IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

BRYANT LAWRENCE RAY and
MARILYN RAY,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. CIV 19-705 KG/JFR

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant United States, by and through its undersigned counsel, respectfully responds in opposition to Plaintiffs' Motion for Partial Summary Judgment Concerning Application of Law of the Place (Doc. 35). As grounds therefor, Defendant states the following.

Introduction

Plaintiffs move for partial summary judgment, asking the Court to find this case is governed exclusively by the law of Acoma Pueblo. Plaintiffs assert that because Mr. Ray's alleged injuries occurred at an Indian Health Service (I.H.S.) hospital in Acoma, New Mexico, Acoma Pueblo provides the applicable law of the place to determine liability and damages. Under Plaintiffs' theory, if the Court awards damages, it should not apply the New Mexico Medical Malpractice Act damages cap, NMSA 1978 § 41-5-6, but rather Acoma tribal law which does not have a limit on damages. Plaintiffs' arguments rely heavily on *Cheromiah v. United States,* 55 F. Supp. 2d 1295 (D.N.M. 1999), a case that has been widely rejected since the opinion issued.

Plaintiffs' arguments are unavailing under current legal authorities which hold that state law, not tribal law, is "the law of the place" pursuant to 28 USC § 1346(b)(1). Federal courts in

this district and elsewhere have repeatedly found that the Federal Tort Claims Act ("FTCA") incorporates state law, not tribal law, in adjudicating cases that may arise on tribal lands. For these reasons, the Court should deny Plaintiffs' motion.

Plaintiffs' Statement of Undisputed Material Facts

Defendant admits Plaintiffs' Undisputed Material Fact Nos. 1-6, but disputes that these facts establish that Plaintiffs are entitled to judgment as a matter of law pursuant to Fed. R. Civ. P. 56(a).

Defendant's Statement of Additional Material Facts

A. Defendant denies that under the FTCA, the law of the place in this case is Acoma Pueblo. Answer, Doc. 5 at ¶28.

B. Defendant denies both that it is liable to Plaintiffs and that they are entitled to recover damages recognized by Acoma Pueblo law. Id.

C. Plaintiffs' claim for damages is limited to damages recoverable under 28 USC § 2674. Id., Second Affirmative Defense.

D. If Defendant is found liable, Plaintiffs are limited to the amount set forth in their administrative claims pursuant to 28 USC § 2675. Id., Third Affirmative Defense.

E. Plaintiffs' claim for damages is subject to the statutory cap of $600,000 under NMSA 1978 § 41-5-6(A), applicable to all acts of alleged medical malpractice in New Mexico occurring after April 1, 1995. Id., Fifth Affirmative Defense.

F. If Defendant was negligent, which is denied, pursuant to the FTCA, it would be liable in the same manner and to the same extent as a private individual under like circumstances. As such, the N.M. Medical Malpractice Act, NMSA 1978 § 41-5-1 *et seq*., applies directly or as a private party equivalent to the United States. Id., Thirteenth Affirmative Defense.

Legal Arguments

A. Summary Judgment Standard

Summary judgment shall only be granted if the record shows that: (1) there is no genuine dispute, (2) as to any material fact, and (3) the moving party is entitled to judgment. *See Beard v. Banks,* 548 U.S. 521, 529, 126 S. Ct. 2572, 2578, 165 L.Ed. 2d 697 (2006). A "genuine dispute" exists when a rational factfinder, who considers the evidence in the summary judgment record, could find in favor of the non-moving party. *Ricci v. DeStefano,* 557 U.S. 557, 586 (2009). A fact is "material" if it might affect the outcome of the case, such as when it hinges on the substantive law at issue. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Wright ex rel. Trust Co. of Kansas v. Abbott Laboratories, Inc.,* 259 F.3d 1226, 1231-32 (10th Cir. 2001).

The law of the place issue is material to determine the application of substantive law here. There is clearly a disputed issue which will determine how the court will decide liability and damages in this matter. As set forth herein, the Court should deny Plaintiffs' motion based on the disputed facts, as well as the current law in cases construing the provisions of the FTCA.

B. Waiver of Sovereign Immunity

It is well established that the United States, as sovereign, is immune from suit except to the extent that it waives its sovereign immunity and unless it consents to be sued. *Smith v. United States,* 507 U.S. 197, 205 (1993). The Federal Tort Claims Act waives sovereign immunity, and gives federal district courts jurisdiction with respect to claims,

> [f]or injury or loss of property, or personal injury or death 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 USC § 1346(b)(1) (Emphasis added.). The present issue before the Court is which body of law the Court will apply to decide this case, tribal law or State law.

The alleged medical negligence in this case occurred at the Acoma Cañoncito Laguna Service Unit Hospital ("ACL Hospital") located in Acoma, New Mexico, which is within the exterior boundaries of the Acoma Indian Pueblo. ACL Hospital is also situated within another sovereign, namely the State of New Mexico. So arises the conflict: whether civil laws of Acoma Pueblo or of New Mexico should apply in this case.

C. The law of New Mexico, not Acoma Pueblo law, should apply because "law of the place" in the FTCA means "law of the state."

Plaintiffs urge this Court to find that because they have alleged acts of negligence by government employees working at the ACL Hospital in Acoma Pueblo, New Mexico, substantive law does not apply to this case. Plaintiffs candidly admit that they want this court to apply Acoma tribal law to avoid the New Mexico Medical Malpractice Act cap on damages, NMSA 1978 § 41-5-6. Doc. 35 at 2-3. While Plaintiffs acknowledge that Defendant's liability is determined "in accordance with the law of the place where the act or omission occurred," 28 USC § 1346(b)(1), they argue that the "place" in this lawsuit is the Acoma Pueblo, not the State of New Mexico, and they seek application of Acoma civil law for the adjudication of this matter. Id. at 3-5.

Although Plaintiffs insist throughout their brief that "place" does not mean the "state," it is well established by the United States Supreme Court and other federal courts, including this district court, that "law of the place" in the FTCA means the "law of the state" and not the law of the tribal entity (or other political entity) located within a state and where the act or omission occurred. The Supreme Court recognized this principle and has never questioned it. *FDIC v. Meyer,* 510 U.S. 471, 478 (1994) ("[W]e have consistently held that § 1346(b)'s reference to

'law of the place' means law of the State – the source of substantive liability under the FTCA."); *Miree v. DeKalb County,* 433 U.S. 25, 29 n. 4 (1977); *See Rayonier, Inc. v. United States,* 352 U.S. 315, 319 (1957) ("[T]he test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred."); *see also, Franklin v. United States,* 992 F.2d 1492, 1495 (10th Cir. 1993); *Flynn v. United States,* 902 F.2d 1524, 1527 (10th Cir. 1990); *Brown v. United States,* 653 F.2d 196, 201 (5th Cir. 1981); *United States v. English,* 521 F.2d 63, 65 (9th Cir. 1975).

Other courts have reached the same conclusion, even when the alleged negligence occurred on Indian land located within a state. *See Champagne v. United States,* 40 F.3d 946 (8th Cir. 1994)(application of North Dakota law in FTCA case alleging that medical malpractice by I.H.S. led to suicide); *Goodman v. United States,* 2 F.3d 291 (8th Cir. 1993)(applying South Dakota law regarding duty owed in FTCA medical negligence case); *Kruchten v. United States,* 914 F.2d 1106, 1107 (8th Cir. 1990)(applying Minnesota law in FTCA claim concerning flood washout on man-made embankment on land held by United States in trust for Upper Sioux Indian Reservation); *Red Lake Band of Chippewa Indians v. United States,* 936 F.2d 1320 (D.C. Cir. 1991)(applying state law of proximate cause in FTCA case alleging failure to provide adequate law enforcement); *Seyler v. United States,* 832 F.2d 120 (9th Cir. 1987) (applying Idaho recreational use statute in FTCA suit involving motorcycle accident that occurred on a road maintained by Bureau of Indian Affairs); *Bryant v. United States,* 565 F.2d 650, 652-53 (10th Cir. 1977)(applying New Mexico law to FTCA action alleging negligence at BIA-run school on an Indian reservation.); *Muhammad v. United States,* 366 F.2d 298 (9th Cir. 1966)(Arizona law applied to FTCA action arising out of auto accident on Indian reservation),

cert. denied, 366 U.S. 959 (1967); *Louis v. United States,* 54 F. Supp. 2d 1207 (D.N.M. 1999)(Decided *before Cheromiah,* the district court applied New Mexico law in a FTCA action alleging medical negligence at I.H.S. hospital on Acoma Pueblo); *Bear Medicine v. United States,* 47 F. Supp. 2d 1172 (D. Mont. 1999)(applying Montana law regarding liability of contractor for injuries to sub-contractor's employee).

Plaintiffs assert that the FTCA requires the application of the "law of the place" to resolve questions of liability. They cite *Cannon v. United States,* 338 F.3d 1183, 1193 (10th Cir. 2003), a case involving damages to mining property caused by World War II munitions testing. (Emphasis added). However, Plaintiffs misconstrue the language in *Cannon* which said, "Because the FTCA mandates the *application of state law* to resolve questions of substantive liability, the question of whether a tort was permanent or continuous depends upon how state law would characterize the tort. Because the Cannons' property is located in Utah, we look to Utah state law to characterize the nature of the tort in this case." *Id*., citations omitted. (Emphasis added.) Thus, *Cannon* directs the courts in this Federal Circuit adjudicating FTCA claims to apply State law in considering liability and damages.

However, Plaintiffs proceed to argue that this court should follow *Cheromiah v. United States,* 55 F. Supp. 2d 1285 (D.N.M. 1999), in which the district court held that the United States' liability in a medical malpractice action arising at the ACL Hospital on Acoma Pueblo in New Mexico would be determined by referring to Acoma tribal law. *Id*. at 1305. In so deciding, Judge Vasquez rejected the reasoning in *Louis v. United States,* 54 F. Supp. 2d 1207 (D.N.M. 1999), another New Mexico case in which Judge Black held that the government's liability arising at the same I.H.S. hospital should be determined under New Mexico law. *Id*. at 1209-10. Considering the weight of all the legal authorities ruling against Plaintiffs' position, their reliance

on *Cheromiah* is misplaced and should not be followed by this court.

Furthermore, there is little support for Plaintiffs in FTCA cases arising on Indian land decided ***after*** *Cheromiah.* Courts have disagreed with its holding, which stands virtually alone in FTCA jurisprudence.[1] The Tenth Circuit, when presented with the question of whether Navajo law or Arizona law applied in a medical negligence case filed in federal court, did not ultimately decide the issue due to plaintiff's failure to disclose an expert. *Harvey v. United States,* 685 F.3d 939 (10th Cir. 2012).[2] The United States District Court in Arizona rejected the reasoning in *Cheromiah* that tribal law should apply under 28 USC § 1346(b)(1), in a case based on injuries sustained by a teenager during a dental procedure performed at Northern Navajo Medical Center, an I.H.S. hospital in Shiprock, New Mexico. *Bryant ex rel Bryant v. United States,* 147 F. Supp. 2d 953, 959 (D. Ariz. 2000) (finding the reasoning in *Cheromiah* unpersuasive and holding that the substantive law of New Mexico applied where acts causing injury occurred on tribal land located within the State of New Mexico); *see also Ben v. United States,* 2007 WL 1461626 (D. Ariz. May 16, 2007)(Arizona substantive law, not Navajo law, is the law of the place to govern the United States' liability in FTCA wrongful death action for failure to maintain right-of-way on Navajo land).

In the United States District Court in New Mexico, Judge Johnson also rejected *Cheromiah's* holding in deciding that Navajo tribal law did not apply to a subrogation claim

1 The only case to agree with *Cheromiah* after it was decided is *Quechan Indian Tribe v. United States,* 535 F. Supp. 2d 1072, 1103 (S.D. Cal. 2007)(Tribal law applied to Indian tribe's negligence claims in a FTCA action alleging that cultural resources were damaged by maintenance activities in right-of-way for electrical transmission line running across the reservation.)

2 In an appeal of summary judgment in a FTCA claim filed in the District of New Mexico alleging negligence at an Arizona I.H.S. hospital arising from an injury to Plaintiff's hand, the Tenth Circuit stated, "We need not decide whether the phrase 'law of the place' in the FTCA requires the application of Navajo law or Arizona law because the outcome is the same under both – Mr. Harvey's failure to provide expert evidence on the issues of injury, causation, negligence or wrongful act or omission rendered summary judgment appropriate on both his misdiagnosis and surgical malpractice claims under Navajo or Arizona law." *Harvey,* 950 F.3d at 950-951 (10th Cir. 2012).

plaintiffs brought under the FTCA seeking indemnification based on a settlement paid for a medical malpractice action against a health care facility operated by the Indian Health Service where the injured party was taken after being struck by a Fed Ex truck. *Federal Express Corp. v. United States,* 228 F. Supp. 2d 1267, 1268 (D.N.M. 2002). The court examined a series of FTCA cases and found that, "Plaintiffs ignored the overwhelming load of case law that has interpreted the term 'law of the place' to refer to the substantive law of the state in which the tort occurred" and concluded that the law of New Mexico governed plaintiffs' claims for subrogation and indemnification. *Id*. at 1268-69 (citations omitted).

In the most recent appellate decision to consider the question of which law is the "law of the place" in a medical negligence case arising at an I.H.S. facility on an Indian reservation, the Eighth Circuit held that state law, not tribal law, provides the substantive law to apply in FTCA claims pursuant to 28 USC § 1346(b)(1). *LaFramboise v. Leavitt,* 439 F.3d 792 (8th Cir. 2006). The court stated four reasons, which should guide this Court. First, it noted that "the plain meaning of the statute – '*the* law of *the* place' – indicates that Congress contemplated a single source of governing law." *Id*. at 794. The court noted Plaintiff's alternative reading of the statute "creates tension with the text, because it envisions that the laws of two places, the State and the tribal reservation, might be applicable. Understanding 'place' to mean 'State' where an act or omission occurs within a State, is consistent with the statute's use of the singular." *Id*. Second, the court recognized that "the most apposite precedents from the federal appellate courts support the view that 'place' means 'State.'" In support, the court cited a series of cases involving federal enclaves, including military bases, monuments, and national parks, which all hold that state law provides the "law of the place" for FTCA actions. *Id.* at 794-95 (citations omitted.) In further support of this reasoning, the court cited *Brock v. United States,* 601 F.2d 976 (9th Cir. 1979), a

case involving two states, in which "the Ninth Circuit concluded that 'place' refers to locality rather than jurisdiction." Id. at 795.

Third, the court found it "unlikely that Congress meant for the liability of the United States to depend on the laws of more than 550 tribal governments . . . given the administration problems that such an interpretation would engender." Id. The court cautioned that such an approach "would subject the United States to varying and often unpredictable degrees of liability, depending on the reservation that was the site of the occurrence" and that "in some instances, the difficulty in proving the existence and substance of any tribal law would be considerable." *Id*., citing *Louis v. United States,* 54 F. Supp. 2d 1207, 1210 n. 5 (D.N.M. 1999).

Fourth, the *LaFramboise* court repeated that "[the] FTCA carefully limits the conditions under which the United States subjects itself to liability, and the scope of waivers of sovereign immunity must be strictly construed." (citations omitted). The court thus rejected Plaintiff's argument[3] that the tribal court would have exclusive jurisdiction over a case brought by a tribal member against private parties arising at a medical facility. *Id*. at 795.

Except for *Cheromiah* and *Quechan,* every court that has considered an FTCA lawsuit based on events or acts on Native lands has applied the laws of the state where the land is located. Several of the cases noted *supra* are from this Circuit or District and provide clear guidance on how the FTCA "law of the place" statute should be applied. *See Bryant v. United States,* 565 F.2d 650 (10th Cir. 1977); *Louis v. United States,* 54 F. Supp. 2d 1207 (D.N.M. 1999); *Federal Express Corp. v. United States,* 228 F. Supp. 2d 1267 (D.N.M. 2002).

In *Cheromiah,* the district court reasoned that the Acoma tribe's law applied as the law of

3 Plaintiff contended that where a tribal court would have jurisdiction over a private person committing an alleged tort, *see Montana v. United States,* 450 U.S. 544, 565-66 (1981), then the "law of the place" for purposes of the FTCA is the law of the reservation. Plaintiff leaned heavily on *Cheromiah v. United States* to make this argument. *See LaFramboise,* 439 F.3d at 794.

the place because the Pueblo was a political entity with jurisdiction over private defendants sued for negligence on tribal land. *See Cheromiah,* 55 F. Supp. 2d at 1302. The court seemed to ignore what the plain meaning of the statute meant and chose tribal law. *Cheromiah* thus allows for the trial court to apply either state or tribal law, which does not square with what other courts have decided on this issue, nor does it comport with the plain meaning of the statute in which Congress intended, that the United States' liability should be determined by a singular set of laws: *the* law of *the* place, pursuant to 28 USC § 1346(b)(1). *See LaFramboise,* 439 F.3d at 794. Moreover, it would result in accepting the notion that the United States would be subject to varying and often unpredictable degrees of liability, depending on which of the hundreds of Native American reservations was the site of the occurrence. *See* Id. at 795. As such, there would be no clear standard "law of the place" to follow. To apply the holding in *Cheromiah* here would be a significant departure from all the courts that have considered this question for more than fifty years. This Court should decline to do so and deny Plaintiffs' motion.

D. The principle of tribal jurisdiction over non-Indians does not require Plaintiffs' claims to be decided by Acoma tribal law.

Plaintiffs further argue that a private person standing in Defendant's shoes would be liable under Acoma law for the acts and omissions they allege here. Under the FTCA language of 28 USC § 1346(b)(1), they posit, Acoma Pueblo law applies to Plaintiffs' claims. They rely on *Montana v. United States,* 450 U.S. 544 (1981), and *Strate v. A-1 Contractors,* 520 U.S. 438 (1997), two cases that outline Indian tribes' "inherent sovereign power" to regulate the conduct of non-Indians on tribal lands. Neither case directly pertains to FTCA claims arising on tribal lands.

Montana sets forth a general rule that, unless there is express authorization, a tribal court lacks civil jurisdiction over the conduct of non-members on the reservation. *Montana v. United*

States, 450 U.S. at 565 (1991). The Court noted two exceptions: the power to "regulate, through taxation, licensing or other means, the activities of non-members, who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases or other arrangements." *Id*. Second, the Court stated the tribe had the right "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 565-66. Neither of these exceptions is broad enough to cover a discrete negligent act by a federal employee on property controlled by the United States – in this case the Indian Health Service. Sixteen years later, in a case involving a motor vehicle accident on a highway that ran though reservation land, the Supreme Court reviewed the *Montana* decision, and held that "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of non-members exists only in limited circumstances." *Strate v. A-1 Contractors,* 520 U.S. at 446 (1997). The Court concluded that there is no federal statute or treaty that expressly authorizes tribal courts to exercise adjudicatory authority over the conduct of non-Indians occurring in a federal facility on tribal land. *See* Id. at 453. Thus, neither of these two cases should control here.

As noted above, the Eighth Circuit rejected the very argument now advanced by Plaintiffs regarding inherent tribal sovereignty. *See LaFramboise,* 439 F.3d at 795. The Eighth Circuit noted that plaintiff's argument was without merit because the Supreme Court "repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian Country." *Id*., citing *Three Affiliated Tribes v. Wold Eng'g, P.C.,* 467 U.S. 138, 148 (1984). The *LaFramboise* court further explained that "the choice of law question does not depend on whether a state court or tribal court would have civil

authority over and action against private parties." *Id*. at 795. The court reiterated that *Brock v. United States* held "[t]he identification of the 'law of the place' turns on the territorial jurisdiction of within which the allegedly tortious act or omissions occurred," and "it is only after 'the place' has been determined that the government shall become liable as a private claimant would become liable under state law." *Id*. at 795-96, citing *Brock,* 601 F.2d at 980.

So too here. This Court should reject Plaintiffs' arguments that Acoma tribal law applies pursuant to the FTCA private person analog. Along with the majority of other courts to address this issue, the Court should conclude that when an alleged negligent act occurs within the territorial boundaries of a tribal reservation, such as within both the Acoma Pueblo and the State of New Mexico, the law of the place under the FTCA is the law of the State of New Mexico.

E. Tribal sovereignty does not require that Plaintiffs' claims must be governed by Acoma law, nor is this principle germane to the issue before the Court.

Plaintiffs' final argument is that tribal sovereignty requires the Court to apply Acoma tribal law. The general notion of tribal sovereignty does not mandate the result that Plaintiffs request here, nor is it relevant to the issue here.

Plaintiffs cite *United States v. Barquin,* 799 F.2d 619, 621 (10th Cir. 1986), to assert that a Native tribe is a sovereign though located within state boundaries. In fact, the *Barquin* court said, "a tribe though physically located within the geographic boundaries of a state, is not a 'local' government agency" for purposes of construing application of the federal bribery statute at issue. Id. *Barquin* held that,

> Congress did not include Indian tribes or their business councils within the ambit of 18 USC § 666. Moreover, the narrowly drawn definitions contained within the section exclude it from the category of federal crimes which are applicable to members of a tribe. We are therefore compelled to observe, if it is the intent of Congress to include tribes within the ambit of §666, it must do so with specificity.

Barquin, 799 F.2d at 621-22. The same rationale could be applied to the FTCA "law of the

place" language in § 1346(b). If Congress had intended for tribal law to be included there, it would have explicitly said so.

Plaintiffs also note that Indian tribes and the federal government are dual sovereigns, citing *Kerr-McGee Corp. v. Farley,* 915 F.Supp. 273 (D.N.M. 1995), and that federal-tribal comity "arises out of mutual respect between sovereigns," citing *Smith v. Moffett,* 947 F.2d 442 (10th Cir. 1991). While these select principles underlying tribal sovereignty may be true, they do not address the "law of the place" question before the Court. If anything, by noting these various principles, Plaintiffs are overstating the ambit of tribal law and tribal civil jurisdiction. For the reasons argued in Section C, *supra,* Plaintiffs' concluding arguments are also without merit. Their arguments regarding the relationship between and among the United States, the states and tribal sovereigns are not relevant to the issues they set forth in their motion. The present motion pertains to what substantive law this Court will apply in deciding this lawsuit brought pursuant to the Federal Tort Claims Act. The plain language of the FTCA and the cases discussed herein that construe the "law of the place" statue, 28 USC § 1346(b)(1), all lead to the inexorable conclusion that New Mexico substantive law, not Acoma tribal law, is the proper law for this Court to apply. Accordingly, the Court should disregard Plaintiffs' final arguments.

WHEREFORE based on the foregoing points and legal authorities, Defendant United States respectfully requests this Court to deny Plaintiffs' motion in its entirety and issue an order stating that New Mexico substantive law is the "law of the place" in this case.

Respectfully submitted,

FRED J. FEDERICI
Acting United States Attorney

/s/ Roberto D. Ortega 1/21/21
ROBERTO D. ORTEGA
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, New Mexico 87103
(505) 346-7274
Roberto.ortega@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 21, 2021, I filed the foregoing pleading electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means as more fully reflected on the Notice of Electronic Filing:

Joe@romerolawnm.com
joe@romeroandwinder.com

Filed Electronically January 21, 2021
ROBERTO ORTEGA
Assistant United States Attorney