

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ASHLEY VAN PATTEN,

Plaintiff,

vs.

Civil No. 09-0034 DJS/RLP

SYLVIA M. OLONA, in her individual
capacity, and PRESBYTERIAN
MEDICAL SERVICES RIO RANCHO
FAMILY HEALTH CENTER and
UNITED STATES OF AMERICA,

Defendants.

**DEFENDANT'S ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT
FOR CIVIL BATTERY, VIOLATION OF CONSTITUTIONAL
RIGHT TO DUE PROCESS AND NEGLIGENCE**

Defendant United States of America by and through its undersigned attorneys respectfully submits its Answer to Plaintiff's First Amended Complaint in this action as follows:

JURISDICTION AND VENUE

1. The averments in paragraph 1 of Plaintiff's First Amended Complaint amount to a legal conclusion to which no response is required.
2. The averments in paragraph 2 of Plaintiff's First Amended Complaint amount to a legal conclusion to which no response is required. To the extent a response is required as to residency, Defendant is without knowledge or information sufficient to form a belief as to Plaintiff's residency and therefore denies the same.

PARTIES

3. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 3 of Plaintiff's First Amended Complaint.

4. Defendant admits the averment in paragraph 4 of Plaintiff's First Amended Complaint only that Ms. Olona was a certified physician's assistant employed by Presbyterian Medical Services, which was deemed eligible for FTCA coverage pursuant to the FSHCAA on June 23, 1996 and has continued without break in coverage since that date. All averments not specifically admitted are denied.

5. Defendant admits the averment in paragraph 5 of Plaintiff's First Amended Complaint only that Rio Rancho Family Health Center was an approved satellite service delivery site of Presbyterian Medical Services, which was deemed eligible for FTCA coverage pursuant to the FSHCAA on June 23, 1996 and has continued without break in coverage since that date. All averments not specifically admitted are denied.

6. Defendant admits the averments in paragraph 6 of Plaintiff's First Amended Complaint only that Ms. Olona was employed by Presbyterian Medical Services, which was deemed eligible for FTCA coverage pursuant to the FSHCAA on June 23, 1996 and has continued without break in coverage since that date, and of which Rio Rancho Family Health Center was an approved satellite service delivery site. All averments not specifically admitted are denied.

FACTUAL BACKGROUND

7. Defendant admits the averment in paragraph 7 of Plaintiff's First Amended Complaint only to the extent that Ms. Van Patten made an appointment and presented to Rio Rancho Family Health Center on January 17, 2007. All averments not specifically admitted are denied.

8. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 8 of Plaintiff's First Amended Complaint.

9. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 9 of Plaintiff's First Amended Complaint.

10. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 10 of Plaintiff's First Amended Complaint.

11. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 11 of Plaintiff's First Amended Complaint.

12. Defendant admits only that Ms. Olona examined Ms. Van Patten for an "IUD check" on January 17, 2007. All averments in paragraph 12 of Plaintiff's First Amended Complaint not specifically admitted are denied.

13. Defendant denies the averments in paragraph 13 of Plaintiff's First Amended Complaint.

14. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 14 of Plaintiff's First Amended Complaint.

15. Defendant denies the averments in paragraph 15 of Plaintiff's First Amended Complaint.

16. Defendant denies the averments in paragraph 16 of Plaintiff's First Amended Complaint.

17. Defendant denies the averments in paragraph 17 of Plaintiff's First Amended Complaint.

18. Defendant admits the averment in paragraph 18 of Plaintiff's First Amended Complaint only that, on January 17, 2007, Ms. Olona ordered a urine human chorionic gonadotropin ("HCG") test for Ms. Van Patten, which was negative for pregnancy. All averments not specifically admitted are denied.

19. Defendant denies the averments in paragraph 19 of Plaintiff's First Amended Complaint.

20. Defendant is without knowledge or information sufficient to form a belief as to the averments in the last sentence of paragraph 20 of Plaintiff's First Amended Complaint. Defendant denies the remaining averments in paragraph 20.

21. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 21 of Plaintiff's First Amended Complaint.

22. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 22 of Plaintiff's First Amended Complaint.

23. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 23 of Plaintiff's First Amended Complaint.

24. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 24 of Plaintiff's First Amended Complaint.

25. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 25 of Plaintiff's First Amended Complaint.

26. Defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph 26 of Plaintiff's First Amended Complaint.

COUNT I: CIVIL BATTERY AGAINST DEFENDANT SYLVIA OLONA

27. Defendant repeats and incorporates herein the above answers to paragraphs 1 through 26 of Plaintiff's First Amended Complaint.

28. Defendant denies the averments in paragraph 28 of Plaintiff's First Amended Complaint.

29. Defendant denies the averments in paragraph 29 of Plaintiff's First Amended Complaint.

30. Defendant denies the averments in paragraph 30 of Plaintiff's First Amended Complaint.

31. Defendant denies the averments in paragraph 31 of Plaintiff's First Amended Complaint.

32. Defendant denies the averments in paragraph 32 of Plaintiff's First Amended Complaint.

33. Defendant denies the averments in paragraph 33 of Plaintiff's First Amended Complaint.

The paragraph beginning with WHEREFORE is a prayer for relief to which no response is necessary. To the extent a response is required, Defendant denies that Plaintiff is are entitled to any such relief.

COUNT II: RESPONDEAT SUPERIOR AGAINST RRFHC SYLVIA OLONA

34. Defendant repeats and incorporates herein the above answers to paragraphs 1 through 33 of Plaintiff's First Amended Complaint.

35. Defendant denies the averments in paragraph 35 of Plaintiff's First Amended Complaint.

36. Defendant denies the averments in paragraph 36 of Plaintiff's First Amended Complaint.

The paragraph beginning with WHEREFORE is a prayer for relief to which no response is necessary. To the extent a response is required, Defendant denies that Plaintiff is are entitled to any such relief.

COUNT III: VIOLATION OF DUE PROCESS RIGHT TO CHOICE OF CONTRACEPTION AGAINST DEFENDANT OLONA

37. Defendant repeats and incorporates herein the above answers to paragraphs 1 through 36 of Plaintiff's First Amended Complaint.

38. The averments in paragraph 38 of Plaintiff's First Amended Complaint amount to a legal conclusion to which no response is required.

39. The averments in paragraph 39 of Plaintiff's First Amended Complaint amount to a legal conclusion to which no response is required.

40. Defendant denies the averments in paragraph 40 of Plaintiff's First Amended Complaint.

41. Defendant denies the averments in paragraph 41 of Plaintiff's First Amended Complaint.

42. Defendant denies the averments in paragraph 42 of Plaintiff's First Amended Complaint.

The paragraph beginning with WHEREFORE is a prayer for relief to which no response is necessary. To the extent a response is required, Defendant denies that Plaintiff is are entitled to any such relief.

**COUNT IV: NEGLIGENT RETENTION AND SUPERVISION
AGAINST DEFENDANT RRFHC**

43. Defendant repeats and incorporates herein the above answers to paragraphs 1 through 42 of Plaintiff's First Amended Complaint.

44. The averments in paragraph 44 of Plaintiff's First Amended Complaint amount to a legal conclusion to which no response is required.

45. Defendant denies the averments in paragraph 45 of Plaintiff's First Amended Complaint.

46. Defendant denies the averments in paragraph 46 of Plaintiff's First Amended Complaint.

The paragraph beginning with WHEREFORE is a prayer for relief to which no response is necessary. To the extent a response is required, Defendant denies that Plaintiff is entitled to any such relief.

AFFIRMATIVE DEFENSES

1. Plaintiff fails to state a claim upon which relief may be granted.
2. Defendant United States, through its employees, acted at all relevant times with due care and diligence and therefore the United States did not breach any actionable duty owed to Plaintiff.

3. In the event that Defendant United States is found negligent, which negligence Defendant denies, such negligence is not the cause in fact or proximate cause of alleged damages suffered by Plaintiff.

4. In the event that Defendant United States is found negligent, which negligence Defendant United States denies, then the acts or omissions of Plaintiff contributed to the injuries and damages of which Plaintiff complains, and Defendant United States is not liable therefor.

5. Defendant United States is not liable for attorneys fees except as provided for by the Federal Torts Claims Act. 28 U.S.C. § 2678.

6. Defendant United States is not liable for interest prior to judgment or for punitive or special damages. 28 U.S.C. § 2674; see also 31 U.S.C. § 1304(b)(1)(A).

7. Pursuant to 28 U.S.C. § 2675(b), a Plaintiff cannot recover more in damages than they demanded in their administrative tort claim.

8. Plaintiff has no right to a jury trial in a personal injury action against the United States. 28 U.S.C. § 2402.

9. Decedent accepted a known risk inherent in the treatment described in the Plaintiff's Complaint.

10. If Defendant was negligent, which is specifically denied, under the Federal Tort Claims Act, the United States is liable in the same manner and to the same extent as a private individual under like circumstances. Accordingly, the New Mexico Medical Malpractice Act, Section 41-5-1 et seq., NMSA 1978, applies directly or as a private party equivalent to the United States.

11. The United States is the only proper defendant for actions against Ms. Olona, Presbyterian Medical Services and Rio Rancho Family Health Center for acts or omissions that occurred after June 23, 1996. 28 U.S.C. § 2679(d)(1).

12. To the extent that any of Plaintiff's claims were not the subject of an administrative tort claim, this court lacks jurisdiction over those claims. 28 U.S.C. § 2675(a).

13. If Defendant was negligent, which is expressly denied, others were also negligent, and in accordance with the doctrine of comparative negligence, Defendant may only be held liable for its proportionate share or the fault, if any.

WHEREFORE, having fully answered, Defendant United States of America prays that:

- a. Plaintiff's Complaint be dismissed with prejudice or, in the alternative, judgment be entered for the United States;
 - b. Defendant United States of America recover its costs herein expended;
- and,
- c. For such other and further relief as this Court may deem just and proper.

Respectfully submitted,

GREGORY J. FOURATT
United States Attorney

Filed electronically 3-27-09

/s/ Virgil H. Lewis II

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I HEREBY CERTIFY that on March 27, 2009, 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:

Ryan J. Villa, Esq.
Law Offices of Robert R. Cooper
1011 Lomas Blvd., NW
Albuquerque, NM 87102

/s/ Virgil H. Lewis II
VIRGIL H. LEWIS II
Assistant U.S. Attorney

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