

ALBUQUERQUE JOURNAL



HOME-OWNED AND HOME-OPERATED ■ MADE IN THE U.S.A.
119TH YEAR, NO. 221 ■ 62 PAGES IN 7 SECTIONS

MONDAY MORNING, AUGUST 9, 1999

FINAL ★★ ★★

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Tribal Law Used in Negligence Suit Against the U.S.

■ *Settlement in son's wrongful death case allows mother to collect damages past federal limit*

BY SCOTT SANDLIN
Journal Staff Writer

A precedent-setting case in which a federal judge decided to apply tribal law in a wrongful death claim against the United States was set-

tled last week as the trial was to take place.

Despite vehement opposition from the Department of Justice, U.S. District Judge Martha Vázquez refused to back off a June ruling to use Acoma tribal law in a medical negligence suit over the death of Michael Cheromiah Jr.

That meant the New Mexico medical malpractice damages limit of \$600,000 wouldn't apply — and the family potentially could have won a much higher award from the judge. There is no damages cap in Acoma

tribal law.

Cheromiah, a 21-year-old member of Laguna Pueblo who loved to rodeo and country-western dance, died Nov. 4, 1995. His mother is from Acoma Pueblo, and his father is from Laguna Pueblo.

Severe chest pains had sent him to the Acoma-Cañoncito-Laguna Hospital emergency room four times in five days. Three times, he was sent home with orders to take ibuprofen and get bed rest.

The fourth time, he was taken by ambulance to Presbyterian Hospi-

tal in Albuquerque, but treatment by cardiac specialists came too late. A fluid buildup around his heart literally squeezed the life out of him.

On Thursday, the Cheromiah family signed papers awarding them \$675,000.

At the insistence of his mother, Diane Cheromiah, who filed suit on his behalf, \$75,000 will go to improve ACL Hospital emergency room services over a three-year period as a memorial to Michael.

Government lawyers referred

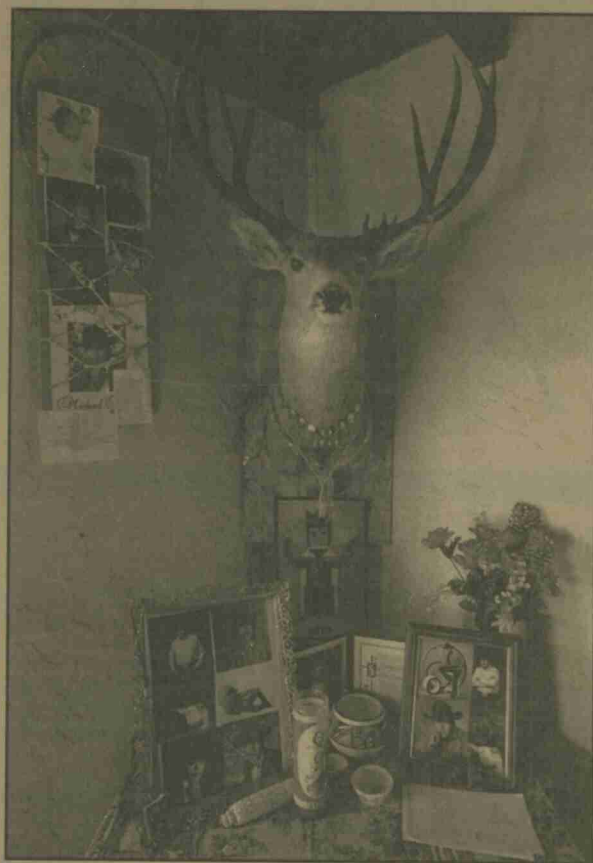
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MISSING HER SON: Diane Cheromiah, left, holds a portrait of her son Michael, who died in 1995 from complications of an infection involving his heart; at right is Michael's brother, Estancio.

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MEMORIAL:
A shrine to Michael Cheromiah Jr. stands in his family's Acoma Pueblo home.

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comment to the Justice Department's public information office, which didn't respond to Journal inquiries Friday. But the Justice Department was clearly dismayed with the court's decision to use tribal law in the case — a first in the nation.

The Federal Tort Claims Act, which waives the government's usual immunity for wrongful acts, orders federal district courts to apply "the law of the place where the act or omission occurred."

Justice Department lawyers argued "the law of the place" meant the law of the state — a position embraced by two other federal judges in New Mexico in similar cases.

In written briefs, Justice lawyers said the applicable law must be pre-existing, articulated and accessible — that is, written law — and Acoma law relies to at least some extent on oral tradition.

"An individual's liability should not be determined by rules or laws that (an) individual has no way to discover," they said.

Albuquerque attorneys Randi McGinn and Kimberly Richards, who represented Diane Cheromiah in the suit, sought an opposite ruling. Applying state law, with its damages cap, would violate the Cheromiah family's due process rights, they argued.

It would also "create a special class of New Mexico citizens — Native Americans — who would not be allowed to fully recover damages caused by the medical malpractice of government hospitals and hospital employees."

In order to be protected by the malpractice cap, hospitals have to meet certain criteria and pay into a fund. No nonfederal hospital in the state in 1995 received the protection of the malpractice damages cap, according to the plaintiffs.

And the United States not only committed medical malpractice on Michael Cheromiah, but also regularly does so to other Native Americans at the end of each federal fiscal year when Indian hospitals are perennially short of cash, the Cheromiah lawyers argued.

They were poised to introduce exhibits showing, for instance, that on a per person basis, the federal government spends almost three times as much on health care to federal prisoners as it does on Native Americans through the Indian Health Service.

For Diane Cheromiah, the policy issues take shape in her continuing grief over losing Michael, the oldest of four children in a close-knit family.

Michael played tackle on the football team at Grants High School and loved livestock and rodeos. He went from trick-or-treating as a rodeo clown when he was young to perennially sporting a black Resistol western hat and latching on to an ambition to be a bull rider.

"We told him 'You're too tall. Your feet will scrape the ground,'" Diane Cheromiah said of Michael, slim and athletic at 6 feet 1 inch tall.

After getting a job with the state highway department in 1993, he moved around to places like Quemado and Cuba working on road building, but he always came home on weekends.

That's where he was when the chest pains, fever and vomiting began on Oct. 31, 1995. That day, he went to the emergency room complaining of chest pain on his left side and was sent home.

He went back Nov. 2, accompanied by his mother, and was given an intravenous injection for dehydration and again sent home.

Michael was back at the hospital less than 12 hours later complaining of chest pain aggravated by lying down and difficulty breathing, and was again sent home without a cardiac exam.

"At one point," Diane Cheromiah said, "he told his sister his pain was so bad he wanted to die."

Diane was getting ready to do the laundry when her daughter, Celena came running in to say Michael was getting stiff and groaning. As he lost consciousness, the family summoned an ambulance.

At the ACL hospital, a new doctor interpreted test results as shock from constriction of the heart and referred him immediately to specialists in Albuquerque.

Cheromiah family lawyers said because he was young and healthy, he could have been saved if he'd gotten adequate medical treatment.

Government lawyers argued that while tragic, Michael's death was the result of rare complication of a viral syndrome for which there is no specific therapy and the doctors at the Acoma hospital were not at fault.

Diane Cheromiah was determined to seek some change.

On the Friday before trial, she was offered \$600,000 to settle the case, but turned it down because it wouldn't change anything at the hospital.

She agreed to the deal when the local U.S. Attorney's Office found \$75,000 that could be included to improve hospital services.

"I'm glad it's over," she said in an interview last week, "but not a day goes by that I don't miss my son."