

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

DENNIS MURPHY, Guardian Ad Litem  
for N.E.D., an incapacitated minor; JACOB DOTSON;  
DOMINIQUE BILLY, individually and as next friend  
of I.C. and S.D., minors,

Plaintiffs,

No. 1:17-cv-00384 JAP/JHR

vs.

THE UNITED STATES OF AMERICA,

Defendant.

**MEMORANDUM OPINION AND ORDER**<sup>\*\*\*</sup>

In its July 27, 2020 Findings of Fact and Conclusions of Law (Doc. 267) (“*Murphy I*”), this Court awarded damages for injuries to N.E.D., a minor child, resulting from Defendant’s negligence. The Court’s award, in substance, was \$1,137,840.00 for past medical expenses,<sup>1</sup>

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\* Defendant filed the release by Plaintiffs of PlayPower Inc. (Confidential Doc. 219-1) and its brief in support of an offset (Confidential Doc. 256) under seal. The Court afforded the parties fourteen days to propose redactions to protect confidential information. *See* Sealed Memorandum Opinion and Order, filed January 27, 2021 (Confidential Doc. 275). On February 8, 2021, Plaintiffs’ counsel asked that the dollar amount of Plaintiffs’ settlement with PlayPower be redacted. In this public version, the Court has redacted all references to the dollar amount.

\*\* Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

<sup>1</sup> This included \$500,000.00 for past medical expenses, stipulated to by the parties prior to trial. (Doc. 216.)

\$14,219,657.00 for future medical expenses, and \$600,000.00 for non-medical damages.<sup>2</sup> *Murphy I* at 15. Before the Court are two remaining issues concerning this award.

First, Defendant contends that it is entitled to an offset of the full amount of a settlement between Plaintiffs and PlayPower, Inc., a former defendant in a parallel state proceeding. For the reasons set forth below, the Court finds that Defendant is entitled to an offset of \$600,000.00, which represents double recovery of non-medical damages covered by Plaintiffs' settlement with PlayPower.

Second, the parties disagree as to whether the trust protecting the award for future medical expenses should be reversionary in nature. That is, Defendant argues that, following N.E.D.'s death, any remaining principal should revert to the United States, rather than to N.E.D.'s estate. Subject to its instructions below, the Court directs that the award of future medical expenses, \$14,219,657.00, be placed in a reversionary trust for the benefit of N.E.D., with any remaining principal after her death reverting to the United States.

### BACKGROUND<sup>3</sup>

On October 20, 2020, the Court held a closed oral argument on the issues of the potential offset and the type of trust in which the award for future medical expenses would be held.

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<sup>2</sup> The New Mexico Medical Malpractice Act caps recovery of damages for non-medical expenses at \$600,000.00. *See* N.M. STAT. ANN. § 41-5-6(A), (B) (1978), *amended by* 1992 N.M. Laws ch. 33.

<sup>3</sup> This opinion presumes familiarity with the facts and holdings set out in *Murphy I*.

**I. Settlement with Former State Court Defendant PlayPower**

In February 2016, N.E.D. fell from playground equipment manufactured by PlayPower. Her father, Plaintiff Jacob Dotson, took her to the Gallup Indian Medical Center, where Defendant's negligence caused her to suffer an anoxic brain injury resulting in permanent and profound disability. On behalf of N.E.D., Plaintiffs brought suit in federal court against the United States under the Federal Tort Claims Act ("FTCA"), and in state court against PlayPower and the City of Gallup for common law tort claims of negligence, negligence *per se*, willfulness or recklessness of suppliers, and strict product liability. (Doc. 99-1.) Thereafter, Plaintiffs and PlayPower reached a confidential settlement. The amount of the PlayPower settlement was [REDACTED].

The release by Plaintiffs of PlayPower (the "Release") (Confidential Doc. 219-1), provides that it is only for non-medical damages.<sup>4</sup> *See* Pls.' Post-Trial Mem. Opp. Gov't's Offset Claim (Doc. 252) (Jan. 31, 2020) ("Pls.' Br. Re: Offset") 7.

At the close of trial, the Court ordered that Plaintiffs' settlement with PlayPower, the accompanying release, and the Guardian Ad Litem report, be placed under seal on the record. (Doc. 266.) The parties submitted post-trial briefing regarding the United States' claimed offset of the total settlement amount against Plaintiffs' recovery.

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<sup>4</sup> "[N]o portion of [the settlement] represent[s] payments for past medical damages, future medical damages, any medical related expenses, prejudgment interest, post judgment interest, exemplary damages or punitive damages." Release at 3.

## II. Reversionary Trust

The parties agree that the damages award for future medical expenses should be placed in trust for the benefit of N.E.D. The parties further agree that a New Mexico trust company, such as the New Mexico Bank & Trust, may act as trustee.

The parties disagree, however, as to what type of trust is appropriate. Plaintiffs argue that any unused trust principal should revert to N.E.D.'s estate in the event of her death. Defendant contends that a "reversionary trust" is warranted, where any unused principal reverts to the United States upon N.E.D.'s death. In support of its position, Defendant provided a sample trust instrument with its pre-trial briefing, outlining a reversionary trust by the terms of which the New Mexico Bank & Trust would act as trustee, and MediBill, Inc., a California company, would act as "administrator." (Doc. 159-1.)

### LEGAL FRAMEWORK

Settlement agreements are contracts, and New Mexico courts interpret them according to contract principles. "A court is bound by the unambiguous language of a settlement agreement." *Russell v. Russell*, 1990-NMCA-080, ¶ 8, 111 N.M. 23, 26, 801 P.2d 93, 96.

In cases involving two successive tortfeasors, New Mexico law accounts for the possibility that a plaintiff may settle with one tortfeasor but not the other and, in so doing, recover damages for a portion of its injuries that may not later be recovered a second time. *See Lujan v. Healthsouth Rehab. Corp.*, 1995-NMSC-057 ¶¶ 26-27, 120 N.M. 422, 429, 902 P.2d 1025, 1032 (emphasis added) ("[The plaintiff has] the burden to show what portion of the . . . *settlement obtained from [one tortfeasor] reasonably is attributable to the original injury. Absent evidence affirmatively establishing such an amount, the entire [settlement] must be set off against any judgment obtained*

against [the successive tortfeasor].”). That is, if the settlement or accompanying release does not specify what damages the plaintiff has foregone in exchange for the settling tortfeasor’s payment, the plaintiff bears the burden of showing that any damages it may obtain against the non-settling tortfeasor have not already been recovered. *See id.* (citing *Sanchez v. Clayton*, 117 N.M. 761, 768, 877 P.2d 567, 574 (N.M. 1994)).

In the context of the FTCA, tort plaintiffs suing the United States are barred from repeatedly seeking payment of damages from the United States for the same injury. *See, e.g., Hull by Hull v. United States*, 971 F.2d 1499, 1505 (10th Cir. 1992) (“[C]ourts cannot subject the government to ongoing obligations like . . . continuing payments . . .”). The New Mexico Medical Malpractice Act bars the payment of a lump sum for future medical expenses. *See* N.M. STAT. ANN. § 41-5-7(D) (1978), *amended by* 1992 N.M. Laws ch. 33 (emphasis added) (“Payment for medical care and related benefits shall be made *as expenses are incurred*.”). In circumstances such as these, the Tenth Circuit authorizes district courts in FTCA cases to fashion remedies, including reversionary trusts, by which periodic payments can be made to injured parties after the United States has discharged its one-time obligation. *See Hull*, 971 F.2d at 1505.

## DISCUSSION

### **I. The United States Is Entitled to an Offset of \$600,000.00 of the Award for Non-Medical Damages**

The issue of whether Defendant is entitled to an offset depends on what damages were covered by the Court’s award (set out in *Murphy I*), and by the settlement between Plaintiffs and PlayPower.

Plaintiffs characterize the settlement with PlayPower as one that covers *only* non-medical damages, whether caused by PlayPower’s allegedly tortious conduct or by Defendant’s

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