

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

2 **Opinion Number:** \_\_\_\_\_

3 **Filing Date: June 19, 2017**

4 **NO. S-1-SC-35974**

5 **BRUCE THOMPSON, as Guardian ad Litem for**  
6 **A.O., J.P., and G.G., Minor Children,**

7           Plaintiff-Respondent,

8 v.

9 **CITY OF ALBUQUERQUE, RAY SCHULTZ, former**  
10 **Chief of Police of the City of Albuquerque, and KEVIN**  
11 **SANCHEZ, City of Albuquerque Police Officer,**

12           Defendants-Petitioners.

13 **ORIGINAL PROCEEDING ON CERTIORARI**

14 **Denise Barela Shepherd, District Judge**

15 City of Albuquerque  
16 Jessica M. Hernandez, City Attorney  
17 Stephanie M. Griffin  
18 Albuquerque, NM

19 for Petitioners

20 Kennedy, Kennedy, & Ives, LLC  
21 Shannon L. Kennedy  
22 Joseph P. Kennedy  
23 Adam C. Flores  
24 Albuquerque, NM

25 for Respondent

1 **OPINION**

2 **CHÁVEZ, Justice.**

3 {1} May the minor children of a parent whom they allege was wrongfully shot and  
4 killed by a law enforcement officer (1) sue for loss of consortium damages under the  
5 New Mexico Tort Claims Act (TCA), NMSA 1978, §§ 41-4-1 to -30 (1976, as  
6 amended through 2015), and (2) bring their lawsuit even if the parent’s estate did not  
7 sue for wrongful death damages? We answer “yes” to both questions for the  
8 following reasons. First, Section 41-4-12 of the TCA waives a law enforcement  
9 officer’s sovereign immunity from liability for personal injury and bodily injury  
10 damages resulting from battery, and loss of consortium damages may be characterized  
11 as either personal or bodily injury damages. Second, loss of consortium damages  
12 result from the wrongful injury or death of someone who was in a sufficiently close  
13 relationship to the loss of consortium claimant, and such damages belong to the loss  
14 of consortium claimant and not to the injured person or the decedent’s estate.

15 **BACKGROUND**

16 {2} The background to our analysis is comprised of the well-pled facts in Plaintiffs’  
17 complaint, which we accept as truthful for purposes of reviewing the district court’s  
18 ruling on Defendants’ motion to dismiss. *Callahan v. N.M. Fed’n of Teachers-TVI*,  
19 2006-NMSC-010, ¶ 4, 139 N.M. 201, 131 P.3d 51.

1 {3} On March 29, 2010, Albuquerque Police Department officers received  
2 information regarding a suspected stolen vehicle located in a commercial parking lot.  
3 Several officers then arrived at the scene and surrounded the suspected stolen vehicle  
4 with their unmarked police vehicles. Mickey Owings parked next to the suspected  
5 stolen vehicle. A passenger exited Owings's vehicle and approached the suspected  
6 stolen vehicle.

7 {4} The APD officers then positioned one of the unmarked police vehicles behind  
8 Owings's vehicle as Officer Sanchez approached Owings's vehicle on foot. Owings  
9 backed his vehicle into the unmarked police vehicle that was preventing him from  
10 leaving. Officer Sanchez drew his gun and pointed it at Owings as he continued to  
11 approach Owings's car. Owings drove away once Officer Sanchez began shooting  
12 at his car. Ultimately, Officer Sanchez shot and killed Owings during this encounter.

13 {5} Plaintiffs are Owings's surviving minor children who sued Defendants for loss  
14 of consortium damages under Section 41-4-12. Plaintiffs allege that Defendants' acts  
15 and omissions caused the wrongful death of their father, and as a result they will be  
16 "forced to grow up without the companionship, guidance, love, enjoyment, and  
17 support of their father . . . ." The district court granted Defendants' Rule 1-012(B)(6)  
18 NMRA motion to dismiss, concluding that the TCA did not waive law enforcement

1 officers' sovereign immunity for a loss of consortium claim. The Court of Appeals  
2 reversed, *Thompson v. City of Albuquerque*, 2017-NMCA-002, ¶ 11, 386 P.3d 1015,  
3 and we affirm the Court of Appeals.

#### 4 **DISCUSSION**

5 {6} “Generally, the Tort Claims Act provides governmental entities and public  
6 employees acting in their official capacities with immunity from tort suits unless the  
7 [TCA] sets out a specific waiver of that immunity.” *Weinstein v. City of Santa Fe ex*  
8 *rel. Santa Fe Police Dep’t*, 1996-NMSC-021, ¶ 6, 121 N.M. 646, 916 P.2d 1313.

9 Section 41-4-12 provides that law enforcement officers' immunity is waived for:

10 liability for personal injury, bodily injury, wrongful death or property  
11 damage resulting from assault, battery, false imprisonment, false arrest,  
12 malicious prosecution, abuse of process, libel, slander, defamation of  
13 character, violation of property rights or deprivation of any rights,  
14 privileges or immunities secured by the constitution and laws of the  
15 United States or New Mexico when caused by law enforcement officers  
16 while acting within the scope of their duties.

17 We review the dismissal of Plaintiffs' claim for loss of consortium damages under  
18 Rule 1-012(B)(6) de novo. *See Fitzjerrell v. City of Gallup ex rel. Gallup Police*  
19 *Dep’t*, 2003-NMCA-125, ¶ 8, 134 N.M. 492, 79 P.3d 836 (noting that whether a  
20 motion to dismiss was properly granted is a question of law).

21 **Loss of consortium is a claim for damages deriving from a tort upon another, but**  
22 **which may be brought as an independent claim for damages to a sufficiently**

1 **close relationship**

2 {7} Defendants argue that there is no waiver of sovereign immunity for loss of  
3 consortium under Section 41-4-12 because loss of consortium is not specifically  
4 enumerated in the statute, and therefore a waiver would be contrary to “the public  
5 policy of New Mexico that governmental entities and public employees shall only be  
6 liable within the limitations of the [TCA] and in accordance with the principles  
7 established in that act.” Section 41-4-2(A). The structure of Section 41-4-12  
8 persuades us otherwise.

9 {8} The plain language of Section 41-4-12 first presents the types of injury for  
10 which a law enforcement officer’s immunity may be waived. *Id.* The types of injury  
11 enumerated include personal and bodily injury. *Id.* Loss of consortium fits squarely  
12 within personal injury as an element of such damages. *See* UJI 13-1810A NMRA  
13 (listing loss of consortium within the category of personal injury damages). Loss of  
14 consortium is a type of personal injury damage because “[d]amages for consortium  
15 are damages for the plaintiff’s emotional distress” due to the harm to a sufficiently  
16 close relationship. *Fernandez v. Walgreen Hastings Co.*, 1998-NMSC-039, ¶ 26, 126  
17 N.M. 263, 968 P.2d 774; *see also Weinstein*, 1996-NMSC-021, ¶ 26 (holding that  
18 emotional distress is a type of personal injury). Courts have recognized that

1 “[d]amages for emotional distress . . . may be recoverable as damages for personal  
2 injury resulting from one of the enumerated acts.” *Romero v. Otero*, 678 F. Supp.  
3 1535, 1540 (D. N.M. 1987) (internal quotation marks omitted). Other courts have  
4 also found that loss of consortium is a damage resulting from bodily injury upon  
5 another. *Brenneman v. Bd. of Regents of the Univ. of N.M.*, 2004-NMCA-003, ¶ 19,  
6 135 N.M. 68, 84 P.3d 685. Whether loss of consortium is labeled as personal or  
7 bodily injury, it is indisputably contemplated by the language of Section 41-4-12.  
8 {9} Section 41-4-12 also delineates the torts for which a law enforcement officer’s  
9 immunity may be waived. *Id.* The enumerated torts include battery, from which  
10 Plaintiffs allege their claim for loss of consortium damages arises in this case. In this  
11 regard, Plaintiffs’ claim for loss of consortium damages derives from a tort  
12 enumerated under Section 41-4-12. *See Williams v. Bd. of Regents of the Univ. of*  
13 *N.M.*, No. CIV 13-0479 JB/WPL, 2014 WL 4351533, at \*11 n.8 (D. N.M. Aug. 18,  
14 2014) (“Loss of consortium can be asserted against New Mexico government actors,  
15 despite that it is not specifically mentioned in the [TCA], provided that the underlying  
16 tort—the one that caused direct physical injury—itsself triggers an immunity waiver  
17 . . . .” (citation omitted)). Loss of consortium damages are derivative in nature  
18 because they arise from a physical injury upon another person. *See Romero v. Byers*,

1 1994-NMSC-031, ¶ 8, 117 N.M. 422, 872 P.2d 840 (“Loss of consortium is simply  
2 the emotional distress suffered by one spouse who loses the normal company of his  
3 or her mate when the mate is physically injured due to the tortious conduct of  
4 another.”). Therefore, both the injury and the tort from which the children’s claim for  
5 loss of consortium damages derive are specifically enumerated under Section 41-4-  
6 12.

7 {10} The Court of Appeals has correctly recognized that immunity may be waived  
8 for loss of consortium damages as a claim deriving from an enumerated tort under the  
9 TCA. In *Wachocki v. Bernalillo County Sheriff’s Department (Wachocki I)*, the Court  
10 of Appeals analyzed a wrongful death claim under Section 41-4-12 and a derivative  
11 claim for loss of consortium damages. 2010-NMCA-021, ¶¶ 1-2, 147 N.M. 720, 228  
12 P.3d 504, *aff’d*, *Wachocki v. Bernalillo Cty. Sheriff’s Dep’t (Wachocki II)*, 2011-  
13 NMSC-039, ¶¶ 1, 12-14, 150 N.M. 650, 265 P.3d 701. The Court of Appeals held  
14 that Section 41-4-12 waived immunity for the wrongful death claim, *Wachocki I*,  
15 2010-NMCA-021, ¶ 1, but regarding the loss of consortium claim, the claimant, who  
16 was the decedent’s sibling, could not recover because he had failed to prove the  
17 foreseeability of harm to a sufficiently close relationship with the decedent. *Id.* ¶¶ 54-  
18 57.

1 {11} Defendants argue that *Wachocki I* did not expressly hold that damages for loss  
2 of consortium may be recovered under Section 41-4-12. The fact that the *Wachocki*  
3 *I* Court analyzed the merits of the claim for loss of consortium damages *after* it  
4 determined there was a waiver for the tort claim from which the damages derived  
5 leads us to conclude otherwise. The Court of Appeals began its analysis on loss of  
6 consortium damages by stating that “damages for loss of consortium may be  
7 recovered under the Section 41-4-2(A) waiver of sovereign immunity.” *Wachocki I*,  
8 2010-NMCA-021, ¶ 50 (citing *Brenneman*, 2004-NMCA-003, ¶ 19). Section 41-4-  
9 2(A) is a general provision explaining the policy reasons behind the TCA. The same  
10 is true of Section 41-4-2(B), which states that “[l]iability . . . under the [TCA] shall  
11 be based upon the traditional tort concepts of duty and the reasonably prudent  
12 person’s standard of care in the performance of that duty.” Due to its general  
13 applicability, Section 41-4-2 pertains to individual sections of the TCA, including  
14 Section 41-4-12. *See Torres ex rel. Estate of Torres v. State*, 1995-NMSC-025, ¶ 11,  
15 119 N.M. 609, 894 P.2d 386 (observing that a waiver of immunity under Section  
16 41-4-2(B) applied to an action for wrongful death by battery caused by law  
17 enforcement officers brought under Section 41-4-12). Therefore, the *Wachocki I*  
18 Court’s statement that damages for loss of consortium may be recovered under the

1 general provision, Section 41-4-2, applies to Section 41-4-12. Similarly, when  
2 construing *Wachocki I* on appeal, this Court analyzed the merits of the claim for loss  
3 of consortium damages when we could have simply declared that there was no waiver  
4 of immunity under Section 41-4-12. *Wachocki II*, 2011-NMSC-039, ¶ 4.

5 {12} *Brenneman*, to which *Wachocki I* cited, also supports our conclusion that  
6 immunity is waived for loss of consortium damages under Section 41-4-12. *See*  
7 *Brenneman*, 2004-NMCA-003, ¶ 1. The *Brenneman* Court concluded that immunity  
8 was waived for a claim for loss of consortium damages in the context of Sections 41-  
9 4-9 and -10, 2004-NMCA-003, ¶ 6, but it also made several statements regarding  
10 waiver of immunity for loss of consortium damages as they pertain to the TCA as a  
11 whole. *See id.* ¶ 1 (“We hold that loss of consortium damages are permissible under  
12 the [TCA]’s provisions for damages resulting from bodily injury.”); ¶¶ 10, 19 (“[W]e  
13 believe that loss of consortium is exactly the type of damage based upon the  
14 traditional tort concepts of duty that the Legislature intended to include under the  
15 applicable waivers of sovereign immunity in the [TCA].” (internal quotation marks  
16 omitted)).

17 {13} Defendants seek to distinguish *Wachocki I* and *Brenneman* on the basis that in  
18 those cases, the Court of Appeals analyzed claims for loss of consortium damages

1 arising from negligence and not an intentional tort. We are not persuaded because  
2 other courts have also recognized that loss of consortium damages may result from  
3 intentional torts. *See McGrath v. Nassau Health Care Corp.*, 217 F. Supp. 2d 319,  
4 335 (E.D. N.Y. 2002) (“Assault and battery claims may sustain derivative loss of  
5 consortium claims.”). In *McGrath*, a public employee brought a lawsuit against her  
6 governmental employer and supervisor alleging assault and battery, among other  
7 claims, while the employee’s husband asserted a loss of consortium claim deriving  
8 from the physical injury upon his wife. *Id.* at 322, 335. The court declined to dismiss  
9 the underlying intentional tort claims because the plaintiffs had pled sufficient facts  
10 to support them, and the loss of consortium claim was also not dismissed because it  
11 was adequately supported by the intentional tort claims. *Id.* at 333-34; *see also Pahle*  
12 *v. Colebrookdale Twp.*, 227 F. Supp. 2d 361, 376 (E.D. Pa. 2002) (recognizing that  
13 an assault and battery on a husband by a police officer, if proven, indubitably forms  
14 the basis for a loss of consortium claim by the wife). Furthermore, waiving immunity  
15 for loss of consortium damages resulting from negligent conduct necessarily implies  
16 that there also is waiver of damages resulting from intentional conduct. It would be  
17 illogical to forego waiving immunity for intentional conduct when waiver for  
18 negligence is permitted, particularly since Section 41-4-12 waives immunity for a

1 wider range of tortious conduct committed by law enforcement officers than any other  
2 classification of public employee. *Compare* §§ 41-4-5, 41-4-6, 41-4-7, 41-4-9, & 41-  
3 4-10 (waiving immunity for negligence of public employees) *with* § 41-4-12 (waiving  
4 immunity for conduct premised on negligence, according to *Wachocki I*, in addition  
5 to assault, battery, and false imprisonment, among other torts). Accordingly, we hold  
6 that immunity is waived for claims of loss of consortium damages deriving from an  
7 enumerated tort under Section 41-4-12.

8 {14} Defendants next contend that even if loss of consortium damages derive from  
9 the underlying battery, any lawsuit for such damages must be brought along with the  
10 underlying battery claim. We agree that a plaintiff who sues for loss of consortium  
11 damages must prove—as an element of loss of consortium damages—that the alleged  
12 tortfeasor caused the wrongful injury or death of someone who was in a sufficiently  
13 close relationship to the plaintiff, resulting in harm to the relationship. However, this  
14 does not mean that the loss of consortium claim must always be brought with the  
15 underlying tort claim, or that actual recovery for the underlying tort is a prerequisite  
16 for the recovery of loss of consortium damages. *See Archer v. Roadrunner Trucking,*  
17 *Inc.*, 1997-NMSC-003, ¶ 13, 122 N.M. 703, 930 P.2d 1155 (stating that while loss of  
18 consortium claimants may recover only if the physically injured person has a cause

1 of action for his or her injuries, actual recovery for the underlying tort is not required  
2 in order to recover loss of consortium damages); *Turpie v. Sw. Cardiology Assocs.,*  
3 *P.A.*, 1998-NMCA-042, ¶ 7, 124 N.M. 787, 955 P.2d 716 (“[T]he defendant must be  
4 at least potentially liable to the injured [person] before it can be liable to the  
5 [claimant] seeking loss of consortium damages.”).

6 {15} For our purposes in reviewing whether Plaintiffs are entitled to bring their  
7 claim as a matter of law, and not whether they may actually recover on their claim  
8 (which we were not asked to decide), Plaintiffs need only have pled sufficient facts  
9 to notify Defendants about the complaint’s general premise. *See Petty v. Bank of*  
10 *N.M. Holding Co.*, 1990-NMSC-021, ¶ 7, 109 N.M. 524, 787 P.2d 443 (“Under our  
11 rules of notice pleading, it is sufficient that defendants be given only a fair idea of the  
12 nature of the claim asserted against them sufficient to apprise them of the general  
13 basis of the claim; specific evidentiary detail is not required at this stage of the  
14 pleadings.”) (internal quotation marks and citation omitted)). Plaintiffs sufficiently  
15 pled the underlying battery claim from which their claim for loss of consortium  
16 damages arose by alleging that Defendants caused the deadly shooting of Owings,  
17 which resulted in the minor children losing their relationship with their father.

18 {16} Defendants also argue that the minor children did not suffer a direct injury

1 because it was only their father who suffered a deadly battery, not the children, and  
2 therefore their claim is merely a bystander claim for which there is no waiver under  
3 Section 41-4-12. *See Weinstein*, 1996-NMSC-021, ¶¶ 24-26 (concluding that the  
4 parents of a battery victim could not bring a separate cause of action for the tort of  
5 negligent infliction of emotional distress because “their claim [was] akin to a  
6 bystander claim” for which there is no waiver of immunity under Section 41-4-12).  
7 Although claims for loss of consortium damages derive from injury to another, the  
8 claimant has also suffered a direct injury for which he or she may seek recovery  
9 separately from the underlying tort. The *Weinstein* Court itself stated that there is a  
10 direct claim for personal injury for which there is an enumerated waiver under  
11 Section 41-4-12. *Weinstein*, 1996-NMSC-021, ¶ 26. The direct injury alleged by a  
12 loss of consortium claimant is one to a relational interest with another who was  
13 physically injured. *Lozoya v. Sanchez*, 2003-NMSC-009, ¶ 20, 133 N.M. 579, 66  
14 P.3d 948, *abrogated on other grounds by Heath v. La Mariana Apartments*, 2008-  
15 NMSC-017, 143 N.M. 657, 180 P.3d 664; *Archer*, 1997-NMSC-003, ¶ 11. Plaintiffs’  
16 claim for loss of consortium damages alleges a direct injury to their relational interest  
17 with their father as a result of the battery upon him. In this regard, Plaintiffs are not  
18 merely “indirect or incidental victims.” *Cf. Lucero v. Salazar*, 1994-NMCA-066, ¶

1 12, 117 N.M. 803, 877 P.2d 1106 (“We thus construe the language of Section 41-4-  
2 2(A) as evincing a legislative intent not to waive immunity for injuries to indirect or  
3 incidental victims of tortious acts committed by government employees.”).

4 {17} A derivative claim for loss of consortium damages need not be brought along  
5 with the underlying tort claim because loss of consortium claimants suffer a direct  
6 injury separate from the physical injury to another. *State Farm Mut. Auto. Ins. Co.*  
7 *v. Luebbers*, 2005-NMCA-112, ¶ 37, 138 N.M. 289, 119 P.3d 169. In *Luebbers*, the  
8 Court of Appeals explicitly held that a minor child could pursue a claim for loss of  
9 consortium damages separate from an underlying wrongful death claim. *Id.*

10 Defendants assert that *Luebbers* cannot be applied here because that case analyzed  
11 a claim for loss of consortium damages against a private party, not a government  
12 entity, under Section 41-4-12 or any other section of the TCA. However, once there  
13 is a waiver of immunity under the TCA, the state is treated the same way as any other  
14 defendant for purposes of that claim. *See* § 41-4-2(B) (“Liability for acts or  
15 omissions under the [TCA] shall be based upon the traditional tort concepts of duty  
16 and the reasonably prudent person’s standard of care in the performance of that  
17 duty.”); *Encinias v. Whitener Law Firm, P.A.*, 2013-NMSC-045, ¶ 15, 310 P.3d 611  
18 (“In enacting the TCA, the Legislature expressed an intent to waive the state’s

1 immunity in situations that would subject a private party to liability under our  
2 common law.” (citing § 41-4-2(B)). Since we have concluded that there is waiver  
3 of immunity for Plaintiffs’ claim of loss of consortium damages as deriving from the  
4 underlying battery upon Owings, the state may be treated like any private party, and  
5 therefore the *Luebbers* holding that claims for loss of consortium damages are  
6 independent is applicable here.

7 {18} Our recognition that claims for loss of consortium damages are independent is  
8 not unprecedented. As this area of law has expanded, this Court has increasingly  
9 allowed plaintiffs with differing relationships to the physically injured person to bring  
10 independent claims for loss of consortium damages that are separate from the  
11 underlying tort claim. *See Fernandez*, 1998-NMSC-039, ¶ 32 (affirming dismissal  
12 of the plaintiff’s underlying tort claim, but holding that the plaintiff could  
13 nevertheless pursue her claim for loss of consortium damages); *Byers*, 1994-NMSC-  
14 031, ¶ 10 (concluding that “[j]ust as a spouse’s pain and suffering is separate  
15 property,” so too the spouse’s recovery for the “emotional suffering due to the loss  
16 of consortium is separate property” (citations omitted)). We hold that Plaintiffs in  
17 this case may bring the claim for loss of consortium damages independent of the  
18 underlying battery claim.

1 **CONCLUSION**

2 {19} Because Section 41-4-12 of the TCA waives immunity for claims of loss of  
3 consortium damages arising from a battery, we hold that Plaintiffs' claim is  
4 permissible. We therefore affirm the Court of Appeals's opinion and remand to the  
5 district court for proceedings consistent with this opinion.

6 {20} **IT IS SO ORDERED.**

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**EDWARD L. CHÁVEZ, Justice**

9 **WE CONCUR:**

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**JUDITH K. NAKAMURA, Chief Justice**

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**PETRA JIMENEZ MAES, Justice**

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**CHARLES W. DANIELS, Justice**

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**BARBARA J. VIGIL, Justice**