

APPENDIX

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANTON M. BUCH; SHARON A. STINUS, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.
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No. 16-35287
D.C. No. 3:15-cv-00136-HRH
MEMORANDUM*
(Filed Aug. 21, 2017)

Appeal from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, Presiding
Submitted August 17, 2017**
Anchorage, Alaska

Before: GRABER, CLIFTON, and M. SMITH, Circuit
Judges.

Plaintiffs Stanton M. Buch and Sharon A. Stinus
timely appeal the district court's dismissal of their
claims under the Federal Tort Claims Act, 28 U.S.C.
§§ 2671-2680, as barred by the doctrine announced in
Feres v. United States, 340 U.S. 135 (1950). Reviewing

* This disposition is not appropriate for publication and is
not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes that this case is suitable
for decision without oral argument. Fed. R. App. P. 34(a)(2).

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de novo, *Whittaker Corp. v. United States*, 825 F.3d 1002, 1005 (9th Cir. 2016), we affirm.

Plaintiffs challenge the correctness of the Supreme Court's decision in *Feres*. Because the Supreme Court has not overruled *Feres*, we must follow it. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“[I]t is [the Supreme] Court’s prerogative alone to overrule one of its precedents.”); *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1196 (9th Cir. 2008) (“[I]n the absence of any Supreme Court decision overruling [an earlier Supreme Court precedent], we must follow the Supreme Court precedent that directly controls, leaving to the Court the prerogative of overruling its own prior decisions.” (internal quotation marks omitted)); see also *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001) (“[W]e are bound to follow this well-worn path [of *Feres*].”).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

STANTON M. BUCH and)	
SHARON A. STINUS,)	
Plaintiffs,)	
vs.)	No. 3:15-cv-0136-HRH
UNITED STATES)	
OF AMERICA,)	
Defendant.)	

ORDER

Motion to Dismiss

Defendant moves to dismiss plaintiffs' complaint.¹ This motion is opposed.² Oral argument was requested³ but is not deemed necessary.

Background

Plaintiffs are Stanton M. Buch and Sharon A. Stinus. Defendant is the United States of America.

In September 2009, Buch "was enlisted with the U.S. Army and stationed at Ft. Wainright, near Fairbanks," Alaska.⁴ Buch was "[d]istraught over difficulties in a domestic relationship and under the influence

¹ Docket No. 7.

² Docket No. 11.

³ Docket No. 13.

⁴ Complaint at 2, ¶ 11, Docket No. 1.

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of alcohol and medications” when he “attempted suicide by slashing his wrists.”⁵ Buch was “rushed to medical care at Bassett Army Community Hospital” and “then transferred to the mental health unit at . . . Fairbanks Memorial Hospital[.]”⁶ Buch was “voluntarily” admitted to Fairbanks Memorial Hospital on September 24, 2009 and “then discharged into the care of the U.S. Army on September 25, 2009.”⁷ “That night, after discharge, . . . Buch, unwatched and unchallenged, left base, purchased a handgun and, under the influence of alcohol, attempted suicide again.”⁸ Buch “survived the attempt but injured himself severely in the head.”⁹ Before Buch “pulled the trigger[.]” he “contacted his mother, plaintiff Sharon Stinus, by telephone, and apprised her of the gun and of his intentions.”¹⁰ Stinus “desperately tried to dissuade . . . Buch from harming himself and tried to ascertain his whereabouts so she could direct Army personnel to him in time.”¹¹ “Stinus was thereby a bystander to the harm which befell . . . Buch.”¹²

On August 13, 2015, plaintiffs commenced this Federal Tort Claims Act (FTCA) action. Plaintiffs allege that U.S. Army personnel breached a duty to

⁵ *Id.*

⁶ *Id.* at 2-3.

⁷ *Id.* at 3.

⁸ *Id.* at 3, ¶ 14.

⁹ *Id.*

¹⁰ *Id.* at 3, ¶ 15.

¹¹ *Id.*

¹² *Id.*

supervise Buch “by negligently failing to place him on a suicide prevention watch with adequate safeguards.”¹³ Plaintiffs allege that Buch “suffered grievous physical wounds, emotional distress, pain and suffering and loss of enjoyment of life” as a result of defendant’s negligence.¹⁴ And they allege that Stinus “suffered severe emotional distress and depression from her exposure to the harm experienced by her son[.]”¹⁵ Plaintiffs allege that their injuries “did not arise out of or flow from any course of activity incident to Stanton Buch’s service with the U.S. Army.”¹⁶

Defendant now moves to dismiss plaintiffs’ complaint pursuant to the *Feres* doctrine.

Discussion

“A motion to dismiss pursuant to the *Feres* doctrine is properly treated as a Fed. R. Civ. P. 12(b)(1) motion to dismiss for lack of subject matter jurisdiction[.]” *Dreier v. United States*, 106 F.3d 844, 847 (9th Cir. 1997). “A Rule 12(b)(1) jurisdictional attack may be facial or factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction.” *Id.* “By contrast, in a factual attack, the challenger disputes the truth of the allegations that,

¹³ *Id.* at 3, ¶¶ 12-13.

¹⁴ *Id.* at 4, ¶ 20.

¹⁵ *Id.* at ¶ 18.

¹⁶ *Id.* at 4-5, ¶ 23.

by themselves, would otherwise invoke federal jurisdiction.” *Id.* Here, defendant is making a facial attack. The court “therefore ‘assume[s] [plaintiffs’] [factual] allegations to be true and draw[s] all reasonable inferences in [their] favor.’” *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (quoting *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004)). The court does not, “however, accept the ‘truth of *legal* conclusions merely because they are cast in the form of factual allegations.’” *Id.* (quoting *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003)).

“As a sovereign, the United States is immune from suit unless it waives such immunity.” *Chadd v. United States*, 794 F.3d 1104, 1108 (9th Cir. 2015). “The FTCA waives the federal government’s sovereign immunity, rendering the United States liable ‘in the same manner and to the same extent as a private individual under like circumstances. . . .’” *Ritchie v. United States*, 733 F.3d 871, 874 (9th Cir. 2013) (quoting 28 U.S.C. § 2674). “In 1950, however, the Supreme Court carved out a judicial exception to the FTCA, holding in *Feres v. United States* that ‘the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.’” *Id.* (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)). “It subsequently extended this principle – known informally as the *Feres* doctrine – in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), to bar third-party claims which derive directly or indirectly from injuries to service members incident to military duty.” *Id.*

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“The *Feres* doctrine is applicable ‘whenever a legal action would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States.’” *Zaputil v. Cowgill*, 335 F.3d 885, 887 (9th Cir. 2003) (quoting *Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997)). “The test has been broadly construed to immunize the United States and members of the military from any suit which may intrude in military affairs, second-guess[] military decisions, or impair[] military discipline.” *Id.* (quoting *Jackson v. Brigle*, 17 F.3d 280, 282 (9th Cir. 1994)).

To determine whether a service member’s injuries arise from activity “incident to service”, the court considers four factors:

“(1) the place where the negligent act occurred, (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of the plaintiff’s status as a service member, and (4) the nature of the plaintiff’s activities at the time the negligent act occurred.”

McConnell v. United States, 478 F.3d 1092, 1095 (9th Cir. 2007) (quoting *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001)). “[N]one of these factors are dispositive.” *Id.* Rather, the court must look at “the totality of the circumstances.” *Id.* (citation omitted).

Consideration of these factors leads to the conclusion that plaintiffs’ alleged injuries arose out of activity incident to Buch’s service in the Army. At the time

of his second suicide attempt, Buch was an enlisted soldier serving on active duty. Plaintiffs have alleged that the cost of almost all of Buch's medical treatment as a result of his second suicide attempt "has been borne by defendant[.]"¹⁷ And, the alleged negligent act, the failure of U.S. Army personnel to provide adequate psychiatric care for Buch after his release from the hospital, presumably took place on base.

Plaintiffs' argument to the contrary is unavailing. Plaintiffs point out that the sole express military exception in the FTCA is for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). Thus, because plaintiffs' claims did not arise out of combatant activities of the military, plaintiffs argue that their FTCA claims should not be dismissed.

Although plaintiffs are correct that the only statutory military exception in the FTCA is for combatant activities, that does not mean that the *Feres* doctrine does not apply here. The *Feres* doctrine is a judicially created exception to the waiver of sovereign immunity in the FTCA that applies in military cases, such as this one, which do not involve combatant activities. And, as discussed above, plaintiffs' alleged injuries arose out of activity incident to Buch's service in the Army. Although Buch was off base when he attempted suicide a second time, plaintiffs' claims are based on the Army's failure to supervise one of its soldiers. Such claims plainly fall within the reach of the *Feres* doctrine. Thus,

¹⁷ Complaint at 4, ¶ 21, Docket No. 1.

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plaintiffs' claims are barred by *Feres* doctrine, and they must be dismissed.

Conclusion

Plaintiffs' request for oral argument¹⁸ is denied. Defendant's motion to dismiss¹⁹ is granted. The clerk of court shall enter judgment dismissing plaintiffs' claims with prejudice.

DATED at Anchorage, Alaska, this 21st day of March, 2016.

/s/ H. Russel Holland
United States District Judge

¹⁸ Docket No. 13.

¹⁹ Docket No. 7.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

Stanton M. Buch and	)	
Sharon A. Stinus,	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
United States	)	
of America,	)	
Defendant.	)	Civil No.

COMPLAINT

COME NOW plaintiffs Stanton M. Buch and Sharon A. Stinus, through counsel, and for their complaint against the United States of America allege on information and belief, as follows:

1. This action is brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, 2401(b) and 28 U.S.C. §§ 1331 and 1346(b).
2. On September 20, 2011 Stanton M. Buch submitted an administrative claim for negligent supervision to the U.S. Department of the Army.

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3. On September 20, 2011 Sharon A. Stinus, the mother of Stanton Buch, submitted an administrative claim for negligent supervision and negligent infliction of emotional distress to the U.S. Department of the Army.

4. On July 31, 2014 the U.S. Department of the Army denied the two administrative claims referenced above. The claimants, through counsel, requested reconsideration of the denial.

5. On February 19, 2015 the U.S. Department of the Army again denied the two administrative claims referenced above. All conditions precedent to a Federal Tort Claims Act have been met.

6. Venue is properly within this District under 28 U.S.C. § 1402(b) as the act complained of occurred in the District of Alaska.

7. Plaintiff Stanton Buch is a resident of the State of Washington.

8. Plaintiff Sharon Stinus is a resident of the State of Pennsylvania.

9. The United States of America, for the U.S. Department of the Army, is the appropriate defendant under the Federal Tort Claims Act.

10. The amount in controversy exceeds \$75,000.

11. In September 2009 plaintiff Stanton M. Buch was enlisted with the U.S. Army and stationed at Ft. Wainwright, near Fairbanks. Distraught over difficulties in a domestic relationship and under the influence

of alcohol and medications, Mr. Buch attempted suicide by slashing his wrists. Mr. Buch was found alive and rushed to medical care at Bassett Army Community Hospital. He was then transferred to the mental health unit at defendant Fairbanks Memorial Hospital, where he was admitted voluntarily on September 24, 2009 and then discharged to the care of the U.S. Army on September 25, 2009.

12. By contract and by its undertaking in assuming the care and custody of plaintiff Buch, a known suicide risk, defendant U.S. Army formed a special relationship with patient Stanton M. Buch. This special relationship gave rise to a duty on the part of defendant to supervise Mr. Buch appropriately, which in his case included the duty to protect Mr. Buch from himself.

13. Defendant breached its duties to plaintiff by negligently failing to place him on a suicide prevention watch with adequate safeguards.

14. That night, after discharge, plaintiff Buch, unwatched and unchallenged, left base, purchased a handgun and, under the influence of alcohol, attempted suicide again. He survived the attempt but injured himself severely in the head. These self-destructive actions, given his suicide attempt the day previous, were reasonably foreseeable by defendant, given its special relationship with plaintiff and custodial role.

15. Before he pulled the trigger plaintiff Buch contacted his mother, plaintiff Sharon Stinus, by telephone, and apprised her of the gun and of his

intentions. Ms. Stinus desperately tried to dissuade plaintiff Buch from harming himself and tried to ascertain his whereabouts so she could direct Army personnel to him in time. Ms. Stinus was thereby a bystander to the harm which befell Mr. Buch.

16. Defendant owed Ms. Stinus a duty to refrain from conduct, including that alleged above, which would with reasonable foreseeability result in her harm.

17. Defendant breached its duty to Ms. Stinus by the acts and omissions alleged above.

18. As a direct and proximate cause of defendant's negligence, Ms. Stinus suffered severe emotional distress and depression from her exposure to the harm experienced by her son, with physical symptoms including headaches, sleeplessness and loss of appetite.

19. Defendant is liable to Ms. Stinus for negligent infliction of emotional distress.

20. As a direct and proximate cause of defendant's negligence, plaintiff Buch suffered grievous physical wounds, emotional distress, pain and suffering and loss of enjoyment of life.

21. As a direct and proximate result of defendant's negligence, plaintiff has required and in future will require significant medical, rehabilitational and other related treatment. Almost all of the cost of this treatment has been borne by defendant, but there have been some uncovered expenses and plaintiff anticipates there will be more such in the future.

22. As a direct and proximate result of defendant's negligence, plaintiff Buch has suffered "severe permanent physical impairment or severe disfigurement" within the meaning of A.S. § 09.17.010(c).

23. Plaintiff Buch's injuries and plaintiff Sharon Stinus' injuries did not arise out of or flow from any course of activity incident to Stanton Buch's service with the U.S. Army.

WHEREFORE, plaintiffs pray for relief from this honorable Court, as follows:

1. For compensatory damages in an amount to be proved at trial;
2. For reasonable attorney's fees and costs of suit incurred herein; and
3. For such other and further relief as the Court deems proper.

DATED this 13 day of August 2015.

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