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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Annette Mattia, et. al., Plaintiffs, vs. United States of America, et al., Defendants.	**CV-24-00252-TUC-RM** **DEFENDANT UNITED STATES OF AMERICA'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

Defendant United States of America (the "United States") hereby replies in support of its Motion to Dismiss (Doc. 11). This reply is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

Plaintiffs concede the following: (1) the United States is the only proper defendant to all claims brought pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq*. ("FTCA"); (2) they cannot recover an award of punitive damages against the United States under the FTCA; and (3) the Estate of Raymond Mattia (the "Estate") is not a proper party to the wrongful death claim (Count Six). The United States respectfully requests the Court enter an Order of Dismissal that is consistent with Plaintiffs' concessions.

For the reasons set forth in the Motion to Dismiss and this reply, the Court should

also dismiss the following claims for the independent reasons noted: (1) all claims asserted by the Estate because it lacks a duly appointed personal representative—a fact admitted by Plaintiffs—and an estate can only act through a duly appointed personal representative; (2) all FTCA claims asserted by the Estate seeking an award of pre-death pain and suffering because such damages are expressly barred by the Arizona survival statute; (3) the negligence claims asserted by the Estate because they are based on allegations of intentional use of force; (4) the aggravated negligence claim asserted by the Estate because no such claim exists under Arizona law; and (5) Annette Mattia's separate claim for intentional infliction of emotional distress ("IIED") because (a) she did not present her claim in accordance with 28 U.S.C. § 2675(a) and (b) the factual allegations in the Complaint are insufficient to state an IIED claim.

II. The Estate's Claims.

A. Plaintiffs Admit the Estate Lacks a Personal Representative.

FTCA actions are governed by the "law of the place" where the act or omission occurred. 28 U.S.C. § 1346(b)(1). Two district courts in this district have rightly determined that the "law of the place" is the law of the state where the act or omission occurred irrespective of the boundaries of any reservation land. *Ben v. United States*, No. CV 04-1850-PCT-PGR, 2007 WL 1461626, at *2 (D. Ariz. May 16, 2007); *Bryant ex. rel. Bryant v. United States*, 147 F.Supp.2d 953 (D. Ariz. 2000). Courts from other jurisdictions have "consistently reached the same conclusion." *Ben*, 2007 WL 1461626, at *2 (collecting cases from other jurisdictions). Thus, the laws of the State of Arizona apply.

The residual question is whether the laws of the State of Arizona permit the Tohono O'odham National Tribal Court (the "Tribal Court") to appoint a personal representative of the Estate. Plaintiffs acknowledge that A.R.S. § 14-3103 provides that a valid personal representative appointment requires an "order of the court or statement of the [probate] registrar." However, Plaintiffs argue that the Tribal Court is the court who has authority to appoint a personal representative because A.R.S. § 14-1301 provides: "[t]his title does not apply to property of Indians *within the jurisdiction of their tribal courts* or to lands held in trust by the United States for Indians." (emphasis added).

While § 14-1301 would, by its express language, except property of the Estate that is within the jurisdiction of the Tribal Court from the provisions of title 14 of the Arizona Revised Statutes, it is a distinction without a difference because Plaintiffs do not dispute that: (1) an estate can only act through a duly appointed representative as a matter of law; and (2) a personal representative has not yet been duly appointed to act on behalf of the Estate, whether by an Arizona probate court, the Arizona probate registrar or the Tribal Court. Thus, Plaintiffs' assertion that they filed a petition with the Tribal Court *on an unspecified date* seeking the appointment of a personal representative does not cure the Complaint's deficiency in this regard. *See Ader v. Est. of Felger*, 375 P.3d 97, 104-05 (App. 2016) ("An estate . . . has no capacity to bring or defend a lawsuit. . . . Simply put, an estate cannot 'act.' Rather, it can only sue and be sued through its personal representative, who 'acts' on behalf of the estate.").

It is noteworthy that Plaintiffs do not seek to stay this litigation pending resolution of their petition by the Tribal Court. Rather, Plaintiffs suggest this Court should simply allow the Estate's facially deficient claims to proceed and grant them a "standing" right to amend their Complaint on an unknown date in the future. The Court should not allow the Estate's claims to remain absent a duly appointed personal representative to maintain those claims.

B. An Award of Damages for Pre-Death Pain and Suffering is Impermissible for FTCA Survival Claims Irrespective of Case Law Governing Civil Rights Claims.

Plaintiffs agree that "the plain text of [A.R.S. § 14-3110] does preclude pre-death pain and suffering" for survival claims. Doc. 16 at 21-22. Plaintiffs argue, however, that the statutory bar on pre-death pain and suffering damages is unenforceable because there is a body of case law recognizing such unenforceability in *civil rights actions brought under 42 U.S.C. § 1983*. Plaintiffs boldly assert that the distinction between § 1983 claims and FTCA claims is "inconsequential." Doc. 16 at 9:15-28. The distinction between these claims is not inconsequential since state law governs FTCA claims (with certain recognized exceptions) and federal law governs constitutional tort claims. The civil rights cases cited by Plaintiffs are inapposite. Plaintiffs have not cited (and cannot cite) a single case recognizing that the damage limitation provision in A.R.S. § 14-3110 does not apply in FTCA actions.

Arizona law is clear that a "decedent's personal injury action may be asserted by the personal representative of [his] estate, on behalf of the estate, provid[ed] that 'damages for pain and suffering of such injured person *shall not* be allowed.'" *Robbins v. United States*, No. CIV03-1224PCT-JAT, 2006 WL 359948, at *6 (D. Ariz. Feb. 14, 2006) (quoting A.R.S. § 14–3110) (emphasis added). "The only way that [a] [p]laintiff can recover non-economic damages [under these circumstances] is to assert a claim for wrongful death[.]" *Id*. There is nothing in the FTCA that changes Arizona law in this regard, and Plaintiffs have cited no case law construing the FTCA in a way that would allow them to circumvent the survival statute.

Plaintiffs cannot rely on § 1983 case law—or their *Bivens* claims which are not the subject of the Motion to Dismiss—to alter the enforceability of Arizona law under the FTCA. Relatedly, in *Est. of Madden by Madden v. Lockhart*, the plaintiffs asserted both a *Bivens* claim for an alleged Eight Amendment violation and an FTCA claim for wrongful death. No. 03-CV-346 TUC JMR, 2009 WL 10707940, at *1 (D. Ariz. Mar. 17, 2009). The district court expressly recognized that the plaintiffs could not recover for the decedent's pre-death pain and suffering under their FTCA claim. *Id*. at *6, n. 7 ("Plaintiffs appear to argue that the negligence of Defendants caused injury to Madden in the form of unnecessary and prolonged suffering and an earlier death. These claims must also be dismissed, as Arizona law provides that damages shall not be allowed for pain and suffering upon the death of the injured person, a prohibition that extends to Madden's estate as well.") (citing A.R.S. § 14-3110).

The United States requests the Court enter an order that, at a minimum, limits damages available for any survival claim to those sustained by Mr. Mattia during the time between his initial injury and death and excludes any damages for pain and suffering.

C. The Estate's Negligence Claims.

Arizona law is clear that "negligence and intent are mutually exclusive grounds for liability" and, with respect to use of force, are inconsistent under Arizona law. *Ryan v. Napier*, 425 P.3d 230, 236 (2018). Thus, "[i]n Arizona, plaintiffs cannot base a negligence claim on an intentional use of force nor on a law enforcement officer's negligent "evaluation" of whether to intentionally use force." *Liberti v. City of Scottsdale*, 816 F. App'x 89, 91 (9th Cir.

2020) (quoting *Ryan*, 425 P.3d at 236) (some quotations omitted).

Plaintiffs argue that scrutiny of the negligence claims based on *Ryan* would be premature because "it is not known whether each Doe BOP Agent intentionally or unintentionally fired his or her weapon." However, the allegations in Plaintiffs' Complaint, which are accepted as true for purposes of Rule 12(b)(6), clearly allege that the agents *intentionally* used force. *See, e.g.,* Doc. 1 at ¶¶ 94, 98-100, 113, 118, 120, 126 and 131. In fact, nowhere in their Complaint did Plaintiffs allege that federal law enforcement agents discharged their firearms after "the original gunshot rang out because of an unintentional fear response" or because "one of the Doe BOP Agent's shot caused others to fire their weapons involuntarily[,]" as hypothesized in Plaintiffs' response. Both negligence claims (simple and aggravated) should be dismissed for this reason.

Additionally, the aggravated negligence claim should be dismissed for the additional and independent reason that Arizona law does not recognize aggravated negligence as a separate cause of action. Indeed, the concept of aggravated negligence is virtually absent from the general framework of Arizona personal injury law and only exists for limited purposes in extremely narrow contexts. Plaintiffs' apparent misunderstanding of these limited contexts is the very reason Plaintiffs' reliance on the cases cited in their response is misplaced.

In support of their argument that Arizona recognizes a separate cause of action for aggravated negligence, Plaintiffs cite a pattern jury instruction titled "Willful or Wanton Conduct (Aggravated Negligence)," and a few cases discussing the concepts of "willful or wanton conduct" and gross negligence. However, none of the cases cited by Plaintiffs recognize aggravated negligence as a separate cause of action. Rather, those cases discuss comparative fault and statutory (qualified) immunity cases.

For example, in *Williams v. Thude*, 934 P.2d 1349 (Ariz. 1997), the plaintiffs did not assert, and the court did not recognize, a claim for aggravated negligence. *Williams for & on Behalf of Dixon v. Thude*, 885 P.2d 1096, 1098 (Ariz. App. 1994)).[1] Rather, the parties had a dispute over a jury instruction regarding "willful or wanton" conduct under the Arizona

[1] The Arizona Court of Appeals' decision sets forth the claims asserted.

comparative fault statute, A.R.S. § 12-2505. *Id*. at 1102-1104 (emphasis added). The issue before the Supreme Court of Arizona involved whether the trial court had given a jury instruction that appropriately characterized the effect of the limiting language in the comparative fault statute. *Williams*, 934 P.2d at 1351 ("At most, we deal here with gross or wanton contributory negligence[.]"). As another example, in *Armenta v. City of Casa Grande*, 71 P.3d 359 (Ariz. App. 2003), the appellate court addressed issues concerning the scope of premises liability under a recreational use immunity statute, A.R.S. § 33-1551(A), which includes language regarding willful, malicious or grossly negligent conduct. Thus, *Armenta* does not recognize a separate cause of action for aggravated negligence, and instead addresses gross negligence in the context of the recreational use immunity statute. 71 P.3d at 364-65. The remaining cases cited by Plaintiffs also do not support their arguments. *See Walls v. Arizona Dep't of Pub. Safety*, 826 P.2d 1217 (Ariz. App. 1991) (discussing gross negligence in the context of qualified immunity under A.R.S. § 12–820.02); *see also Luchanski v. Congrove*, 971 P.2d 636 (Ariz. App. 1998) (same); *see also Lyon v. Helton*, 2022 WL 1788565 (Ariz. App. June 2, 2022) (discussing gross negligence in the context of the immunity provided under 42 U.S.C. § 14503(a)(3) and under a condominium's CC&Rs). The Court should dismiss the negligence claims for these reasons.

III. Annette Mattia's Separate and Distinct IIED Claim.

A. Annette Mattia Did Not Comply with 28 U.S.C. § 2675(a).

Ms. Mattia admits that an FTCA claimant must present her claim to the appropriate federal agency for determination pursuant to and in compliance with § 2675(a) and a claim is deemed presented for purposes of § 2675(a) *only if* a party submits: "(1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, *and* (2) a sum certain damages claim." Doc. 16 at 3:11-14 (*quoting Blair v. IRS*, 304 F.3d 861, 864 (9th Cir. 2002) (emphasis added)). These undisputed claim presentation requirements are jurisdictional. *Castro v. United States*, No. 23-15841, 2024 WL 2892438, at *1 (9th Cir. June 10, 2024) (citing *Avery v. United States*, 680 F.2d 608, 611 (9th Cir. 1982)).

Ms. Mattia argues, however, that she satisfied the claim presentation requirements

based on a letter sent by Plaintiffs' counsel to Customs and Border Protection dated November 15, 2023 (the "Notice of Claim"), which included an accompanying Standard Form 95 (the "SF-95"). *See* Doc. 16-1. As discussed below, neither the Notice of Claim nor the SF-95 satisfies the claim presentation requirements in § 2675(a).

1. Neither the Notice of Claim Nor the SF-95 Mentions Ms. Mattia's Separate and Distinct IIED Claim or Her Alleged Injury.

The Notice of Claim expressly and unequivocally provides that it and the accompanying SF-95 are "intended to provide notice . . . that the siblings and children of Raymond Mattia are filing a tort claim against Customs and Border Protection (CBP) for the *wrongful death of Raymond Mattia*." Doc. 16-1 at 2 (emphasis added). The Notice of Claim and SF-95 each contain numerous factual allegations purporting to describe the encounter between federal law enforcement agents and *Mr. Mattia*. Doc. 16-1 at 2-3 and 5. However, neither the Notice of Claim nor the SF-95 contains a single factual allegation regarding an encounter between federal law enforcement agents and Ms. Mattia.

In an attachment to the SF-95, Plaintiffs again included numerous factual allegations purporting to describe the encounter between federal law enforcement agents and *Mr. Mattia*. Doc. 16-1 at 7-8. Based on these allegations, Plaintiffs gave the United States notice that Plaintiffs believed the federal law enforcement agents' actions *with respect to Mr. Mattia* "violated Arizona assault, battery, and wrongful death laws. . . . [and] further violated the Unites States Constitution because they involved, at least, an unlawful seizure and excessive force." Doc. 16-1 at 8. Additionally, in the "nature of injury" section of Plaintiffs' attachment to their SF-95, Plaintiffs described their claimed injury as the loss associated with the death of Mr. Mattia, not the intentional inflectional of emotional distress vis-à-vis Ms. Mattia. *Id*.

Ms. Mattia cited *Avery v. United States*, 680 F.2d 608 (9th Cir. 1982), for the proposition that even "a skeletal claim form" suffices for purposes of satisfying the notice of claim requirements. However, the Ninth Circuit expressly stated in *Avery* that even a "skeletal form" must contain the "elements of notice of [the] *accident and injury* and a sum certain representing damages . . . to overcome an argument that jurisdiction is lacking." 680 F.2d at

610. Here, there is no mention in the Notice of Claim or SF-95 that Ms. Mattia resided in the vicinity of Mr. Mattia's home or that she suffered severe emotional distress because she overheard the shooting and/or speculated that bullets might hit her home, as now alleged in the Complaint.[2] There is also no mention in the Notice of Claim or SF-95 that law enforcement agents took any action whatsoever, whether intentional or unintentional, with respect to persons residing in the vicinity of Mr. Mattia's home, such as Ms. Mattia.

Ms. Mattia also cited *Broudy v. United States*, 722 F.2d 566 (9th Cir. 1983), as support for her argument that she satisfied the notice of claim requirements. *Broudy* is distinguishable from and is not instructive in this case. In *Broudy*, the Ninth Circuit considered the sufficiency of the plaintiff's administrative claim which alleged injury stemming from exposure to radiation. 722 F.2d at 567-68. Mr. Broudy's surviving spouse presented the notice of claim after he died from the disease identified in the notice of claim. *Id*. The Ninth Circuit found that the plaintiff's notice of claim sufficiently "state[d] the location and date of the accident, the nature and extent of the injury, the dollar amount of the claim and a description of how the accident occurred" and rejected the defendant's argument that the plaintiff's administrative claim did not give sufficient notice of a tort stemming from the government's alleged failure to warn Mr. Broudy about the dangers associated with radiation exposure post-service. *Id*.; *see also Shipek v. United States*, 752 F.2d 1352, 1355 (9th Cir. 1985) (noting that the plaintiff's notice of claim in *Broudy* provided information that "spann[ed] a time period from decedent's first exposure to radiation until his death").

Broudy is distinguishable for multiple reason. First, this Court is not being asked to decide whether giving notice of the shooting could be construed as giving notice of a claim arising from a duty that arose in the future as a result of the shooting (such as the failure to warn post-service in *Broudy*). Second, unlike the plaintiff in *Broudy*, Ms. Mattia did not submit an administrative claim that describes the facts and circumstances surrounding her individual IIED claim, as opposed to the shooting generally. As stated above, there is no

[2] Ms. Mattia did not allege in her Complaint or argue in her response that any bullets actually hit her home or that federal law enforcement agents even fired in the direction of her home.

mention in the Notice of Claim or SF-95 that Ms. Mattia lived near Mr. Mattia, that she was harmed in any way by virtue of her living near Mr. Mattia, that she was inside her home during the shooting, that she overheard the shooting, that she observed the shooting, or that during the shooting she speculated bullets might hit her home. Additionally, there is also no mention in the Notice of Claim or SF-95 that federal law enforcement agents took any action whatsoever—much less intentional—with respect to Ms. Mattia.

To properly present an IIED claim under § 2675(a), a claimant must, at a minimum, notify the appropriate federal agency that she suffered emotional distress in the first instance. *See*, *e.g.*, *Goss v. United States*, 353 F. Supp. 3d 878, 885 (D. Ariz. 2018) ("By specifically seeking compensation for emotional distress, Plaintiff placed the government on notice of his emotional distress claim."). Here, Ms. Mattia did not make any attempt in the Notice of Claim or SF-95 to notify the appropriate federal agency that she suffered any form of emotional distress or that she was the subject or target of any intentional acts committed by federal law enforcement agents. At most, the Notice of Claim identified her as being one of Mr. Mattia's siblings seeking to recover *for Mr. Mattia's death*. Doc. 16-1 at 3-4.[3] Ms. Mattia did not comply with the first requirement of § 2675(a), and the Court should dismiss her IIED claim for lack of administrative exhaustion.

2. Neither the Notice of Claim Nor the SF-95 Demands a Sum Certain for Ms. Mattia's Separate and Distinct IIED Claim.

Although Plaintiffs admitted in their response that Ms. Mattia was required to demand a "sum certain" to satisfy the requirements of § 2675(a) (*see* Doc. 16 at 3:13-14), they did not identify any sum certain demanded by her. It is also not mentioned in the Complaint.

The Notice of Claim provides that "Mr. Mattia's death has caused immeasurable grief and loss by his family. . . [and] [h]is family seeks a just settlement from CBP to account for

[3] The mere fact that Ms. Mattia was identified in the Notice of Claim as being a relative of Mr. Mattia does not satisfy the presentment rule for purposes of her individual claim. *See*, *e.g.*, *Saccuci v. United States*, No. CV-07-1277-PHX-SRB, 2008 WL 11338797, at *4-6 (D. Ariz. June 19, 2008) (dismissing wife's loss of consortium claim for lack of administrative exhaustion because although she was identified as a "wife" on each of her husband's three notices of claim, which referenced "consortium of wife," the notices of claim did not expressly describe her loss of consortium, as opposed to her husband's).

this loss and they demand $15,000,000 . . .” Doc. 16-1 at 4 (emphasis added). Thus, the Notice of Claim demanded $15,000,000 as compensation for Mr. Mattia’s death and did not specify that any portion thereof was demanded for a separate and distinct IIED claim by Ms. Mattia. The SF-95 clarifies that of the $15,000,000 demanded, $1,000,000 was demanded for “personal injury” and $14,000,000 was demanded for “wrongful death.” Doc. 16-1 at 5 (§§ 12(b)-(d)). Although not entirely clear, the attachment to the SF-95 appears to further clarify that the $1,000,000 demanded for “personal injury” was for Mr. Mattia’s alleged pre-death injuries because it provides that “[t]his claim seeks recovery . . . for Mr. Mattia’s *own* injuries before he died . . .” Doc. 16-1 at 8 (emphasis added). As such, neither the Notice of Claim nor the SF-95 demands a specific sum certain for Ms. Mattia’s purported IIED claim.

Although not stated in the response, Ms. Mattia may be attempting to rely on the figures included in the SF-95 as evidence of her individual compliance with the sum certain requirement. However, any such reliance by Ms. Mattia would be misplaced because the Complaint includes multiple FTCA claims asserted by multiple claimants and neither the Notice of Claim nor the SF-95 identifies the sum certain demanded by each claimant for their respective claim(s). As explained by the circuit court in *Turner ex rel. Turner v. United States*: “in multiple claimant actions under the FTCA, each claimant must *individually* satisfy the jurisdictional prerequisite of filing a proper claim. If the claimant fails to provide a sum certain within the claim, the administrative claim fails to meet the statutory prerequisite . . .” 514 F.3d 1194, 1200 (11th Cir. 2008) (internal citations and quotations omitted and emphasis added). Thus, “[w]here separate claims are aggregated under the FTCA, the claimant must present the government with a definite damage amount for *each* claim.” *Keene Corp. v. United States,* 700 F.2d 836, 842 (2d Cir.1983) (emphasis added). The same is true when a single claimant is asserting multiple claims and fails to identify the specific amount demanded for one of the claims. *See Blair v. I.R.S.*, 304 F.3d 861, 865-69 (9th Cir. 2002) (finding proper exhaustion of a claim for lost wages but not a claim for medical expenses because the notice of claim did not specifically set forth a sum certain for the claimed medical expenses).

Under these circumstances, dismissal of Ms. Mattia’s IIED claim is appropriate for

lack of exhaustion of administrative remedies. *See Castro*, 2024 WL 2892438, at *2 (affirming summary judgment in favor of the United States on the plaintiffs' personal injury claims because § 2675(a) required a "specific valuation of their personal injury claims"); *see also Caidin v. United States*, 564 F.2d 284, 287 (9th Cir. 1977) (holding that a sum certain demanded for a class of plaintiffs did not satisfy § 2675 for the plaintiff as an individual claimant and the plaintiff could not rely on the aggregate amount demanded for the class for his individual claim). Ms. Mattia did not make any attempt in the Notice of Claim or SF-95 to demand a sum certain for her IIED claim. Therefore, she did not comply with the second requirement of § 2675(a), and the Court should dismiss her IIED claim for lack of administrative exhaustion.[4]

B. Ms. Mattia Failed to State an IIED Claim.

The Court must evaluate Ms. Mattia's IIED claim based on the allegations contained in the Complaint, not the numerous assertions included in Plaintiffs' response. In the Complaint, Ms. Mattia alleges that she suffered emotional distress because she "overheard the shooting" while she was "in her home[,]" which is "next to" Mr. Mattia's home. Doc. 1 at ¶¶ 71-73. As noted in the Motion to Dismiss, Ms. Mattia admitted in the Complaint that rounds were fired in the direction of Mr. Mattia's home, not her home. *See*, *e.g.*, Doc. 1 at ¶ 124 and ¶ 117. Ms. Mattia did not allege in the Complaint that rounds were fired in "close proximity" to her, as asserted in the response, or allege any other facts that would suggest federal law enforcement agents *intentionally* placed her in any danger when they interacted with Mr. Mattia outside his home. *See*, *e.g.*, Doc. 1 at ¶ 118 ("Defendants intended to cause, and did cause, Mr. Mattia to experience . . . emotional distress[.]") and ¶ 122 ("Defendants' actions were a substantial factor in causing harm to *Mr. Mattia*[.]") (emphasis added). Based on the factual allegations in the Complaint, Ms. Mattia has not stated an IIED claim.

[4] Assuming *arguendo* the Court does not dismiss Ms. Mattia's IIED claim, the Court must explain what portion of the amount included in the SF-95 relates to Ms. Mattia's separate and distinct IIED claim. This is so because in an FTCA action, a claimant cannot recover damages in excess of the sum certain demanded in the administrative claim. 28 U.S.C. § 2675(b). It's unclear how the Court could complete such apportionment because Plaintiffs did not offer an apportionment methodology in their response and there is absolutely nothing in the Notice of Claim or SF-95 that would instruct the Court how to do so.

IV. Conclusion.

For the foregoing reasons and the reasons set forth in the Motion to Dismiss, the United States respectfully requests the Court dismiss all claims asserted against it except for the wrongful death claim asserted by Mr. Mattia's surviving adult children.

Respectfully submitted September 16, 2024.

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