Circuit Court for Montgomery County
Case No. 436125

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2279

September Term, 2017

RAUL T. ARISTORENAS, *et al.*

v.

MONTGOMERY COUNTY, MARYLAND, *et al.*

Meredith,
Nazarian,
Arthur,

JJ.

Opinion by Nazarian, J.

Filed: February 22, 2019

In July 2016, a 911 call center in Montgomery County experienced a service outage that lasted approximately one hour and forty-five minutes. During the outage, Marlon Somarriba, who suffered from chronic kidney ailments, experienced a medical emergency and died. Eduardo Somarriba, Marlon's father, alleges that he and other friends and family called 911 repeatedly, for over an hour, but were unable to get through. Eventually they did, and rescue personnel responded, but they couldn't revive Marlon and he died.

Mr. Somarriba and Raul T. Aristorenas, the personal representative of Marlon's estate, filed a wrongful death and survival action against Montgomery County and two individual supervisors in the County's Department of General Services (collectively, the "County"). The amended complaint alleged that the defendants' negligence in maintaining an air conditioning unit caused the unit to fail, which caused the 911 service outage and, in turn, caused Marlon's death.

After briefing and a hearing, the Circuit Court for Montgomery County granted the County's motion to dismiss the amended complaint. The court concluded that the allegations did not state a claim for negligence—which underlies both the wrongful death and the survival claims—because the County is immune from suit and the individual defendants did not owe a duty to Mr. Somarriba or Marlon. We agree and affirm.

I. BACKGROUND

Because this appeal arises from a motion to dismiss, we take the underlying story from the amended complaint:

> 10. On the night of July 10, 2016 by 11:00 pm, 911 Emergency Call Centers in Montgomery County experienced

a complete service outage, causing all callers who dialed 911 for emergency assistance to hear a busy tone. Callers were unable to communicate with all operators. The outage continued until July 11, 2016, when service was restored around 1:00am.

11. This 911 outage was caused by certain electrical, mechanical, and computer failures at Montgomery County owned, operated, and maintained 911 phone facilities. The systems were negligently designed and maintained by Montgomery County, its agencies, and employees including the three named defendants. In particular, the HVAC unit that failed on the night of the outage was maintained in a grossly negligent manner. The duty owed to maintain that critical unit was very high as it was the only unit that cooled the critical severs necessary to keep the 911 center running and its failure to function would crash the entire 911 system. It was not filled with coolant, which was grossly negligent under the circumstances. The level of coolant was also not checked, which is grossly negligent under the circumstances.

12. Montgomery County, the Montgomery County Department of General Services, David Dise, Individually and in his Official Capacity as Director of Montgomery County Department of General Services, and Beryl L. Feinberg, the Deputy Director and Chief Operating Officer of the Montgomery County Department of General Services were both negligent and grossly negligent in the maintenance and planning of critical 911 call center systems. A single HVAC Unit was used to cool the computer server room. Defendants were grossly negligent in failing to put coolant in this critical system, despite their knowledge that the failure of the HVAC system would crash the 911 call center. Moreover, alarms and warnings that the server room was overheating did not function or poorly functioned such that personnel did not know what happened when the crash occurred, and no back up system existed in the event that the HVAC unit failed. These negligent and grossly negligent acts caused the HVAC unit to fail, the servers to overheat, and the entire 911 call system to black out.

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15. Decedent Marlon Somarriba was under care for chronic kidney ailments. The conditions were not life threatening as long as Mr. Somarriba had reasonable access to 911 services

> in case of an emergency. Based on Defendant's media representation, he believed 911 was always operational.
>
> 16. On July 10 and 11, 2016, during the 911 phone call center outage, Marlon Somarriba had a medical emergency. Mr. Somarriba was having trouble breathing, and after applying a blood pressure monitor on himself, realized that he had extremely low and dangerous blood pressure. His father, Eduardo Somarriba, called 911 repeatedly to attempt to contact emergency services to dispatch an ambulance for Marlon Somarriba. Because the emergency communication center in Montgomery County was having a call outage due to mechanical, electrical, and computer malfunctions caused by its negligence and gross negligence, fire and rescue was unable to respond to any 911 calls placed for the purposes of bringing assistance to Marlon Somarriba.
>
> 17. Marlon's friends and family repeatedly called 911, and repeatedly got a busy tone. They called in vain for over an hour. No emergency vehicles arrived to render assistance to Marlon Somarriba during that one hour time span.
>
> 18. The Somarriba's [sic] believed, because of 911 advertising and the public awareness campaign establishing it as the number to call during emergencies, that 911 was an emergency service that was promised to them as being readily available in time of emergencies without fear of interruption or service outage.
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> 19. Fire rescue and police were eventually dispatched over at least one hour later. When they arrived at Marlon Somarriba's location, they were unsuccessful in getting Marlon Somarriba to respond. They rendered first aid and other medical assistance to him on the scene for 15 minutes. Mr. Somarriba was pronounced dead by [an EMS Medic] at 0028 hours.

The defendants moved to dismiss, and the circuit court held a hearing and dismissed the amended complaint with prejudice. We supply additional facts as necessary below.

II. DISCUSSION

Messrs. Somarriba and Aristorenas raise five questions[1] in their brief, and the County raises four.[2] We consolidate all of these questions into one: whether the circuit

[1] Messrs. Somarriba and Aristorenas phrased their Questions Presented as follows:

> 1. Did the Court err by failing to consider the exact nature of the activity the government sought to immunize – simple maintenance?
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> 2. Did the Court incorrectly immunize all activities of any kind, no matter how private or corporate, because the overall mission of the 911 call center was governmental?
>
> 3. Did the Court apply the wrong test to determine governmental immunity by only considering if the mission of the 911 call center was governmental, without any countervailing consideration of whether the activities at issue were entirely or partly private?
>
> 4. Did the Court incorrectly fail to analyze the County's tort duty under normal tort law standards and the heightened standards applicable to 911 systems imposed by COMAR?
>
> 5. Did the Court improperly fail to allow discovery and fail to recognize the potential liability of the Director of the Montgomery County Department of General Services for the negligence in this case?

[2] The County stated its Question Presented as follows:

> I. Where the provision of access to emergency ambulance service through a 911 call center is statutorily mandated, provided for the benefit of the public at large, and inures no profit to the County, does governmental immunity bar Appellees' claim against the County for negligent operation of its 911 system?
>
> II. Does the public duty doctrine apply to bar a finding that the Appellees owed a duty to properly maintain the 911 call center to decedent, where the 911 call center is mandated for general public use by law and in the absence of any affirmative actions or statements between the Appellees and the decedent?

court erred in dismissing the amended complaint with prejudice.

When reviewing a decision to grant a motion to dismiss for failure to state a claim, "we must determine whether the complaint, on its face, discloses a legally sufficient cause of action." *Schisler v. State*, 177 Md. App. 731, 743 (2007) (citations omitted). "[W]e accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party." *Converge Servs. Grp. v. Curran*, 383 Md. 462, 475 (2004).

A. The County Is Immune.

First, we must determine whether the County is immune from tort liability. "Certain well-established rules apply to tort actions filed against local governments . . . ." *DiPino v. Davis*, 354 Md. 18, 47 (1999). "Under Maryland common law, a local government is immune from tort liability when it functions in a 'governmental' capacity, but it enjoys no such immunity when it is engaged in activities that are 'proprietary' or 'private' in nature." *Zilichikhis v. Montgomery Cnty.*, 223 Md. App. 158, 192 (2015); *see also Austin v. City of Balt.*, 286 Md. 51, 53 (1979) ("Unlike the total immunity from tort liability which the State and its agencies possess, the immunity of counties, municipalities and local agencies is limited to tortious conduct which occurred in the exercise of a 'governmental' rather than

> III. Does the Amended Complaint state a cause of action for gross negligence, where the only facts in support of the claim are an alleged failure to properly maintain an air conditioning unit?
>
> IV. Given the lack of any facts establishing specific actions by the County's department director and deputy department director, are those individuals properly a party to this case?

a 'proprietary' function."); *accord Rios v. Montgomery Cnty.*, 386 Md. 104, 124 (2005).

There can at times be some "difficulty in distinguishing between those functions which are governmental and those which are not . . . ." *Rios*, 386 Md. at 128. But the Court of Appeals has adopted guidelines that look at whether the function benefits the public as a whole or the County as an enterprise:

> Where the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest, it is governmental in its nature.

Austin, 286 Md. at 59–60 (quoting *Mayor and City Council of Balt. v. Blueford*, 173 Md. 267, 275–76 (1937)); *accord Rios*, 386 Md. 128–29. The Court has also observed that "[a]nother way of expressing the test . . . is whether the act performed is for the common good of all or for the special benefit or profit of the corporate entity." *Tadjer v. Montgomery Cnty.*, 300 Md. 539, 547 (1984).

In this case, the question is whether maintenance of the 911 system—including the maintenance of an air conditioning unit that is alleged to be necessary to its proper functioning—is a governmental or proprietary activity. We have no difficulty finding this function governmental. *First*, the operation of the 911 system is "sanctioned by legislative authority"—state law requires each county to operate a 911 system and requires the County to provide public access to police, fire, and ambulance services through that system. Md. Code (2003, 2018 Repl. Vol.) § 1-304(a), (c) of the Public Safety Article ("PS"). *Second*, Messrs. Somarriba and Aristorenas do not assert—nor can they—that the County derives

a profit or benefit from the 911 system. And *third*, the parties do not dispute that the 911 system benefits the public health and promotes the welfare of all. Messrs. Somarriba and Aristorenas implicitly acknowledge as much in the amended complaint when they allege that "Montgomery County advertised 911 as a life saving service that would always be available in time of emergency with the intention that each individual citizen in Montgomery County would rely on the assertion." Indeed, the General Assembly recognized that classically public purpose explicitly in the statute: "The General Assembly: (1) recognizes the paramount importance of the safety and well-being of the public; [and] (2) recognizes that timely and appropriate assistance must be provided when the lives or property of the public are in imminent danger . . . ." PS § 1-302 (a)(1) & (2).

Messrs. Somarriba and Aristorenas attempt to define the governmental function at issue not as providing a 911 system, but instead as maintaining the air conditioning unit. By this logic, the public purpose isn't public safety, but the routine maintenance of air conditioning units in County buildings, and from there they analogize building maintenance to cases holding that *road* maintenance is proprietary. *See Montgomery Cnty. v. Voorhees*, 86 Md. App. 294, 301 (1991) (county not immune for negligence "arising out of its maintenance and control of the county roads"); *Smith v. City of Baltimore*, 156 Md. App. 377, 383 (2004) (city not immune for claim arising from "fail[ure] to maintain its streets"). This argument misconstrues the cases. There *is* a line of cases holding that the maintenance of public paths and roads is "proprietary," and that therefore, immunity does not protect the defendant local governments from negligence-based tort claims. *See Anne*

Arundel Cnty. v. Fratantuono, 239 Md. App. 126, 134–39 (2018). But they don't cite, and we haven't found, any cases extending that exception to contexts outside of torts that arise from the negligent maintenance of "public ways."[3] The focus of the public way exception is not the act or acts of *maintenance*, but rather that the alleged injury occurred on a *public way*.[4] And the exception is limited: numerous other cases, in this Court and the Court of Appeals, have found maintenance in the context of other public endeavors to be "governmental." *See Bagheri v. Montgomery Cnty.*, 180 Md. App. 93, 97 (2008) (identifying Maryland cases holding that the operation and maintenance of a public park, a day camp, a town pool, a police force, and a courthouse have been held to be governmental in nature).

The functions the County performs in connection with its 911 system, including maintenance of the buildings and equipment that allow it to operate, are governmental functions, and the County is immune from tort liability for Messrs. Somarriba and Aristorenas's wrongful death and survival action claims.[5]

[3] There is one case in which the court held that a local government activity other than the maintenance of a public way, renting stalls in a market, was proprietary in nature. *Reed v. Mayor and City Council of Balt.*, 171 Md. 115, 188 A. 15, 16 (1936). But even in that case, the court's focus was on the city's duty to maintain public walkways in that market.

[4] Although courts have acknowledged and applied the long-standing and well-established "public ways" exception, we have at the same time recognized the logical incongruity in conceptualizing that sort of maintenance as "proprietary." *Fratantuono*, 239 Md. App. at 134 n.1.

[5] To the extent Messrs. Somarriba and Aristorenas argue that governmental immunity does not apply "when an activity does not involve the use of a public official's discretion or judgment, but merely involves the performance of a defined task," that argument fails. They attempt to rely on *Ashburn v. Anne Arundel Cnty.*, 306 Md. 617, 622 (1986), but that

B. The Individual Defendants Cannot Be Liable Because They Owed No Duty To Mr. Somarriba Or His Son.

The next question is whether the amended complaint stated a claim against the two individual defendants, Mr. David Dise, the director of the County's Department of General Services ("DGS") and Beryl L. Feinberg, a DGS supervisor. We agree with the circuit court that it didn't.

The amended complaint asserted two counts: wrongful death and a survival action. The right to bring a wrongful death claim arises from Maryland Code (1973, 2013 Repl. Vol.) § 3-902(a) of the Courts and Judicial Proceedings Article ("CJ"), which provides that "[a]n action may be maintained against a person whose wrongful act causes the death of another." A "wrongful act" includes negligence. CJ § 3-901(e); *see also Spangler v. McQuitty*, 449 Md. 33, 53 (2016) ("The wrongful death statute allows the decedent's beneficiaries or relatives to recover damages for loss of support or other benefits that would have been provided, had the decedent not died as a result of another's negligence."). Similarly, a survival action sounds in negligence, and seeks compensation for the decedent's conscious pain and suffering before death on behalf of the decedent's estate. Md. Code (1974, 2017 Repl. Vol.) § 7-401(y) of the Estates and Trusts Article; *see DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 58 (2010) (the three elements of survival action are: "1. that the defendant's negligence was the direct and proximate cause of the accident; 2.

case didn't address whether a local *government* was immune. Instead, *Ashburn* addressed whether an *individual* police officer was protected from liability by the public official immunity, a doctrine not asserted in this case.

that the deceased lived after the accident; and 3. that between the time of the accident and the time of death [the deceased] suffered conscious pain") (quotations and citation omitted).

For the amended complaint to survive a motion to dismiss, it must allege facts sufficient to support a claim of negligence against Mr. Dise and Ms. Feinberg. And the first element of negligence is that the defendant owe a duty to the plaintiff:

> In order to state a claim in negligence, the plaintiff must allege and prove facts demonstrating (1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty.

Dehn v. Edgecombe, 384 Md. 606, 619 (2005) (internal quotations and citation omitted). With regard to the wrongful death claim, we must decide whether the individual defendants owed a duty to protect Mr. Somarriba from the injuries he suffered as a result of his son's death (namely, mental anguish, emotional pain and suffering, and loss of comfort). *See* CJ § 3-904(d). For the survival action, we must decide whether the individual defendants owed a duty to protect Marlon from the pain and suffering he suffered prior to his death. *See DRD Pool*, 416 Md. at 58. The question of whether a duty exists is a question of law that we review *de novo*. *Pace v. State*, 425 Md. 145, 154 (2012) (*citing Valentine v. On Target, Inc.*, 353 Md. 544, 549 (1999)).

Messrs. Somarriba and Aristorenas's theory of liability is that negligence in maintaining the air conditioning unit caused the 911 service outage, and that negligent maintenance in turn caused Marlon's death. But the amended complaint contains no

allegations about any particular action or omission by Mr. Dise or Ms. Feinberg. Instead, the amended complaint alleged that Mr. Dise and Ms. Feinberg were responsible for overseeing the maintenance of the air conditioning unit; for example, that each was responsible for "maintaining the air conditioner unit that failed the night of the blanket 911 outage" and for "the circuit breakers, alarms, and other systems that failed to properly alert 911 call center personnel that the call center systems were not working."

Generally speaking, where a defendant does not do something to create or continue a risk of harm, the defendant "does not owe an affirmative duty to protect, aid, or rescue the plaintiff." Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick, *The Law of Torts* § 251 (2nd ed., June 2018 update); *Fried v. Archer*, 139 Md. App. 229, 244–45 (2001), *aff'd sub nom Muthukumarana v. Montgomery Cnty.*, 370 Md. 447 (2002). "On the other hand, where the defendant by some action on his part, creates, maintains or continues a risk of physical harm, the general standard or duty is the duty of reasonable care, that is, the duty to avoid negligent conduct." Dobbs, *The Law of Torts* § 251. Messrs. Somarriba and Aristorenas rely on this broad principle to argue[6] that Mr. Dise and Ms. Feinberg's alleged negligence in overseeing maintenance of the air conditioning unit led to "the peril of a county without 911 services," and that they owed a duty of care to Mr. Somarriba and his son to perform that duty properly. But as we noted earlier, the amended complaint contains

[6] They don't actually make this argument with respect to Mr. Dise and Ms. Feinberg directly. Instead, they appear to argue that a duty in tort attaches to the *County* based on what they characterize as "normal negligence principles." This argument makes no sense vis-à-vis the County because, as explained above, general negligence principles do not apply to the County—the County is immune. But we construe their arguments liberally.

no allegations of acts or omissions by Mr. Dise and Ms. Feinberg—either with regard to these particular plaintiffs or to the air conditioning unit—that could support a finding that they owed a duty to Mr. Somarriba or his son.[7] It describes their roles in County government and alleges that the air conditioning failed, but not *how* the ongoing performance of their professional duties created a duty to prospective 911 callers.

Instead, Messrs. Somarriba and Aristorenas try four other ways to create a duty flowing to them these employees, none of which works. *First*, they argue that that County "mechanics" who worked on 911 systems owed a duty of care to potential 911 callers. As an initial matter, no County "mechanics" were named as defendants in the amended complaint. To the extent Messrs. Somarriba and Aristorenas seek to hold Mr. Dise and Ms. Feinberg liable for the actions or inactions of the County employees they supervise on a theory of *respondeat superior*, that argument fails—County employees can only be liable in negligence for their own (grossly) negligent conduct. *See Baltimore Police Dept. v. Cherkes*, 140 Md. App. 282, 333 (2001). Either way, the amended complaint doesn't contain any factual allegations that could support a finding that these defendants or their employees were negligent, let alone grossly negligent.[8]

[7] Because the complaint fails on its face to state a claim for negligence, it is not necessary for us to reach the parties' arguments about gross negligence.

[8] Messrs. Somarriba and Aristorenas argue, without citation, that they should have been afforded the opportunity to conduct discovery in order to determine whether the air conditioning unit was serviced by third-party contractors. But before a party is entitled to conduct discovery, the party must state a claim upon which relief may be granted, and they haven't.

Second, to extent Messrs. Somarriba and Aristorenas argue that Mr. Dise and Ms. Feinberg owed a duty of care to Mr. Somarriba and his son as a potential 911 caller because "the requirement of privity is relaxed" where "the magnitude of the risk increases," *see Cash & Carry Am., Inc. v. Roof Solutions, Inc.*, 223 Md. App. 451, 464 (2015) (quotation and citation omitted), that argument also fails. *Cash & Carry* addressed a totally different question—"whether a roofing contractor who performs work on a structure owes a duty of care in tort to a third-party owner of personal property inside the structure," *id.* at 454—and doesn't extend a duty on the part of County building maintenance supervisors to all prospective users of a system housed in that building. The plaintiffs in this case are at least one step removed from the duty recognized in *Cash & Carry*.

Third, Messrs. Somarriba and Aristorenas argue that regulations governing the 911 system create a duty in tort to Mr. Somarriba and his son. The "Statute or Ordinance Rule" holds that a statute or ordinance can prescribe a duty, and that violation of the statute or ordinance is prima facie evidence of negligence. *Kiriakos v. Phillips*, 448 Md. 440, 457 (2016). There are two prerequisites: the plaintiff must "(1) show the violation of a statute or ordinance designed to protect a specific class of persons, and (2) that the violation proximately caused the injury complained of." *Id.* (cleaned up). Messrs. Somarriba and Aristorenas argue that here, COMAR "creates duties that 911 centers owe to the citizens of this State," and specifically that COMAR 12.11.03.04 "required 24 hour a day operation of Montgomery County's 911 center and required safeguards to prevent shorting the system out." But they don't argue that these regulations protect a specific class of persons,

nor do they argue (or even allege) that Mr. Somarriba and his son were members of such a class or that the harm they suffered was of a kind that the regulation was intended to prevent. *See Kiriakos*, 448 Md. at 459, 462–63.

Fourth, and finally, Messrs. Sommarriba and Aristorenas dispute that the "public duty" doctrine protects Mr. Dise and Ms. Feinberg from liability. The public duty doctrine provides that "when a statute or common law 'imposes upon a public entity a duty to the public at large, and not a duty to a particular class of individuals, the duty is not one enforceable in tort.'" *Muthukumarana*, 370 Md. at 486 (quoting Dan B. Dobbs, The Law of Torts § 271 (2000) (§ 345 of June 2018 update)). When a public entity or employee has a duty to protect the general public, and injury results from breach of that duty, the entity or individual may not be held liable. *Id.* The doctrine does not apply, though, where an individual has a special relationship with the plaintiff, *i.e.*, when that the individual "affirmatively acted to protect or assist the specific individual, or a specific group of individuals like the individual, in need of assistance, thereby often inducing the specific reliance of the individual on the employee." *Id.* at 496 (citing *Ashburn v. Anne Arundel Cnty.*, 306 Md. 617, 631 (1986)).

Before reaching the special relationship question, we would need to decide whether it is appropriate to apply the public duty doctrine to the individual defendants in this case—that is, two County employees who were alleged to have been responsible for maintaining an air conditioning unit in a County facility. We decline to do so because neither party briefed this issue sufficiently. The County's position assumes that the public duty doctrine

applies to such employees, without explaining why. Messrs. Somarriba and Aristorenas deny that the public duty doctrine applies, but also fail to explain why. We decline to reach this issue because the circuit court's decision to dismiss this case can be affirmed for the numerous independent grounds explained above.[9]

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

[9] Even if the public duty doctrine were satisfied here, Messrs. Somarriba and Aristorenas's claims would fail anyway because the facts as pled do not support the existence of a special relationship. Indeed, they don't even argue that Mr. Dise and Ms. Feinberg had a special relationship with plaintiffs. Instead, they argue that that a special relationship exists between "911" and the public: "there is actually a sufficient promise made by 911 to any citizen that it will be operational to find that [sic] special relationship exists." But of course, "911" is not an entity that can make a promise or owe a duty, let alone be sued in tort for breaching a duty. And even assuming that Messrs. Somarriba and Aristorenas intended to argue that it was not "911" but rather Mr. Dise and Ms. Feinberg who made and broke a "promise," the amended complaint is devoid of allegations supporting the existence of a special relationship between them and these plaintiffs.