Ray v. United States, ___ F. Supp. 3d ___, 2021 WL 3472630 (D.N.M. Aug. 6, 2021)

- **Holding:** "Law of the place" in 28 U.S.C. § 1346(b)(1) of the Federal Tort Claims Act refers to the state where the alleged tortious conduct occurred even if within Indian country.
- **Summary:** Plaintiffs alleged medical malpractice in connection with treatment at an Indian Health Service hospital located in the Acoma Pueblo that, in turn, is situated in New Mexico. They sought damages under the FTCA. State law limits medical malpractice monetary recovery; Acoma tribal law does not. Given this difference, Plaintiffs moved for partial summary judgment concerning the proper interpretation of 28 U.S.C. § 1346(b)(1) that authorizes FTCA liability "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." They contended "that (1) the plain language of 'law of the place where the act or omission occurred' requires that Acoma tribal law apply to Plaintiffs' claims; (2) '[l]egal principles authorizing tribal jurisdiction to be asserted over non-Indians require that Plaintiffs' claims be governed by Acoma Tribal Law;' and (3) '[n]otions of tribal sovereignty require that Plaintiffs' claims be governed by Acoma Tribal Law.'" The district denied the motion.

  Settled decisional law, the court held, required rejection of the first two arguments. Plaintiffs relied primarily upon *Cheromiah v. United States*, 55 F. Supp. 2d 1295 (D.N.M. 1999), for the proposition that "law of the place" referred in this case to the law of Acoma Pueblo. *See also Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1072, 1103 (S.D. Cal. 2008). But that reliance ran headlong into Tenth Circuit and other New Mexico federal precedent in the court's view:

  > Contrary to the holdings in *Cheromiah* and *Quechan Indian Tribe*, the Tenth Circuit and other cases in the District of New Mexico have not equated "law of the place" with a political entity's jurisdiction over legal claims. Significantly, in *Bryant v. United States*, the Tenth Circuit applied New Mexico law to an FTCA action that allegedly occurred on an Indian reservation. *Bryant v. United States*, 565 F.2d 650 (10th Cir. 1977); *see also Magdalena v. United States*, 2008 WL 11334066 (D.N.M.) (applying New Mexico law to FTCA action that allegedly occurred on Pueblo land); *Louis v. United States*, 54 F. Supp. 2d 1208, 1209-1210 (D.N.M. 1999) (decided before *Cheromiah* and concluding that New Mexico law, not the law of Acoma Pueblo, is "law of the place"). Indeed, in *Fed. Express Corp. v. United States*, [228 F. Supp. 2d 1267 (D.N.M. 2002),] this Court rejected the plaintiffs' reliance on *Cheromiah* on the issue of "law of the place" noting that the "[p]laintiffs ignore 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." ... The Court also explained that "even if tribal jurisdiction concurrently extends to the claim at hand, the mere existence of jurisdiction is not determinative in deciding what 'law of the place' applies. Rather, the inquiry ends where it is determined the negligence occurred."

  The court then discussed the Eighth Circuit's post-*Cheromiah* opinion in *LaFromboise v. Leavitt*, 439 F.3d 792 (8th Cir. 2006), that reached the same conclusion. There, the court of appeals, inter alia, "thought 'it unlikely that Congress meant for the liability of the United States to depend on the laws of more than 550 tribal governments throughout the country.'"

As to the third argument, the court "certainly agree[d]" with the general principle that "'the Federal Government[] [has a] longstanding policy of encouraging tribal self-government,' a policy that 'reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory." But such right of "self-government is limited 'to the extent that sovereignty has not been withdrawn by federal statute or treaty[,]'" and here "the FTCA's 'law of the place' requirement is a federal statutory provision that withdraws tribal sovereignty, i.e., the right to apply tribal law, over tortious conduct that occurred on tribal land under the ambit of the FTCA." In short, "[h]ad Congress intended for tribes to apply their laws to FTCA cases that occurred on tribal lands, Congress would have expressly indicated as much in the FTCA, but Congress did not."

- **Relevant (2021) Deskbook Section:** 6:9 n.56