

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEW MEXICO

LYDELL MARVIN-BEGAY

Plaintiff,

No. CV 15-00358 LAM/SCY

v.

UNITED STATES OF AMERICA,

Defendant.

ANSWER TO COMPLAINT

Service upon the United States government is not complete until the Rule 4(i) burden for service of process has been met. To serve the United States in a case arising under the Federal Tort Claims Act, Plaintiff must serve 1) the United States Attorney General; and 2) the United States Attorney. Fed. R. Civ. P. 4(i). On April 25, 2015, Plaintiff filed an executed summons return (*Doc. No. 3*), which states that Damon P. Martinez, United States Attorney for the District of New Mexico, was served April 29, 2015. The United States Attorney General accepted service on May 5, 2015.

On this 6th day of July, 2015, Defendant United States of America, by and through undersigned counsel, submits its Answer to Plaintiff's Complaint for Damages ("Complaint")(*Doc. No. 1*) as follows:

Nature of the Case

1. The United States denies the allegations set forth in paragraph 1 of Plaintiff's Complaint.

2. With respect to paragraph 2 of Plaintiff's Complaint, the United States admits only that Plaintiff Lydell Begay visited the emergency room at the Northern Navajo Medical Center in Shiprock, New Mexico on March 6, 2014 and March 13, 2014. The United States is without sufficient information at this time with which to admit or deny the remaining inferences and allegations set forth in paragraph 2 of Plaintiff's Complaint and therefore they are denied.

3. The United States denies the allegations set forth in paragraph 3 of Plaintiff's Complaint.

4. Paragraph 4 of Plaintiff's Complaint sets forth a legal conclusion to which no response is required. To the extent a response is required, the United States denies the allegations set forth in paragraph 4 of Plaintiff's Complaint.

The Parties

5. The United States is without sufficient information with which to admit or deny the allegations set forth in paragraph 5 of Plaintiff's Complaint and therefore they are denied.

6. Paragraph 6 of Plaintiff's Complaint states a legal conclusion to which no response is required. To the extent a response is required, the United States admits only that the case arises under the Federal Tort Claims Act, 28 U.S.C. § 2672. The United States denies the remaining inferences and allegations set forth in paragraph 6 of Plaintiff's Complaint.

Jurisdiction and Venue

7. The United States admits the allegations set forth in paragraph 7 of Plaintiff's Complaint.

8. Paragraph 8 of Plaintiff's Complaint sets forth a legal conclusion to which no response is required. To the extent that a response is required, the United States of America admits only that Turner W. Branch, Esq., on behalf of Plaintiff, submitted an administrative tort

claim on May 28, 2014. The Department of Health and Human Services (“HHS”) denied the administrative tort claim on January 22, 2015. All other inferences and allegations in Paragraph 8 are denied.

9. Paragraph 9 of Plaintiff’s Complaint sets forth a legal conclusion to which no response necessary. To the extent that a response is required, the United States of America admits only that Plaintiff’s claims are governed by the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401(b), 2671-80, and further affirmatively states that liability of the United States is set forth in 28 U.S.C. § 2674. All other inferences and allegations in Paragraph 9 are denied.

10. With respect to the allegations set forth in paragraph 10 of Plaintiff’s Complaint, the United States admits that venue is proper in this District.

Statement of Facts

11. With respect to paragraph 11 of Plaintiff’s Complaint, the United States admits only that Lydell Begay presented to the emergency room of Northern Navajo Medical Center (“NNMC”) on March 6, 2014 complaining of blurred vision in his right eye. The United States affirmatively states that the medical records otherwise speak for themselves and the remaining allegations set forth in paragraph 11 are denied.

12. With respect to paragraph 12 of Plaintiff’s Complaint, the United States admits only that on March 6, 2014, no CT scan or MRI was performed. The remaining inferences and allegations set forth in paragraph 12 are denied.

13. With respect to paragraph 13 of Plaintiff’s Complaint, the United States admits only that on March 6, 2014, Lydell Begay was treated by Dr. Annicol Marrocco and that Mr. Begay was given tobramycin drops for conjunctivitis and an appointment in the eye clinic 3 days later, for which he did not appear. The United States affirmatively states that the medical records

otherwise speak for themselves and the remaining allegations set forth in paragraph 13 are denied.

14. With respect to paragraph 14 of Plaintiff's Complaint, the United States admits only that Lydell Begay presented to the emergency room of NNMC on March 13, 2014. The United States affirmatively states that the medical records otherwise speak for themselves and the remaining inferences and allegations set forth in paragraph 14 are denied.

15. With respect to paragraph 15 of Plaintiff's Complaint, the United States admits only that the CT scan conducted March 13, 2014 showed a "solitary intraparenchymal hypodense mass within the left occipital lobe."

16. With respect to paragraph 16 of Plaintiff's Complaint, the United States admits that NNMC arranged for timely transfer of Lydell Begay to UNMH. The remaining inferences and allegations set forth in paragraph 16 are denied.

17. Paragraph 17 sets forth allegations of fact which are not directed to this Defendant and as such, no response is required. To the extent a response is required, the United States affirmatively states that the medical records speak for themselves.

18. Paragraph 18 sets forth allegations against an independent contractor, not designated as an employee of the Federal Government for purpose of the Federal Tort Claims Act, and as such, the allegations of Paragraph 18 are not directed to this Defendant and no response is required. To the extent a response is required, the United States admits that Dr. Marrocco's licenses were restricted for grounds unrelated to the care provided in this case.

19. Paragraph 19 sets forth allegations against an independent contractor, not designated as an employee of the Federal Government for purpose of the Federal Tort Claims Act, and as such, the allegations of Paragraph 19 are not directed to this Defendant and no

response is required. To the extent a response is required, the United States admits that Dr. Marrocco's licenses were restricted in March 25, 2011 for grounds unrelated to the care provided in this case.

20. Paragraph 20 sets forth allegations against an independent contractor, not designated as an employee of the Federal Government for purpose of the Federal Tort Claims Act, and as such, the allegations of Paragraph 20 are not directed to this Defendant and no response is required. To the extent a response is required, the United States admits that Dr. Marrocco's licenses were restricted for grounds unrelated to the care provided in this case.

21. Paragraph 21 sets forth allegations against an independent contractor, not designated as an employee of the Federal Government for purpose of the Federal Tort Claims Act, and as such, the allegations of Paragraph 21 are not directed to this Defendant and no response is required. To the extent a response is required, the United States admits that Dr. Marrocco has been fined for actions unrelated to the care provided in this case.

22. Paragraph 22 sets forth allegations against an independent contractor, not designated as an employee of the Federal Government for purpose of the Federal Tort Claims Act, and as such, the allegations of Paragraph 22 are not directed to this Defendant and no response is required. To the extent a response is required, the United States denies that Dr. Marrocco required monitoring for her care and treatment of Lydell Begay on March 6, 2014.

23. With respect to paragraph 23 of Plaintiff's Complaint, the United States denies that Dr. Marrocco required monitoring for her care and treatment of Lydell Begay on March 6, 2014. The United States denies the remaining inferences and allegations set forth in paragraph 23 of Plaintiff's Complaint.

24. Paragraph 24 of Plaintiff's Complaint states a legal conclusion to which no response is required. To the extent a response is required, the United States denies paragraph 24 of Plaintiff's Complaint.

FIRST CAUSE OF ACTION: MEDICAL NEGLIGENCE

25. In response to paragraph 25 of Plaintiff's Complaint, the United States incorporates its responses to paragraphs 1-24 of Plaintiff's Complaint as if stated herein.

26. The United States denies the allegations set forth in paragraph 26 of Plaintiff's Complaint.

27. The United States denies the allegations set forth in paragraph 27 of Plaintiff's Complaint and each of its subparts.

28. The United States denies the allegations set forth in paragraph 28 of Plaintiff's Complaint.

29. The United States denies the allegations set forth in paragraph 29 of Plaintiff's Complaint.

30. The United States denies the allegations set forth in paragraph 30 of Plaintiff's Complaint.

31. The United States denies the allegations set forth in paragraph 31 of Plaintiff's Complaint.

32. The United States denies the allegations set forth in paragraph 32 of Plaintiff's Complaint.

33. The United States denies the allegations set forth in paragraph 33 of Plaintiff's Complaint.

34. The United States denies the allegations set forth in paragraph 34 of Plaintiff's Complaint.

35. The United States denies the allegations set forth in paragraph 35 of Plaintiff's Complaint.

SECOND CAUSE OF ACTION: NEGLIGENT SUPERVISION

36. In response to paragraph 36 of Plaintiff's Complaint, the United States incorporates its responses to paragraphs 1-35 of Plaintiff's Complaint as if stated herein.

37. The United States denies the allegations set forth in paragraph 37 of Plaintiff's Complaint.

38. The United States denies the allegations set forth in paragraph 38 of Plaintiff's Complaint.

39. The United States denies the allegations set forth in paragraph 39 of Plaintiff's Complaint.

40. The United States denies the allegations set forth in paragraph 40 of Plaintiff's Complaint.

41. The United States denies the allegations set forth in paragraph 41 of Plaintiff's Complaint.

42. The United States denies the allegations set forth in paragraph 42 of Plaintiff's Complaint.

43. The United States denies the allegations set forth in paragraph 43 of Plaintiff's Complaint.

44. The United States denies the allegations set forth in paragraph 44 of Plaintiff's Complaint.

45. The United States denies the allegations set forth in paragraph 45 of Plaintiff's Complaint.

THIRD CAUSE OF ACTION: NEGLIGENT HIRING/CREDENTIALING

46. In response to paragraph 46 of Plaintiff's Complaint, the United States incorporates its responses to paragraphs 1-45 of Plaintiff's Complaint as if stated herein.

47. The United States denies the allegations set forth in paragraph 47 of Plaintiff's Complaint.

48. The United States denies the allegations set forth in paragraph 48 of Plaintiff's Complaint.

49. The United States denies the allegations set forth in paragraph 49 of Plaintiff's Complaint.

50. The United States denies the allegations set forth in paragraph 50 of Plaintiff's Complaint.

51. The United States denies the allegations set forth in paragraph 51 of Plaintiff's Complaint.

52. The United States denies the allegations set forth in paragraph 52 of Plaintiff's Complaint.

53. The United States denies the allegations set forth in paragraph 53 of Plaintiff's Complaint.

54. The United States denies the allegations set forth in paragraph 54 of Plaintiff's Complaint.

55. The United States denies the allegations set forth in paragraph 55 of Plaintiff's Complaint.

56. The United States denies the allegations set forth in paragraph 56 of Plaintiff's Complaint.

57. The United States denies Plaintiff's prayer for relief.

AFFIRMATIVE DEFENSES

Defendant United States of America, by counsel, and for its Affirmative Defenses to the Complaint, states as follows:

1. Any allegation not admitted, controverted, or denied previously in this Answer is hereby denied.

2. The Complaint fails to state a claim upon which relief can be granted.

3. Recovery is limited to the amount of the administrative claim under 28 U.S.C. § 2675(b), 28 U.S.C. 1346(b).

4. Plaintiff is not entitled to pre-judgment interest or punitive damages against the United States under 28 U.S.C. § 2674.

5. The United States of America is not liable for attorneys' fees except as provided for under 28 U.S.C. § 2678.

6. Plaintiff is not entitled to an award of costs except as provided by 28 U.S.C. § 2412.

7. Plaintiff is not entitled to trial by jury against the United States of America under 28 U.S.C. § 2402.

8. To the extent Plaintiff is entitled to damages, which is denied, Plaintiff's entitlement, if any, should be reduced by any allowable credits or offsets or any benefits paid to Plaintiff by any agency of the United States of America.

9. The United States of America is entitled to have its liability for Plaintiff's damages, if any, reduced according to New Mexico law of comparative fault pursuant to NMSA 1978 § 41-3A-1.

10. Under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 et seq., the United States is liable in the same manner and to the same extent as a private individual under like circumstances. Accordingly, under New Mexico law, damages in this type of action are limited under the terms of the New Mexico Medical Malpractice Act (Act), NMSA § 41-5-6 and subject to other provisions of the Act which might apply as appropriate.

11. The United States of America is not liable for unavoidable medical complications.

12. At all times relevant to the incident or events giving rise to Plaintiff's Complaint, the United States and/or its employees possessed and applied the knowledge and used the skill and care ordinarily used by reasonably well-qualified hospitals, clinics, and physicians of the same type and specialty giving due consideration to the locality involved.

13. This Court lacks jurisdiction over any of Plaintiff's claims which were not the subject of an administrative tort claim. 28 U.S.C. § 2675(a).

14. The injuries or damages, or both, alleged in the complaint were not proximately caused by a negligent act or omission of any employee of the United States of America acting within the scope and course of employment.

15. To the extent Plaintiff is entitled to damages, which is denied, Plaintiff's entitlement, if any, should be reduced to the extent Plaintiff failed to mitigate his damages.

16. Any injuries or damages sustained by Plaintiff were due to the negligent acts or omissions of others, known or unknown, over whom the United States of America had no control.

17. The negligent acts or omissions of others, known or unknown, over whom the United States of America had no control, were superseding and intervening causes, such that the chain of causation was broken, and the United States of America therefore cannot be held liable for any alleged negligence.

18. Any recovery by Plaintiff is subject to the availability of appropriated funds. 42 U.S.C. § 223(k).

19. The United States of America reserves the right to raise additional defenses that become apparent through the factual development of the case.

WHEREFORE, having fully answered the Complaint, the United States of America respectfully requests an order dismissing Plaintiff's Complaint with prejudice, that Plaintiff's prayer for relief be denied, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

DAMON P. MARTINEZ
United States Attorney

/s/ Erin E. Langenwalter
ERIN E. LANGENWALTER
Assistant United States Attorney
District of New Mexico
P.O. Box 607
Albuquerque, New Mexico 87103
505-346-7274
erin.langenwalter@usdoj.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 6, 2015, 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:

For Plaintiff: Turner W. Branch - twb@branchlawfirm.com
Margaret M. Branch - mmb@branchlawfirm.com
Seth T. Cohen - scohen@candzlaw.com
Cynthia Zedalis – czedalis@candzlaw.com

/s/ Erin E. Langenwalter _____
ERIN E. LANGENWALTER
Assistant United States Attorney