No. 20-15908

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMIEN JENSEN, et al.,
Plaintiffs-Appellants,

v.

EXC INC., a Nevada corporation, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
STEVEN P. LOGAN, DISTRICT JUDGE • CASE NO. 3:15-cv-08019-SPL

APPELLANT'S OPENING BRIEF

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I. Statement of Jurisdiction

The district court had diversity jurisdiction over this case under 28 U.S.C. § 1332. This Court has jurisdiction of this appeal from a final judgment after a jury verdict, dated December 23, 2019 (ER-4), and an order denying post-judgment relief, April 15, 2020 (ER-1) under 28 U.S.C. § 1291. The notice of appeal was filed timely on May 11, 2020 (ER-33), per 28 U.S.C. § 2107 and FRAP 4(a)(4).

II. Statement of the Issues

A. Whether the district court erroneously allowed the defense to introduce unreliable, inadmissible hearsay from police reports, including conclusions as to the cause of the accident, for the truth of the matters asserted, thereby infecting the jury and its finding of lack of fault by defendants, by putting an official stamp of law enforcement on the defense version of events.

B. Whether the district court erred in denying Jensens'[1] motion for summary judgment on liability because the stipulated, undisputed facts established EXC's negligence per se, *i.e.,* driving the bus in the wrong lane of traffic in violation of A.R.S. § 28-721—was a proximate cause of the death and injuries.

[1] Plaintiffs-appellants are identified as "Jensens" in this brief and defendants-appellees as "EXC," unless otherwise specified.

C. Whether the district court erroneously denied Jensens' motion for judgment as a matter of law because no jury reasonably could find that the movement of the Jensens' car was a superseding intervening cause of the death and injuries where EXC admits the accident would not have occurred but for Conlon's negligence per se, *i.e.,* driving out of his lane and into the left lane in violation of a highway safety statute whose "primary purpose is to avoid head-on collisions with oncoming traffic." *United Dairymen v. Fisher-Miller Hay & Dev. Co.*, 609 P.2d 609, 612 (Ariz. App. 1980).

D. Whether the district court erred in granting EXC's renewed motion for judgment on the pleadings, thereby improperly ordering the dismissal of parties and claims based on Navajo law, because (1) federal law preempts application of Arizona substantive law in this case and, (2) alternatively, Arizona's choice-of-law principles mandate application of Navajo substantive law, not Arizona substantive law.

III. Statement of the Case

A. Factual Background

This litigation arises from a fatal collision between a tour bus chartered, owned, and operated by EXC, and a passenger vehicle carrying Jensens, a Navajo family. The collision occurred on U.S. Highway 160, located on tribal trust land

near the Kayenta Township in Kayenta, Arizona. ER-326-27.

On the morning of September 21, 2004, Defendant Conlon was driving a 57-person, 25-ton bus on a tour with 39 other occupants from the Hampton Inn in Kayenta. ER-327, 652, 669-670. The tour was heading west to the Grand Canyon. ER-327, 653, 667, 671-672, and 673. As Conlon prepared to enter westbound Highway 160 from the Hampton Inn Driveway, he saw an SUV driven by Bert Wisner to his left (*i.e.,* approaching from the east) that had pulled out onto westbound Highway 160 within a couple hundred feet or less of Conlon's position, and travelling in the left lane. ER-198:17-19, 327, 653-654, 669-670, 671 673, 689, 770. Despite knowing that he had a slower vehicle and knowing that the highway narrowed to a single lane 1500 feet to the west of his stationary position, Conlon pulled out of the driveway before Mr. Wisner had passed the driveway ER-196:3 – 198:11, 327-28, 654, 667, 674-676, 681, 693, 709-710, 725, 739. Conlon almost immediately pulled into the left lane in front of the faster-moving SUV. The SUV was forced to the right to pass the bus. ER-197:11-22, 327-28, 654, 671-672, 674-677, 693, 696, 735, 739.

Defendant Conlon was distracted by the Mr. Wisner on his right side and improperly drove the bus into the designated two-way left turn lane occupied by Jensens' vehicle. ER-200:2 – 202:22, 327-28, 656-657, 672, 705-708, 712, 716, 724-726, 740-741. Decedent Butch Johnson was driving eastbound with his

pregnant wife Jamien Rae Jensen and the couple's child, D. Johnson—all enrolled resident citizens of the Navajo Nation, domiciled on the Navajo Reservation—in their sedan. Mr. Johnson was in the center turn lane prior to the collision. ER-207:9-24, 657, 672. Conlon saw Mr. Johnson at the last moment and veered the bus sharply to the right. ER-208:8 – 210:9, 655, 679-680, 694-695, 708, 716-717. The bus crashed into the left front of Mr. Johnson's vehicle, killing him instantly and injuring Ms. Jensen and the couple's son. ER-327-28, 655, 724. As a result of the collision, Jamien Rae Jensen later miscarried her unborn child, Corey Jensen Johnson. ER-3, 103. Navajo police and emergency personnel, as well as Arizona Department of Public Safety personnel, responded to the scene.

The area of impact occurred in the center of the road, in the area close to the left westbound travel lane and the turn lane. ER-211:14 – 213:5, 702-704,717, 724, 740. The physical evidence and Defendant Conlon's veering of the bus establish that Conlon was driving the bus outside of his travel lane and in the center turn lane prior to veering and immediately prior to impact. ER-211:14 – 213:5, 656-657, 672, 705-708, 712, 716, 724-726, 740-741. The defense expert, who opined on the locations of the vehicles only at the point of impact and not before, testified that the point of impact was 1.5 to 2 feet in the west travel lane from the line between that lane and the center turn lane. ER-170:17 – 171:17, 655, 657, 702-707, 712, 716-717, 724, 726, 741-740. He further testified that the point of impact

between the bus and the car was 2 to 3 feet in from the bus-driver's-side edge of the bumper in the front. ER-655, 657, 702-707, 712, 716-717, 724, 726, 741-740. The defense testimony, when combined with Conlon's own admission that he took evasive action before impact, confirmed by Mr. Wisner (the driver of the SUV), establishes that Defendant Conlon had the bus well into the center turn lane before impact. ER-211:14 – 213:5, 655, 657, 702-707, 712, 716-717, 724, 726, 741-740.

At the time of the accident, EXC were engaged in a 12-day tour of national monuments, including two scheduled stops on their tour of the Navajo Nation. ER-327-28. The Monument Valley Visitors Center and the Hampton Inn in Kayenta, Arizona are both located on tribal trust land within the Navajo Nation.

B. Procedural History

On February 16, 2015, while the prior appeal finding the Navajo courts lacked jurisdiction, *EXC, Inc. v. Jensen*, 588 Fed. Appx. 720 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 2538 (2016), was pending, per agreement of the parties, plaintiffs filed this case under Navajo law against all defendants, including the insurer, in the district court. ER-785. EXC brought a renewed motion for judgment on the pleadings, seeking application of Arizona law. On September 22, 2017, the district court granted the motion, finding Arizona law based on the jurisdictional decision, dismissed the complaint, including parties and claims based on Navajo

law, and allowed an amended complaint. ER-27-32. Jensens filed an amended complaint on October 16, 2017. ER783-814.

Jensens filed their motion for summary judgment on liability. ER-407-782 (facts and evidence). The district court denied the motion, but found that EXC were negligent per se for failing to keep their tour bus in the right lane until Mr. Wisner's vehicle had passed.[2] ER-16-26.

In preparing for trial, the parties stipulated to the admission of a portion of the police reports that showed the measurements taken at the scene. ER-377-79. In addition, the parties stipulated to the admission of certain photographs of the scene taken by officer or technicians. *E.g.,* ER-373. The parties did not stipulate to any other parts of the police reports or files.

Because EXC identified police reports as potential exhibits, Jensens brought their motion in limine no. 2 to exclude unreliable, inadmissible hearsay statements and conclusions contained within those reports and similar documents, such as the coroner's report. ER-397-99. In response, EXC agreed "that hearsay that does not fall under a recognized hearsay exception should not be permitted." ER-396. The district court granted Jensens' motion after argument. ER-11-15. The Court held that portions of the reports based on personal knowledge of the author(s) were admissible, but other portions were excluded.

[2] All defendants were liable for the conduct of Mr. Conlon. ER-54:8-10.

Subsequently, EXC listed among their proposed trial exhibits portions of the ADPS and Navajo reports (Exh. 150). ER-373. However, consistent with their stipulation that the remainder of the policy report was inadmissible and would not be introduced, EXC listed the ADPS report solely for purposes of memory refreshment. *Id.* Jensens maintained their objections. *Id.* Defendants had designated a police officer as a witness to testify at trial. After the Court permitted Defendant's expert to offer improper testimony regarding conclusion of liability by the police officer Defendants opted not to call the police officer witness. [3] No police officer testified at trial.

During direct, Mr. Romero asked Mr. Turner about certain admitted or to be admitted materials he had reviewed, including depositions, accident reconstruction reports,[4] etc. Neither Mr. Romero nor Mr. Turner mentioned police reports.

During cross examination, Mr. Turner testified as to the documents he reviewed and those upon which he relied. He reviewed photographs and the police reports. ER-300:22-25. He relied upon the opinions of Mr. Alexander, Jensens'

[3] EXC listed one officer as a potential witness on its trial witness list, Officer Eavenson, a commercial traffic enforcement officer who investigated and cited Mr. Conlon for motor carrier violations including not having his log book, not having his medical certifications in his possessions, etc. ER-342.

[4] While the expert reports themselves were inadmissible, their substance would be admitted when the reconstructionists testified and thus Mr. Turner relied on the opinions to be admitted.

accident reconstructionist expert, as the best information that described what occurred. *Id.* and ER-301:1-2.

Mr. Turner reviewed a lot of information, including statements written by passengers, statements by Mr. Conlon, the depositions of passengers, the depositions of Mr. Conlon, and the police reports. ER-301:1-25. When asked if he relied on all of that material in preparing his opinions, Mr. Turner did not answer directly, but described how he relied on some of the passengers' testimony more than others because of seat location, etc., and that others' description of what occurred did not fit with the physical facts. ER-302:1-18.

Mr. Turner never testified that he relied upon the police reports in the formation of his opinions. Mr. Masterson asked him if he "reviewed" the ADPS report, and Mr. Turner answered, "yes." ER-304:20-25. When asked if he relied upon that report in forming his opinions, he did not explicitly say he relied upon the police reports in forming his opinions; he said, "It all contributed. I read it all and evaluated it." ER-305.[5] Mr. Turner testified that he typically would review police reports, but did not say he would rely on them. ER-305:1-11[6]

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[5] Reliance requires dependence. That is, the opinions would not stand without the materials relied upon. Contribution or consideration or review do not equate to reliance; each of those can involve rejection.

[6] As discussed below, this line of questioning has no relevance to the introduction of inadmissible evidence in the police reports. This line of questioning relates to whether the opinions of the testifying expert are admissible, despite being based at least in part on inadmissible evidence.

At this point, Mr. Masterson asked for a sidebar. He sought the Court's ruling that he be allowed "to ask the witness about information he reviewed in the [ADPS] report including witness statements, statements from the driver, and actual information provided by the DPS officer in that report." ER-305:17-22. He asserted that Mr. Turner "testified he relied upon [the report] in preparing his opinions," *id.*, even though Mr. Turner did not say that.

Mr. Masterson further represented to the Court he sought to use the information to show bias based on the materials he "reviewed." ER-306:13-20. During sidebar, Mr. Masterson gave an example of particular questioning for Mr. Turner: "In the [ADPS] report, for example, the officer determined and indicated in the report that there was no improper driving by Conlon. I'd like to ask him that question." ER-307:10-14. Jensens objected that the conclusions of the officer were not admissible and covered by the prior ruling on the motion in limine. ER-307:16-22.

While the Court acknowledged its prior ruling, ER-306:22-24, the Court agreed with EXC's argument, finding that Jensens had "opened the door" and that because Mr. Turner reviewed the information, it became admissible. ER-306:24-25 ("But if he's gone into that, you know, it's fair game."); ER-308:1-6 ("Mr. Romero, I believe based on the direct examination where you elicited a lot of information about what he did to arrive at his opinion and I overruled the objection

and basically agreed that he should be considered as an expert, that limited question should be permitted, and I will permit it.").

Mr. Masterson then delved into inadmissible evidence from the reports and did not ask any questions related to bias. He did not ask about the basis for Mr. Turner's opinion, but instead improperly introduced inadmissible and unreliable hearsay for the truth of the matters asserted. EXC used the ruling to bring out unsubstantiated and inadmissible statements and conclusions as if they were established facts.

Mr. Masterson stated the police report said there was no improper action by Conlon, that a single officer at the scene "investigated the accident, took the measurements, talked to all the witnesses" and that officer "also determined that the car driven by Mr. Johnson was traveling at a speed too fast for conditions." ER-308:10-25, 309:1-6. Mr. Masterson also stated that the report said that "the car driven by Mr. Johnson, engaged in unsafe passing" and "was traveling at a speed too fast for conditions." ER-309:7-14. Mr. Turner did not recall these latter two and tried to point out the conflict between the conclusions in the report and the physical evidence and opinions of Mr. Alexander, but was cut off. ER-309:21-25. EXC was not interested at all in what Mr. Turner reviewed or relied upon and why (*i.e.,* his purported desire to explore bias), but instead was using Mr. Turner as the

conduit for Mr. Masterson to recite, as facts, what the police reports stated, disregarding the inadmissibility of the materials.

Mr. Masterson continued, stating that ADPS "went out to the scene of the accident, investigated the accident, made measurements, took photos," "[t]alked to witnesses at the scene who saw the accident," found "there was no improper action" by the bus, and said "the white car driven by Mr. Johnson was driving too fast." ER-310:1-20. On the last part, Mr. Turner asked to speak to that issue, but was denied. The only thing he was allowed was to say yes to whether the report stated that Mr. Johnson was driving too fast. *Id.*

Mr. Masterson brought up the police reports with Mr. Alexander, Jensens' accident reconstructionist expert. ER-236:14 – ER-238:10. While Mr. Alexander said he relied on the police reports, his reliance was limited to the photographs and measurements. His testimony and opinions were contrary to a finding of no improper action by Conlon and thus he did not rely on any such conclusion. EXC admitted that Mr. Alexander did not rely upon the officer's conclusions when, during closing, EXC argued that he "ignored" the findings of APS. ER 132:1-2, 138:1.

During closing, EXC used the APS conclusions as facts to bolster the defense version of events:

> If Mr. Conlon didn't cause the accident, you're done. So what happened here? Mr. Johnson drove his car right into the front of the bus while the bus was in its lane.
>
> * * *
>
> The Department of Public Safety highway patrol officer who was at the scene of the accident who investigated the accident on the same day of the accident designated the Johnson vehicle vehicle number one. What does that mean?
>
> Well, Mr. Alexander told you that DPS officers will determine who they think is at fault, and they will designate that vehicle number one. So the DPS officer who was at the scene of the accident that day, investigated the accident, talked to witnesses, took photographs, took measurements, made the decision that Mr. Johnson's vehicle was the at-fault vehicle, vehicle number one.
>
> And the DPS officer went further. The DPS officer who investigated the accident, who was at the scene of the accident, who took photographs, who took statements, who took measurements stated that the Johnson vehicle was traveling eastbound on U.S. 160 when it crossed the center line and collided into traffic unit number two. Traffic unit number two is the bus.
>
> And the DPS report prepared by the officer who was at the scene, who investigated the accident, who took measurements, who took photographs, who talked to witnesses and prepared a report said, with respect to vehicle number two, the bus, there was no improper action.
>
> And he also noted that the Johnson vehicle was traveling at a speed too fast for conditions, … that he was speeding.

ER-119:11 - 120:11. Mr. Masterson continued this theme throughout his closing. ER-130:18-24 ("the Arizona Department of Public Safety officer who investigated the accident, took photographs, took statements, took measurements, and wrote a report"); ER-138:18-19 ("The DPS officer never said the bus was in the universal turn lane."); ER-139:7-9 ("Just like everyone on the bus said, just like the DPS

officer said,[7] Mr. Johnson's car was well inside the bus – the bus's travel lane."). The first question on the jury form was whether defendants were at fault for the accident. The jury found they were not. ER-39-40.

During trial, Jensens brought a motion under Rule 50 for judgment as a matter of law based on the district court's pre-trial ruling that Mr. Conlon was negligent per se for not keeping the bus in the far right lane until after the Wisner vehicle passed. ER-157-164. Jensens' motion was based on Mr. Conlon's admission that the accident would not have occurred had he kept the bus in the right lane until after Mr. Wisner had passed the bus in the left lane. ER-276:24 – 277:2. Mr. Alexander testified that the accident would not have happened if the bus stayed in the right lane. ER-216:24 – 217:1-9. The defense expert offered no opinion on this issue and could not say where the vehicles were just prior to the crash. ER- There was no evidence presented that, had the bus stayed in the right lane in compliance with the law, the accident would have occurred anyway. The Court denied the motion, finding that the jury could determine the accident would have occurred anyway. ER-177:15-21. Following trial, Jensens renewed their motion, and the Court denied it again, albeit on different grounds ER-1-4. Jensens timely filed their notice of appeal on May 11, 2020. ER-33-38.

[7] The officer apparently based this conclusion on hearsay statements from Conlon and Wuest. EXC thus used the statements from Conlon and Wuest to bolster them by filtering them through the officer's conclusion.

IV. Summary of the Argument

This appeal proceeds from a series of errors made by the district court.

First, the district court erred in overruling Jensens' objections and in admitting, through cross-examination of Jensens' experts, prejudicial and inadmissible hearsay from police reports for the truth of the matter asserted, including conclusions of an officer as to fault, thereby infecting the jury by placing the imprimatur of law enforcement on the defense version of events.

Second, the district court erred in denying the Jensens' summary judgment on liability since no set of undisputed facts reasonably could have led to any conclusion other than that EXC's negligent-per-se conduct of driving the tour bus out of the right lane in violation of Arizona's highway safety statutes was an actual and proximate cause of the death and injuries.

Third, the district court erred in denying Jensens' judgment as a matter of law on liability since none of the evidence presented at trial reasonably could have led to any conclusion other than that the Jensens have proved all of the elements of negligence liability in this case, including that EXC's negligent-per-se conduct was a proximate cause of the death and injuries. In particular, no jury reasonably could find that the movement of decedent's car was a superseding intervening cause.

Fourth, the district court wrongly granted EXC's motion for judgment on the pleadings, thereby erroneously dismissing parties and claims based on Navajo law

which applies pursuant to (1) federal preemption of state law and (2) proper application of Arizona's own choice-of-law principles.

V. Argument

A. The district court committed plain and reversible error in allowing the introduction of unreliable, inadmissible hearsay evidence from police reports, including conclusions regarding fault and non-fault, for the truth of the matters asserted under the guise of cross-examination as to alleged bias by Jensens' expert.

Generally, evidentiary rulings are reviewed for an abuse of discretion. *Spencer v. Peters*, 857 F.3d 789, 797 (9th Cir. 2017). Where, as here, legal issues predominate because the district court applied the incorrect standard, review is de novo. *United States v. W.R. Grace,* 504 F.3d 745, 754 (9th Cir. 2007). Jensens preserved this issue by filing their motion in limine no. 2 and by objecting during trial at sidebar. ER-397-400, 307:16-22. The district court ruled in Jensens' favor (and EXC stipulated to it) on the motion in limine, but allowed the evidence in over objection during trial.

1. The police reports (other than the stipulated items) were inadmissible hearsay.

Police reports and their contents generally are inadmissible hearsay evidence. *Colvin v. United States,* 479 F.2d 998 (9th Cir.1973). Hearsay is of course an out-of-court statement introduced to prove the truth of the matter asserted. Fed. R. Evid. 801(c).

The excerpts of the police reports that EXC listed as an exhibit solely for potential refreshment of memory were inadmissible hearsay, except to the extent statements were based on personal observations and measurements of officers. For the vast majority of the reports, no hearsay exception applies. *Colvin,* 479 F.2d at 1003; *see also United States v. Pazsint,* 703 F.2d 420, 424 (9th Cir.1983); *see Miller v. Field,* 35 F.3d 1088, 1091 (6th Cir. 1994)(factual findings based on hearsay are inadmissible as unreliable); *Dallas & Mavis Forwarding Co. v. Stegall,* 659 F.2d 721, 722 (6th Cir. 1981) (upholding exclusion of police officer's testimony as to the exact location of the accident based on hearsay (interview), not physical data (there was none)). [8]

Although the vast majority of the police reports in this case were inadmissible hearsay (*i.e.,* no exception applied), the district court committed reversible error in allowing EXC to introduce, through cross-examination of Jensens' commercial driving expert, Robert Turner (and also of Jensens' accident reconstructionist, Gabriel Alexander), inadmissible material from the police

[8] Contrary to EXC's assertions, there was no one single officer who did everything, measured everything, spoke with everyone, etc. EXC's proposed Exh. 150, ER-373, 380-394, shows the multiple officers involved. It also shows multiple levels of hearsay, liability conclusions without explanation or basis, other than a self-serving interview with Mr. Conlon, and a hearsay interview with one of the passengers, a failure to interview Mr. Wisner, the lack of any qualifications by the officer who made conclusions, among many other issues preventing admission. The indicia of unreliability is overwhelming, which is consistent with EXC's listing of it as for refreshment only and not for admission.

reports for the truth of the matter asserted. Specifically, EXC used certain largely unexplained conclusions of fault and non-fault made by a police officer to influence the jury's decision in finding that EXC was not at fault for the accident.

2. Where as here experts do not rely on inadmissible hearsay, allowing defense counsel to bring out inadmissible hearsay during cross-examination was plain and reversible error.

As discussed above, neither Mr. Turner nor Mr. Alexander relied on any portions of the police reports except for the measurements and some photographs to which the parties stipulated. Both experts, based on their relevant fields, placed blame on Mr. Conlon for his conduct that caused the accident or otherwise fell below appropriate standards of conduct.

In reaching their conclusions, neither relied on a police officer's unsubstantiated, unexplained, and unreliable conclusions that Mr. Conlon engaged in no improper action, that Mr. Johnson's speed was too fast for conditions, or that Mr. Johnson was engaged in unsafe passing. In fact, EXC admitted that there was no reliance, arguing Mr. Alexander "ignored" the police officer's conclusions. ER 132:1-2, 138:1. "Ignoring" something is the complete opposite of reliance upon it.

Without reliance on such inadmissible hearsay evidence, the defense was not allowed to cross-examine Mr. Turner or Mr. Alexander on those materials. Rule of Evidence 703 provides that "[a]n expert may *base* an opinion on facts or data in the case that the expert has been made aware of or personally observed." Emphasis

added. The facts and data relied upon in forming an opinion need not be admissible for the opinion itself to be admitted "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject…." *Id.* Rule of Evidence 705 allows "an expert [to] state an opinion — and give the reasons for it — without first testifying to the underlying facts or data[, b]ut the expert may be required to disclose those facts or data on cross-examination."

Thus, an expert may only testify on cross-examination about inadmissible facts or data relied upon in forming the expert's opinions. *In re Indus. Silicon Antitrust Litig.,* No. 95-2104, 1998 WL 1031508, at *1 (W.D. Pa. Oct. 20, 1998); *Bryan v. John Bean Div. of FMC Corp.,* 566 F.2d 541, 546–47 (5th Cir. 1978). The district court's ruling allowing EXC to indirectly get into evidence the police reports and the officer's conclusions without first establishing any reliance by the experts on those inadmissible portions was reversible error.[9]

3. Even if the experts had relied upon the inadmissible, unreliable hearsay conclusions of the police officer, allowing defense counsel to bring out inadmissible hearsay during cross-examination for the truth of the matters asserted was plain, reversible error.

[9] The District Court's reasoning that Jensens "opened the door" by asking Mr. Turner about admitted or to be admitted evidence on which he relied (opinions of Alexander, deposition testimony, etc.) finds no basis in the rules. Indeed, Rule 705 contemplates that inadmissible materials *actually relied upon* in forming opinions *may* be exposed on cross-examination, subject to limitations on purpose and a finding that the evidence is more probative than prejudicial.

Inadmissible evidence, even when relied upon by an expert,[10] does not become admissible, much less for the truth of the matter asserted. *Williams v. Illinois,* 567 U.S. 50, 69 (2012) ("[A]n expert['s]…*reliance does not constitute admissible evidence of this underlying information*.") (emphasis added) (citations omitted); *Polythane Sys., Inc. v. Marina Ventures Int'l, Ltd.,* 993 F.2d 1201, 1207 (5th Cir. 1993) (reliance by expert on portions of another expert's report does not render the report admissible); *United States v. Stone,* 222 F.R.D. 334, 339 (E.D. Tenn. 2004), *aff'd,* 432 F.3d 651 (6th Cir. 2005)(not automatically admissible because of reliance). As the Fourth Circuit has stated, there is nothing that "compel[s] the admission of any evidence desired by a litigant simply because that otherwise inadmissible evidence can be styled by one expert witness as something he relied upon in reaching his opinion." *United States v. Mest,* 789 F.2d 1069, 1074 (4th Cir. 1986).

The inadmissible evidence relied upon by an expert may be brought out on cross-examination for limited purposes, such as impeachment, to show bias, or to explain or explore the foundation of the opinions. *Paddack v. Dave Christensen, Inc.,* 745 F.2d 1254, 1262 (9th Cir. 1984)("inadmissible hearsay used by an expert

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[10] As discussed previously, there is no evidence that either Mr. Turner or Mr. Alexander relied on anything from the police reports except measurements and photographs. Indeed, EXC admits this in closing by arguing that Mr. Alexander ignored the police conclusions.

may be admitted solely to illustrate and explain the expert's opinion," and "is not otherwise admissible as evidence."). In *Paddack,* this Court held that, while an expert can rely on hearsay in forming opinions, the Rules do not "allow the admission of the reports to establish the truth of what they assert." *Id.; Lucent Techs. Inc. v. Microsoft Corp.,* No. 07-CV-2000 H (CAB), 2010 WL 11442894 at *3 (S.D. Cal. 2010) (citations omitted)(inadmissible evidence relied upon by expert can be considered "for the limited purpose of attacking or explaining" expert opinion). In no case, however, does reliance equate to admissibility of the evidence for the truth of the matter asserted. *Coe v. Strong,* No. C13-6088 RJB-JRC, 2014 WL 4540226 at *7 (W.D. Wash. 2014) (citation omitted) (inadmissible evidence may be proffered under Rule 705 "as it is not being offered for the truth of the matter asserted.").

Cross-examination of an expert cannot be used to "slip[] hearsay evidence into the trial [under the guise of impeachment] will not be permitted," and constitutes reversible error. *Bobb v. Modern Prod., Inc.,* 648 F.2d 1051, 1055 (5th Cir. 1981), *overruled on other grounds by Gautreaux v. Scurlock Marine, Inc.,* 107 F.3d 331 (5th Cir. 1997); *Bryan, supra* 566 F.2d at 546–47 (conclusions of non-testifying experts inadmissible as relied upon data or impeachment; admission can occur "under special circumstances with external guarantees of reliability and strong limiting instructions to prohibit the jury from considering the evidence

substantively.")(footnote omitted); *Lewis v. Rego Co.,* 757 F.2d 66, 73 (3d Cir. 1985) (effect of cross-exam improperly placed hearsay before jury); *United States v. Gomez-Gallardo,* 915 F.2d 553, 555 (9th Cir. 1990) (citations and internal quotation marks omitted) ("[I]mpeachment is not permitted where it is employed as a guise for submitting to the jury substantive evidence that is otherwise unavailable.").

Furthermore, use of inadmissible evidence relied upon by an expert in cross-examination is subject to other limitations as well, including the balancing test of Rule 403 (excluding evidence that is more prejudicial than probative). *Conerly Corp. v. Regions Bank,* No. CV 08-813, 2010 WL 11538005 at *6 (E.D. La. Jan. 20, 2010) (citations omitted); *United States v. Ince,* 21 F.3d 576, 582 (4th Cir. 1994)(highly prejudicial evidence not for impeachment, but "an attempt to circumvent the hearsay rule and to infect the jury"); *Hynix Semiconductor Inc. v. Rambus, Inc.,* No. CV-00-20905RMW, 2008 WL 282376 at *5 (N.D. Cal. 2008) (cross-examination of expert on underlying facts or data "remains subject to the limits of Rule 403").

Jensens argued in their motion in limine no. 2 that the police report evidence should be excluded under Rule 403. ER-399. The district court, however, did not engage in any such analysis. Under any view of the inadmissible and unreliable evidence used by EXC, it was far more prejudicial than any minimal probative

value it may have had. The prejudice was severe, as the evidence put the stamp of authority (law enforcement) on a conclusion that Mr. Conlon did nothing improper and therefore improperly influenced the jury's decision to find EXC was not at fault for the accident, the first question on the verdict form. There was no probative value as the conclusion was unreliable (not based on observations, based on hearsay, based on self-serving statements by Mr. Conlon, woefully incomplete interviews, not based on physical evidence, lacking explanation or support (passing, too fast, etc.)). The failure to conduct a proper balancing test is reversible error. *Simpson v. Thomas,* 528 F.3d 685, 691 (9th Cir.2008).

In addition, there was no limiting instruction by the Court as to the evidence. ER-41-59. Instead, as set forth above, the district court allowed it to be mentioned repeatedly for the truth of the matters asserted. This too was reversible error. *United States v. 0.59 Acres of Land,* 109 F.3d 1493 (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction); *Paddack,* 745 F.2d at 1262 (limiting instruction required).

Error is reversible where it affects a party's substantial rights. *Estate of Barabin v. AstenJohnson, Inc.,* 740 F.3d 457, 464 (9th Cir. 2014). This Court presumes prejudice and requires the benefitting party to establish harmless error. *Id.* at 465. Here, the district court's failure to ensure that the experts were "not merely serving as … conduit[s] through which hearsay is brought before the jury,"

Stone, 222 F.R.D. at 341, infected the jury.

The first question on the jury form was whether the defendants were at fault. ER-39. EXC repeatedly used the inadmissible and unreliable hearsay evidence not solely to show alleged bias, but for its truth and to put the imprimatur of official state action on the conclusion that defendants were not at fault. EXC's use of this evidence as established fact in the successful attempt to influence the jury's decision was abundantly evident in EXC's closing argument:

> The simple cause of the accident, as recognized by everyone who was there, as recognized by the investigating Department of Public Safety officer, that Mr. Johnson's car came out of his lane, traveled across the universal turn lane, traveled into the bus's lane, and hit the bus.

ER-140:21-25. The jury did exactly what EXC asked by following the law enforcement conclusion of non-fault by EXC.

B. The district court erred in denying Jensens' motion for summary judgment on the issue of negligence liability because they conclusively established, before trial, that EXC's negligent-per-se conduct of driving out of the right lane and proceeding in the left lane, in violation of Arizona's public safety statutes, was an actual and proximate cause of the death and injuries.

This Court reviews *de novo* the denial of a summary judgment motion. *Warfield v. Alaniz*, 569 F.3d 1015, 1019 (9th Cir. 2009). "Viewing the evidence in the light most favorable to the nonmoving party," the reviewing court "must determine whether there are any genuine issues of material fact and whether the

district court correctly applied the relevant substantive law." *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005).

The district court properly concluded EXC was negligent per se for having violated A.R.S. § 28-721 by not staying in the right lane until the Wisner vehicle passed, but erred in denying Jensens summary judgment on liability. ER-20-21. As the court noted, Jensens cited multiple instances of negligent conduct by EXC based on undisputed facts, including (1) his driving out of the right lane, in violation of A.R.S. § 28-721, and (2) his crossing over the center lane into the path of Jensens' vehicle. ER-651-58. However, the district court improperly conflated these discrete instances of negligent conduct—including Conlon's violation of A.R.S. § 28-721, established as negligence per se[11]—in purporting to explain why causation remained as an issue for trial. Thus, the court wrote:

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[11] In their motion for summary judgment, Jensens argued that "[t]he undisputed facts establish Conlon's violations of the various statutory and common law duties" and that "*[e]ach of these independently* is sufficient to find liability as a matter of law . . . ." ER- (emphasis added). Jensens elaborated that each of these violations caused, as a matter of law, the fatal collision:

> Had Conlon complied with *any one* of the duties identified he would have been travelling in the right-hand lane of westbound Highway 160, at the time Butch Johnson and his family safely passed . . . . .
>
> Because the undisputed facts establish multiple violations of duties, *each of which independently* establishes liability, and because there is no dispute that compliance with the duties at each stage of the sequence of events *independently* would have prevented the accident, summary judgment on liability is appropriate.

> Plaintiffs argue that the proximate cause of Plaintiffs' injuries was Defendant Conlon's decision to move into the left lane from the right lane *and*, necessarily, to then cross over the universal, center lane, which caused a head on collision with Plaintiffs' vehicle. . . . Here, a reasonable jury could determine that Defendant Conlon's decision to move into the left lane did not, by itself, proximately cause the accident. A reasonable jury could find that Defendant Conlon could have moved into the left lane and proceeded to stay in the left lane without causing an accident. In other words, the jury could conclude that, unless the decedent moved into Defendant Conlon's traffic lane, the vehicles could have proceeded in their respective lanes despite Defendant Conlon's statutory negligence.

ER-22-23. In essence, the district court ruled that because the jury was free to conclude that the movement of Jensens' vehicle *also* was a cause of the crash, Jensens had failed to establish conclusively that EXC's negligence per se by failing to keep the bus "on the right half of the roadway," A.R.S. § 28-721(A), was a proximate cause of the harm.

This ruling of the district court is foreclosed by proper application of Arizona law in view of Mr. Conlon's negligent-per-se violation of A.R.S. § 28-721. Contrary to the district court's position, the possibility that a plaintiff's conduct *also* could be one of the causes of a plaintiff's harm does not preclude a dispositive determination that a defendant's negligent conduct conclusively caused the harm, and hence that liability exists as a matter of law. Under Arizona law "[t]he negligence complained of need not be the sole cause, but need only be a proximate cause to support a verdict for the plaintiff." *Ariz. St. Hwy Dept. v. Bechtold*, 460 P.2d 179, 183 (Ariz. 1969) (citation omitted); *cf.* Dan B.

Dobbs *et al.,* Hornbook on Torts § 14.5, at 318 (2nd ed. 2016) (defendant's conduct need only be a cause)(citations omitted).[12] Arizona law specifies that "[t]he proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces an injury, and without which the injury would not have occurred." *Robertson v. Sixpence Inns of America, Inc.*, 789 P.2d 1040, 1047 (Ariz. 1990) (citations omitted). In view of the absence of any asserted superseding intervening cause in this case, the relevant causation inquiry boils down to whether the but-for test is satisfied. *See* Dobbs *et al.,* Hornbook on Torts § 14.5, at 317 ("In the great mass of cases, courts apply a but-for test to determine whether the defendant's conduct was a factual cause of the plaintiff's harm . . . . Under the but-for test, the defendant's conduct is a factual cause of the plaintiff's harm if, but-for the defendant's conduct, that harm would not have occurred."). In this case, Jensens based the motion on the lack of any facts that could support as reasonable the conclusion that the harm that occurred would have happened if EXC had not acted negligently. The district court's determination

[12] Because the existence of other possible causes does not preclude a plaintiff from proving that a defendant's negligent conduct was *a* cause of plaintiff's harm, the district court's statement that "[t]he jury could also find that" the decision of a nonparty, Mr. Wisner, "to pull into the right lane to pass the bus was unreasonable conduct under the circumstances," ER- has no relevance in relation to the question whether the bus driver's negligent-per-se conduct of driving on the wrong side of the roadway has been conclusively shown to be *a* cause of the fatal collision.

that the bus driver was negligent per se[13] places in sharp relief the inescapable truth of the proposition that but-for EXC's driving in the left lane, the death and injuries would not have occurred.

The district court's failure to acknowledge that but-for causation conclusively exists in this case derives from the court's misapprehension of that test in the context of the relevant facts. Pursuant to the but-for test, the proposition whose truth or falsity must be ascertained is, in essence, as follows: "But for the *defendant's* negligent conduct (in this case, the bus driver's negligent-per-se conduct of driving out of the right lane and traveling in the left Westbound lane, Jensens would not have been harmed." The district court's opinion, however, treats the causation inquiry as though the task were to demonstrate the truth or falsity of the following, contrary proposition: "But for the *plaintiff's* conduct, the plaintiff would not have been harmed." Thus, the district court opined that "the jury could conclude that, unless *the [Plaintiffs'] decedent* moved into Defendant Conlon's

[13] Since the district court determined that "as a matter of law, Defendant Conlon breached his duty to stay in the right lane and violated A.R.S. § 28-721," ER-22, the statement that "a reasonable jury could find that Defendant Conlon's attentiveness to Mr. Wisner's vehicle was reasonable conduct under the circumstances," ER-23:13-15, seems both inexplicable and contrary to Arizona law regarding the legal effect of negligence per se. *See, e.g., Caldwell v. Tremper*, 367 P.2d 266, 270 (Ariz. 1962) ("When the breach of a statutory duty is held to be negligence *per se*, or negligence as a matter of law, the court holds that the legislature has created an absolute duty, which cannot be escaped by attempting to prove that the breach was in fact done in the exercise of due care.")

traffic lane," ER-23:6-8 (emphasis added), Jensens would not have been harmed or killed.

Manifestly, the district court misapprehended and misapplied the but-for test and reversal is required.

C. The district court erred in denying Jensens' Rule 50(b) motion for judgment as matter of law as to liability for negligence per se because no jury reasonably could find that the movement of decedent's vehicle was a superseding intervening cause in this case as a matter of law.

This Court reviews *de novo* the denial of a motion for judgment as a matter of law. *Dunlap v. Liberty Natural Prods.*, 878 F.3d 794, 797 (9th Cir. 2017). "The test is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury." *Id.* (citations and internal quotation marks omitted).

Jensens submitted their timely renewed motion for judgment as a matter of law, pursuant to Rule 50(b), subsequent to the district court's denial of their initial Rule 50(a) motion during the trial proceedings. At trial, the Jensen Plaintiffs presented several independent bases for liability of EXC. One of those scenarios was the failure of EXC to keep the bus in the right lane until after the Wisner vehicle passed on the bus' left.

At trial, Jensens conclusively proved EXC's negligence-per-se conduct was a cause-in-fact of the death and injuries, warranting the granting of Jensens' motion. The district court denied both the in-trial motion and the post-trial motion.

In so ruling, the court did not deny or even address Jensens' argument that they had "established conclusively that the fatal collision would not have occurred if Mr. Conlon [the bus driver] had obeyed A.R.S. § 28-721 by keeping his tour bus in the right lane." ER-1-4. Instead, the court based its denial of the Rule 50(b) motion on its view that a jury question existed regarding the legal effect of a superseding intervening cause. The court wrote:

> Proximate cause is "a natural and continuous sequence of events stemming from the defendant's act or omission, unbroken by any efficient intervening cause, that produces an injury, in whole or in part, and without which the injury would not have occurred." However, a superseding cause, which is sufficient to become the proximate cause of the final result and relieve defendant of liability for his original negligence, arises when an intervening cause occurs and was unforeseeable. Whether an event constitutes a superseding cause is ordinarily a question of fact for the jury to decide.
>
> Here, Defendants cite to three sources of evidence supporting their theory that the decedent driver crossed into Defendant Conlon's lane, which ultimately caused the accident. The Court finds that, viewing the evidence in a light most favorable to Defendants, reasonable minds could differ on whether Defendant Conlon's statutory violation was the proximate cause of the accident or the decedent driver's actions constituted an intervening-superseding cause of the accident. Because the evidence does not clearly compel a verdict for Plaintiffs, judgment as a matter of law is improper.

ER-3:18 – 4:5 (citations omitted).

The determination that a jury question remained on proximate cause as to a possible superseding intervening cause—namely, the movement of Jensens' vehicle—is fatally flawed. First, the movement of Jensens' vehicle cannot constitute an *intervening* cause, under established Arizona law. And second, assuming *arguendo* the vehicle's movement were intervening, it cannot constitute a *superseding* cause, under established Arizona law. Accordingly, because no jury reasonably could have found that the movement of decedent's vehicle was a superseding intervening cause that defeated the establishment of proximate causation, Jensens met their burden of proving that proximate cause—and hence each of the elements of liability—exists in this case. This Court must reverse the denial and remand the case for trial on damages.

1. As a matter of Arizona law, no jury reasonably could find that the movement of Jensens' vehicle was an *intervening* cause in this case.

The district court's opinion that the jury could conclude that "the decedent driver's actions constituted an intervening-superseding cause of the accident," is foreclosed by Arizona law. In the seminal case of *Herzberg v. White*, the Arizona Supreme Court explained: "An intervening force is defined as being one that actively operates in producing harm after the original actor's negligent act or omission has been *committed*. This situation usually arises when the original negligent act has ceased its active operation and has produced a passive

condition . . . .” 66 P.2d 253, 257 (Ariz. 1937) (emphases in original). “[W]here defendant’s negligent course of conduct . . . actively continues up to the time the injury is sustained, then any outside force which is also a substantial factor in bringing about the injury is a concurrent cause of the injury *and never an ‘intervening’ force*.” *Zelman v. Stauder*, 466 P.2d 766, 769 (Ariz. App. 1970) (emphasis added).

EXC’s negligent-per-se conduct commenced when Conlon moved the bus out of the right lane and into the left lane of the roadway, in violation of “‘a statute enacted for the protection and safety of the public,’” *Contreras v. Brown*, No. CV-17-08217-PCT-JAT, 2019 WL 1980837, at *7 (D. Ariz. May 3, 2019)(citation omitted), continued as he cut off Wisner, and continued until impact with Jensens’ vehicle. Because EXC’s “negligent course of conduct . . . actively continue[d] up to the time the injury [was] sustained,” the movement of Jensens’ vehicle could at most, be “a concurrent cause of the injury” and *not* “an ‘intervening’ force.” *Zelman*, 466 P.2d at 769. In the words of the Arizona Supreme Court, EXC’s negligence had *not* “ceased its active operation and . . . produced a passive condition” when the head-on collision occurred. *Herzberg*, 66 P.2d at 257. Hence, the concurrent movement of Jensens’ vehicle was *not*, according to Arizona law, “[a]n *intervening* force.” *Id.* (emphasis added).

Smith v. Johnson, 899 P.2d 199 (Ariz. App. 1995), is a case squarely on point to show the error of the district court's decision. In *Smith*, the Court reversed plaintiff's post-defense verdict motion for a new trial. Plaintiff was injured when her car collided with defendant's car. Defendant had "blindly [made] a left-hand turn across plaintiff's lane of travel" in violation of "a 'negligence per se' statute." *Id*. at 202, 204. The Court rejected the argument that any negligence by plaintiff was a superseding cause of the accident because, inter alia, it was *not intervening*:

> [E]ven if plaintiff ought to have slowed down as she approached the area where traffic was backed-up, her failure to do so could not have been a superseding cause of the accident because it did not occur *after* defendant's turn, but rather either before or simultaneously with it. Moreover, plaintiff's presence in the approaching lane was not unforeseeable to defendant, nor was it abnormal or extraordinary. Accordingly, the only reasonable conclusion is that defendant's negligence was a proximate cause of the accident.

Id. at 202-203 (emphasis in original). As in *Smith,* EXC's negligence per se began well before the collision and carried through to the crash. Jensens' conduct cannot by law be an intervening cause that allows EXC off the hook.

The district court's denial of the Rule 50 motion was in error as a matter of law and requires reversal.

2. <u>As a matter of Arizona law, no jury reasonably could find that the movement of Jensens' vehicle was a *superseding* cause in this case.</u>

Even assuming *arguendo* that the Jensens' vehicle's movement was intervening (it was not), the movement could not be a *superseding* intervening

cause. "Under Arizona law as developed in negligence cases, an intervening cause does not relieve an earlier actor of liability if the intervening cause was reasonably foreseeable." *D'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886, 893 (9th Cir. 1977). As stated by the Arizona Supreme Court:

> Arizona . . . recognizes . . . that a particular defendant may not avoid liability for his causative act by claiming that the conduct of some other person was also a contributing cause.
>
> . . . .
>
> . . . [W]here the negligent conduct of the first actor increases the foreseeable risk of a particular harm occurring through the conduct of a second actor, the "fact that the harm is brought about through the intervention of another force does not relieve the [first] actor of liability."

Oniveros v. Borak, 667 P.2d 200, 205, 206 (Ariz. 1983) (citation omitted).

Moreover, "an intervening force becomes a superseding cause only when its operation was both unforeseeable and when with the benefit of 'hindsight' it may be described as abnormal or extraordinary." *Rossell v. Volkswagen of America*, 709 P.2d 517, 526 (Ariz. 1985). Accordingly, a

> defendant is not relieved of liability simply because he could not have foreseen the manner in which the accident occurred, including the negligent intervention of third parties. The question is whether the plaintiff was in the foreseeable range of defendant's negligent conduct . . . and whether the injury resulted from the recognizable risk that made that conduct negligent.

Id. (citations omitted).

In this case, Arizona law establishes that a driver and passengers who have been killed or injured by a violator of A.R.S. § 28-721 in a head-on collision undeniably were "in the foreseeable range of [the violator's] negligent conduct" and that their injuries and death "resulted from the recognizable risk that made that [the violator's] conduct negligent." *Rossell*, 709 P.2d at 526. Here, the requisite foreseeability for demonstrating proximate causation *exists as a matter of law* because the statute's "primary purpose is to avoid head-on collisions with oncoming traffic." *United Dairymen v. Fisher-Miller Hay & Dev. Co.*, 609 P.2d 609, 612 (Ariz. App. 1980). This Arizona highway safety code provision, A.R.S. § 28-721, thus is a statute that "is 'designed to protect the class of persons, in which [the Jensen Plaintiffs and their decedent] are included, against the risk of the type of harm which in fact occurred as a result of [the statute's] violation.'" *Estate of Hernandez by Hernandez-Wheeler v. Arizona Bd. of Regents*, 866 P.2d 1330, 1339 (Ariz. 1994)(citation omitted).

Since negligence per se is conclusively established in this case, so too is the foreseeability of the presence of Jensens and the death and injuries stemming from the head-on collision that was caused by EXC's violation of A.R.S. § 28-721. *See Young v. Environmental Air Prods*., 665 P.2d 88, 94 (Ariz. App. 1982) (citations omitted) ("An intervening force is not a superseding cause if the original actor's negligence creates the very risk of harm that causes the injury.")

"Ordinarily the question of whether negligence is the proximate cause of an injury is a question of fact for a jury to decide and not a question of law, *unless after reviewing all the facts and circumstances there is no reasonable chance or likelihood that the conclusions of reasonable [persons] would differ.*" *Harmon v. Szrama*, 429 P.2d 662, 664 (Ariz. 1967) (citation omitted) (emphasis added). In this case, the movement of Jensens' vehicle, like the conduct of the plaintiff in *Smith v. Johnson*, "was not unforeseeable to defendant, nor was it abnormal or extraordinary," and hence "*the only reasonable conclusion* is that defendant's negligence was a proximate cause of the accident." 899 P.2d at 202-203 (emphasis added). Accordingly, just as "*Smith v. Johnson* reversed a defense verdict, finding defendant's negligence was a proximate cause of plaintiff's injuries" as matter of law, *Glazer v. State*, 321 P.3d 470, 484 n.6 (Ariz. App. 2014) (citation and internal quotation marks omitted), *vacated in part*, 347 P.3d 1141 (Ariz. 2015), so does the present case require reversal of the denial of Jensens' motions for judgment as a matter of law. *See Stewart v. Gilmore*, 323 F.2d 389, 391 (5th Cir. 1963) (emphasis added) ("When the ends of justice require it, a federal trial judge has the power *and the duty* to set aside a jury's verdict, to grant a new trial, or to grant a judgment notwithstanding the verdict.").

D. The district court erred in applying Arizona substantive law in this case—disregarding, inter alia, tribal recognition of the life of an unborn child and those harmed by loss of the child—because Navajo substantive law applies pursuant to federal law and Arizona's choice-of-law principles.

This Court reviews *de novo* a grant of a motion for judgment on the pleadings. *Rocky Mountain Farmers Union v. Corey*, 913 F.3d 940, 949 (9th Cir. 2019). "Judgment on the pleadings is proper when, taking all allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *Stanley v. Trs. of the Cal. State Univ.*, 433 F.3d 1129, 1133 (9th Cir. 2006). *De novo* review also obtains with respect to both a district court's preemption decision and choice of law analysis. *Delisle v. Speedy Cash*, No. 19-55794, 2020 U.S. App. LEXIS 18059, at *1 (9th Cir. 2020). Jensens preserved this argument in their response to the motion.

Here, the district court disregarded Jensens' preemption arguments and then failed to apply Arizona's choice of laws jurisprudence, which requires application of Navajo law. The district court opined as follows:

> . . . Plaintiffs' efforts to have Navajo law govern this case is [sic] an extension of what has already been litigated—that is, "the Navajo Nation tribal court does not have jurisdiction over nonmember [Defendants] relating to the highway accident that occurred on September 21, 2004." If the present case cannot be heard in the courts of the Navajo Nation for want of jurisdiction, it follows that the laws of the Navajo Nation cannot be exported into federal court to achieve the same end.

ER-29:25 – 30:4 (citation omitted).

These statements by the district court evince errors. First, jurisdiction is separate and distinct from the *further* question of the applicable substantive law. *See Kolbe v. Trudel*, 945 F. Supp. 1268, 1270 (D. Ariz. 1996) ("Choice of law . . . is one matter, subject matter jurisdiction is another."); *accord Sells v. Espil*, No. A-CV-15-89, 1990 Navajo Sup. LEXIS 5 at *13 (Nav. Sup. Ct. 1990) ("The determination that the Navajo court has jurisdiction . . . has no bearing on choice of law matters."); *see also* Cohen's Handbook of Federal Indian Law § 7.04[6][2], at 657-58 (Nell Jessup Newton et al., eds., 2012 ed.) [hereinafter "Cohen's Handbook"] (observing that "federal courts are obligated in diversity cases to apply the choice-of-law rules of the state in which they sit, and thus will be obligated to apply tribal law to cases in which their comparable state court would have done so," and that "[f]ederal statutes may also specifically require application of tribal law in some contexts").

Second, the district court failed to address the numerous instances of "material authority"—federal statutes, Supreme Court decisions, and numerous Arizona cases—discussed by Jensens that compel recognition of the applicability of Navajo substantive law. ER-27-32. This body of "material authority"—inexplicably disregarded by the district court—governs the question of the applicable substantive law in this litigation, and is reiterated and explained below.

1. Federal law preempts application of Arizona substantive law in this case.

Federal law precludes application of Arizona substantive law and requires application of Navajo substantive law. First, Congress preempted Arizona law by enacting the Navajo-Hopi Rehabilitation Act of 1950. Second, judicial resolution of this dispute is controlled by *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g Co.*, 476 U.S. 877 (1986), in which the United States Supreme Court determined that federal law preempted a state law that required Indians to acquiesce to the application of state civil law as a condition for using state courts to sue non-Indians for wrongful conduct on an Indian reservation.

The Navajo-Hopi Rehabilitation Act appropriated funds to construct Navajo Indian Route 1, later designated a part of U.S. Highway 160, the roadway on which the fatal tour bus/auto collision at issue in this case occurred. Congress authorized the funds (1) "to further the purposes of existing treaties with the Navajo Indians"; (2) "to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes"; and (3) "to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities." 25 U.S.C. § 631 (1958). Another express purpose of the Act was to facilitate "the fullest possible participation of the Navajos in the administration of their affairs." 25 U.S.C. § 636 (1950).

In fulfillment of Congress's purposes in funding the construction of roadways across the Navajo Reservation, the Navajo Nation enacted and implemented the Navajo Nation Tour and Guide Services Act, 5 N.N.C. §§ 2501-2505, to regulate commercial touring, reflecting a broad joint tribal and federal commitment to promoting tribal self-government and encouraging economic development which preempts the application of Arizona law. *Cf. New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331, 335-36 (1983) (holding that New Mexico's hunting and fishing laws are preempted by the operation of federal law where, with extensive federal assistance and supervision, the Mescalero Apache Tribe has established a comprehensive scheme for managing the reservation's fish and wildlife resources). Moreover, the legislative history of the Navajo-Hopi Rehabilitation Act demonstrates Congress's intent to preempt state law in passing the Act.

A proposed (and ultimately defeated) precursor to the 1950 Navajo-Hopi Rehabilitation Act—a 1949 bill whose Senate version was titled S. 1407—would have altered the Navajo Nation's sovereignty and autonomy by allowing Arizona law to apply within the Navajo Reservation. *See Williams v. Lee*, 358 U.S. 217, 222 n.9 (1959) (briefly summarizing legislative history of Navajo-Hopi Rehabilitation Act). The controversial, and rejected, portion of the bill, Section 9, provided, in relevant part, as follows:

> From and after the effective date of this Act, all Indians within the tribal and allotted lands of the Navajo and Hopi Reservations shall be subject to the laws of the State wherein such lands are located, and shall have access to the courts of such State for the enforcement of their rights and the redress of wrongs to the same extent and in the same manner as any other citizen thereof . . . .

H.R. No. 1338, 81st Cong., 1st Sess. (1949) (Conference Report on Bill (S. 1407) Promoting Rehabilitation of Navajo and Hopi Indians). President Truman vetoed the bill because of his concern that Section 9 would violate the Navajos' treaty-based sovereignty and autonomy within the Navajo Reservation:

> I have withheld my approval with reluctance and only after the most careful consideration of all the provisions of S. 1407. The bill contains many meritorious features. In fact, *its only objectionable provisions are those of section 9 which, with some qualifications, extend State civil and criminal laws and court jurisdiction to the Navajo-Hopi Reservations which are now under Federal and tribal laws and courts.*

95 Cong. Rec. 14,784 (1949) (veto message of President Harry S. Truman) (emphasis added). Specifically, the President objected to what he regarded as the bill's "serious threats to the basic rights of these Indians," including "the tribal practices and customs governing the descent and distribution of personal property upon death." *Id.*

In response to the presidential veto, Congress eventually enacted a revised bill which "eliminate[d] all of the provisions of Section 9 which refer[red] to the applicability of State civil and criminal laws and court jurisdiction on the Navajo-Hopi Reservations." S. Rep. No. 1202, 81st Cong., 1st Sess. (1949); Act of

Apr. 19, 1950, ch. 92, 64 Stat. 44. The enactment of this redrafted bill occurred after the House of Representatives also rejected a proposed amendment that would have extended state law on the Navajo Reservation with respect to a limited number of subject matters, including "regulation of automotive traffic." 96 Cong. Rec. 2085-2094, 2089 (1950) (transcript of House debate over Senate Bill 2734). Rejecting even this proposed extension of limited state authority, Congress enacted the final version of the bill. The text and legislative history of the Navajo-Hopi Rehabilitation Act establish Congress's intent to preempt the application of state law on the Navajo Reservation. *See also Warren Trading Post v. Arizona State Tax Com'n*, 380 U.S. 685, 690 & n.17 (1965) (noting that Congress in the Navajo-Hopi Rehabilitation Act funded construction of Navajo Route 1 "in compliance with its treaty obligations" and that "Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control . . . .").

The preemption of state law is further confirmed in the decision in *Wold*. There, the high court held that North Dakota was precluded by federal law—namely, Public Law 280, Act of Aug. 15. 1953, 67 Stat. 588—from requiring Indian tribes to consent to the application of state civil law before being permitted to sue non-Indians in the state's courts. 476 U.S. at 887 ("[W]e must conclude that such [state] disclaimers of jurisdiction cannot be reconciled with the congressional

plan embodied in Pub. L. 280 and thus are pre-empted by it."). The Court first examined the structure, purpose, and legislative history of Public Law 280 before concluding that the federal statute preempted the state's disclaimer of jurisdiction. *See id.* at 884-87. Next, the Court considered the divergent interests implicated in the case to reinforce its conclusion that the State's conditioning access to state courts by the requirement that state law be applied was "unduly burdensome on the federal and tribal interests," was a "potentially severe intrusion on the Indians' ability to govern themselves according to their own laws," and invited "a potentially severe impairment of the authority of the tribal government, its courts, and its laws." *Id.* at 888-9l.

The Supreme Court's conclusion in *Wold* that Public Law 280 preempts state law is dispositive with respect to whether the substantive laws of Arizona or of the Navajo Nation apply in this case. *See* Cohen's Handbook § 6.04[3][e], at 569 ("Because all states were given the opportunity to acquire . . . civil jurisdiction over actions to which Indians are parties, Congress arguably intended the specific methods provided in Public Law 280 as the sole means by which states could assert jurisdiction."); *see also* William C. Canby, Jr., *American Indian Law in a Nutshell* 287 (6th ed. 2015) (citing, inter alia, *Wold*, 476 U.S. 877) (emphasis added) (noting the "important collateral effect" of Public Law 280 *in all states*). As in *Wold*, imposition of state civil law in this case "simply cannot be reconciled

with Congress' jealous regard for Indian self-governance." 476 U.S. at 890. Especially in light of the *additional* preemptive force of the Navajo-Hopi Rehabilitation Act, this Court must conclude that Arizona substantive law is federally preempted and that Navajo substantive law must be applied instead.[14]

2. Application of Arizona's choice-of-law principles directs courts to select Navajo law, not Arizona law.

Arizona's choice-of-law principles require application of Navajo law. In diversity cases, federal courts "apply the substantive law of the forum in which the court is located, including the forum's choice of law rules." *Ins. Co. of North Am. v. Fed. Express Corp.*, 189 F.3d 914, 919 (9th Cir.1999). "Arizona courts apply the Restatement (Second) of Conflict of Laws . . . to determine the controlling law for multistate torts. The Restatement instructs courts to look to the state that has 'the most significant relationship to the occurrence and the parties' of any tort claim." *Bobbitt v. Milberg LLP*, 801 F.3d 1066, 1070 (9th Cir. 2015) (citations omitted); Restatement (Second) of Conflict of Laws § 145(1) (1971). The district court did not apply Arizona choice of laws principles.

[14] Where state substantive law is preempted, the state's choice-of-law rules may also be supplanted. *See* Jackie Gardina, *Federal Preemption: A Roadmap for the Application of Tribal Law in State Courts*, 35 Am. Indian L. Rev. 1, 32 (2010-2011) (arguing that the Supreme Court's Indian law jurisprudence preempts "a state's laws, including its choice-of-law rules" and "directs state courts to apply the whole law of the tribe, including tribal choice-of-law provisions"); *cf.* 7 Navajo Nation Code § 204 (Navajo Nation's choice-of-law statute).

"The inquiry is qualitative, not quantitative. The court must evaluate the contacts according to their relative importance with respect to the particular issue." *Id.* (citations and internal quotation marks omitted). "Application of choice-of-law principles will sometimes lead state and federal courts to apply tribal law to disputes arising in Indian country." Cohen's Handbook § 7.06[2], at 656; *see also* William C. Canby, Jr., American Indian Law in a Nutshell 263 (6th ed. 2015) (emphasis added) ("State courts applying normal choice of law principles should *frequently* apply tribal law to issues arising in Indian country."). The United States Supreme Court, moreover, has both modeled and confirmed the propriety of federal and state courts' applying tribal law. *See, e.g., Jones v. Meehan*, 175 U.S. 1, 28-32 (1899) (applying tribal probate law in quiet title action).

Arizona's choice-of-law framework reinforces the conclusion that Navajo Nation substantive law applies. With respect to whether the state or the tribe "has the most significant relationship to the occurrence and the parties" of the present tort claim, *Bobbitt*, 801 F.3d at 1070 (citation and internal quotation marks omitted), the Navajo Nation's relationship clearly predominates. As delineated by the Arizona Supreme Court, the "especially relevant contacts to be considered include" the following:

1. The place where the injury occurred;

2. The place where the conduct causing the injury occurred;

3. The domicile, residence, nationality, place of incorporation and place of business of the parties;

4. The place where the relationship, if any, between the parties is centered.

Id. (citation omitted). In addition, "[t]he Restatement § 6 sets forth several relevant factors in determining which law to apply, including: (1) the needs of the interstate systems, (2) the relevant policies of the forum state, (3) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty, predictability, and uniformity of result, and (7) ease in the determination and application of the law to be applied." *Patton v. Cox*, 276 F.3d 493, 496 (9th Cir. 2002).

Proper application of Arizona's choice-of-law principles compels selection of Navajo law with respect to all of the legal issues in contention. Under the Restatement framework, which Arizona follows, the Navajo Nation clearly has the stronger interest in having the federal courts apply the Navajo Nation's general tort laws to adjudicate the Jensen Plaintiffs' claims for liability and damages. With regard to the fatal tour bus/auto collision at issue in this litigation, the place where the injury occurred and where the injury-causing conduct occurred is within the boundaries of the Navajo Nation rather than outside reservation boundaries. *See Tohono O'odham Nation v. Schwartz*, 837 F. Supp. 1024, 1032 (D. Ariz. 1993)

(applying Restatement factors in determining whether locus of contract in dispute was on the reservation or off the reservation). Hence these first two categories of "especially relevant contacts," *Bobbitt*, 801 F.3d at 1070, favor application of Navajo law.

So does the third category, i.e., the question of "[t]he domicile, residence, nationality, place of incorporation and place of business of the parties." *Id*. All of the persons killed or injured, Jensen and Johnson family members, are enrolled Navajos whose domicile or residence, and nationality, are within the Navajo Nation. Moreover, none of the EXC Defendants are citizens of, or incorporated within, the State of Arizona; accordingly, Arizona's relationship to the occurrence and the parties is *de minimis*. Indeed, the fact that the Navajo Nation is the domicile/residence of all of the persons injured or killed in the collision may be dispositive because "Arizona courts traditionally have accorded great weight in the conflicts analysis to the domicile of the tort victim in a personal injury case." *Garcia v. Gen. Motors Corp.,* 990 P.2d 1069, 1076 (Ariz. App. 1999).

The fourth and final Restatement category of "especially relevant contacts" is "[t]he place where the relationship, if any, between the parties is centered." *Bobbitt*, 801 F.3d at 1070 (citation and internal quotation marks omitted). This category, too, favors application of Navajo law. Addressing this Restatement factor, the Arizona Supreme Court has clarified that the choice-of-law test "focuses

. . . on the state where the relevant relationship existed and that state's interest in the claim." *Id.* at 1071. This focus is crucial when applying the place-of-injury factor as well, for that Restatement factor "suggests that the law of that place will apply, but it is only one factor to consider in determining *which state has the most significant relationship to the case*." *Pounders v. Enserch E & C, Inc.*, 306 P.3d 9, 14 (Ariz. 2013) (citation omitted) (emphasis added).

The Navajo Nation's federally recognized interest in promoting tribal self-government and controlling internal relations is best served by the application of Navajo law to this dispute. *See* Cohen's Handbook § 4.01[2][e], at 220 (citations omitted) (noting that "the [Supreme] Court has acknowledged that tribes have authority . . . to regulate domestic relations among members, and to prescribe rules of inheritance among members"). Arizona's interest in applying state law is *de minimis* because "'[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history.'" *McGirt v. Oklahoma*, No. 18-9526, slip op. at 33 (S. Ct. July 9, 2020) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

That the Navajo Nation has the most significant relationship to this case, and is the place where the relationship between the parties is centered, is further supported by the district court's own well considered views concerning that relationship and its locus in an earlier phase of this case: "There is no question that

the Navajo Nation has the right to regulate tourism on the reservation." *EXC, Inc. v. Jensen*, No. CV 10–08197–PCT–JAT, 2012 WL 3264526, at *15 (D. Ariz. 2012). The court elaborated:

> [T]here is no question that the Navajo Nation can place conditions on nonmembers touring the Navajo Nation. These conditions necessarily include requiring any tourism company to obtain a license, enter into a Passenger Service Agreement, and to abide by the Nation's laws regulating tourism. If nonmembers do not agree to the conditions set by the Nation, the Nation may exclude those [nonmembers].

Id. at *16. Accordingly, it is the Navajo Nation, not Arizona, which has the most significant relationship to this case.

The Restatement's four choice-of-law guidelines discussed above—all of which favor application of Navajo law generally in this litigation—direct a court's "final choice unless they are contrary to the general factors of § 6," *Bates*, 749 P.2d at 1371, factors that provide "basic policy considerations that apply in every choice-of-law case." *Pounders*, 306 P.3d at 15. Far from pointing to a contrary determination, the relevant policy considerations strongly reinforce the final selection of Navajo substantive law. *Cf. Tracy v. Superior Court*, 810 P.2d 1030, 1032, 1041 (Ariz. 1991) (stating, in a case that "involves the question of comity between our state and the separate, sovereign jurisdiction of the Navajo Nation" and "deal[s] with tribal law," that "tribal laws are entitled to recognition on the basis of comity if they are otherwise in accord with Arizona's public policy"). Most crucial is judicial sensitivity to "the basic policies underlying the particular

field of law," *Bobbitt*, 801 F.3d at 1070, for this case implicates core policies of the field of federal Indian law as well as the field of personal injury law. In a 1987 federal diversity case addressing state and tribal authority over an on-reservation vehicular accident, the United States Supreme Court pronounced a broadly controlling underlying policy. "We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government," the Court wrote, a policy that "operates even in areas where state control has not been affirmatively pre-empted by federal statute." *Iowa Mutual*, 480 U.S. at 14. This mandatory federal policy of the field of Indian law, together with the availability of Navajo law that resonates with pro-compensation policies underlying the field of tort law generally, compels use of tribal law to resolve the Indian country litigation that is on appeal before this Court.

Wrongful Death, Loss of Consortium, and Recognition of the Life of an Unborn Child. Exemplifying "the relevant policies" and "relative interests" of the Navajo Nation, as well as "the basic policies underlying the particular field of law," *Bobbitt*, 801 F.3d at 1070,[15] is the Navajo Nation's wrongful death law and especially its recognition of the life of an unborn child. Relying on the Restatement, the Arizona Supreme Court has directed that "the law of the state

[15] Other Restatement policy considerations do not apply or are minimally relevant in the present context. *See, e.g.*, *Pounders*, 306 P.3d at 16 (narrowing inquiry to two factors "[b]ecause of the diminished significance of the [other] listed factors in tort cases").

with the 'dominant interest' or 'greater interest' should govern" with respect to wrongful death issues, that "[c]ompensation of an injured plaintiff is primarily a concern of the state in which the plaintiff is domiciled," and that the existence of "a strong policy interest in fully compensating the plaintiffs to make them whole" carries weight. *Bryant v. Silverman*, 703 P.2d 1190, 1192, 1194, 1196 (Ariz. 1985). These choice-of-law principles point to Navajo law as governing all of the wrongful death issues in this litigation. Like all Indian tribes generally, the Navajo Nation has a vital, federally protected interest in controlling its internal domestic relations, and this interest manifestly encompasses specifying (1) recognition of the compensable value of the lost life of an unborn child, (2) which family members are qualified beneficiaries to the wrongful death estate of an enrolled Navajo, and (3) what persons are authorized to bring a wrongful death action. The Navajo Nation is the domicile of all of the Jensen Plaintiffs, while none of the EXC Defendants is an Arizona resident or domiciliary. *Cf. id.* at 1195 ("[U]nder the facts of this case the domicile contact carries great weight in our determination of which state's law to apply . . . .").

The Navajo Nation, moreover, has declared "a strong policy interest in fully compensating . . . plaintiffs to make them whole," thereby embracing one of the most "basic policies underlying tort law." *Id.* Importantly, the Navajo Nation Supreme Court has recognized the right of compensation for the loss of the life of

an unborn child. *EXC, Inc. v. Kayenta Dist. Ct.*, No. SC-CV-07-10, 2010 Navajo Sup. LEXIS at *30 (Nav. Sup. Ct. 2010). Thus, the Navajo Nation Supreme Court has held that Navajo law "permits all causes of action generally recognized by law to compensate an 'injured party,' including survival and wrongful death actions," and that courts are authorized "to provide relief based upon any generally recognized legal theory." *Tsinahnajinnie v. John*, No. SC-CV-80-98, 2001 Navajo Sup. LEXIS 2 at *6-7 (Nav. Sup. Ct. 2001). Further, under Navajo law all members of a decedent's "immediate family" are qualified as beneficiaries of a wrongful death estate, entitled to collect proceeds, *id.* at *9-10 (internal quotation marks omitted), and the "immediate family" is comprised of (1) persons closely related by blood living in the same residence group or camp who offered to and received from the decedent "mutual assistance and support" and (2) persons "being of" the decedent mother's clan or "born for" the decedent father's clan, *In re Estate of Apachee*, No. WR-CV-197-821983, Navajo Dist. LEXIS 3 at *13-14 (Nav. Dist. Ct. 1983) (internal quotation marks omitted).[16] The broadly inclusive compensatory policies of Navajo law concerning wrongful death and recognition of the life of an unborn child demonstrate the Navajo Nation's traditional and

[16] The Navajo Nation Supreme Court also recognizes the legitimacy of "open[ing] an estate for a decedent to have a personal representative bring a claim, whether it is a survival action or a wrongful death suit" as well as allowing "[a]ny person who has a claim" to "bring his or her own claim." *Tsinahnajinnie*, No. SC-CV-80-98, 2001 Navajo Sup. LEXIS 2 at *8-9.

continuing control of internal tribal relations and endows the Nation with the requisite "dominant interest" under Arizona's choice-of-law principles.[17]

Death or Injury Caused to an Unborn Child. The Navajo Nation Supreme Court has observed that the unborn child "occupies a space in Navajo culture that can best be described as holy or sacred" and is "alive at conception, and develops perfectly in the care of the mother," *EXC, Inc. v. Kayenta Dist. Ct.*, No. SC-CV-07-10, 2010 Navajo Sup. LEXIS at *30, indicating that death or injury caused to a child *in utero* is compensable from the point of conception. The Navajo Nation's vital interest in this issue of the highest religious, cultural, and personal significance to Navajo people clearly points toward the choice of Navajo law.

Joinder of Insurers. Whether direct joinder of an insurer in a lawsuit against its insureds is permitted is an unsettled question in Navajo law and therefore would necessitate certification of the question to the Navajo Nation Supreme Court. *See, e.g., Peabody Western Coal Co. v. Nez*, No. SC-CV-49-2000, 2001 Navajo Sup. LEXIS 7 (Nav. Sup. Ct. 2001) (addressing "a certified question posed by the United States District Court for the District of Arizona pursuant to Rule 3 of the

[17] The same choice-of-law analysis, which privileges the presence of strong compensatory policies, justifies application of the Navajo Nation's law with respect to the loss of consortium allegations in this case. The availability of relief for loss of consortium is clear from *Tsinahnajinnie*, wherein the Navajo Nation Supreme Court affirmed that Navajo law "permits all causes of action generally recognized by law to compensate an 'injured party'" and accommodates the provision of "relief based upon any generally recognized legal theory." No. SC-CV-80-98, 2001 Navajo Sup. LEXIS 2 at *6-7.

Navajo Rules for Declaratory Rulings on Questions of Navajo Law").[18] Navajo case law does indicate that joinder of insurers would be permitted under the Navajo traditional method of dispute resolution, *nalyeeh*, where an insurer is regarded as a "relative" or "clan member[ ]" of the wrongdoer and is bound to pay compensation for injuries caused by the wrongdoer. *Benalli v. First Nat'l Ins. Co. of Am.*, No. SC-CV-45-96, 1998 Navajo Sup. LEXIS 4 at *21-24 & n.3 (Nav. Sup. Ct. 1998).

Negligence Per Se. Navajo law authorizes "relief based upon any generally recognized legal theory," *Tsinahnajinnie*, No. SC-CV-80-98, 2001 Navajo Sup. LEXIS 2 at *7, such as negligence per se. *See also* 7 Navajo Nation Code § 204(D) (providing that matters not covered by Navajo or federal law "may be decided according to comity with reference to the laws of the state in which the matter in dispute may have arisen"). Moreover, with respect to any unresolved question about the Nation's law on matters of personal injury and liability, certifying the question to the Navajo Nation Supreme Court is an available and proper procedural avenue pursuant to comity. The choice of Navajo law on liability, including duties and standards of care applicable in this litigation,[19] is justified by careful consideration of Arizona's choice-of-law principles, as explained *supra*.

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[18] *Available at* http://www.navajocourts.org/rules/declapro.htm.

[19] Navajo tort law "recognize[s] a heightened standard of care for drivers in open range areas on the Navajo Nation." *Castillo v. Charlie*, No. A-CV-32-93,

VI. Conclusion

For the foregoing reasons, Jensens ask this Court to grant relief as follows:

A. grant a new trial as a result of the improper admission of inadmissible hearsay conclusions in the police reports regarding liability that infected the jury's decision-making, *Estate of Barabin,* 740 F.3d at 466;

B. reverse the district court's denial of Jensens' motion for summary judgment on negligence liability or, alternatively, their renewed motion for judgment as a matter of law, and remand for a trial on damages only;

C. reverse the district court's refusal to apply Navajo law and requiring the district court to reinstate the claims and parties dismissed solely because Arizona law was applied;

D. provide other relief as is just and necessary.

1995 Navajo Sup. LEXIS 2 at *7 (Nav. Sup. Ct. 1995) (citation omitted). Whether a "heightened standard of care" accordingly applies with regard to any of the allegations of negligence in this litigation may require that the question be certified to the Navajo Nation Supreme Court.

DATED this 30th day of October, 2020

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CERTIFICATE OF SERVICE

I hereby certify that, on October 30, 2020, the foregoing **Appellants' Opening Brief and Appellant's Excerpts of Record** were electronically transmitted to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 20-15908

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No. 20-15908

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMIEN JENSEN, et al.,
Plaintiffs-Appellants,

v.

EXC INC., a Nevada corporation, et al.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA
STEVEN P. LOGAN, DISTRICT JUDGE • CASE NO. 3:15-cv-08019-SPL

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STATUTORY PROVISIONS

Jamien Jensen, et al., v. EXC, Inc., et al.

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[CHAPTER 89]

AN ACT

April 17, 1950
[S. 2559]
[Public Law 473]

To authorize the extension of officers' retirement benefits to certain persons who while serving as enlisted men in the Army of the United States during World War II were given battlefield promotions to officer grade and were incapacitated for active service as a result of enemy action.

Officers' retirement benefits.
Battlefield promotions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who while serving on active duty as an enlisted man in the Army of the United States at any time during the period between December 7, 1941, and September 2, 1945—

(1) was appointed or recommended by his commanding officer or superior military authority for a battlefield appointment as a commissioned officer in the Army of the United States;

(2) while performing the duties of a commissioned officer, was injured in line of duty incident to combat with the enemy;

and who, subsequent to being so injured as a result of that appointment or recommendation was ordered to active duty as a commissioned officer in the Army of the United States, or the Air Force of the United States, shall be considered to have been serving on active duty as a commissioned officer when so injured, for the purpose of determining entitlement to physical disability retirement benefits in effect at the time he was relieved from active duty: *Provided*, That the provisions of section 411 of the Career Compensation Act of 1949 (Public Law 351, Eighty-first Congress) shall apply to persons qualified for retirement benefits under this Act: *Provided further*, That nothing contained in this Act shall preclude persons entitled to retirement benefits under the provisions of this Act from computing their retirement pay in accordance with the disability retirement laws in effect prior to the effective date of the Career Compensation Act of 1949.

63 Stat. 823.
37 U. S. C., Sup. III, § 281.

63 Stat. 802.
37 U. S. C., Sup III, § 231 note.
Post, pp. 158, 794–796.

SEC. 2. No additional or back pay or allowances for any period prior to the date of enactment hereof shall accrue to any person solely by reason of the enactment of this Act.

Approved April 17, 1950.

[CHAPTER 92]

AN ACT

April 19, 1950
[S. 2734]
[Public Law 474]

To promote the rehabilitation of the Navajo and Hopi Tribes of Indians and a better utilization of the resources of the Navajo and Hopi Indian Reservations, and for other purposes.

Navajo and Hopi Tribes.
Rehabilitation, etc.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to further the purposes of existing treaties with the Navajo Indians, to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes, to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens, the Secretary of the Interior is hereby authorized and directed to undertake, within the limits of the funds from time to time appropriated pursuant to this Act, a program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians, the more productive employment of their manpower, and the supplying of means to be used in their rehabilitation, whether on or off the Navajo and Hopi Indian Reservations. Such program shall include the following projects for which capital expenditures in the amount shown after each project listed in the

Appropriations authorized.

following subsections and totaling $88,570,000 are hereby authorized to be appropriated: Projects.

(1) Soil and water conservation and range improvement work, $10,000,000.

(2) Completion and extension of existing irrigation projects, and completion of the investigation to determine the feasibility of the proposed San Juan-Shiprock irrigation project, $9,000,000.

(3) Surveys and studies of timber, coal, mineral, and other physical and human resources, $500,000.

(4) Development of industrial and business enterprises, $1,000,000.

(5) Development of opportunities for off-reservation employment and resettlement and assistance in adjustments related thereto, $3,500,000.

(6) Relocation and resettlement of Navajo and Hopi Indians (Colorado River Indian Reservation), $5,750,000.

(7) Roads and trails, $20,000,000.

(8) Telephone and radio communication systems, $250,000.

(9) Agency, institutional, and domestic water supply, $2,500,000.

(10) Establishment of a revolving loan fund, $5,000,000.

(11) Hospital buildings and equipment, and other health conservation measures, $4,750,000.

(12) School buildings and equipment, and other educational measures, $25,000,000.

(13) Housing and necessary facilities and equipment, $820,000.

(14) Common service facilities, $500,000.

Funds so appropriated shall be available for administration, investigations, plans, construction, and all other objects necessary for or appropriate to the carrying out of the provisions of this Act. Such further sums as may be necessary for or appropriate to the annual operation and maintenance of the projects herein enumerated are hereby also authorized to be appropriated. Funds appropriated under these authorizations shall be in addition to funds made available for use on the Navajo and Hopi Reservations, or with respect to Indians of the Navajo Tribes, out of appropriations heretofore or hereafter granted for the benefit, care, or assistance of Indians in general, or made pursuant to other authorizations now in effect. Additional sums authorized.

SEC. 2. The foregoing program shall be administered in accordance with the provisions of this Act and existing laws relating to Indian affairs, shall include such facilities and services as are requisite for or incidental to the effectuation of the projects herein enumerated, shall apply sustained-yield principles to the administration of all renewable resources, and shall be prosecuted in a manner which will provide for completion of the program, so far as practicable, within ten years from the date of the enactment of this Act. An account of the progress being had in the rehabilitation of the Navajo and Hopi Indians, and of the use made of the funds appropriated to that end under this Act, shall be included in each annual report of the work of the Department of the Interior submitted to the Congress during the period covered by the foregoing program. Administration. Completion date. Report to Congress.

SEC. 3. Navajo and Hopi Indians shall be given, whenever practicable, preference in employment on all projects undertaken pursuant to this Act, and, in furtherance of this policy, may be given employment on such projects without regard to the provisions of the civil-service and classification laws. To the fullest extent possible, Indian workers on such projects shall receive on-the-job training in order to enable them to become qualified for more skilled employment. Employment of Indian workers.

SEC. 4. The Secretary of the Interior is authorized, under such regulations as he may prescribe, to make loans from the loan fund authorized by section 1 hereof to the Navajo Tribe, or any member or association of members thereof, or to the Hopi Tribe, or any member or Loans.

association of members thereof, for such productive purposes as, in his judgment, will tend to promote the better utilization of the manpower and resources of the Navajo or Hopi Indians. Sums collected in repayment of such loans and sums collected as interest or other charges thereon shall be credited to the loan fund, and shall be available for the purpose for which the fund was established.

Leases of restricted lands.

SEC. 5. Any restricted Indian lands owned by the Navajo Tribe, members thereof, or associations of such members, or by the Hopi Tribe, members thereof, or associations of such members, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, or business purposes, including the development or utilization of natural resources in connection with operations under such leases. All leases so granted shall be for a term of not to exceed twenty-five years, but may include provisions authorizing their renewal for an additional term of not to exceed twenty-five years, and shall be made under such regulations as may be prescribed by the Secretary. Restricted allotments of deceased Indians may be leased under this section, for the benefit of their heirs or devisees, in the circumstances and by the persons prescribed in the Act of July 8, 1940 (54 Stat. 745; 25 U. S. C., 1946 edition, sec. 380). Nothing contained in this section shall be construed to repeal or affect any authority to lease restricted Indian lands conferred by or pursuant to any other provision of law.

Navajo tribal constitution.

SEC. 6. In order to facilitate the fullest possible participation by the Navajo Tribe in the program authorized by this Act, the members of the tribe shall have the right to adopt a tribal constitution in the manner herein prescribed. Such constitution may provide for the exercise by the Navajo Tribe of any powers vested in the tribe or any organ thereof by existing law, together with such additional powers as the members of the tribe may, with the approval of the Secretary of the Interior, deem proper to include therein. Such constitution shall be formulated by the Navajo Tribal Council at any regular meeting, distributed in printed form to the Navajo people for consideration, and adopted by secret ballot of the adult members of the Navajo Tribe in an election held under such regulations as the Secretary may prescribe, at which a majority of the qualified votes cast favor such adoption. The constitution shall authorize the fullest possible participation of the Navajos in the administration of their affairs as approved by the Secretary of the Interior and shall become effective when approved by the Secretary. The constitution may be amended from time to time in the same manner as herein provided for its adoption, and the Secretary of the Interior shall approve any amendment which in the opinion of the Secretary of the Interior advances the development of the Navajo people toward the fullest realization and exercise of the rights, privileges, duties, and responsibilities of American citizenship.

Availability of Navajo tribal funds.

SEC. 7. Notwithstanding any other provision of existing law, the tribal funds now on deposit or hereafter placed to the credit of the Navajo Tribe of Indians in the United States Treasury shall be available for such purposes as may be designated by the Navajo Tribal Council and approved by the Secretary of the Interior.

Tribal council recommendations, etc.

SEC. 8. The Tribal Councils of the Navajo and Hopi Tribes and the Indian communities affected shall be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by this Act. In the administration of the program, the Secretary of the Interior shall consider the recommendations of the tribal councils and shall follow such recommendations whenever he deems them feasible and consistent with the objectives of this Act.

Payments to States under Social Security Act.

SEC. 9. Beginning with the quarter commencing July 1, 1950, the Secretary of the Treasury shall pay quarterly to each State (from sums made available for making payments to the States under sections 3 (a), 403 (a), and 1003 (a) of the Social Security Act) an amount, in addition to the amounts prescribed to be paid to such State under such sections, equal to 80 per centum of the total amounts of contributions by the State toward expenditures during the preceding quarter by the State, under the State plans approved under the Social Security Act for old age assistance, aid to dependent children, and aid to the needy blind, to Navajo and Hopi Indians residing within the boundaries of the State on reservations or on allotted or trust lands, with respect to whom payments are made to the State by the United States under sections 3 (a), 403 (a), and 1003 (a), respectively, of the Social Security Act, not counting so much of such expenditure to any individual for any month as exceeds the limitations prescribed in such sections.

49 Stat. 621, 628, 646.
42 U. S. C., Sup. III, §§ 303(a), 603(a), 1203 (a).
Post, pp. 548, 550, 553.

Joint Committee on Navajo-Hopi Indian Administration.

SEC. 10. (a) There is hereby established a joint congressional committee to be known as the Joint Committee on Navajo-Hopi Indian Administration (hereinafter referred to as the "committee"), to be composed of three members of the Committee on Interior and Insular Affairs of the Senate to be appointed by the President of the Senate, not more than two of whom shall be from the same political party, and three members of the Committee on Public Lands of the House of Representatives to be appointed by the Speaker of the House of Representatives, not more than two of whom shall be from the same political party. A vacancy in the membership of the committee shall be filled in the same manner as the original selection. The committee shall elect a chairman from among its members.

Function.

(b) It shall be the function of the committee to make a continuous study of the programs for the administration and rehabilitation of the Navajo and Hopi Indians, and to review the progress achieved in the execution of such programs. Upon request, the committee shall aid the several standing committees of the Congress having legislative jurisdiction over any part of such programs, and shall make a report to the Senate and the House of Representatives, from time to time, concerning the results of its studies, together with such recommendations as it may deem desirable. The Commissioner of Indian Affairs at the request of the committee, shall consult with the committee from time to time with respect to his activities under this Act.

Powers.

(c) The committee, or any duly authorized subcommittee thereof, is authorized to hold such hearings, to sit and act at such times and places, to require by subpena or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and to make such expenditures as it deems advisable. The cost of stenographic services to report such hearings shall not be in excess of 25 cents per hundred words. The provisions of sections 102 to 104, inclusive, of the Revised Statutes shall apply in case of any failure of any witness to comply with any subpena or to testify when summoned under authority of this subsection.

2 U. S. C. §§ 192–194.

Appointment and compensation of experts, etc.
42 Stat. 1488; 63 Stat. 972, 954.
5 U. S. C., Sup. III, §§ 1071–1153.
Post, pp 232, 262, 1100

(d) The committee is authorized to appoint and, without regard to the Classification Act of 1923, as amended, fix the compensation of such experts, consultants, technicians, and organizations thereof, and clerical and stenographic assistants as it deems necessary and advisable.

Appropriation authorized.

(e) There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this section, to be disbursed by the Secretary of the Senate on vouchers signed by the chairman.

Approved April 19, 1950.

be modified so as to apply to service performed by employees in positions covered by the Wisconsin retirement fund.

"(2) All employees in positions covered by the Wisconsin retirement fund at any time on or after January 1, 1951, shall, for the purposes of subsection (c) only, be deemed to be a separate coverage group; except that there shall be excluded from such separate coverage group all employees in positions to which the agreement applies without regard to this subsection.

"(3) The modification pursuant to this subsection shall exclude (in the case of employees in the coverage group established by paragraph (2) of this subsection) service performed by any individual during any period before he is included under the Wisconsin retirement fund.

"(4) The modification pursuant to this subsection shall, if the State of Wisconsin requests it, exclude (in the case of employees in the coverage group established by paragraph (2) of this subsection) all service performed in policemen's positions, all service performed in firemen's positions, or both."

Effective date.

SEC. 2. For the purposes of section 218 (f) of the Social Security Act (relating to effective dates of agreements), the amendment made by the first section of this Act shall take effect as of January 1, 1951.

Approved August 15, 1953.

Public Law 280 CHAPTER 505

AN ACT

August 15, 1953
[H. R. 1063]

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

State jurisdiction over criminal offenses.

"1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

"§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

"(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

Taxation of property, etc.

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

State jurisdiction over civil causes.

SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§ 1360. State civil jurisdiction in actions to which Indians are parties

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

Taxation of property, etc.

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

27000 O - 53 - 40

Repeal.

SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

Removal of legal impediment.

SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Consent of U. S. to other States.

SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

Public Law 281 — CHAPTER 506

August 15, 1953
[H. R. 3409]

AN ACT

To terminate certain Federal restrictions upon Indians.

Repeals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 467 and 2136 of the Revised Statutes (25 U. S. C., sec. 266) and section 2135 of the Revised Statutes (25 U. S. C., sec. 265), all of the said laws being laws which forbid the sale, purchase, or possession by Indians of personal property which may be sold, purchased, or possessed by non-Indians, are hereby repealed.

Livestock.
62 Stat. 759.

SEC. 2. (a) Section 1157 of title 18 of the United States Code, as amended, is further amended by striking the period at the end thereof and adding the following: ": *Provided*, That this section shall apply only to livestock purchased by or for Indians with funds provided from the revolving loan fund established pursuant to the Acts of June 18, 1934 (48 Stat. 984), and June 26, 1936 (49 Stat. 1967), as amended and supplemented, or from tribal loan funds used under regulations of the Secretary of the Interior, and to livestock issued to Indians as loans repayable 'in kind', and to the increase of all such livestock, and only until such time as such loans are repaid: *Provided further*, That it shall be the duty of any purchaser of Indian livestock to use reasonable diligence to ascertain that such livestock are not subject to such loans."

25 USC 461-509 passim.

Repeal.

(b) Section 1 of the Act of July 4, 1884 (23 Stat. 94, 25 U. S. C., sec. 195), is repealed.

Approved August 15, 1953.

Public Law 282 — CHAPTER 507

August 15, 1953
[H. R. 4508]

AN ACT

To authorize the sale of certain lands to the State of Oklahoma.

Oklahoma.
Conveyance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary

Arizona Revised Statutes Title 28. Transportation § 28-721. Driving on right side of roadway; driving on shoulder; exceptions

A. On all roadways of sufficient width, a person shall drive a vehicle on the right half of the roadway except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing the movement.

2. When the right half of a roadway is closed to traffic while under construction or repair.

3. On a roadway divided into three marked lanes for traffic under the rules applicable on the roadway.

4. On a roadway designated and signposted for one-way traffic.

B. On all roadways, a person driving a vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall drive the vehicle in the right-hand lane then available for traffic or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

C. In an age restricted community that is located in an unincorporated area of a county with a population of more than three million persons, a person may drive a golf cart or a neighborhood electric vehicle on a paved shoulder that is adjacent to a roadway or as close as practicable to the right-hand curb or edge of a paved roadway if there is no delineated paved shoulder.

APPENDIX — EXCERPTS FROM THE TOUR AND GUIDE SERVICES ACT AND REGULATIONS

Excerpts from Navajo Nation Tour and Guide Services Act, 5 N.N.C. § 2501 *et seq.* [formerly Tourist Passenger Services Act adopted November 2, 1972] and its associated regulations, which were in effect on September 21, 2004, and which provided that:

> § 2501. Permits
>
> A. No person, firm, association or corporation shall, either directly or indirectly, furnish, provide or conduct passenger transportation for hire, for the purposes of touring, visiting, sightseeing or like activities within the Navajo Nation unless such person, firm, association or corporation shall first obtain a permit from the Division of Economic Development of the Navajo Nation to perform such activities within the Navajo Nation.

Navajo Nation Tour and Guide Services Act, 5 N.N.C. § 2501A.

* * *

> **§ 2504. Operation without permit**
>
> A. Any person, firm, association or corporation who shall furnish, provide or conduct any of the prescribed activities without first obtaining and without having in its possession a valid permit therefor shall be

subject to exclusion under the provisions of 17 NNC § 1901 *et seq.* and with due process of law.

Navajo Nation Tour and Guide Services Act, 5 N.N.C. § 2504A.

* * *

THE NAVAJO NATION

RULES AND REGULATIONS

12/01/2003

NAVAJO NATION TOURIST PASSENGER SERVICE ACT

Navajo Nation Law (Title 5, Navajo Nation Code, § 2501 *et seq.*) provides for the regulation of tour operations within the jurisdictional limits of the Navajo Nation. This law gives the Navajo Nation specifi c authority to issue reasonable rules and regulations to implement this Act, and which rules and regulations are herein prescribed.

PURSUANT TO:

CHAPTER 1: PERMITS

A. Application

Any person(s) desiring to obtain a Tour Permit to conduct Tourist Passenger Services on the Navajo Nation must

fi rst apply to the Navajo Nation by submitting a complete application along with the listed supporting documents and permit fees in accordance with the Navajo Nation Tourist Passenger Service Act rules and regulations. The requirements are listed below.

B. Copy of Business License or Article of Incorporation

Each applicant shall furnish the Navajo Nation a true and correct copy of the Articles of Incorporation or Business license of company, or any other documented proof of business establishment and operation such as a Navajo Preference Certification, Internal Revenue Service Employer Identification Number, or Navajo Tax Commission Form 100.

C. Commercial General Liability Insurance

Upon application, proof of possession of a Commercial General Liability Policy which carries a minimum amount of $750,000 combined single limit coverage listing the Navajo Nation as Additional Insured. The certificate or copy of the policy shall be furnished to the Navajo Nation and the Insurance Agent's name, address, and telephone number shall be included for verification purposes.

* * *

F. Agreement between the Tour Company and the Navajo Nation

A contractual agreement shall be executed between the parties involved which will serve as the regulatory control. The agreement shall contain at a minimum the following information:

1. Terms and conditions of the Agreement and Permitted Area

2. Indemnification

3. Consent to Navajo Laws and Courts

    a. Preference in Employment

    b. Navajo Business Preference

4. Any special arrangements as negotiated between Permittee and Navajo Nation

G. Fee Schedule

At the time of approval of the application and prior to the issuance of the tour permit, a fee will be payable in the form of money order or cashier's check to the Navajo Nation (no personal checks), as follows:

1. Annual - Navajo	$1,000.00
2. Administrative - Navajo	$ 50.00

3. Annual - Non-Navajo	$3,000.00
4. Administrative - Non-Navajo	$ 50.00

* * *

CHAPTER 2: OPERATION OF TOUR SERVICE ON NAVAJO NATION

* * *

E. Vehicles Insured, Driver's License, Park Rules and Regulations, Employment Preference.

1. Vehicles and Vehicles Insured

Permittee and employees shall utilize only those passenger vehicles which are insured for such purposes and which vehicles are listed on the insurance certificate and filed with the application. Navajo Tribal Park employees and the Navajo Police and Rangers are authorized to question operators and/or owners of vehicles being used to transport tour passengers to insure that the vehicles are properly insured.

2. Driver's License

The tour vehicle operator shall be the holder of a valid Driver's License issued by the state in which the individual resides and shall have such license in his possession at all times when

he is operating a motor vehicle in the conduct of tour operations or services, and shall upon request or demand, display the same to any tribal offi cial, Navajo Police or Ranger.

* * *

Navajo Nation Tour and Guide Services Act, 5 N.N.C. § 2501 *et seq.* regulations, Chapter 1, A., B., C., F., and G., Chapter 2, E.

TOUR PASSENGER SERVICE
AGREEMENT VEHICLE TOURS

This Agreement is made and entered into this _____ day of _____ ___ , 200 , by and between the Navajo Nation, hereinafter called Permittor, and , hereinafter called Permittee.

WITNESSETH:

1) In consideration of the mutual covenants, terms and conditions herein set, and payment of fees pursuant to established schedules, Permittor does hereby grant Permittee authorization to operate a Tourist Passenger Service at prescribed locations on the Navajo Nation, beginning on January 1, 2004 or the date when Permit requirements have been satisfactorily met, whichever occurs later, and expiring on December 31, 2004.

2) Permittee agrees to be bound by the provisions set forth in the Navajo Nation Code, Title V, § 2501 et seq., and any rules, regulations, directives and guidelines promulgated in accordance to such law by the Navajo Nation. Permittee consents to the jurisdiction of the Navajo Nation Courts related to the activities under this Agreement on lands within the jurisdiction of the Navajo Nation.

Navajo Nation Tour and Guide Services Act, 5 N.N.C. § 2501 *et seq.* regulations, Tourist Passenger Service Agreement ¶¶ 1 and 2.

7 Navajo Nation Code

§ 204. Law applicable

D. Any matters not addressed by Navajo Nation statutory laws and regulations, Diné bi beenahaz'áanii or by applicable federal laws and regulations, may be decided according to comity with reference to the laws of the state in which the matter in dispute may have arisen.

(*available at* http://www.nnols.org/navajo-nation-code.aspx)