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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Kaori Stearney, et al.,

Plaintiffs,

v.

United States of America,

Defendant.

3:16-CV-08060-DGC

UNITED STATES' MOTION FOR SUMMARY JUDGMENT

Defendant United States moves for summary judgment in this purported police chase case because (1) Plaintiffs cannot prove that any conduct of any Navajo Police Officer proximately caused the crash between Nonparty at Fault Kee Brown and Plaintiffs' vehicle, or any of Plaintiffs' damages, (2) Plaintiffs' claims that negligent training, supervision, and failure to implement or enforce an appropriate pursuit policy fail due to a lack of evidence, and since these claims fall under the Federal Tort Claim Act's (FTCA) discretionary function exception (DFE), (3) Plaintiffs cannot prove negligent training and supervision occurred or proximately caused the crash; (4) Plaintiffs' claims that Defendant did not promulgate or enforce an appropriate pursuit policy fail, due to a lack of evidence, and because this alleged failure did not proximately cause the

crash; and (5) Plaintiffs failed to state valid economic loss claims under Arizona's wrongful death statutes for either Plaintiff RH or the Estate of Yuki Hirayama.

I. Summary judgment standard.

A party is entitled to summary judgment if "the pleadings, admissions, answers to interrogatories, and depositions which, along with any affidavits, show the absence of a genuine issue of material fact." *Bahn v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th Cir.1991); Fed.R.Civ.P. 56(c).

II. The Federal Tort Claims Act (FTCA).

This Court has jurisdiction over this FTCA action (28 U.S.C. §§ 1346(b) and 2671 *et seq*.). The FTCA states the United States may be held liable for injury caused by a federal employee's negligent act where a private person would be liable in accordance with the law of the place where the event occurred. 28 U.S.C. § 1346(b). No one disputes that the Navajo police officers were deemed federal employees. S.O.F. # 1. Liability is measured by the substantive law of Arizona. *Richards v. U.S.*, 369 U.S. 1, 8-10 (1962); *Louie v. United States*, 776 F.2d 819, 824 (9th Cir.1985).

II. The Court should grant summary judgment because Plaintiffs cannot establish proximate cause.

Plaintiffs seek to impose liability for the deaths and injuries caused by a reckless drunk driver, Kee Brown (a nonparty at fault), whom Plaintiffs argue tried to avoid capture by Sgt. David Butler. But Plaintiffs cannot prove Butler proximately caused the crash between Brown and Plaintiffs' van, or that he caused Plaintiffs' damages.[1] Plaintiffs' theory of liability is based on opinions of their expert, George Kirkham. Similar testimony has been routinely rejected by the courts as speculative. *Scott v. Harris*, 550 U.S. 372, (2007); *Athay v. Stacey*, 128 P.3d 897, 903 (Idaho.2005); *Nye v. Mistick*, 2015 WL 11511580; *Lovett v. Strength*, 2010 WL 8998590.

[1] Despite the express allegations in Plaintiff's Amended Complaint (*see e.g.*, ¶¶ 39, 40), Plaintiff's expert admitted he had no criticism of police officers besides Butler. S.O.F. # 57. Thus the Court should grant summary judgment on Plaintiffs' allegations in the Amended Complaint stated against all other officers.

To establish proximate cause, Plaintiffs must demonstrate that *because* Butler failed to turn off his lights and siren at some indeterminate time or place along Highway 160 (160), this caused Brown to cross the center line into a head-on collision with Plaintiffs' van after Brown was miles ahead and out of sight of Butler. Plaintiff's entire case is based on Kirkham's speculative argument that Brown was a "panicked" driver (S.O.F. # 27) and that Butler was the "catalyst that pushes the driver of the suspect vehicle to steadily increase his speed and engage in other reckless actions" to avoid capture. *Id*. But Plaintiff cannot prove Brown's state of mind without evidence – as opposed to their expert criminologist's speculation. Plaintiffs admittedly have no such evidence like a statement or testimony from Brown who died in the crash (S.O.F. # 35), or testimony from witnesses on whether Butler's turning off his lights and siren would have would motivated Brown to slow down and not cross the center line. Nor can they prove that Brown continued to flee because he saw police lights. Plaintiffs, who have the burden, have no evidence that Brown saw Butler's lights – or even the ability to see them. While their entire liability theory is based on the premise that "there was never a point in time when Kee Brown could have looked in his rear view mirror and concluded that he was no longer being chased" (S.O.F. # 29), they have no evidence (1) that there were rearview mirrors (S.O.F. # 31) or (2) that Brown could see Butler at all, particularly at the critical time – the last minutes before the crash – since the topography blocked his view for several minutes, and would thus eliminate any "catalyst effect." S.O.F. #s 24, 25, 28.

A. Plaintiffs cannot meet the elements of proximate cause.

To prove a negligence claim, a plaintiff must show a duty of defendant to plaintiff, a breach of that duty, and an injury proximately caused by the breach. *Wisener v. Arizona*, 598 P.2d 511, 512 (Ariz. 1979); *Boyle v. City of Phoenix*, 563 P.2d 905, 906 (Ariz. 1977). "The term 'proximate cause' is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 693 (2011). A defendant's act is the proximate cause if it produces injury "in a natural and continuous sequence, unbroken by any efficient

intervening cause" would not have occurred without the conduct. *Pompeneo v. Verde Valley Guidance Clinic, Inc.*, 226 Ariz. 412, 414, ¶ 9, 249 P.3d 1112 (App.2011). Plaintiffs must produce evidence, showing in direct sequence, unbroken by any new independent cause, that Butler's failure to terminate his lights and siren caused the harm, without which it would not have happened.

B. Plaintiffs' speculative theory does not create a material question of fact.

Kirkham opined that Brown had to divide his attention between the pursuing officer and the darkened roadway ahead of him. S.O.F. # 30. He stated that Butler would have been visible every time Brown looked in his mirror, and this caused the crash. S.O.F. # 29. However, it is undisputed that Plaintiffs have no evidence that Brown was watching Butler in a rearview mirror – or that he even had a mirror to look through.[2] S.O.F. # 31. They merely speculate he would have seen the lights. Further, while Kirkham originally opined that 160 was "straight and flat" (S.O.F. # 28), implying that he believed Butler was always in Brown's line of vision, 160's topography and adjacent land demonstrate that Brown and Butler could not have seen each other for the last 1.5 minutes (as Butler testified) – due to a large downward curve to the north and significant dips in 160 before the accident location. S.O.F. #s 24, 25, 28.

It is also undisputed that Plaintiffs have no evidence of what Brown was thinking, what was in his mind (S.O.F. # 36), or what motivated him to cross the center line – after

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[2] Kirkham's only response to this lack of evidence is that mirrors are standard equipment on U.S. made vehicles, discounting that the truck was in disrepair even before the accident. S.O.F. # 32. The photos show that the entire truck was burned beyond the point of recognition. S.O.F. # 33. Despite sending an expert to examine the truck before filing this lawsuit, or giving Defendant notice of it, Plaintiffs made no effort to preserve its remains that would have allowed both parties to investigate whether or not there were mirrors, Plaintiffs' burden. S.O.F. # 34. If the matter proceeds to trial, Defendant will seek a finding that Plaintiffs' spoliation creates a negative interest that the evidence would be adverse to Plaintiffs on this point. *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 371 (9th Cir.1992).

it was physically impossible for him to see Butler for the last 1.5 miles, even if he had a mirror. They have no evidence on Brown's background, education, or circumstances. S.O.F. # 37. Kirkham never talked to his family or anyone who knew him. He admits he has no evidence on Brown's thought process. S.O.F. #s 35, 36, 40, 41. Each time Kirkham was confronted with a lack of evidence supporting his theory that Brown was a panicked driver, he argued this was "common sense" based on putative national standards on which Butler received training. S.O.F. # 44. Kirkham circled back to these "standards" but never explained how he links them to Brown's state of mind, about which he has no personal knowledge. *Id*.

Kirkham also opines that once police lights and siren are eliminated from the situation, fleeing drivers invariably slow down and will no longer drive recklessly. S.O.F. # 45. He has this opinion because it "usually happens" that way, according to his experience and studies such as those written by Geoffrey Alpert, the foundation for Kirkham's testimony. S.O.F. # 46. But Alpert has testified that one cannot interpolate his studies' findings to a particular case like this one. S.O.F. # 47. Kirkham also admitted this (S.O.F. # 48), but then does exactly what he and Alpert state is invalid: opining that Brown behaved a certain way, generalizing the studies to Brown.

Further, the record also contradicts Kirkham's opinion that Brown would have stopped behaving recklessly once Butler stopped pursuing him. Butler first lost sight of Brown for several minutes, and thus stopped and turned off his lights and siren. S.O.F. # 5, 51. Despite this, outside any police presence, Brown then involved himself in a hit and run event, recklessly causing damage to a school yard fence and one of his headlights, before Butler saw him again and pursued him – all before the accident at issue occurred. S.O.F. # 7, 8, 52. Right before the crash, Butler was physically blocked from Brown's sight for several miles for 1.5 minutes. S.O.F. #s 24, 25, 28. Thus, even absent Butler's lights and siren, Brown engaged in reckless driving, further showing that Butler's actions did not cause Brown's recklessness in crossing the center line.

Hornbook law teaches that cause in fact cannot be predicated on speculation:

> A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant. Prosser and Keeton, Torts § 41 at 269 (5th Ed.1984).

Further,

> It is necessary that the facts upon which an expert relies for his or her opinions should afford a reasonably accurate basis for his or her conclusions as distinguished from mere guess or conjecture. Expert witnesses are to confine their opinions to relevant matters which are certain or probable, not those which are merely possible. *State v. Struzik*, 5 P.3d 502, 506 (Kan.2000)

Summary judgment is proper when the opposing party relies on disputed "facts" based on speculation. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.2007) ("Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment"); *Nelson v. Pima Community College*, 83 F.3d 1075, 1081-82 (9th Cir.1996) ("[M]ere allegation and speculation do not create a factual dispute for purposes of summary judgment."); *Cadarian v. Merrell Down Pharm., Inc.*, 745 F.Supp. 409 (E.D.Mich.1989) (summary judgment is not precluded simply because a party has produced an expert to support its position).

C. The case law rejects Plaintiffs' police pursuit causation theories.

Even if the Court accepts that Brown could see Butler throughout the entire drive on 160, allowing this issue to proceed would require the trier to speculate whether Butler's turning off his lights would have stopped "catalyzing" Brown. *See Lovett v. Strength*, 2010 WL 8998590 ("The Court agrees that Alpert should not be able to testify to what the suspect Clark would have done in this case had the pursuit been terminated," finding that "such proposed testimony would be speculation"); *Athay v. Stacey*, 128 P.3d 897, 903 (Idaho.2005) (no abuse of discretion to strike Alpert's opinions in a police chase case that were "replete with references to what the suspect would have done and what the suspect was thinking," finding a lack of foundation for such references). Plaintiffs' theory requires the trier to speculate *where* Brown would have stopped traveling at a high rate of speed, and the *distance* Brown would have continued before stopping. It also requires the trier

to speculate whether Brown's act of crossing the center line was a "panicked" one as Plaintiffs argue, or a malicious one, though Kirkham refused to allow for that possibility even in the face of daily news of widespread random acts of deadly violence (S.O.F. # 38), and despite his admissions that he has no actual evidence of Brown's intent. He also has no knowledge of *when* Brown would have stopped (seconds, minutes, five minutes) (S.O.F. # 53), or *where* (a ½ mile, 1 mile, 2-3 miles) if Butler turned off his lights. In other words, Plaintiffs have no evidence that if Butler turned off his lights and siren this would have allowed Brown to feel he was free and clear with sufficient time or distance to avoid the crash. The Supreme Court has rejected the theory that police can control the danger posed by a fleeing car by simply stopping the chase:

> there would have been no way to convey convincingly to respondent that the chase was off, and that he was free to go. Had respondent looked in his rearview mirror and seen the police cars deactivate their flashing lights and turn around, he would have had no idea whether they were truly letting him get away, or simply devising a new strategy for capture. Perhaps the police knew a shortcut he didn't know, and would reappear down the road to intercept him; or perhaps they were setting up a roadblock in his path. Given such uncertainty, respondent might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow. *Scott v. Harris*, 550 U.S. 372, 385 (2007) (citation deleted).

Further, all of Kirkham's opinions are based on how a reasonable person might flee the police. S.O.F. # 54. But it is also undisputed that Brown was impaired with a blood alcohol content of over three times the legal limit. S.O.F. # 55. The trier would have to guess how he would react given this impairment. Setting aside the speculations stated above, even if Plaintiffs had competent evidence that a *reasonable person* would have seen Butler, reacted to his turning off his lights, felt safe, and stopped at some unidentified time and place, the trier would still have to speculate on what a *drunk driver* might have done differently. Kirkham admitted he could not do this. S.O.F. # 56.[3] Thus Plaintiffs

[3] He admitted he had no pharmacologic opinions or opinions on the impact of alcohol on a person's perceptions, judgment, and motor responses, since these were outside his area of expertise, though he conceded these would all be impacted by alcohol. *Id*.

seek to violate the rule disallowing speculation-based proximate cause arguments (*see Keeton, supra*), by asking the trier to determine how a drunk driver who had already engaged in a reckless hit and run would react to Butler's terminating his lights – assuming he could see them.

This case differs from *Estate of Aten v. City of Tucson*, 817 P.2d 951 (Ariz.App.1991), which rejected a "gross negligence" standard under Arizona's immunity pursuit statute A.R.S. § 28-624, holding that the City of Tucson was not entitled to summary judgment on proximate cause in a pursuit case. First, *Aten* turned on the issue of the proper legal standard – *i.e.*, simple negligence or gross negligence. Second, Plaintiffs' causation theory differs: here, Plaintiffs are arguing that the "police vehicle becomes a catalyst and proximate cause of what happens by continuing to push the person." S.O.F. # 27. In *Aten*, by contrast, plaintiff argued that the accident's proximate cause was a police failure to block in a fleeing car, their continuing to pursue it after a helicopter arrived, and the copter's illuminating it which contributed to its flight, in violation of Tucson police policies. No such restrictions appear in the Federal policy that applies here. S.O.F. #s 58, 60. Rather, after termination of a pursuit, the applicable policy, *i.e.*, BIA – Office of Justice Services Law Enforcement Handbook, § 2-24-10 (S.O.F. # 58), specifies that Butler may continue to follow, locate, identify, and apprehend the suspect. *Id*. Plaintiffs' proximate cause theory is Kirkham's speculative catalyst theory. The plaintiff made no such argument in *Aten*.

Further, to the extent Plaintiffs argue under *Aten* that Butler violated a police policy, *viz.*, an Arizona Peace Officer Standards and Training Board (AZPOST) training module, by allegedly failing to signal to Brown he was ending the pursuit by turning off his lights – and that this failure proximately caused the fatal crash[4] – *Scott v. Harris, supra,*

[4] Neither the AZPOST training modules nor the Arizona Administrative Code mandates that Navajo police must follow these modules once they go to their agency. S.O.F. # 61. The officers are told to follow their own policies, and are mandated obey *federal* policy, *i.e.*, to follow, locate, identify and apprehend. *Id*. AZPOST training modules are simply

rejected as speculative the theory that an officer conveying he or she is ending a pursuit will have an impact since an alleged failure to "signal" is too ambiguous to be meaningful to a fleeing suspect – if he can see it – and can't be the proximate cause as a matter of law.

D. The Court should grant summary judgment on proximate cause.

No matter how Plaintiffs dress it up, their theory is a mass of speculation. Their expert speculates on what was in Brown's mind and what was motivating him – including claiming he was pushed to a "frenzy state" because he could see Butler behind him. S.O.F. # 43. He fails to account for other potential causes – maliciousness, suicide, mental illness, etc. He admits he does not know what was going on in Brown's truck, whether he endangered others for the "hell of it," or suffered mental illness. S.O.F. # 40. Kirkham instead resorts to arguing that it is "self-evident" that Brown lost control and killed the Plaintiff's family. S.O.F. # 42. To accept Plaintiff's theory, the trier would have to find that Brown was a rational person who acted in conformance with only 70% (not 100%) of the criminals interviewed in the Alpert studies (S.O.F. # 49) – though the evidence shows he was not rational but impaired during this police encounter. Many other causes could have motivated him. No one will ever know because he died, and no one ever talked to him. This is the missing link in Plaintiffs' proximate causation chain and shows that no empirical evidence exists to support Plaintiffs' theory.

III. Plaintiffs' claims for negligent training and supervision for an alleged failure to have safe policies, and failure to implement and enforce them, fail under the DFE and for lack of causation.

Summary judgment should also be granted on Plaintiffs' claims of negligent training and supervision of Tribal Police (Dkt. 59 at ¶¶ 44(f), 51(f), 58(f), 65(f) and 69(f)) for two reasons. First, claims about failing to have safe policies or failing to implement and enforce pursuit policies (*Id.* at ¶¶ 44(j)-(k), 51(j)-(k), 58(j)-(k), 65(j)-(k), and 69(j)-

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that: training material to which Butler was exposed during his classes to receive his Arizona peace officer certification.

(k)) fall under the DFE. Second, Plaintiffs cannot show that any of these alleged failures caused the accident.

A. The United States has not waived sovereign immunity for conduct that falls under the DFE.

The DFE precludes tort liability for "any claim…based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not that discretion involved be abused." 28 U.S.C. § 2680(a). The Supreme Court has adopted a two-part test to determine whether the discretionary function exception applies. *Gonzalez v. United States*, 814 F.3d 1022, 1027 (9th Cir. 2016) (*citing Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988)). First, the Court must determine whether the challenged action was discretionary, meaning that "it involves an element of judgment or choice." *Berkovitz*, 486 U.S. at 536. In this regard, the discretionary function exception "will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for any employee to follow." *Id.* Second, "assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* The Supreme Court explained that "[t]he basis for the discretionary function exception was Congress' desire to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* (*quoting United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)). The challenged action, therefore, must be one made based upon considerations of public policy.

B. Training and supervision fall under the DFE.

Plaintiffs claim that the United States "[f]ailed to properly train and supervise Tribal Police…in the proper conduct of police pursuit." Doc. 59 ¶¶ 44(f), 51(f), 58(f), 65(f), and 69(f). As to the DFE's first prong, Plaintiffs have not alleged that the United States violated any federal statute, regulation, or mandatory directive. The undisputed evidence shows Plaintiffs have not identified any evidence that any of the police officers

involved did not complete their training, that their training failed to comply with any mandatory directive, or that they were negligently supervised. S.O.F. # 70-72. Further, Plaintiffs' police practices expert, Kirkham, opined that he has no opinion on the negligent failure to train or supervise issue. S.O.F. # 69. As to the second prong, the courts have consistently determined that decisions relating to training and supervision of employees involve policy judgments within the DFE. *Vickers v. U.S.*, 228 F.3d 944, 950 (9th Cir.2000) ("This court and others have held that decisions relating to hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield."); *Gager v. U.S.*, 149 F.3d 918, 920-22 (9th Cir.1998); *Attallah v. U.S.*, 955 F.2d 776, 784-85 (1st Cir.1992) (nature and extent of supervision is within discretionary function). Thus any decisions as to training and supervision of Tribal Officers are protected by the DFE, and the Court should grant summary judgment on these claims, stated in ¶¶ 44(f), 51(f), 58(f), 65(f), and 69(f) of Plaintiffs' Amended Complaint.

C. Failing to have or implement safe policies regarding police pursuits falls under the DFE.

Plaintiffs seek to second-guess the policies adopted and implemented by Navajo law enforcement. *See* ¶¶ 44(j-k), 51(j-k), 58(j-k), 65(j-k), and 69(j-k). However, the DFE also bars such allegations. As to the DFE's first prong, Plaintiffs cannot identify any federal statute, regulation or mandatory directive that the Navajo Police Department pursuit policy violates. Plaintiffs' own expert admitted he had no information as to any mandatory directive. S.O.F. # 70. Plaintiffs cannot dispute that the Navajo Police Department police pursuit policy itself provides for discretion, balancing "the need to stop a suspect against the potential threat to themselves and the public created by a pursuit or apprehension," satisfying the first prong of the DFE. S.O.F. # 75.

Law enforcement policy decisions fall under the DFE. *Horta v. Sullivan*, 4 F.3d 2, 21 (1st Cir.1993) ("although law enforcement agents have a mandatory duty to enforce the law, decisions as to how best to fulfill that duty are protected by the discretionary

function exception to the FTCA"). This includes policy determinations. *See Smith ex rel Fitzsimmons v. U.S.*, 496 F.Supp.2d 1035 (D.N.D.2007) (BIA officers' conduct in prioritizing enforcement of tribal laws involved element of judgment, satisfying the DFE's first element). Likewise, determinations in carrying out law enforcement functions are shielded from FTCA liability. *United States v. Faneca,* 332 F.2d 872, 874 (5th Cir.1964); *Georgia Cas. and Sur. Co. v. U.S.,* 823 F.2d 260, 263 (8th Cir.1987) ("the means chosen by the Government to enforce the law are protected by the discretionary function exception"); *McElroy v. United States,* 861 F.Supp. 585, 591 (W.D.Tex.1994) ("because it is the mandatory duty of law enforcement agents to enforce the law, decisions as to how best fulfill that duty are protected by the discretionary function exception"). The DFE protects *any* exercise of discretion, whether negligent or non-negligent. *U.S. v. Dalehite*, 346 U.S. 15, 33 (1953).

D. The Court should enter summary judgment on Plaintiffs' negligent training and supervision claim because they cannot establish proximate cause.

To hold an employer liable in a negligent supervision claim, a plaintiff must establish "(1) that the employer knew or should have known that the employee was not competent to perform the assigned task and (2) that the employer's failure to supervise the employee caused the plaintiff's injury." *Sloan v. U.S.,* CV-16-8059-PCT-DGC, 2016 WL 3548766, *2 (D.Ariz. June 30, 2016). Plaintiffs have not alleged or presented any evidence that Butler's training was insufficient, that he had not completed his training, that he had ever improperly engaged in a pursuit before this one, that he had engaged in any prior misconduct, that he had ever received any discipline, or that he had even been cited for traffic violations. S.O.F. # 70-73. Plaintiffs' expert conceded he had no opinion on the negligent training or supervision issue. S.O.F. # 69. Thus the Court should grant summary judgment on the negligent training and supervision claims. *Ward v. Mount Calvary Lutheran Church*, 873 P.2d 688, 695 (App.1994) (even inferring negligent supervision, summary judgment was appropriate without evidence showing the negligence proximately caused the injury).

IV. The Court should grant summary judgment on Plaintiffs' claims that Defendant did not have an appropriate pursuit policy and did not enforce it because this was not a proximate cause of the crash.

The Court should likewise grant summary judgment on Plaintiffs' claim that Defendant did not have an appropriate pursuit policy; no evidence shows that Defendant's policy proximately caused the crash. A defendant's act is the proximate cause only if the conduct, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and if the injury would not have occurred without the conduct. *Pompeneo*, *supra*.

The Navajo Nation Police follows the pursuit policy promulgated by the BIA. S.O.F. #74. No evidence supports Plaintiffs' claim that Defendant "[f]ailed to have safe and/or appropriate policies in place governing pursuit and apprehension of motorists by the Navajo Nation Police Department." Doc. 59 at ¶¶ 44(j), 51(j), 58(j), 65(j), and 69(j). Indeed, Kirkham states no criticisms of the BIA policy, which he says is generally accepted in the police community and is appropriate if followed. S.O.F. # 76-77.

Likewise, Plaintiffs' allegation that Defendant "[f]ailed to implement and enforce Navajo Nation Police Department policies and procedures in effect governing pursuit and apprehension of motorists by the Navajo Nation Police Department" (Doc. 59 at ¶¶44(k), 51(k), 58(k), 65(k), and 69(k) is also unsupported by any evidence.[5] Plaintiffs' expert expressed no opinions that Butler's alleged failure to notify dispatch he was ending the pursuit caused the accident, or that any other officer violated any standards or caused the crash. S.O.F. #78-80. Thus Paragraphs 44(j-k), 51(j-k), 58(j-k), 65(j-k), and 69(j-k) should be dismissed with prejudice.

[5] The only part of Defendant's policy that Plaintiffs' expert addressed was the requirement to notify dispatch of location, traffic conditions and termination of the pursuit, but conceded this did not cause the accident. S.O.F. # 78 at 245:7-22, 251:11-20.

V. Plaintiffs fail to state valid claims for economic loss claims under Arizona's wrongful death statute for either RH or the Estate of Yuki Hirayama.

Plaintiffs improperly make a claim for Tomohiro Hirayama's (RH's father) loss of earning capacity and retirement benefits of $2.9 to $3.8 million, without stating RH's loss. S.O.F. # 63. This claim is improper and violates Arizona's wrongful death statutes. A.R.S. § 12-612 *et seq*; Plaintiffs have come forth with no valid evidence to support Plaintiff RH's economic loss claim, entitling Defendant to summary judgment.

Under Arizona law, Plaintiffs may only claim the financial losses including future income and services that RH lost, less the value of the income and services she is currently receiving, until she reaches majority. Recommended Arizona Jury Instructions, (RAJI), Damages for Wrongful Death, Personal Injury Damages 3; A.R.S. § 12-613. Plaintiffs fail to meet their burden since their expert states nothing about RH's economic loss.

Gandy v. U.S., 437 F.Supp.2d 1085, 1087 (D.Ariz.2006) states the controlling law. To prevent double recovery, the court held that damages for loss of earnings in a survival matter must be limited to those incurred between the decedent's injury and death. The Court held that the Restatement does not allow an Estate in a survival action to recover a Deceased's loss of future earnings. Yet Plaintiffs continue to claim this as part of their damages without ever stating RH's actual losses. *See* Restatement (Second) of Torts § 926(a) (limiting "damages for loss or impairment of earning capacity… to harms suffered before the death [of the injured person."]). In this matter, Plaintiffs cannot properly claim the money, goods, and resources that RH's father would have earned over his life time. This claim is precluded by Arizona's survival statute and is thus not relevant.

Plaintiffs received plain notice of Arizona's requirements for an economic loss claim for wrongful death under Arizona law, the law applied under the FTCA. 28 U.S.C. § 1346. S.O.F. # 64. To avoid dismissal, Plaintiffs amended their complaint to correct and purportedly dismiss certain survivor claims – yet they continue to make these same improper claims, including for Mr. Hirayama's entire future earnings. S.O.F. # 63. However, RH is only entitled to the income and services that she already lost as result of

his death, and income she will likely lose in the future. In other words, RH may only recover the value of the economic support her father would have provided her till she reached majority less what she is currently receiving. Thus Plaintiffs' expert report regarding her father's future earnings is improper as matter of law and does not create a material question of fact. *See Barragan v. Superior Court,* 12 Ariz. App. 402, 404, 470 P.2d 722 (1970) (Arizona's survivor statute only provides for damages sustained by the deceased party from the time of accident until death). No such damages arose or supports a survivor claim since Mr. Hirayama unfortunately was instantly killed by Brown.

Further, though Mr. Hirayama was a Japanese expatriate who made only a five year commitment to work in America (S.O.F. # 62), Plaintiff's expert improperly bases his opinions on a hypothetical income Hirayama might have earned in America for the rest of his working life, measuring *his* loss and based on *his* income, without showing the actual loss to RH. Plaintiffs fail to meet their burden of proving the income and services RH lost due to her father's death and what she would have reasonably received in the future. Nor does their expert state any evidence of the decline in income or support RH has experienced. S.O.F. # 66. Plaintiffs also focus on forms of compensation Mr. Hirayama would have earned: life insurance, retirement, salary, without mentioning their impact on RH. *Id.*

Plaintiffs attempt to improperly inflate the value of claim by focusing on RH's father's entire future earning capacity, which misses the mark. Their claims regarding his entire earning capacity and retirement benefits is inconsistent with the Arizona's wrongful death statues, and do not create a material question of fact.[6]

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[6] Plaintiffs' method only measures Mr. Hirayama's income less a small amount (6%) for his own consumption, allocating all the net earnings to RH. This method fails to account for the consumption for three other family members that would make the consumption offset a much larger figure and would reduce RH's recovery. It also does not account for taxes, and measures the loss for too long a period – years after RH reaches majority, in violation of Arizona law. S.O.F. # 67. Defendant reserves the right to bring a *Daubert* motion regarding each of Plaintiff's experts' methodologies, including those of their

A. RH has no claim for damages from her brother's estate.

Moreover, to the extent Plaintiffs are claiming that RH may receive damages directly from her brother Yuki's estate, this theory also fails as a matter of law. RH cannot recover these. *See* A.R.S. § 12-612(A); *Solomon v. Harman*, 489 P.2d 236, 240 (Ariz.1971) (affirming dismissal of decedent's brother and sister because they did not have a statutory right to be plaintiffs in the action). Arizona recognizes only that minor children may maintain a derivative claim for damages for loss of consortium for injury to a *parent*. *See e.g. Villarreal v. Department of Transportation*, 160 Ariz. 474, 774 P.2d 213 (1989). But neither Arizona nor the Restatement, nor any other state in the nation, recognize a direct or derivative cause of action for loss of consortium or economic loss by one sibling against a third party for the loss of a sibling's relationship.

Since there is no evidence of any valid beneficiaries, summary judgment should be entered as to this Count of Plaintiffs' Amended Complaint.

Conclusion

For all the foregoing reasons, Defendant's Motion for Summary Judgment must be granted.

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economic loss expert, who also renders opinions regarding RH's 16 year old brother Yuki's alleged economic loss over his entire life, and speculates on Yuki's future profession, and opines about a hypothetical wife he marries years from now, all using American statistics for Asian-American men, and disregarding Yuki's Japanese citizenship.

Respectfully submitted this 4th day of May 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing which transmitted a copy to the following registrant of the CM/ECF System:

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