

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA

Christine Fluhrer, as mother and )  
Personal Representative of the Estate )  
of Shiree Wilson, )

Case No. 4:15-cv-165

Plaintiff, )

**ANSWER OF  
UNITED STATES OF AMERICA**

v. )

United States of America, et al., )

Defendants. )

The United States of America, by Christopher C. Myers, United States Attorney for the District of North Dakota, and Tara Vavrosky Iversen and Cameron W. Hayden, Assistant United States Attorneys (“United States”), for its Answer to Plaintiff’s Complaint alleges and states:

Unless admitted, qualified, or otherwise answered herein, the United States denies each and every allegation in the Complaint.

**JURISDICTION**

1. Paragraph I states a legal conclusion requiring no response from the United States.

**PARTIES**

2. The United States denies, for lack of information, the allegations in Paragraph II.

3. Upon information and belief, the United States admits Shiree Wilson was an enrolled member of the Turtle Mountain Band of Chippewa Indians. The United States denies, for lack of information, the remaining allegations in Paragraph III.

4. The United States admits the allegations in Paragraph IV.

5. The United States admits the Indian Health Service (“IHS”) is an agency within the Department of Health and Human Services. The United States admits the Great Plains Area, formerly known as the Aberdeen Area, is based in Aberdeen, South Dakota. The United States admits the Great Plains Area works with 22 Indian Health Service Units and Tribal Health Units to provide health care to 122,000 Native Americans residing in North Dakota, South Dakota, Nebraska, and Iowa. The United States admits IHS operates the Quentin N. Burdick Memorial Health Care Facility (“QBMHF”) in Belcourt, North Dakota.

6. The United States admits Dr. Julius Theophilus and Dr. Lloyd McPherson are employees of the Indian Health Service working at QBMHF. The United States admits Dr. Robert Zabenko was an employee of the Indian Health Service who worked at QBMHF. The United States admits that Dr. McPherson and Dr. Zabenko provided care to Shiree Wilson. The United States denies the remaining allegations in Paragraph VI of the Complaint.

7. Paragraph VII does not require an answer from the United States; it is therefore denied for lack of information.

### **FACTS**

8. The United States admits Shiree Wilson passed away on January 22, 2014, and that Shiree Wilson was discharged from QBMHF’s emergency room on January 21, 2014. The United States further admits Shiree Wilson delivered a son on January 14,

2014, and that she was 24 years old. The United States denies, for lack of information, the remaining allegations in Paragraph VIII.

9. The United States admits Dr. Zabenko evaluated Shiree Wilson on January 10, 2014, and that he recommended she deliver her baby by cesarean section because the baby was in a Frank breech position. The United States admits there are risks associated with vaginally delivering a baby in a Frank breech position. The United States admits at the time of the cesarean section on January 14, 2014, Shiree Wilson was 39 weeks pregnant. The United States denies, for lack of information, the remaining allegations in Paragraph IX.

10. The United States admits that at Shiree Wilson's January 10, 2014, prenatal visit, her blood pressure was recorded at 136/75 and her Body Mass Index was recorded at 38.62 (not 41). The United States admits that Shiree Wilson's medical record included a notation that she had a possible heart murmur. The United States admits medical records show that on January 13, 2014, Shiree Wilson's white blood cell count was 21.30. The United States admits that on January 14, 2014, Dr. Zabenko wrote that Shiree Wilson had a mild nonproductive cough. The United States denies, for lack of information, the remaining allegations in Paragraph X.

11. The United States admits Shiree Wilson was admitted to QBMHF on January 14, 2014, for a cesarean section. Based upon medical records of that admission, the United States admits that Dr. Zabenko delivered a baby boy, that Shiree Wilson was discharged on January 16, 2014, and that Dr. Julius Theophilus' name appears on a medical record entitled ExitCare Patient Information dated January 16, 2014. Although

Dr. Theophilus' name appears on the ExitCare record, the United States specifically denies that Dr. Theophilus was involved in Shiree Wilson's care. The United States denies the remaining allegations in Paragraph XI.

12. The United States admits Shiree Wilson returned to the QBMHF emergency room on January 21, 2014, at or about 8:14 a.m., and that Dr. Lloyd McPherson evaluated her. Based upon information contained in the medical record of this visit, the United States admits the remaining allegations in Paragraph XII.

13. The United States admits that on January 21, 2014, Shiree Wilson's blood pressure was recorded at 167/105, and that the medical record reflects a possible heart murmur, an increased respiratory rate, and a white blood count of 14.30 per lab report (15.0 per progress note). The United States admits Dr. McPherson wrote in his notes dated January 21, 2014, that Shiree Wilson's chest x-ray showed infiltration of the right lower lobe and that the radiologist felt that Shiree Wilson "definitely has a possible atypical-type pneumonia." The United States admits Shiree Wilson's CT scan dated January 21, 2014, showed that her heart was mildly enlarged, and her chest x-ray showed her cardiac silhouette was in the upper limits of normal for size and her lungs had possible fluid overload. The United States denies, for lack of information, the remaining allegations of Paragraph XIII.

14. The United States admits Shiree Wilson was discharged from the emergency room on January 21, 2014. Based upon information contained in the medical record of her visit, the United States admits Dr. McPherson told Shiree Wilson she had

“atypical pneumonia bilaterally” and that he prescribed her antibiotics and decongestants. The United States denies the remaining allegations in Paragraph XIV.

15. The United States denies, for lack of information, the allegations in Paragraph XV.

16. The United States admits Shiree Wilson passed away on January 22, 2014, and that she was transported to QBMHF by ambulance. The United States denies Shiree Wilson was pronounced dead before being transported to QBMHF. The United States denies, for lack of information, the remaining allegations in Paragraph XVI.

17. The United States admits Dr. Mark Koponen from the University of North Dakota completed an autopsy on Shiree Wilson on January 23, 2014. The United States admits that, among other things, Dr. Koponen found that Shiree Wilson’s heart weighed 580 grams and that she had severe pulmonary congestion and edema. The United States denies, for lack of information, the remaining allegations in Paragraph XVII.

18. The United States denies the allegations in Paragraph XVIII, including all of its subparagraphs labeled a through h.

19. The United States denies the allegations in Paragraph XIX.

20. The United States denies the allegations in Paragraph XX.

21. The United States denies the allegations in Paragraph XXI.

22. The United States denies the allegations in Paragraph XXII.

23. The United States denies the allegations in Paragraph XXIII.

24. The United States denies the allegations in Paragraph XIV.

25. The United States admits the allegations in Paragraph XXV.

26. The United States admits the allegations in Paragraph XXVI.

27. The United States admits that on or about November 17, 2014, Plaintiff sent supplemental information to the Department of Health and Human Services, Office of the General Counsel.

28. The United States admits that on or about June 17, 2015, Plaintiff submitted a medical opinion of Dr. Gary A. Milzner to the Department of Health and Human Services, Office of the General Counsel.

29. The United States denies the allegations in Paragraph XXIX. The United States avers that Plaintiff's administrative claim was denied on December 11, 2015.

30. The "WHEREFORE" paragraph following Paragraph XXIX is a prayer for relief requiring no response. To the extent a response is required, the United States denies Plaintiff is entitled to the relief requested.

### **AFFIRMATIVE DEFENSES**

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

2) The United States violated no actionable duty owed to Plaintiff or Plaintiff's decedent.

3) The United States, through its employees and agents, acted with due care and diligence at all relevant times.

4) There exists no proximate cause between any alleged act, omission, or breach of duty by the United States and all or part of Plaintiff's alleged injuries or damages.

5) Any injuries suffered or damages sustained by Plaintiff's decedent at the time and place, and on the occasion, alleged in the Complaint were not foreseeable by the United States and were not caused by any negligence, fault, or want of care on the part of the United States, its agents, or employees acting within the scope of their employment.

6) Plaintiff's injuries or damages, if any, were caused wholly or in part by the acts or omissions of other parties, persons, or entities, their servants, agents, representatives, or employees, none of whom are agencies or employees of the United States for whom the United States has any liability pursuant to the FTCA.

7) In the event the United States is found to have been negligent, which negligence is denied, the superseding and intervening negligence of third parties, over whom the United States should not be held liable, broke any causal connection between the United States' negligence and Plaintiff's alleged injuries, severing the legal effect of the United States' negligence, thereby barring recovery or, alternatively, mandating that any recovery be proportionately reduced.

8) Plaintiff's recovery, if any, is barred or limited due to comparative fault.  
See N.D.C.C. § 32-03.2-02.

9) To the extent Plaintiff failed to mitigate damages, recovery should be reduced.

10) To the extent the United States is found liable for any damages to Plaintiff, the United States is entitled to an offset or credit for any past and future benefits provided or to be provided, or paid or to be paid to Plaintiff by the United States (including the Department of Health and Human Services ("HHS") and the HHS Indian Health

Service), as a result of any injury alleged in the Complaint, and is further entitled to an offset of any other benefits received by Plaintiff, not excluded from consideration by the collateral source rule, as a result of same.

11) Plaintiff's recovery, if any, is limited to the amount of the administrative claim under 28 U.S.C. §§ 2675(b) and 1346(b).

12) The United States is entitled to all limitations on liability and damages applicable to the action as set forth in North Dakota law, including N.D.C.C. § 32-42-02, the FTCA, and any other applicable law.

13) Pursuant to 28 U.S.C. § 2674, Plaintiff is not entitled to prejudgment interest.

14) Any claims not exhausted, as required by the FTCA, are barred.

15) Pursuant to N.D.C.C. § 32-21-03, Shiree Wilson's surviving child is entitled to bring a wrongful death action before Shiree Wilson's surviving mother and/or personal representative.

16) Plaintiff has not served the United States with an affidavit containing an admissible expert opinion supporting a prima facie case of professional negligence within three months of the commencement of this action, as required by N.D.C.C. § 28-01-46.

17) The United States asserts it may have additional defenses which are not known at this time, but which may be ascertained through discovery. The United States specifically preserves such other affirmative defenses as they are ascertained through discovery.



WHEREFORE, the United States prays for judgment as follows:

- (1) That Plaintiff's claims and causes of action be dismissed with prejudice on the merits;
- (2) That the United States be awarded costs and disbursements allowable by law; and
- (3) Any other relief the Court deems just and equitable.

Dated this 9th day of March, 2016.

CHRISTOPHER C. MYERS  
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