

1 **BUSTAMANTE, Judge.**

2 {1} Should New Mexico retain the old common law rule that claims for damages
3 caused by intentional torts do not survive the death of the person asserting them? The
4 district court dismissed the case below based solely on the rule. We decline to address
5 the rule because it is not necessary to do so. Under NMSA 1978, § 37-2-4 (1884), a
6 statutory abatement and revivor provision, dismissal of the complaint was improper.
7 Thus, we reverse.

8 **BACKGROUND AND PROCEEDINGS**

9 {2} This case arose from an unfortunate set of circumstances which occurred in
10 early 2011. According to the first amended complaint, Mark Pooler voluntarily
11 committed himself for inpatient care at a psychiatric facility. While he was an
12 inpatient resident his wife and daughter obtained a “temporary order of protection and
13 order to appear.” Mr. Pooler was released from the facility on April 12, 2011. He was
14 never served with the temporary order.

15 {3} On April 13, Pooler went to his son’s home to retrieve some items of personal
16 property. Assertedly he was not aware that his wife and daughter were present in his
17 son’s home. Pooler’s daughter called 911, and an Albuquerque Police Officer was
18 sent. Despite his assertion that he did not know about the restraining order, Mr. Pooler
19 was arrested and jailed at the Metropolitan Detention Center.

1 {4} Pooler was held at the jail for thirty-one days. Upon his release he had to obtain
2 counsel to represent him in the criminal case brought against him by the arresting
3 officer. On July 7, 2011, the criminal charges were dismissed because the restraining
4 order had not been served on him as of the time he was arrested.

5 {5} Pooler filed a complaint against the City of Albuquerque and the Albuquerque
6 Police Department on July 9, 2012, asserting theories of wrongful arrest, battery, and
7 false imprisonment. Pooler passed away on October 14, 2012. It is undisputed that
8 Pooler's death was not related in any way to the events underlying this litigation. His
9 son was named personal representative of his estate, and a motion to substitute parties
10 was filed on November 7, 2012.

11 {6} Defendants opposed the motion for substitution arguing that all of the theories
12 in the complaint abated upon Pooler's death. Somehow the reply to Defendants'
13 opposition to the substitution was filed in the district court's record four days before
14 Defendant's brief was filed. In the reply, Pooler's estate correctly pointed out that in
15 all the cases Defendants relied on the injured party had died before any complaint was
16 filed. Inexplicably, Pooler's estate then asserted that Section 37-2-4 did "not apply to
17 the death of the plaintiff." The district court entered an "order allowing substitution
18 of party." The order does not reflect any ruling on Defendants' abatement argument.

19 {7} On the same day, the district court entered an order allowing Pooler's estate to
20 amend the original complaint. The amended complaint named the arresting officer as

1 a Defendant, added more factual detail and asserted two more theories of recovery,
2 including negligence theories of false arrest and false imprisonment, plus equal
3 protection and due process violation “with regard to treatment of New Mexicans with
4 Disabilities.”

5 {8} Defendants moved for summary judgment as to the amended complaint relying
6 primarily on their earlier argument that the theories for recovery involved intentional
7 torts and thus did not survive Pooler’s death. Defendants also argued that the negligent
8 hiring, training, and supervision claims did not “fit” under the New Mexico Tort
9 Claims Act. NMSA 1978, § 41-4-12 (1977). The district court apparently construed
10 the entire complaint as asserting intentional torts because its sole rationale for
11 dismissal was that the claim did not survive Pooler’s death.

12 **ANALYSIS**

13 {9} Section 37-2-4 provides:

14 No action pending in any court shall abate by the death of either, or both,
15 the parties thereto, except an action for libel, slander, malicious
16 prosecution, assault or assault and battery, for a nuisance or against a
17 justice of the peace [magistrate] for misconduct in office, which shall
18 abate by the death of the defendant.

19 As he did below, Pooler’s counsel inexplicably asserts that the statute does “not apply
20 to the decedent . . . or his estate.” While we sometimes accept concessions made by
21 parties, we will not do so if it would be harmful to the law. *State v. Caldwell*, 2008-
22 NMCA-049, ¶ 8, 143 N.M. 792, 182 P.3d 775 (“This Court . . . is not bound by the

1 [s]tate’s concession and we conduct our own analysis.”). Here, the assertion is simply
2 wrong.

3 {10} By its plain terms Section 37-2-4 prevents the abatement of causes of action
4 based on the death of any of the parties if the deaths occur while the action is pending.
5 This case was pending when Pooler passed away. As such his claims survived his
6 death. It is irrelevant that his causes of action might not have survived if he had died
7 before filing suit. *Frampton v. Santa Fe, Nw. Ry. Co.*, 1930-NMSC-036, ¶ 3, 34 N.M.
8 660, 287 P. 694. *Frampton* held that causes of action not covered by the general
9 survivorship statute—the predecessor to the current NMSA 1978, § 37-2-1
10 (1941)—would yet survive under the predecessor to Section 37-2-4.¹ *Frampton*, 1930-
11 NMSC-036, ¶ 4. Thus, even if Pooler’s actions were all intentional torts and would
12 not survive his death under the common law, they are protected from abatement by
13 Section 37-2-4. The exceptions which follow the broad survivorship provision apply
14 only if the “defendant” in the case dies. That did not occur here.²

15 ¹Section 37-2-4 is identical to the statute in force in 1930, except that the
16 compiler inserted the bracketed word [magistrate] after the justice of the peace system
17 was abolished.

18 ²Defendants argue on appeal that the negligent hiring, training and supervision
19 theories should remain dismissed because there is no waiver of immunity under the
20 Tort Claims Act for such action. We will not address the issue in the first instance on
21 appeal. The district court’s order dismissed the entire case on the abatement theory
22 only and did not address this argument.

1 {11} We reverse and remand for further proceedings.

2 {12} **IT IS SO ORDERED.**

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MICHAEL D. BUSTAMANTE, Judge

5 **WE CONCUR:**

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CYNTHIA A. FRY, Judge

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LINDA M. VANZI, Judge