

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

AUG 21 1991

ROBERT L. HOECKER
Clerk

YVONNE PACE; LESTER PACE,)
)
Plaintiffs-Appellants,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Defendant-Appellee.)

No. 90-6368
(D.C. No. CIV-90-519-W)
(W.D. Oklahoma)

ORDER AND JUDGMENT*

Before LOGAN, MOORE, and BALDOCK, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Yvonne Pace sued the United States under the Federal Tort Claims Act for injuries she sustained while being treated by a military doctor at an air force base hospital. Her husband, Lester Pace, also sued for loss of consortium. Pace, who was on active duty as a captain at the time of her injuries,

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

alleged that she sought medical care for a routine urinary tract infection; that her treating doctor administered a drug he should have known might cause, as it did, Stevens-Johnson Syndrome; and that as a result, she was left with scarring over a large percentage of her body and was placed on retirement status.

The government sought and obtained dismissal under the doctrine of Feres v. United States, 340 U.S. 135 (1950), relying upon our opinion in Madsen v. United States, 841 F.2d 1011 (10th Cir. 1987).

We agree with the district court that Madsen controls, and that the district court properly dismissed the action. The attempts to distinguish Captain Pace's situation from that in Madsen are unavailing. Plaintiffs in both cases were retired at the time of the action, and both argued that their medical treatment was not incident to their service in the military. It is also apparent that in Madsen the plaintiff, as here, was not ordered to the hospital. We see no principled way of distinguishing the cases to permit different results.

We also agree that Mr. Pace's claim for loss of consortium is derivative and is therefore also barred by the Feres doctrine. See Kendrick v. United States, 877 F.2d 1201, 1206, 1207 (4th Cir. 1989), cert. dismissed, 110 S. Ct. 1104 (1990); Gaspard v. United States, 713 F.2d 1097, 1101-02 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984).

AFFIRMED.

Entered for the Court

James K. Logan
Circuit Judge