IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

BRYANT LAWRENCE RAY and
MARILYN RAY,

No. CIV 19-705 KG/JFR

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT CONCERNING APPLICATION OF LAW OF THE PLACE

Plaintiffs, by and through undersigned counsel, move this Court for partial summary judgment. Plaintiffs request a finding that this case is governed by the civil law of the Pueblo of Acoma. As grounds therefor, Plaintiffs state as follows:

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiffs Bryant and Marilyn Ray are both registered members of the Acoma Pueblo. *See* Deposition of Bryant Ray, 12:6-8

2. The medical care received by Plaintiff Bryant Ray from Dr. Christopher C. Cordes that forms the basis of Plaintiffs' Complaint was provided at the Acoma Cañoncito Laguna Indian Health Service Hospital. *See* Deposition of Dr. Cordes, 10:5-11

3. The Acoma Cañoncito Laguna Indian Health Service Hospital is located on The Pueblo of Acoma. *See* Answer (Doc 5) at page 1, paragraph 2 and foot note to paragraph 2

4. The Acoma Cañoncito Laguna Indian Health Service Hospital is operated by the Indian Health Service – U.S. Department of Health and Human Services ("HHS") *See id*. at page 2, paragraph 6

5. Dr. Cordes was at all relevant times a commissioned officer in the United States

HHS and a licensed optometrist practicing at ACL. *See* Complaint (Doc 1) at page 2, paragraph 7 and Answer (Doc 5) at page 2, paragraph 7

6. Dr. Cordes was at all relevant times acting within the scope of his employment. *See id*.

LEGAL ANALYSIS AND AUTHORITY

A. Partial Summary Judgment is Appropriate on the Issue of Which Law Applies.

A party may move for summary judgment that is "interlocutory in character." Fed. R. Civ. P. 56(c). Summary judgment is proper if there are no genuine questions of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Determining the proper substantive law to apply in an FTCA case is a question of law. *Richards v. United States*, 369 U.S. 1 (U.S. 1962). It is proper for this court to determine what substantive law applies to the specific facts presented in this FTCA case. *Richards v. United States*, 369 U.S. at 7-11.

B. The Applicable Law of the Place in this Matter is Acoma Tribal Law and the New Mexico Malpractice Act Cap on Damages Does Not Apply to Plaintiffs' Claims.

The New Mexico Malpractice Act cap on damages does not apply in this case. The Federal Tort Claims Act (FTCA) states that the government "shall be liable [for tort claims]…in the same manner and to the same extent as a private individual under like circumstances[.]" 28 U.S.C. § 2674. The FTCA "mandates application of [the law of the place] to resolve questions of substantive liability." *Cannon v. United States*, 338 F.3d 1183, 1192 (10th Cir. 2003). In *Cheromiah v. United States*, 55 F. Supp.2d 1295 (D.N.M. 1999), the Court held that Acoma tribal law was the "law of the place" to be applied to FTCA medical malpractice claims filed by Acoma and Laguna tribal members treated at the ACL hospital. *Id*. at 1305.

The Acoma Tribal Court has adopted, in its entirety, the Restatement 2d Torts "as a

guideline for medical malpractice claims..." *Louis v. United States*, Case No. 97 CV 24, pg. 14 (Court of the Pueblo of Acoma 1997). The legal definition of negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." Restatement (Second) of Torts §282 (Am Law Inst 1965). The Acoma Tribal Court has held that the New Mexico Medical Malpractice Act cap on damages "is repugnant to the traditions and customs of the Pueblo to adequately compensate injured parties." *Louis*, pg. 14. Since Acoma tribal law applies as the "law of the place", the New Mexico Medical Malpractice Act cap on damages clearly does not apply in Plaintiffs' case. *Id*.

1. **The plain language of the FTCA requires that Plaintiffs' claims be governed by Acoma Tribal Law**

Under the doctrine of sovereign immunity, "'the United States, as sovereign, is immune from suit save as it consents to be sued … , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Weaver v. United States*, 98 F.3d 518, 520 (10th Cir.1996) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). The threshold question in any suit in which the United States is a defendant, then, must be whether Congress has specifically waived sovereign immunity, and a plaintiff's recovery is limited by the express terms of the United States' waiver. *Louis v. United States*, 54 F.Supp.2d 1207, 1209 (D.N.M. 1999).

In this case, the FTCA sets the parameters of the United States' liability. Pursuant to the FTCA, the United States is made liable (within the scope of its waiver of sovereign immunity) for personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b)(1) (emphasis

added). The "place" where the negligent or wrongful acts and omissions alleged by Plaintiff against Defendant occurred was on the Pueblo of Acoma. Accordingly, Acoma tribal law, as opposed to the laws of the State of New Mexico, is the applicable law on which Plaintiffs' medical negligence claims should be governed.

The meaning of the phrase "the law of the place" was considered in *Hess v. United States*, where the question presented was what law applied in an FTCA wrongful-death action where death occurred on navigable waters within the territorial limits of the State of Oregon. *Hess v. United States*, 361 U.S. 314, 315 (1960). In *Hess*, the United States Supreme Court determined that because the "death and the wrongful act or omission which allegedly caused it occurred within the State of Oregon . . . liability must therefore be determined in accordance with the law of that place." *Id*. at 318. The Court further noted that, because the death occurred on navigable waters, Oregon law would require the determining court to look to maritime law. See *id*.

In rejecting the argument that death actually occurred on the dam on which the decedent had been working and, therefore, the applicable law was the law governing torts occurring on land, the Court explained:

> "It is clear . . . that the term 'place' in the Federal Tort Claims Act means the political entity, in this case Oregon, whose laws shall govern the action against the United States 'in the same manner and to the same extent as a private individual under like circumstances.' There can be no question but that Oregon would be required to apply maritime law if this were an action between private parties, since a tort action for injury or death occurring upon navigable waters is within the exclusive reach of maritime law."

Hess, 361 U.S. at 318 n.7 (emphasis added; internal citation omitted). the Court in *Hess* was quite explicit that "[i]t is clear . . . that the term 'place' in the [FTCA] means the political entity

…." *Id*. (emphasis added).

The plain language of the FTCA and "the phrase 'the law of the place' can only be interpreted to mean the law of a recognizable entity having jurisdiction over the site where the act occurred, which is not necessarily the 'law of the state.'" *Quechan Indian Tribe v. United States*, 535 F.Supp.2d 1072, 1103 (S.D.Cal. 2008). Such an interpretation is consistent with the Tenth Circuit's determination that "a tribe, even though physically located within the geographic boundaries of a state, is . . . a sovereign." *United States v. Barquin*, 799 F.2d 619, 621 (10th Cir. 1986). Further, tribes such as the Pueblo of Acoma, are recognized as political entities. As the Ninth Circuit has explained:

> "Indian tribes have been recognized, first by the European nations, later by the United States, 'as distinct, independent political communities' qualified to exercise powers of self-government, not by virtue of any delegation of powers, but rather by reason of their original tribal sovereignty." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 232 (1982 ed.) (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519, 8 L.Ed. 483 (1832)). Tribal sovereignty is of "a unique and limited character." *United States v. Wheeler*, 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978). The incorporation of tribes within the territory of the United States means that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance." *Id*. However, "until Congress acts, the tribes retain their sovereign powers." *Id*.

State of Montana v. Gilham, 133 F.3d 1133, 1135-36 (9th Cir. 1998). Thus, the "place" the Court must consider when determining the "law of the place" applicable to Plaintiffs' medical negligence claims is the political entity of The Pueblo of Acoma.

2. <u>Legal principles authorizing tribal jurisdiction to be asserted over non-Indians require that Plaintiffs' claims be governed by Acoma Tribal Law.</u>

A private person standing in the Government's shoes would be liable under Acoma tribal law for the acts and omissions alleged by Plaintiff against the United States in this case.

As a result, under the language of the FTCA, the laws of the Pueblo of Acoma apply to Plaintiff's claims. The question of when a private person is liable under tribal law was addressed by the United States Supreme Court first in *Montana v. United States*, 450 U.S. 544 (1981), and more recently in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). In *Montana*, the Supreme Court held that the Crow Tribe of Montana was without power to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe. Montana, 450 U.S. at 565. However, citing Indian tribes' "inherent sovereign power" to exercise certain forms of civil jurisdiction over non-Indians on reservations, the Court explained that

> "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Id. at 565-566 (internal citations omitted). In *Strate*, the Court further clarified that *Montana*

> "described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare."

Strate, 520 U.S. at 446.

In an FTCA case where the alleged negligence occurs in a health-care facility that is located on the reservation and operated by a federal agency (IHS) pursuant to an agreement with the tribe on whose land the facility sits, the United States clearly is engaged in activity that directly affects the tribe's political integrity, economic security, health, or welfare. *Cheromiah v. United States*, 55 F. Supp. 2d 1295, 1305 (D.N.M. 1999). The United States shares a special trust

relationship with Native Americans that is reflected in, among other things, the United States' obligation to provide Indians with high quality health care. The Ninth Circuit commented on this obligation when it said the following about the Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq*. ("IHCIA"):

> "Reviewing the text of the IHCIA and the relevant legislative history, one is struck by Congress' recognition of federal responsibility for Indian health care. In the language of the IHCIA itself, Congress declares that in order to fulfill its "special responsibilities and legal obligation to the American Indian people," the nation's policy is "to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy."

McNabb for McNabb v. Bowen, 829 F.2d 787, 792 (9th Cir. 1987) (quoting 25 U.S.C. § 1602)). Indeed, Congress has specifically found that "[f]ederal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people." 25 U.S.C.A. § 1601(a). Thus, when the United States, pursuant to the special trust relationship, undertakes to provide medical care for the native population and provides that care in a negligent manner, the United States unquestionably engages in activity that directly affects the tribe's health and welfare. *See Strate*, 520 U.S. at 446. Accordingly, Plaintiffs submit that their claims come within the second exception set forth in *Montana* and the Court must find that the law applicable to their claims is the law of the Pueblo of Acoma.

3. Notions of tribal sovereignty require that Plaintiffs' claims be governed by Acoma Tribal Law.

Application of tribal law in the circumstances of this case is appropriate. As the United States Supreme Court has explained,

> "Indian tribes occupy a unique status under our law. At one time

> they exercised virtually unlimited power over their own members as well as those who were permitted to join their communities. Today, however, the power of the Federal Government over the Indian tribes is plenary. Federal law, implemented by statute, by treaty, by administrative regulations, and by judicial decisions, provides significant protection for the individual, territorial, and political rights of the Indian tribes. The tribes also retain some of the inherent powers of the self-governing political communities that were formed long before Europeans first settled in North America."

Nat'l Farmers Union Ins. Companies v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985). Notwithstanding the federal government's "plenary" power, however, "a tribe is a sovereign entity. . . ." *Barquin*, 799 F.2d at 621; see also Kerr-McGee Corp. v. Farley, 915 F.Supp. 273, 276 (D.N.M. 1995) ("Indian tribes and the federal government are dual sovereigns."). The Supreme Court long ago discussed the unique relationship shared by the United States and the tribes in the context of determining whether the Cherokee Nation is a "foreign state" within the meaning of the United States Constitution. Answering the question in the negative, the Court explained that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence[, as] the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." *Cherokee Nation v. State of Ga.*, 30 U.S. 1, 16 (1831). That Indian tribes retain attributes of sovereignty over both their members and their territory is reflected in the federal government's longstanding policy of encouraging tribal self-government. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987) (internal citations omitted). It is this tribal self-government that, in turn, helps fuel a federal-tribal comity "aris[ing] out of mutual respect between sovereigns." *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991).

WHEREFORE, based on the foregoing, Plaintiffs respectfully request that the Court rule in their favor and hold that the law of the Pueblo of Acoma apply to this case for all purposes including but not limited to setting forth the measure of Plaintiffs' damages.

Respectfully submitted,

by: /s/ Joseph M. Romero

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I certify that a true copy of the foregoing pleading was filed and served upon opposing counsel via CM/ECF on the 14h day of December, 2020.

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