 New Mexico that occurred while the public employee was acting  
16 within the scope of [~~his~~] the public employee's duty.

17 E. A governmental entity shall have the right to  
18 recover from a public employee the amount expended by the  
19 public entity to provide a defense and pay a settlement agreed  
20 to by the public employee or to pay a final judgment if it is  
21 shown that, while acting within the scope of [~~his~~] the public  
22 employee's duty, the public employee acted fraudulently or with  
23 actual intentional malice causing the bodily injury, wrongful  
24 death or property damage resulting in the settlement or final  
25 judgment.

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1           F. A governmental entity shall not provide a  
2 defense for a public employee or pay costs and attorney fees or  
3 any settlement or final judgment entered against a public  
4 employee when the state is the plaintiff in the action or the  
5 action is brought pursuant to the Fraud Against Taxpayers Act.

6           ~~[F.]~~ G. Nothing in Subsections B, C and D of this  
7 section shall be construed as a waiver of the immunity from  
8 liability granted by Subsection A of this section or as a  
9 waiver of the state's immunity from suit in federal court under  
10 the eleventh amendment to the United States constitution.

11           ~~[G.]~~ H. The duty to defend as provided in  
12 Subsection B of this section shall continue after employment  
13 with the governmental entity has been terminated if the  
14 occurrence for which damages are sought happened while the  
15 public employee was acting within the scope of duty while the  
16 public employee was in the employ of the governmental entity.

17           ~~[H.]~~ I. The duty to pay any settlement or any final  
18 judgment entered against a public employee as provided in this  
19 section shall continue after employment with the governmental  
20 entity has terminated if the occurrence for which liability has  
21 been imposed happened while the public employee was acting  
22 within the scope of ~~[his]~~ the public employee's duty while in  
23 the employ of the governmental entity.

24           ~~[I.]~~ J. A jointly operated public school, community  
25 center or athletic facility that is used or maintained pursuant

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1 to a joint powers agreement shall be deemed to be used or  
2 maintained by a single governmental entity for the purposes of  
3 and subject to the maximum liability provisions of Section  
4 41-4-19 NMSA 1978.

5 ~~[J-]~~ K. For purposes of this section, a "jointly  
6 operated public school, community center or athletic facility"  
7 includes a school, school yard, school ground, school building,  
8 gymnasium, athletic field, building, community center or sports  
9 complex that is owned or leased by a governmental entity and  
10 operated or used jointly or in conjunction with another  
11 governmental entity for operations, events or programs that  
12 include sports or athletic events or activities, child care or  
13 youth programs, after-school or before-school activities or  
14 summer or vacation programs at the facility.

15 ~~[K-]~~ L. A fire station that is used for community  
16 activities pursuant to a joint powers agreement between the  
17 fire department or volunteer fire department and another  
18 governmental entity shall be deemed to be operated or  
19 maintained by a single governmental entity for the purposes of  
20 and subject to the maximum liability provisions of Section  
21 41-4-19 NMSA 1978. As used in this subsection, "community  
22 activities" means operations, events or programs that include  
23 sports or athletic events or activities, child care or youth  
24 programs, after-school or before-school activities, summer or  
25 vacation programs, health or education programs and activities

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or community events."

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