IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JOHN DAVID GARCIA,

Plaintiff,

v. Case Number: CV-08-295-JB/WDS

UNITED STATES OF AMERICA, and
BEN GARCIA,

Defendants.

RESPONSE IN OPPOSITION TO UNITED STATES' MOTION TO DISMISS (#15)

This suit for damages was brought against the United States under the Federal Tort Claims Act (FTCA) seeking damages for grievous injuries suffered by Plaintiff John David Garcia caused by Defendant Ben Garcia (no relation), who was an Isleta tribal police officer on the date of the incident, December 9, 2006, when Plaintiff was attending his daughter's wedding. It is Plaintiff's position that Officer Garcia is deemed an employee of the United States by virtue of federal law, and that he acted within the scope of his employment when he caused injuries to Plaintiff.

The United States has filed a Motion to Dismiss Plaintiff's Complaint on three grounds:

1) that Officer Garcia was not acting within the scope of his employment as a police officer;

2) that Plaintiff's claims are excepted from the FTCA waiver of U.S. sovereign immunity; and

3) that Plaintiff has failed to exhaust tribal court remedies.

As explained below, none of these contentions provides a basis for granting the United States'

Motion to Dismiss.

I. Standards for Consideration of a Motion to Dismiss under Rule 12(b).

The United States' Motion to Dismiss has been brought pursuant to F.R.Civ.P. Rule 12(b)(1), lack of subject matter jurisdiction, and 12(b)(6), failure to state a claim upon which relief can be granted. This is a case where the court's subject matter jurisdiction is dependent upon the same statute, namely the FTCA, which creates the substantive claims, intertwining the jurisdictional inquiry with the merits. In such cases the motion should be treated as one arising under Rule 12(b)(6), or after proper conversion into a motion for summary judgment under Rule 56. United States *ex rel.* Homes v. Consumer Insurance Group, 318 F.3d 1199, 1203 (10th Cir. 2003 *en banc*).

Motions to dismiss pursuant to Rule 12(b)(6) must be considered by the court with a view of the allegations in the Complaint in a light most favorable to the non-moving party. Teigen v. Renfrow, 511 F.3d 1072, 1078 (10th Cir. 2007). However, the moving party may contest jurisdiction by challenging those allegations with the submission of affidavits and other evidence—which is what the United States has done here, attaching several exhibits to its Motion. The United States acknowledges, nonetheless, that reasonable inferences raised in the pleadings must be resolved in favor of the Plaintiff. U.S. Memorandum in Support of Motion to Dismiss, at pp. 4-5 (hereafter "U.S. Memo"), *citing* Dill v. City of Edmond, 155 F.3d 1193, 1201 (10th Cir. 1998).

This Response in Opposition attaches a number of exhibits including the recent deposition of Officer Garcia to rebut the factual conclusions asserted by the United States. The Tenth Circuit has held that "[w]hen a court relies on affidavits and other evidentiary materials submitted by the parties to resolve disputed jurisdictional facts, a defendant's motion to dismiss should be treated as one for summary judgment under Rule 56(c)." United States *ex rel.* Sikkenga v. Regence Bluecross

Blueshield, 472 F.3d 702, 717 (10th Cir. 2006). That is the case here. As demonstrated below, it is Plaintiff's position that the evidence supports Plaintiff's assertion that this claim has been properly brought under the FTCA. In addition, the United States' Motion to Dismiss is premised on genuinely disputed factual contentions, which should not be adjudicated on either a Motion to Dismiss under Rule 12, or a Motion for Summary Judgment under Rule 56. The factfinder should first hear and resolve factual disputes. Thus, the United States' Motion to Dismiss must be denied.

II. The Actions of Officer Garcia Injuring Plaintiff Were Within the Scope of His Employment as an Isleta Police Officer; and He Is Thus Deemed to Be a Federal Employee for FTCA Purposes.

A. Facts

The Complaint alleges that, on December 9, 2006, Plaintiff was at St. Augustine Church in the Pueblo of Isleta to attend the wedding of his daughter. ¶ 9. Shortly before the wedding ceremony was scheduled to begin, Plaintiff took his 3-year old granddaughter to a restroom within the church complex, and waited for her outside of the restroom. ¶ 10. While he was waiting for his granddaughter, Plaintiff was accosted by several men, one of whom was Officer Garcia, who told Plaintiff that the room where he was standing was "off limits", and demanded that he leave immediately. ¶ 11. Plaintiff explained that he was waiting for his three year-old granddaughter to come out of the restroom, and did not instantly leave the area. Officer Garcia, who was in plainclothes, then said "Don't you realize I am a police officer." So Plaintiff began to walk out of the room where he had been standing. ¶ 12. (Under Officer Garcia's account, Plaintiff completely walked out of the room.)

Plaintiff alleges he then felt a blow to his head, and fell to the floor. Injuries were sustained by contact from either the blow or the floor. Plaintiff's complaint alleged that the unprovoked blow

to his head was delivered by Officer Garcia in a negligent and pointless effort to remove Plaintiff from the premises. ¶ 13. (Officer Garcia testified Plaintiff turned to face the Officer and tried to push back into the doorway, but the Officer pushed Plaintiff back, and down he went). Bleeding internally from the mouth, and in great pain and embarrassment, Plaintiff got up off the floor. His granddaughter came out of the rest room, and he took his granddaughter the hundred feet or so, back to the front of the church for the wedding. He immediately walked his daughter down the aisle at the ceremony, as he had promised her, though he had suffered a broken jaw as a result of the negligent strategy initiated and utilized by Officer Garcia. ¶ 14. The Complaint goes on to describe Plaintiff's injuries and condition, his severe embarrassment and emotional distress as a result of Officer Garcia's actions, and the legal bases for his claims.

The United States has offered a list of "Undisputed Material Facts" and a number of exhibits which contain a variety of accounts of the episode described in the Complaint. As discussed in the next section, Plaintiff disputes the materiality of "Undisputed Material Fact" number 2, that Officer Garcia was "not on duty", and the accuracy and relevance of Fact number 3, that he was "attending the wedding with his family," since there were other principals attending that wedding, not members of his family, with whom he interacted during the critical episode with Plaintiff. Officer Garcia's own account is that he felt he had to act as a police officer for all these people over the issue of "that other wedding" using the restroom near the wedding he was attending.

The United States has offered selected pages from law enforcement reports with a variety of versions of that episode. U.S. Exhibit A consists of two pages (9 and 11) from a Bureau of Indian Affairs (BIA) Internal Affairs Report. Page 9 of that exhibit contains a statement that Officer

Garcia was off-duty at the time of the incident at St. Augustine.[1] Page 11 states (highlighted in yellow):

> Benjamin Garcia was off duty attending a wedding reception when he intervened in a disturbance. He verbally identified himself as a police officer in order to gain the attention and stop what he and other witnesses viewed as a physical assault.

Page 10 of that same report (attached as Plaintiff's Exhibit 2) includes the following paragraph:

> Ben Garcia reported John Garcia was in the St. Augustine Community Building causing a disturbance when he asked John to leave. Ben and other witnesses reported John had touched a female in the building and was being rude. John stated in his interview he was engaged in a discussion about the use of the restroom in the building when he may have inadvertently touched a female with his prosthesis (right arm).

U.S. Exhibit B consists of a number of pages from an FBI investigative report of an "altercation" between Officer Garcia and Plaintiff. The 4th and 5th pages contain the reports of two Isleta police sergeants based on Officer Garcia's contemporary statements of what happened at St. Augustine Church on December 9, 2006. Those reports, along with Officer Garcia's signed statement at the end of the FBI report, sound like standard law enforcement reports. They allege that Plaintiff was "causing a disturbance inside the church reception/rectory area, and … apparently was putting his hands on people;" that Officer Garcia "physically escorted" Plaintiff out of the church; and that he was "pushed" by Plaintiff, and/or that Plaintiff swung at him, at which point Officer Garcia was said to have "pushed the subject out the door where he fell down." Sgt. Alfred Abeyta's report states (on the 6th page) that Officer Garcia said he identified himself as a law enforcement officer to Plaintiff, and that "a battery was attempted upon him." Officer Garcia's

[1] On December 13, 2006, an Isleta Pueblo Police Detective contacted the BIA's Professional Standards Division, thereby initiating an inquiry which resulted in the BIA Internal Affairs Case Report. *See* cover page and page 1 attached hereto as Plaintiff's Exhibit 1. That inquiry was not completed until May 5, 2008, after this lawsuit had been filed, when the BIA transmitted the report back to the Isleta Police Department with a belated "NOT SUSTAINED" conclusion as to Plaintiff's complaint.

signed statement on the last page states that he observed offensive conduct on the part of Plaintiff, at which point "I noticed a few people looking at me expecting me to intervene." His statement then states that he identified himself as a police officer, and took steps to remove Plaintiff from the room, while encountering resistance from Plaintiff whom he reported "swung his arm at my face", and that he responded by pushing Plaintiff to the floor.[2] Plaintiff and members of his wedding party, and the priest, dispute these typical and standard "police account versions" of events, and will testify that the disturbance was caused by the women at the wedding party Officer Garcia was attending. For purposes of this motion, under any set of facts, the Officer was acting as a Federally trained and funded police officer.

On June 15, 2007, as part of an internal affairs investigation, Officer Garcia was interviewed by BIA Special Agent Robert Esquerra. By that time Officer Garcia's version of the incident had changed. No longer claiming that Plaintiff had "swung" at him, he said, "I think it was more – more of a push." Interview, p. 11, attached as Plaintiff's Exhibit 3. Noting the inconsistency with Officer Garcia's earlier statement, Agent Esquerra admonished him:

> [Y]ou're a police officer. … And you know what your responsibilities are as a police officer. … Whether you're on or off duty. … You know, we – we – one, we are required to remain conduct even above a civilian. Somehow in this statement you say, 'I identified myself as a police officer.' If you identify yourself as a police officer, and this guy says, 'You know what? I don't give an F.' And he swings at you, he's basically assaulting a police officer. Now -- … which, hey, you're justified in protecting yourself whether you're a civilian or police officer, but by you being a police officer and being identified as a police officer, you have a responsibility now, right? … Someone assaults you or you see an assault, they know you're a police officer, you have a responsibility either to act when someone's life's in danger – or to be a good witness.

Exh. 3, pp. 12-13. As the interview continued, Agent Esquerra admonished Officer Garcia again:

[2] The recitation of these various statements should not be viewed as an admission by Plaintiff of their accuracy or truthfulness with regard to Plaintiff's conduct. As shown above, and as will be proven at trial, Plaintiff has no right arm, and was wearing a prosthetic arm to his daughter's wedding for appearances only. He has no control over the prosthetic.

> [A]s a police officer, you have an obligation, especially if an assault happened. If you were assaulted, and this guy you pushed, you brought him off balance, and he went down. Now, as a police officer, you have an obligation not only to follow through with – if you want to charge the guy. … But also his welfare now.

Id., pp. 14-15. Later in the interview, after Special Agent Gilmore also asked questions of Officer Garcia, Agent Esquerra continued his admonitions:

> But the one thing we hold on to when we make mistakes or whatever, is to – just our integrity to say what's true. You are a law enforcement officer. You understand that we have to adhere to a higher conduct. Plain and simple. That when we do things people look at us. Just like, I think in your statement, they – they knew, the people in your party know you were an officer. So they expected you to do something. … They expected you to act. Hey you acted. But in that same aspect of it, after all this little scuffle occurred, and like you said, I can understand not wanting to call cops knowing they're going to start this whole reporting thing and all this, but still you understand that as an officer, you know you're obligated to -- … uphold the law and enforce the law. And what now, of course, you as a victim could say, 'Hey, you know he assaulted me. I just figured I'm not going to charge him with anything. I am an officer, but I could – I – you know, that's up to me to – whether I want to charge him or not.

Id., pp. 31-32. Essentially, the Federal Agency (BIA) admits as an evidentiary matter that Officer Garcia was acting as a police officer in this case.

On January 7, 2009, Defendant Ben Garcia (no longer employed by the Isleta Police Department) was deposed. He continued to justify his actions on December 9, 2006, as a law enforcement officer in response to questioning by counsel for the United States:

> "Q: Were you thinking that you were in the role of a police officer at that time or as an attendee at a wedding?
>
> "A. I think, after I had identified myself as a police officer, yeah.
>
> "Q. You think that then you were as a police officer?
>
> "A. Yes."

Deposition p. 51, Plaintiff's Exhibit 4 (hereafter "Depo"). This testimony confirms the admissions of the BIA investigators.

Officer Garcia also confirmed at the deposition that he approached Plaintiff because people at the wedding expected him, as a police officer, to do something. Depo. at p. 29. He didn't have kind things to say about the people (at the wedding he was attending) who urged him to react to the three year old in the bathroom and her disabled grandfather waiting for her. On page 33 of his Deposition he refers to certain women at the wedding party (not members of his family) as "instigators [who] don't know when to keep their mouth shut and try to make something big out of something small." *See also* page 29 of the June 15, 2007 Interview (Plaintiff's Ex. 3). Thus, there is substantial evidence that Officer Garcia did not have a "personal motive", as argued by the United States; *see* discussion in the next section. The entirety of Officer Garcia's statements, both during law enforcement interviews and at his deposition on January 7th, demonstrate that he believed he was acting pursuant to his authority and responsibilities as an Isleta police officer. Police are often asked to keep the peace, whether "off" or "on" the clock, and are expected to act. Moreover, the statements by BIA Special Agent Esquerra, made to Officer Garcia during the June 2007 Interview, demonstrate that he thought that Officer Garcia had an obligation to act as a law enforcement officer, and arrest Plaintiff if he believed that an unlawful physical assault had occurred.[3]

The discussion above should not be understood to be an admission by Plaintiff that Officer Garcia was acting reasonably or in good faith. The officer admitted that Plaintiff appeared to him

[3] The United States' Exhibit D is a January 9, 2009, Declaration by George B. Jojola, the current Isleta Police Chief who had no evident personal involvement in the investigation of Officer Garcia's conduct, but who, after reading statements, offers his view that Officer Garcia "was not engaged in activities furthering his employment with IPD

to be an "older gentleman" with "gray hair" and a "gray beard and mustache." Depo. at p. 14. He did not claim to know that Plaintiff is also handicapped, with no right arm. He also said that he didn't intend to hurt Plaintiff. Depo. p. 31. He continued to justify his actions based on his contention that this "older gentleman" was the aggressor—even after he had identified himself to Plaintiff as a police officer. Plaintiff denies this, and will offer evidence at trial to contest this version of the incident.

B. Officer Garcia Was Acting Within the Scope of His Employment as a Matter of Law.

Section 314 of Public Law 101-512 provides that an Indian tribe which undertakes a BIA program under a contract pursuant to the Indian Self-Determination Act (ISDA), 25 U.S.C. §§ 450, *et seq.,* is deemed to be part of the BIA, and that the tribe's employees are deemed employees of the BIA while acting within the scope of their employment in carrying out that contract. The United States asserts that Officer Garcia was not acting within the scope of his employment as an Isleta Pueblo police officer when his tortious conduct occurred. Plaintiff agrees with the United States (U.S. Memo at p. 8) that the law of New Mexico governs whether Officer Garcia was acting within the scope of his employment. Allender v. Scott, 379 F.Supp.2d 1206, 1218 (D.N.M. 2005). In New Mexico whether a law enforcement officer is acting within the scope of his or her employment is generally an issue of fact. Cain v. Champion Window Co., 164 P.3d 90, 94 (N.M.App. 2007); Allender v. Scott, *supra*, 379 F.Supp.2d at 1219. "However, when no reasonable trier of fact could conclude that an employee is acting in the course or scope of employment, summary judgment is properly granted." Cain, *supra., citing* Rivera v. N.M. Highway & Transp. Dept., 855 P.2d 136, 138 (N.M. 1993).

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before 3 p.m. on December 9, 2006." This legal conclusion is addressed in the following section of this Response

The United States' argument focuses on the fact that Officer Garcia was not wearing his uniform or badge at the time of the incident at St. Augustine Church on December 9, 2006, and the statement of Chief of Police Jojola (U.S. Exhibit D) that Office Garcia was not "on duty" at the time. This is not determinative of whether a police officer acts within the scope of his employment under New Mexico law. Narney v. Daniels, 846 P.2d 347, 115 N.M. 41, 47-48 (N.M.App. 1993). Further, the excerpts from the ISDA contract cited by the United States (U.S. Memo at p. 9, and U.S. Exhibit C) shed no light on whether Officer Garcia was acting within the scope of his employment. They simply refer to the role of tribal officers while on duty.

The United States correctly cites (U.S. Memo at p. 8) the New Mexico test for assessing whether an employee's act is performed within the scope of his or her employment, which is:

> 1. Whether the employee's act "was something fairly and naturally incidental to the employer's business assigned to the employee, and
>
> "2. It was done while the employee was engaged in the employer's business with the view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee."

Cain v. Champion Window Co., *supra*, 164 P.3d at 94. The various reports filed in this matter, and the deposition testimony of Officer Garcia, demonstrate that he was acting as a police officer–albeit recklessly—when he injured Plaintiff.

The United States contends that Officer Garcia was acting pursuant to a "personal motive" (U.S. Memo at p. 9) when he confronted Plaintiff. But that is not what Officer Garcia has said about the episode at any time; and the evidence does not support the United States' wishful conclusion. The statement that Officer Garcia signed on the last page of the BIA report (U.S.

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Exhibit B, p. 7) states that there were "people looking at me expecting me to intervene." His other statements also indicate that people in the wedding party knew he was a policeman, and expected him to do something about Plaintiff's presence in the reception area. Nowhere in any of these reports is there any indication that he took action on behalf of his own family. At his deposition he said that members of another family got into an argument with Plaintiff; indeed, he said that they were the "instigators", not Plaintiff.

Throughout the various investigations Officer Garcia has insisted that he was acting as a police officer, and BIA Special Agent Esquerra's many admonitions to him during the July 2007 interview (*see* references to Plaintiff's Exh. 3 in the previous section) show that it was his view that a tribal law enforcement officer has an "obligation" to take action when there is an assault in his presence. Officer Garcia's actions were taken in response to allegations that Plaintiff had assaulted a female in the wedding party,[4] and he justified the use of force (whether a blow or a "push") against Plaintiff based on an allegation that Plaintiff "swung" at him or pushed him. All of these accounts of the episode generated by the U.S. or the Isleta Police Department use the lingo of law enforcement to explain Officer Garcia's actions, whether they were justified or not.

The United States also argues that "Defendant Ben Garcia was not enforcing Pueblo or federal law, nor was he making any arrest, nor was a felony occurring in his presence." U.S. Memo at p. 10. However, as Officer Garcia described the episode and his reasons for intervening, he was enforcing Pueblo and federal law at the time (notwithstanding his "No" answers to those deposition questions from the Assistant U.S. Attorney, which questions called for a legal conclusion. Depo. at

[4] The female allegedly "assaulted" by Plaintiff provided BIA with a version of the incident inconsistent with allegations of willful conduct by Plaintiff. But for purposes of this Response to the U.S. Motion to Dismiss, the truthfulness of the allegation is irrelevant, as Officer Garcia has consistently asserted that he was acting in response to an allegation of improper touching of a female.

p. 51.) Officer Garcia was proceeding on the allegation that Plaintiff had inappropriately touched an Indian female at the wedding. That is a crime under federal law, 18 U.S.C. § 2244(b), which provides

> Whoever, in the special maritime and territorial jurisdiction of the United States [including Indian country—*see* 18 U.S.C. § 1152] … knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years or both.

Further, Officer Garcia claims to have been assaulted by Plaintiff, which is itself a federal crime. *See* 18 U.S.C. § 111 (assault on a federal officer, which includes tribal officers acting pursuant to ISDA contracts, *see* United States v. Young, 85 F.3d 334 (8th Cir. 1996)); and 18 U.S.C. § 113(a)(5) (simple assault within federal jurisdiction). Indeed, Agent Esquerra admonished him for not charging Plaintiff with assault based on Officer Garcia's contemporary account of the episode. While Plaintiff, being a non-Indian (though it is not clear that Officer Garcia knew that at the time), could not be prosecuted in tribal court, crimes by a non-Indian against an Indian are prosecuted in federal court. Williams v. United States, 327 U.S. 711 (1946). Thus, there is no question that Officer Garcia had the authority to arrest or detain Plaintiff for a variety of federal crimes if there was probable cause to do so. At his deposition he said he had such authority, a conclusion based in part on the training he received at the Federal Law Enforcement Training Center in Artesia, New Mexico (Depo. at p. 8).

Officer Garcia's view in this matter is supported by the law of the land, which has recognized that tribal law enforcement officers may detain and exclude non-Indians within Indian Country. "Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." Duro

v. Reina, 495 U.S. 676, 697 (1990); *see also* United States v. Terry, 400 F.3d 575, 579-80 (8th Cir. 2005).

. The United States also offers two pages from the Isleta ISDA law enforcement contract (U.S. Exhibit C), highlighting certain provisions, as further evidence to show that Officer Garcia's actions were not within the scope of his employment. But the contracted services are broadly stated in that contract. The Contractor (the Isleta Pueblo Police Department) is to

> "1. **Maintain security for all residents** of the Isleta Indian Reservation; 2. Provide law enforcement services … according to procedures and guidelines found in … 25 CFR 11 [which contains the definitions of crimes, including simple assault, § 11.400, sexual assault, § 11.407, and criminal trespass, § 11.411]; … 4. **Respond to any and all verbal or written complaint registered by residents of the Isleta Indian Reservation** …."

U.S. Exhibit C (emphasis added.) Officer Garcia's actions, as described by him, were fully within the scope of the ISDA contract's various descriptions of the services being rendered under the contract.

The United States asserts that "The fact that [Officer Garcia] identified himself as an Isleta Police Officer does not change the fact that he was not on duty and was not acting within the scope of his employment by the Isleta Police Department." U.S. Memo at 10. No authority is cited for this proposition. But the fact that he identified himself as a law enforcement officer is significant evidence, alongside the various reports of the incident, showing that he believed that he was acting within the scope of his employment. Regardless of his belief, objectively speaking, he was acting as a police officer. Indeed, the only evidence the United States offers to show that he was acting on a "personal motive" is the fact that he was attending his brother's wedding. All the accounts of the episode demonstrate that he was urged, as a police officer, by people not his relatives, to take action

to deal with criminal behavior allegedly committed by Plaintiff.[5] Special Agent Esquerra also opined during his interview of Officer Garcia, that he had an "obligation" to take action, based on the circumstances as allegedly presented to him.

Officer Garcia was clearly acting within the scope of his employment at the time of the incident at issue in this case under any fair view of the law, but particularly under New Mexico law.[6] But if the court finds that the evidence presented in these briefs falls short of conclusively determining that fact, there is still more than enough evidence demonstrating that there are unresolved factual issues, leaving genuine disputes over material facts. Under these circumstances, there is no basis for granting the United States' Motion to Dismiss, which should be treated as a Motion For Summary Judgment under Rule 56.

III. Plaintiff's Claims Do Not Fall Within the FTCA Exception at 28 U.S.C. § 2680(h).

The United States also contends that, even if Officer Garcia were acting within the scope of his employment, Plaintiff's claims are barred by an exception to the United States' waiver of sovereign immunity found in the FTCA, namely 28 U.S.C. § 2680(h). That exception excludes "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights …." Thus, the United States argues that Plaintiff's claims are barred by this exception.

Plaintiff's Complaint does not allege that Officer Garcia committed *any* of the intentional torts listed in Section 2680(h). He has asserted three claims against the United States under the

[5] On page 10 of its brief the United States attempts to use the allegation in Paragraph 36 of the Complaint that Plaintiff was engaging in non-criminal behavior to prove that Officer Garcia was not enforcing criminal law. That is a *non sequitur*. It was Officer Garcia's reaction to allegations of assault and sexual touching which led to the confrontation. Plaintiff, of course, denies that he provoked any confrontation with Officer Garcia.

FTCA. His First Claim for Relief states that Officer Garcia "negligently and recklessly injured Plaintiff." ¶ 23. His Second Claim for Relief states that Officer Garcia "intentionally inflicted emotional distress on Plaintiff." ¶ 30. His Third Claim for Relief alleges that "Officials of the Bureau of Indian Affairs negligently certified Officer Ben Garcia as a qualified law enforcement officer …." ¶ 37. Moreover, based on the deposition testimony of Officer Garcia, there is strong evidence to support Plaintiff's Claims for Relief, as his removal from the premises by Officer Garcia was based on the latter's negligent reliance on the wild allegations of sexual assault being made by members of a wedding party.

Counsel for the United States cites Judge Johnson's decision in Trujillo v. United States, 313 F.Supp.2d 1146 (D.N.M. 2003), U.S. Memo at p. 12, and a Massachusetts District Court case for the proposition that a court "must look to the substance of plaintiff's claims, rather than the elected theory." According to Judge Johnson, "Plaintiffs cannot turn an intentional tort into negligence conduct by a turn of a phrase -- by merely labeling the conduct as negligence." 313 F.Supp.2d at 1152. Plaintiff has not done so; this is not a matter of labeling allegations in the Complaint. Negligent hiring, training and supervision certainly is not 'an intentional tort', and here, training issues exist; even the Officer states in his deposition he thought he was acting consistent with his training. As summarized above, the facts which have been presented to this Court regarding the blow to Plaintiff's jaw do not necessarily suggest an assault and battery. Plaintiff claims never to have seen what hit him. Complaint ¶ 13. Officer Garcia denies having done anything intentional to hurt Plaintiff (Depo. at p. 31); and his various statements, though inconsistent, have suggested that he was merely pushing the Plaintiff, or "deflecting" Plaintiff's

[6] *Narney v.* Daniels, supra, is oft-cited in New Mexico on this precise issue, and sets out a four-part test for analyzing

swinging arm, or grabbing Plaintiff's arm (the prosthetic where his right arm used to be?) resulting in Plaintiff losing his balance and hitting a pole with his face as he fell to the ground. This does not sound like assault and battery; at any rate, Plaintiff did not allege Officer Garcia's version(s) in the Complaint. The United States' argument is misplaced in this case.

What is clear to Plaintiff is that Officer Garcia exercised terribly reckless and negligent judgment in the matter, and caused grievous injuries to Plaintiff, based on wild assertions by persons attending a wedding reception that Plaintiff was assaulting a female wearing a backless dress and was trespassing and disrupting that reception (though Plaintiff and his wedding group were simply using the restroom with the permission of the parish priest.) Officer Garcia saw Plaintiff as an "older gentleman" with "gray hair" and a "gray beard and mustache." He certainly saw that Plaintiff was dressed in a white tuxedo at the time of the incident. He should have realized that Plaintiff was handicapped as well. Finally, Officer Garcia now claims under oath that he did not intend to hurt Plaintiff, and willful intent is an element of the torts of assault and battery.

Thus, Plaintiff is not manufacturing claims with 'a turn of a phrase'. The circumstances of his injury are not clear to him, as he 'came to' on the ground; only evidence at trial, with the court weighing the credibility of witnesses against prior statements, will determine the facts, and then apply the appropriate body of law to the facts. The United States' Motion to Dismiss is no substitute; reasonable inferences raised in the pleadings must be resolved in the Plaintiff's favor. *See* discussion at page 2, *supra.* Here, those inferences are further colored by the Federally trained Tribal Officer's own testimony that he did not intend the injuries to Plaintiff.

The United States reads Judge Johnson's opinion in Trujillo too broadly, suggesting a *per se*

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police conduct. The United States' position in this case simply does not comport with a significant body of New

rule that the assault and battery (among other enumerated intentional torts) exception in Section 2680(h) must mean that FTCA claims based on the actions of law enforcement officers may *only* be brought when the offending policeman is a federal officer. Thus, the exception would swallow the rule that tribal police acting under a 638 contract are considered federal employees for FTCA purposes. What the United States appears to be arguing is that *any* law enforcement judgment exercised by a law enforcement officer is necessarily willful in its character, and that any allegation of tortious conduct necessarily involves an intentional tort excepted from the United States' consent to suit under the FTCA. But that is not what the statute says; and if that were true, no FTCA claim could ever be brought with regard to a law enforcement action by a tribal policeman. That cannot be what Congress intended when it passed Section 314 of Public Law 101-512. Otherwise, any non-Indian accosted by a tribal police officer in Indian country, federally funded through a contract with the BIA, would never have a claim for the tortious conduct of that policeman, except in tribal court where (as here) the Tribe may disavow the actions of the officer, deny insurance coverage, and rest comfortably behind its tribal sovereign immunity from suit (even in tribal court.) *See* the discussion in the next section regarding exhaustion of tribal court remedies. (It is odd that in the USA, a citizen injured by an Officer as severely in this case is being told he cannot seek redress for his injuries, and that the Officer is being told by those who trained and paid him that he will not be defended in Court, nor covered by insurance purchased by his own Tribe.)

What is undeniably clear from Plaintiff's Complaint and the evidence presented by the parties in connection with the United States' Motion to Dismiss is that the Plaintiff has properly pleaded a claim for infliction of emotional distress, a tort claim *not* enumerated in the exception in

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Mexico law.

Section 2680(h) of the FTCA. Plaintiff was dressed in wedding finery, the father of the bride, and yet, only moments before walking his daughter down the church aisle, was confronted and injured, causing extreme embarrassment to him on a day which should have been remembered for the rest of his days only with love and joy. This is not a simple manipulation of the wording of a pleading, as presented to Judge Johnson in the Trujillo case where the plaintiffs also alleged assault and battery based on the same set of facts from which they had allegedly demonstrated intentional infliction of emotional distress; Plaintiff is making a discrete claim based on New Mexico tort law, Weise v. Washington Tru Solutions, 192 P.3d 1244 (N.M.App. 2008), and a series of detailed factual allegations—supported by the evidence—which reveal negligent conduct and the elements of a claim for infliction of emotional distress.

Finally, the United States argues that Isleta police officers "are not authorized by law to execute searches, to seize evidence, or to make arrests for violations of federal law absent specific authorization to do so." U.S. Memo at 13. This cannot be true, as it invites an absurd result—that tribal officers have no authority to protect reservation residents from non-Indian criminal conduct, a stated purpose of the ISDA contract. As pointed out in the previous section, the Supreme Court held long ago in Williams v. United States, *supra* 327 U.S. 711 (1946), that such non-Indian crimes must be prosecuted in federal court pursuant to 18 U.S.C. § 1152, and that tribal police have the authority to detain and exclude non-Indians "and to transport [the non-Indian offender] to the proper authorities" (necessarily federal if the victim of the non-Indian criminal behavior is an Indian.) Duro v. Reina, *supra*, 495 U.S. at 697 (1990).

In sum, Plaintiff has properly pleaded, and the evidence supports, allegations of negligent and/or reckless conduct on the part of Officer Garcia, and intentional infliction of emotional

distress, and the exception in Section 2680(h) of the FTCA is thus inapplicable.

IV. The Federal Tort Claims Act Does Not Require Tribal Court Exhaustion of Remedies Before Pursuing a Claim in Federal Court.

Finally, the United States contends that Plaintiff must exhaust his remedies in Isleta tribal court before invoking the jurisdiction of this court. Plainly, exhaustion of tribal court remedies is not a prerequisite for an FTCA claim, as the United States cannot be sued in tribal court; U.S. District Courts have "exclusive jurisdiction" over FTCA claims, 28 U.S.C. § 1346(b)(1); and the FTCA provides the "exclusive remedy" for claims of injury caused by persons denominated federal employees acting within the scope of their employment. 28 U.S.C. § 2679(b). "A suit brought under the FTCA in a court not specified in the Act is therefore subject to dismissal. [citations] Rather than providing an express grant of subject matter jurisdiction to the Acoma Tribal Court**,** then, the FTCA clearly contemplates jurisdiction over such disputes only in federal district courts. The critical limitation specified in the FTCA is that exclusive jurisdiction is granted to "the district courts." Louis v. United States, 967 F.Supp. 456, 458 (D.N.M. 1997).

The United States cites Enlow v. Moore, 134 F.3d 993, 996 (10th Cir. 1998), for the proposition that civil jurisdiction over non-Indians "presumptively lies in tribal courts". Since Enlow, however, the Supreme Court has made it clear that the opposite proposition is true. In Atkinson Trading Post v. Shirley, 532 U.S. 645 (2001), the Court cited Montana v. United States, 450 U.S. 544 (1981), for the proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" with certain exceptions, not applicable here. 532 U.S. at 651.

The United States offers that it is "likely" that the Isleta Tribal Court has civil jurisdiction

over this matter, offering no authority or evidence for that proposition. But an examination of the Isleta Judicial Code demonstrates that there has been no waiver of tribal sovereign immunity by the Pueblo, even with respect to suits in tribal court. Indeed, Officer Garcia, a defendant herein, has been left to fend for himself, as the Pueblo has provided neither legal counsel nor insurance to cover his defense or any liability. Depo. at pp. 12-13. Again, Congress could not have intended this result when it enacted Section 314 of Public Law 101-512, providing that tribal employees performing functions under ISDA contracts funded by the federal government, leaving non-Indians who find themselves on Indian reservations and confronted by a tribal policeman with no relief from tortious conduct on the part of the tribal employee.[7]

V. CONCLUSION.

For the foregoing reasons, the United States' Motion to Dismiss should be denied.

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Respectively submitted,

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[7] Nor is there a private cause of action for a violation of civil rights by a tribal government. Santa Clara Pueblo .v Martinez, 436 U.S. 49 (1978).