

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA

JUNE 21, 2023  
MOTION HEARING  
BEFORE THE HONORABLE TERRENCE W. BOYLE  
UNITED STATES DISTRICT JUDGE

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CLINTON PRESTLEY	5:23-CV-143-BO-RN
TERRANCE SHINE	7:23-CV-23-BO-BM
DEAN H. HOLMES	7:23-CV-29-BO-RJ
GREGORY JOHNSON	7:23-CV-30-BO-BM
THOMAS HOBBS	7:23-CV-40-BO-RN
BARRY A. BARAK, JANE BARAK	7:23-CV-42-BO-RN
COMETTO DAVIS, WENDY DAVIS	7:23-CV-43-BO-BM
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FRED PALUMBO, as person representative of the estate of Joan S. Palumbo	7:23-CV-74-BO-KS
KERRICK W. BREEN, as personal representative of the estate of Christine M. Breen	7:23-CV-83-BO-BM
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DARLENE BROOKS	7:23-CV-89-BO-RN
PATRICIA WARREN, as personal representative of the estate of Roseanne Warren	7:23-CV-91-BO-BM
EDWARD LUTHY, Jr., as personal representative of the estate of Charlotte Luthy	7:23-CV-93-BO-RN
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ELIZABETH S. AKERS, as personal representative of the estate of Paul C. Akers	7:23-CV-120-BO-RN
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MARY BAILEY	7:23-CV-149-BO-KS
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ERNEST HUNT	7:23-CV-452-BO-BM
CHARLES JAMES	7:23-CV-453-BO-BM
JAMES BROWN, Jr.	7:23-CV-463-BO-RN
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MARINDA TURNER	7:23-CV-498-BO-RN
RONALD WALKER, Sr.	7:23-CV-499-BO-RJ
TERRI WEBB	7:23-CV-504-BO-RN
ALLEN WASHINGTON	7:23-CV-517-BO-RN
RONALD JOHNSON	7:23-CV-520-BO-RJ
KENNETH MANERS	7:23-CV-527-BO-KS
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EDWARD RAYMOND	7:23-CV-546-BO-KS
JOHN RIFFE	7:23-CV-550-BO-KS
JAMES STANLEY	7:23-CV-557-BO-RN
DARREL STEWART	7:23-CV-558-BO-BM
PHILIP AMRHEIN	7:23-CV-560-BO-RJ
RUSSELL BARBUTO	7:23-CV-562-BO-RN
RONALD CORIELL	7:23-CV-566-BO-KS
MARK CAGIANO	7:23-CV-569-BO-RN
GARY CLIFFORD	7:23-CV-574-BO-BM

CHARLES HAJEK  
COLLEEN GANEY  
DANA HAGEN  
DARRELL KING  
ROBERT TIPTON

7:23-CV-580-BO-KS  
7:23-CV-729-BO-RN  
7:23-CV-805-BO-KS  
7:23-CV-811-BO-RJ  
7:23-CV-814-BO-RJ

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

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ATTORNEYS FOR PLAINTIFFS PRESENT:

James Edward Bell, III, Kevin R. Dean, Mona Lisa Wallace, Joel R. Rhine, Nevin Wisnoski, Zina Bash, and Hugh R. Overholt.

ATTORNEYS FOR DEFENDANT PRESENT:

John A. Bain and Haroon Anwar

AMY M. CONDON, CRR, RPR, CSR  
Official Court Reporter  
United States District Court  
Raleigh, North Carolina  
Stenotype with computer-aided transcription

1 (Wednesday, June 21st, 2023, commencing at 2:00 p.m.)

2 P R O C E E D I N G S

3 THE COURT: Good afternoon to everyone.

4 We're here on a motion to strike and other matters  
5 that may arise during the course of this proceeding.

6 Let's see, I'll hear from the plaintiffs first on  
7 that and then from the defendant.

8 Mr. Bell, are you the person who wants to speak  
9 primarily?

10 MR. BELL: Yes, Your Honor.

11 THE COURT: I'll recognize you.

12 MR. BELL: Please the Court, Your Honor.

13 The plaintiffs believe, Your Honor, that the defenses  
14 that we've asked to be stricken should be stricken.

15 This is a very unique statute. It's -- some people  
16 say it's akin to a strict liability statute; some say it's not,  
17 but we think it actually is a very different statute that  
18 requires two things: Plaintiffs prove they were in the base  
19 for 30 days and they were harmed.

20 So the question about some of the defenses that were  
21 raised, for example, contributory negligence, we just can't see  
22 how that would apply.

23 Now, Judge, recognizing that this is a new issue, a  
24 new statute, there's not a lot of case law on it. I think this  
25 might be the first case law, is if you do strike the defenses,

1 which we would urge you to do, we'd like for you to do so  
2 without prejudice so if something during discovery comes up,  
3 the Government thinks they have a defense they could raise,  
4 they wouldn't be prejudiced so we have a good record going down  
5 the road.

6 THE COURT: What about the Twombly and Iqbal rules  
7 about adequacy of pleading?

8 MR. BELL: I think, Judge, as we go down the road,  
9 this is a lot simpler case than a lot of people think it is.  
10 It's a -- and maybe if we're going to be talking about  
11 scheduling and things like that, we can address that issue.

12 But the -- some defenses, we believe, are clearly not  
13 appropriate. The Government has asked to have two defenses or  
14 set-off. However, in our opinion try to redefine what the  
15 statute says. I think they recognize one of them was -- I  
16 believed they agreed to take one out and not agree to take the  
17 other out.

18 So we think our position is solid, Your Honor. But  
19 we do recognize that because of the uniqueness of the statute  
20 that during discovery there may be an opportunity to argue if  
21 one of these defenses should be allowed. We don't want to  
22 prejudice them for that because we want to have a good record.

23 THE COURT: Is that all you want to say?

24 MR. BELL: I think that's all I need to say, Your  
25 Honor.

1 THE COURT: All right. I'll hear from Mr. Bain, is  
2 it?

3 MR. BAIN: Yes, Your Honor. Thank you, Your Honor.  
4 May it please the Court.

5 The Camp Lejeune Justice Act places an unprecedented  
6 burden on the Court and the parties to achieve results that are  
7 fair and expeditious for all claimants.

8 Plaintiffs' motion to strike illustrates one of the  
9 reasons why the Camp Lejeune Justice Act litigation should have  
10 global case management.

11 Different judges in this district have applied  
12 different standards to motion to strike affirmative defenses;  
13 therefore, the Court should defer ruling on this issue until  
14 there's a master complaint and master answer and there are  
15 procedures for global case management in place. To proceed  
16 otherwise creates a risk of inconsistent decisions, which is  
17 what global case management is designed to avoid.

18 The United States' position is that the Twombly/Iqbal  
19 standard should not be applied to affirmative defenses in an  
20 answer and for that reason the plaintiffs' motion to strike  
21 should be denied. There are good reasons why Twombly/Iqbal  
22 should not be applied to affirmative defenses, particularly in  
23 mass tort cases where hundreds of plaintiffs have  
24 simultaneously filed claims against a defendant.

25 THE COURT: This is not a negligence case; it's a

1 statutory case.

2 MR. BAIN: It is a statutory case, but it's a remedy  
3 that sounds in tort, so it is similar to other mass tort cases.

4 THE COURT: How would contributory negligence in any  
5 event apply in this case?

6 MR. BAIN: Well, as Mr. Bell alluded to, this is a  
7 brand new statute, Camp Lejeune Justice Act. There is no  
8 precedent interpreting the statute, and we're not moving to  
9 dismiss; we're just preserving our defenses.

10 As I mentioned, the statute appears to provide a tort  
11 remedy for personal injury or wrongful death caused by  
12 exposures of contaminants in the Camp Lejeune water. Under  
13 that understanding, each of the affirmative defenses that we've  
14 asserted have a good faith basis in law with potential factual  
15 predicates, and I can address each of those in turn.

16 But turning to the defenses that we have alleged with  
17 respect to assumption of risk, contributory negligence --

18 THE COURT: How would people assume the risk? Who  
19 would know the water was poison?

20 MR. BAIN: Your Honor, we're not suggesting in any  
21 way that the plaintiffs or the claimants are responsible for  
22 their own interest. However, there have been claims made in  
23 some complaints that certain employees of the Navy at Camp  
24 Lejeune and certain officers were aware of the contamination in  
25 the early 1980s and failed to take appropriate actions in



1 response to that.

2 Under the terms of the statute, which covers anyone  
3 who was at Camp Lejeune from 1953 to 1987, those individuals  
4 are potential plaintiffs. There are very --

5 THE COURT: So you think they knew the water was  
6 poison and they said, "That's fine with me. I'll go ahead and  
7 drink it and shower with it."

8 MR. BAIN: They knew that there was some  
9 contamination as alleged in some of the plaintiffs' own  
10 complaints. Those contaminants were not regulated at the time.  
11 They may have continued to drink the water knowing what the  
12 laboratory results were.

13 We think it's a very, very limited number of  
14 plaintiffs, but the statute covers such a long range of people  
15 that those people who the own plaintiffs' complaints have  
16 alleged knew about the contamination and failed to take action  
17 are potential plaintiffs under the statute.

18 THE COURT: How many cases are in the administrative  
19 process now?

20 MR. BAIN: There are approximately 70,000 claims.

21 THE COURT: How many of those have you made offers  
22 in?

23 MR. BAIN: Your Honor, I would like to address that,  
24 if I could. There have been no offers that have been made yet;  
25 however, the Navy is committed to paying valid claims as fairly

1 and expeditiously as possible.

2 THE COURT: When would you do that?

3 MR. BAIN: Excuse me?

4 THE COURT: When would you do that?

5 MR. BAIN: They will be doing that soon.

6 THE COURT: What does "soon" mean?

7 MR. BAIN: Soon would be --

8 THE COURT: A year from now?

9 MR. BAIN: Not a year from now. Not a year from now.

10 THE COURT: We're running up -- excuse me for being  
11 in a dialogue, but I think that's a productive way to discuss  
12 things.

13 We're running up on the one-year anniversary of the  
14 Act now.

15 MR. BAIN: Yes.

16 THE COURT: And six months from February 10th or 11th  
17 will be the beginning -- will be the first period of filing in  
18 this court.

19 MR. BAIN: Could I give some -- Your Honor, could I  
20 give some background about where the Navy is in the claims?

21 THE COURT: That would be most helpful.

22 MR. BAIN: Over the last many months, the Navy has  
23 been marshaling personnel and information technology resources  
24 in order to fairly evaluate the claims and make appropriate  
25 offers.

1           Before the passage of the Camp Lejeune Justice Act,  
2 the Navy's Tort Claims Unit processed approximately 2000 claims  
3 per year with 22 employees.

4           THE COURT: During the MDL?

5           MR. BAIN: This was just all their claims throughout  
6 the country, any tort claims, medical malpractice --

7           THE COURT: Not specific to Camp Lejeune?

8           MR. BAIN: No. These are medical malpractice, truck  
9 accidents, slip and falls.

10           So they get about 2000 claims per year, and they have  
11 22 people in Norfolk who handle those claims. That was their  
12 yearly average.

13           So with the passage of the Camp Lejeune Justice Act,  
14 they had to marshal resources to handle these influx of claims.  
15 They have now set up a separate unit, the Camp Lejeune Claims  
16 Task Force, that's presently staffed with 36 active and  
17 reservists, Judge Advocate General officers, as well as  
18 civilian employees who have experience from this Tort Claims  
19 Unit. The task force is now in the process of hiring 50  
20 additional attorneys to join this unit, as well as a number of  
21 paralegals, IT, and support staff.

22           Even before the Act was passed, the Navy started  
23 looking into software solutions to manage the influx of claims  
24 that it was potentially going to get up to a million claims.  
25 And shortly after President Biden signed the statute, they put

1 out bids for contracts for IT Solutions to manage this number  
2 of claims.

3 THE COURT: I hope you would agree with me that one  
4 of the ways to energize the disposition of all these claims is  
5 for it to take place in the administrative process; that the  
6 administrative process is uniquely suited to deal with the  
7 claims on an immediate basis and not have them come to Federal  
8 Court for jury trials.

9 MR. BAIN: That's correct, Your Honor. And we're  
10 working on processes to be able to fairly adjudicate the claims  
11 at the administrative stage.

12 So the Navy is marshaling all of these resources, but  
13 they need to set up a system that is going to be not only  
14 expeditious but it's going to be fair so that it treats similar  
15 claims similarly and that it provides --

16 THE COURT: What's the standard of proof within the  
17 administrative process, same as in the Court?

18 MR. BAIN: The proof that will be required -- as you  
19 may know from the FTCA process, all that's required in a claim  
20 is essentially a statement of what your claim is and a sum  
21 certain. So the Navy needs more documentation in order to make  
22 an evaluation and make an offer. So it's a multifaceted  
23 process.

24 It's not going to be the same as the proof required  
25 in a court case, but they are going to need information

1 regarding the diagnosis of the disease and certain information  
2 about whether the person was at Camp Lejeune.

3 THE COURT: Does the Navy have authorization from its  
4 command to actually monetize claims to actually pay amounts of  
5 credit on the United States?

6 MR. BAIN: That is going to be forthcoming soon, we  
7 anticipate.

8 THE COURT: But you don't have it right now?

9 MR. BAIN: Not right now. It has to be done in  
10 conjunction --

11 THE COURT: So you couldn't -- for the past -- what  
12 are we into, 11 months or so? So for the past 11 months, you  
13 don't have a dollar that you can contribute to settling a case?

14 MR. BAIN: Well, that's not necessarily the case.  
15 Given these cases, the Navy has to coordinate with the  
16 Department of Justice. So they would have to come to us with  
17 recommendations, and then the --

18 THE COURT: They don't have the independent authority  
19 to settle cases?

20 MR. BAIN: Not for these cases, no, because the  
21 aggregate amount is far beyond what their settlement authority  
22 is independently at the Navy.

23 THE COURT: Thank you for your candor. Some of us  
24 are under the impression that any settlement within the  
25 administrative process is charged against the Navy's budget.

1 MR. BAIN: That's not --

2 THE COURT: Is that true?

3 MR. BAIN: It comes out of the judgment fund, which  
4 is the fund that pays claims against the United States over a  
5 certain amount.

6 THE COURT: Even within the administrative process?

7 MR. BAIN: That's correct, Your Honor.

8 THE COURT: So there's no impediment budget-wise to  
9 making settlement payments?

10 MR. BAIN: Not budget-wise. It has to do with the  
11 authority through the coordination with the Department of  
12 Justice that has to be done.

13 THE COURT: So the DOJ is involved in approving  
14 administrative settlements?

15 MR. BAIN: In this circumstance, yes.

16 THE COURT: Was that the way the law was structured  
17 or is that an add-on that you developed?

18 MR. BAIN: That had nothing to do with the Camp  
19 Lejeune Justice Act. That's the way the regulations are set  
20 out for tort claims generally.

21 So tort claims that go over a certain amount have to  
22 be approved in coordination with the Department of Justice.  
23 And there's also an aggregate rule that if the aggregate claims  
24 go over a certain amount, then even if an individual claim is  
25 under that amount, it has to be approved by the Department of

1 Justice.

2 So the challenge is the number of claims, the  
3 evaluation that the Navy has to do, the process with working  
4 with the Department of Justice to get approval --

5 THE COURT: So not to be -- not to interrupt, but to  
6 share with you the dialogue. You've got 70,000 live claims in  
7 the administrative process and about 1300 cases or 1400 cases  
8 here and in all of those 70,000 claims the Department of  
9 Justice has to be a partner in agreeing to settle them.

10 MR. BAIN: That's correct, Your Honor.

11 THE COURT: Okay.

12 MR. BAIN: So we are working now with the Navy to  
13 develop procedures which will expedite the making of offers on  
14 claims and will also try to do it in a way that's fair to the  
15 claimants and also fiscally responsible. And that's what we're  
16 working on and hope to be able to implement it soon.

17 As I said, it's a very high priority for both the  
18 Department of the Navy and the Department of Justice.

19 On the motion to strike, I would just -- you know, I  
20 just want to reiterate a couple points that our position is  
21 that Twombly/Iqbal should not apply to affirmative defenses.  
22 That seems to be the new majority position of courts in this  
23 district.

24 I appreciate Your Honor in the McGinity case had a  
25 different position many years ago, but I think that the

1 position now has shifted that Twombly/Iqbal does not apply to  
2 affirmative defenses. And that's what the position of the  
3 Government is based, on the language of Rule 8, which has a  
4 different pleading standard set out for allegations that are  
5 made in a complaint in which there must be a showing of a  
6 predicate for relief and the allegations in affirmative  
7 defenses which must just be short, plain statements of  
8 defenses.

9           So the language of Rule 8 supports the fact that  
10 Twombly and Iqbal should not apply to affirmative defenses.

11           We also believe that, as I said, each of our  
12 affirmative defenses have a basis in law. So, for example, the  
13 affirmative defense that we submit that there's a failure to  
14 state a claim for relief, whether or not Twombly or Iqbal  
15 applies to affirmative defenses it --

16           THE COURT: Well, some of the claims are not  
17 adequately supported where the plea of injury is a gross  
18 condition or some -- I don't know. There's a term that the  
19 plaintiffs are using, and clearly that's not an adequate  
20 description of the loss or the injury.

21           MR. BAIN: That's correct, Your Honor. So that's one  
22 of the bases that might be an argument made that the claim has  
23 failed to state a claim for relief. It just says "serious  
24 injury." Or with respect to exposure, the claims almost always  
25 just recites the element of the statute between August 1st,



1 1953, and December 31st, 1987, the plaintiff worked, resided,  
2 or was otherwise exposed for greater than 30 days to the water  
3 at Camp Lejeune. That's just a restatement of the element of  
4 the statute. It doesn't say anything about when, where, or how  
5 the plaintiff was exposed to contaminated water, which is  
6 significant since several of the water systems at Camp Lejeune  
7 were never contaminated.

8 United States reserves the right to challenge  
9 plaintiffs' complaints under Federal Rule Civil Procedure 12(c)  
10 for failure to state a claim. It's incongruous for the  
11 plaintiffs to challenge the United States' affirmative defenses  
12 when their claims are so formulaic themselves.

13 There are a number of other claims if you -- defenses  
14 that I could address if you'd like, Your Honor.

15 THE COURT: Yeah. I'm not going to have a hearing  
16 every day, so we're live on the scene today and it's my hope  
17 that we can be constructive; that this can advance the entire  
18 package; that it's not singled out; what this part of the Court  
19 does today contributes to the effort of the entire court  
20 because we're very much in agreement on the need to act  
21 universally.

22 So you have this opportunity to have sort of a pit  
23 stop in the middle of the race, and we'll go from there.

24 MR. BAIN: Okay. Well, let me address, then, some of  
25 the other affirmative defenses. So, for example, the

1 plaintiffs also wrongly challenge the affirmative defenses on  
2 third-party causation. Causation is a stated element in the  
3 Camp Lejeune Justice Act and its standard tort law, the  
4 defendant cannot be liable for harm caused by others.

5 Here, it will be undisputed that the contamination of  
6 Camp Lejeune's Tarawa Terrace water system was caused by the  
7 practices of the ABC Dry Cleaners which is a private off-base  
8 company.

9 Depending on the specific circumstances of the  
10 plaintiffs' exposure, which again have not been alleged with  
11 any particularity in the plaintiffs' complaints, third-party  
12 causation defenses may be implicated.

13 Plaintiffs also wrongly challenge the affirmative  
14 defenses based on offset. One defense is based on the  
15 statutory offset provision that's in the Act itself, and the  
16 other defense is based on the Supreme Court statement in Brooks  
17 versus United States.

18 The United States agrees with the plaintiff that the  
19 Camp Lejeune Justice Act's offset provision is for a disability  
20 award, payment, or benefit provided that has to be related to  
21 the Camp Lejeune water, and the United States can revise that  
22 affirmative defense to make that explicit.

23 The United States does not agree that the value of  
24 services rendered is an inappropriate offset under the statute.  
25 The value of services rendered could be a benefit provided

1 under the statutory language, and whether that value qualifies  
2 as a benefit under the statute should be decided -- should not  
3 be decided on the plaintiffs' motion to strike, but should be  
4 subject to fuller briefing in an appropriate factual  
5 evidentiary context.

6           Whether the United States is entitled to the  
7 additional offset stated in Brooks versus United States should  
8 also be subject to briefing. The fact that the statute  
9 specifies particular offsets and not others did not necessarily  
10 mean that Congress intended to foreclose the other offsets and  
11 allow plaintiffs to basically get a double recovery from the  
12 United States such as compensation for medical services that  
13 are paid for by Tricare Insurance for military members.

14           So I think that that is all I want to say about  
15 particular affirmative defenses unless Your Honor has other  
16 questions about them.

17           THE COURT: I don't at this time.

18           MR. BAIN: Thank you, Your Honor.

19           THE COURT: Okay. I'll hear from some of the other  
20 plaintiffs' attorneys.

21           Yes, ma'am.

22           MS. BASH: Your Honor, Zina Bash from Keller Postman.

23           THE COURT: Yes.

24           MS. BASH: I wanted to address the Iqbal issue. As  
25 Your Honor knows, there's disagreement among the courts. We

1 think that Iqbal should apply consistent with your 2020  
2 decision. And it has been applied by other courts in this  
3 circuit as recently as earlier this year, so I don't think that  
4 there's a majority position.

5 But what we'd like to flag is that whether or not  
6 Iqbal applies, their defenses still do not meet the plain text  
7 of Rule 12(f) which allows for the rejection of defenses if  
8 they are insufficient or immaterial. So we think that that  
9 insufficient prong imports an Iqbal-like standard. There  
10 cannot be formulaic boilerplate defenses.

11 So, for example, even the color that Mr. Bain added  
12 about Tarawa Terrace, that's not in here, right? So we  
13 wouldn't know exactly what it is that we're up against without  
14 more precision in the answers. So we would ask for at least  
15 the plain text of Rule 12(f) to apply. We think a lot of them  
16 should be struck under that, the insufficiency.

17 And then immateriality, the assumption of the risk,  
18 for example, and the offsets and the contributory negligence  
19 are just not material, right? So the statute isn't about  
20 negligence. So contributory negligence should not be an  
21 excuse.

22 And our position is that the offsets -- they've  
23 offered to amend Answer Number 7 which we believe should be  
24 amended. We would ask for more precision to say precisely what  
25 the statute says; that it's only about benefits received in

1 connection with the water at Camp Lejeune, not just Camp  
2 Lejeune at large, because that's broader.

3           But on Answer Number 8 where they are just trying to  
4 create, you know, an offset for any -- the value of any of the  
5 services rendered based on the Brooks decision, what I would  
6 say is that that Brooks decision, a 1949 case that long  
7 predates the Justice Act, even in that case the Supreme Court  
8 made clear that the offsets would not be permitted, if doing so  
9 would conflict with the statute. And we think that in this  
10 case the broad offsets that the Government would like to impose  
11 conflict directly with the text of the statute which has very  
12 limited language about the types of offsets that it will allow.

13           So aside from being, you know -- the decision, the  
14 Supreme Court decision itself says to look to the statute and  
15 whether the additional offsets conflict, it was also dicta. The  
16 Court noted that the issue had not been briefed and that it was  
17 not resolving anything definitively. So we would not think  
18 that the Brooks decision should allow these broader offsets  
19 that the Government is now proposing.

20           I understand the failure to state a claim for some of  
21 the complaints, but, you know, the complaint that I'm here on  
22 today, Ms. Colleen Ganey versus the United States, lists all of  
23 the -- all of the elements of the statute, not in a formulaic  
24 way. It gives very specifics. And same thing for I think  
25 many, if not most, of our complaints.

1           So I think, again, on the assumption of the risk  
2 defense, the contributory negligence defense, and the  
3 mitigation of damages defense, I think all three of those fail  
4 under Rule 12(f) whether or not Iqbal applies, even though our  
5 position is that Iqbal should apply to all of these.

6           Your Honor, would you mind if I say just a few words  
7 about my client, Ms. Colleen Ganey?

8           THE COURT: That's fine.

9           MS. BASH: Mr. Dowling and I spoke with her last week  
10 in anticipation of these hearings. We like to just update our  
11 clients whenever we are going to be here on their cases, and  
12 she asked us to tell the Court a little bit about her because  
13 she could not be here today.

14           So Ms. Ganey was born in 1961 and lived the four  
15 years of her life on the base at Camp Lejeune. Her father was  
16 a lieutenant colonel stationed at Camp Lejeune.

17           She left the base at four years old and kind of  
18 proceeded. She was ill a lot, but nothing particularly heavy  
19 until her last year of college she came down with ALS and  
20 developed symptoms very quickly. Within four years she became  
21 quadriplegic. So though she had one year left in college, she  
22 persevered and it took her 10 years to graduate, and she  
23 ultimately did.

24           But this disease really robbed kind of the career she  
25 had hoped for and the life that she had hoped for. She was

1 never able to marry or have children. And now in her fifties  
2 she is living with her mother, the widow of the lieutenant  
3 colonel, Ms. Ganey, who is 90 years old. And Colleen's biggest  
4 fear is that she will lose her only caretaker, her mother, and  
5 be institutionalized.

6 So all of us have clients with similarly heavy  
7 stories, and we just wanted to underscore the reason for the  
8 rush. This is a very complex case, and we think that narrowing  
9 the issues for the Court by striking defenses that should not  
10 apply here aids toward the efficiency that we're all looking  
11 for.

12 And the last thing I would say, Your Honor, when we  
13 were about to get off the phone, Ms. Ganey asked if I could  
14 bring a picture of her to court. Mr. Dowling pressed back that  
15 it wasn't necessary; the Court would understand she's not in a  
16 condition to be here today, and she insisted that we at least  
17 bring it, so I have that here with me today. I'm happy to  
18 leave it with the Court, but I just wanted to offer it because  
19 she specifically asked and insisted that we bring it, and so we  
20 have it here today.

21 THE COURT: No case is a number; every case is a  
22 human story, and so I appreciate that.

23 MS. BASH: Thank you, Your Honor.

24 MS. WALLACE: Your Honor, if I may.

25 THE COURT: Ms. Wallace.

1 MS. WALLACE: I'm Mona Lisa Wallace. I'm here with  
2 Wallace and Graham and I'm also here with these gentlemen who  
3 will speak on their own behalves.

4 But we're here because we actually filed a motion to  
5 strike all of the Government's defenses. We don't normally  
6 ever do that. We did not do that in the Smithfield cases.  
7 We've never done it.

8 We did it in these cases because we feel so strongly  
9 about the need to get these cases moving as quickly as we  
10 possibly can.

11 We will be in D.C. on Monday --

12 THE COURT: I'm sorry. You'll be what?

13 MS. WALLACE: If I may sit, is that okay, so you can  
14 hear me? I'm sorry.

15 We're working on the fact sheet with the Justice  
16 Department. We filed the joint motion with the Justice  
17 Department. We're hoping for an early resolution --

18 THE COURT: Resolution of what?

19 MS. WALLACE: These cases. At least --

20 THE COURT: Of the cases?

21 MS. WALLACE: Yes, sir. We're hoping. We've been  
22 meeting --

23 THE COURT: How do you think they'll end?

24 MS. WALLACE: Your Honor, I think there's an  
25 extremely good probability that if we can -- and we're meeting



1 Monday to work with the Justice Department, Adam Bain. We've  
2 been working in fact sheets --

3 THE COURT: They haven't made an offer yet.

4 MS. WALLACE: I know, sir, but we're trying to --

5 THE COURT: No money has been committed.

6 MS. WALLACE: Yes, sir. I think it's disgraceful, to  
7 be honest with you.

8 THE COURT: It'll be the year 2040 before the first  
9 case is paid out at this rate.

10 MS. WALLACE: Your Honor, I agree.

11 THE COURT: I understand, but I don't see any glimmer  
12 of any expectation that a case will settle or cases will  
13 settle. And, you know, I'm sensitive of the fact that I'm  
14 working with my colleagues and we're united in our effort, but  
15 yet I have individual obligations to do my job and so that's  
16 why we're here today.

17 MS. WALLACE: Yes, sir. That's what I'm hoping  
18 you'll do. You will look at these one by one.

19 We filed a motion to strike all of them, and I think  
20 it would be very helpful, if the Court has time, to go down all  
21 17 of them.

22 When I hear them talk about, Your Honor, a tort case,  
23 Your Honor, contributory negligence --

24 THE COURT: A what kind of case?

25 MS. WALLACE: This is a statutory case.

1 THE COURT: I understand that.

2 MS. WALLACE: It's not a tort case.

3 THE COURT: I understand. That's what I said.

4 MS. WALLACE: When they mentioned contributory  
5 negligence, Your Honor, as a plaintiff's lawyer of 41 years in  
6 North Carolina, they allege contributory negligence, I have to  
7 prove gross negligence to overcome that. That opens every area  
8 of discovery that is completely contrary to the Camp Lejeune  
9 Justice Act.

10 I mean, it was our understanding that liability is  
11 not at issue. And so that's why I think the earlier the Court  
12 addresses these issues -- and we're hopeful we can address them  
13 today. I agree with everything both counsel to the left of me  
14 said, except if we can address them today. I don't think we  
15 should have to wait to ask the Government to address them in  
16 more detail on a motion or to amend them. I don't think we  
17 have to wait on discovery. I think we should put them out  
18 there, find out what the evidence is they have, what the real  
19 position is on it and ask them to quickly give us additional  
20 facts or they should be stricken.

21 So I'm -- I agree with Your Honor 100 percent. And I  
22 think until we know -- and we can address what these defenses  
23 are -- it's going to be more difficult for us to agree on fact  
24 sheets and we need the fact sheets to be able to get all the  
25 cases in the database to set up a settlement, or at least a

1 potential settlement or at least discussions.

2 THE COURT: What's your name?

3 MR. RHINE: Joel Rhine, Your Honor. I've been before  
4 you several times, Your Honor.

5 First, just in the Iqbal and Twombly, you got it  
6 right. You got it right back in 2015 in Vandevender when you  
7 applied Iqbal and Twombly to affirmative defenses and you  
8 quoted all the different cases. And you said that "in support  
9 of each of the challenged defenses, defendants asserts no facts  
10 at all." So you struck them, and you compared it to "tossing  
11 affirmative defenses into the case like a fish hook without  
12 bait." That's exactly what's happened here. That's exactly  
13 what's happened here in every single one of their defenses.

14 For example, on the 12(b)(6), on the failure to state  
15 a claim for relief can be granted, there's no facts whatsoever  
16 alleged. On the -- you can go through each and every one.

17 Judge, this is very similar to the Reazer-Kremitzki  
18 case, which was dealing with the Seventh Circuit where there  
19 was a conflict between whether or not Iqbal and Twombly would  
20 apply to a 12(b)(6). And the Court said it really doesn't  
21 matter. However, whether Twombly or Iqbal pleading standard  
22 applies likely makes little difference. Factual allegations  
23 that were sufficient before Twombly and Iqbal will likely still  
24 be sufficient and barebones affirmative defenses have always  
25 been insufficient.

1           So, Judge, if you go through each one of their  
2 defenses, the first affirmative defense, which is just we fail  
3 to state a claim for which relief can be granted, there's a  
4 question as to whether or not that is even really an  
5 affirmative defense. But even if it is an affirmative defense,  
6 they have to put some meat on the bones, and it's a barebones  
7 allegation just like you struck in 2015.

8           On the second affirmative defense whether or not it's  
9 the proximate cause of the injury. Again, they got to make  
10 some allegations. All of the -- it's just simply saying  
11 that -- let me back up.

12           On the causation, the causation is simply stated  
13 forth the elements of the plaintiffs' claim. A real  
14 affirmative defense is not one that just says you haven't met  
15 your burden of proof. And we've cited cases, Judge, that it is  
16 a defense which demonstrates that a plaintiff has not met its  
17 burden is not an affirmative defense. And that a defense of  
18 failure to state a claim is not an affirmative defense but is  
19 merely a negation of plaintiffs' claims. You can apply that to  
20 every one of the instances in which the Court -- which the  
21 defendants have just gone to our burden of proof and have  
22 alleged that we haven't met that. That's not a real  
23 affirmative defense.

24           Ms. Wallace was also absolutely correct when she  
25 talked about this negligence standard. They got to be careful

1 what they ask for. I mean, if we -- if they assert a  
2 negligence case, then we've got to go and prove gross  
3 negligence. We've got to show everything that happened out  
4 there. Also, this assumption of the risk, careful what you're  
5 asking for. Because if we assume the risk, we're going to  
6 bring in all that evidence that the Navy and the Marines knew,  
7 and hid it, and we've been told that all this evidence isn't  
8 coming in.

9 Well, if they bring that defense, it's coming in and  
10 that's going to make these cases longer and stronger. So I say  
11 on that one, make the defense.

12 THE COURT: Is that enough?

13 MR. RHINE: On the sixth affirmative defense, Your  
14 Honor, recovery is limited to any amount in the administrative  
15 claim. Again, that's not an affirmative defense. The statute  
16 sets forth what we have to do.

17 Judge, you know, on all of these, most of these  
18 12(f)s are not favored; they are disfavored. The reason why  
19 they are disfavored is because it's usually a dilatory tactic.  
20 Well, here, Judge, just like in the Reazer-Kremitzki case, if  
21 it will declutter the files, then it will actually save time.  
22 And what we would like to do is to save time, declutter the  
23 files, take out all of these affirmative defenses, let's go try  
24 these cases on the real issues, which is the causation and  
25 damages. It's a strict liability statute.

1 Thank you, Judge.

2 THE COURT: Thank you. Mr. Bain, let me --

3 MR. BAIN: May I have a couple responses?

4 THE COURT: Yeah. But I wanted to speak to you just  
5 first about an inquiry.

6 Will trying some of these cases improve or detract  
7 from achieving a global settlement?

8 MR. BAIN: Trying some of these cases in a way which  
9 are representative of the larger claims will improve the  
10 prospects of settlement. So not trying the first cases that  
11 were filed based on just being in the courthouse first, but  
12 actually picking out representative cases, and if the sides  
13 cannot agree on values, for example, having trials might assist  
14 the resolution globally of all the claims.

15 THE COURT: Yeah. I'm not wedded to first in, first  
16 out. Best in, best out would be a better way to put it.

17 MR. BAIN: I agree, Your Honor.

18 THE COURT: Okay.

19 MR. BAIN: Just a couple points I wanted to make in  
20 response to the plaintiffs' argument.

21 They claim that our defenses are lacking because they  
22 don't have factual specificity responding to the plaintiffs'  
23 complaints, but the plaintiffs' complaints are so formulaic  
24 with respect to the disease and exposure that it's practically  
25 impossible to be factually specific in response with respect to

1 affirmative defenses.

2 THE COURT: If somebody says life-threatening  
3 conditions, what can you say? I mean driving too fast is a  
4 life-threatening condition.

5 MR. BAIN: That's right, Your Honor. We don't know  
6 what the specific disease is; we don't know where they were at  
7 Camp Lejeune; how they are exposed. So it's difficult in those  
8 circumstances to articulate factually specific affirmative  
9 defenses. So we raise them in order -- because Rule 8(c) says  
10 the affirmative defenses must be stated in the answer.

11 So at the time of the answer, affirmative defenses  
12 must be stated and then we have discovery to allow us to be  
13 able to see whether they are applicable or not. So that's our  
14 position on that.

15 Given the formulaic recitation in the plaintiffs'  
16 complaints, the affirmative defenses really can't be more  
17 factually specific at this point.

18 And then to the response to the argument this is a  
19 statutory action, not a tort action. Well, the Federal Court  
20 Claims Act is a statute as well. This is a remedy, a tort  
21 remedy against the United States like the Federal Tort Claims  
22 Act that provides certain circumstances in which the United  
23 States might be liable for personal injury or wrongful death,  
24 so it is a tort statute and there's a real question as to where  
25 the CLJA, the Camp Lejeune Justice Act, is silent what fills in

1 there, what -- the --

2 THE COURT: Well, the federal common law will  
3 probably fill in there and that will come from the Court.

4 MR. BAIN: Well, some common law will fill in.

5 THE COURT: The Court has some degree of creative  
6 ability to fashion the law and apply it to the claims in these  
7 cases.

8 MR. BAIN: That's right, Your Honor. And we would  
9 suggest that the Federal Tort Claims Act is a statute to look  
10 to because it looks to the analogous private liability and like  
11 circumstances and the relevant jurisdiction.

12 THE COURT: I think all the judges on this court, I  
13 don't speak for them collectively, but I can say that it's my  
14 opinion -- and I think they share it -- that we will be charged  
15 with the obligation of fashioning the federal common law to fit  
16 into the contours of this litigation.

17 MR. BAIN: That's right, Your Honor. That's the  
18 reason why, given that this is a brand new statute, there's no  
19 decisions out there, that we raise the defenses that we did.  
20 We took it very seriously. We researched the potentially  
21 applicable law. We consulted with the local U.S. Attorney's  
22 Offices about the potential affirmative defenses under North  
23 Carolina law and we asserted our defenses based on that.

24 It wasn't done reflexively; it wasn't done without  
25 any thought. This is a high-profile case, this is a new



1 statute and we were very careful in the affirmative defenses  
2 that we asserted. And many of them we asserted prefaced with  
3 the phrase "to the extent the evidence shows."

4 So I just want Your Honor to know this is a brand new  
5 statute. We asserted the affirmative defenses that we thought  
6 might be appropriate in this circumstance.

7 MS. WALLACE: Your Honor, may I? What's so  
8 concerning about that --

9 THE COURT: Well, I heard from you already, so if you  
10 don't mind.

11 MS. WALLACE: Yes, sir.

12 THE COURT: Is there anyone else?

13 MS. WALLACE: Nevin, sir.

14 THE COURT: Who are you?

15 MR. WISNOSKI: Thank you, Your Honor. May it please  
16 the Court. Nevin Wisnoski here on behalf of Kim Callan and  
17 Robert Tipton. Just a few points I'd like to point out,  
18 particularly in response --

19 THE COURT: Keep it brief.

20 MR. WISNOSKI: -- to the Government.

21 Sorry, Your Honor?

22 THE COURT: Keep it brief.

23 MR. WISNOSKI: Absolutely.

24 Even in what was just pointed out, the idea of  
25 potential factual predicates, it will be undisputed to the

1 facts -- to the extent the facts show. This is speculation.  
2 Speculation, even under North Carolina's lower notice pleading  
3 standard, is insufficient for an affirmative defense. So even  
4 if Your Honor doesn't find that Iqbal/Twombly applies -- and it  
5 does, and we've briefed that thoroughly -- even under a lower  
6 notice pleading standard, anything predicated as to the extent  
7 that facts shown with no facts alleged is insufficient as a  
8 matter of law.

9 THE COURT: Who are you?

10 MR. DEAN: Good afternoon, Your Honor. My name is  
11 Kevin Dean. I'm here on behalf of the Akers plaintiffs.

12 THE COURT: Yeah. Okay.

13 MR. DEAN: CV-120. Other counsel, Jim Roberts, is in  
14 trial so I --

15 THE COURT: I can hear from you today.

16 MR. DEAN: Yes, sir.

17 I just adopt all the arguments that have been made by  
18 plaintiffs' counsel, but I wanted the Court just to simply know  
19 that when Your Honor gets ready for us to try the Akers' case,  
20 we'll be ready to go.

21 THE COURT: Try the what case?

22 MR. DEAN: Akers, A-K-E-R-S. The estate of Dr. Paul  
23 Akers.

24 THE COURT: Why would I be ready to try that?

25 MR. DEAN: I was just passing along that my point was

1 there's not a lot of discovery we believe we need, so we would  
2 be ready for trial whenever Your Honor is ready regardless of  
3 how the rulings go with the defenses. That's all I have to  
4 say, Your Honor.

5 THE COURT: Okay.

6 MR. DEAN: Thank you.

7 THE COURT: Well, I think I've heard what I need to  
8 hear today, and I appreciate y'all attending. I know this is  
9 an important matter. We as a court are trying to be very  
10 conscientious but also very responsive both in the big way and  
11 in the little way. So hopefully this will bring justice to all  
12 concerned.

13 Thank you, and I'll be in recess.

14 \* \* \*

15 (The proceedings concluded at 2:40 p.m.)

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1 UNITED STATE DISTRICT COURT  
2 EASTERN DISTRICT OF NORTH CAROLINA  
3  
4

5 CERTIFICATE OF OFFICIAL REPORTER  
6

7 I, Amy M. Condon, CRR, RPR, CSR, Federal Official  
8 Court Reporter, in and for the United States District Court for  
9 the Eastern District of North Carolina, do hereby certify that  
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18 Dated this 23rd day of June, 2023.  
19

20 *Amy M. Condon*

21 /s/ Amy M. Condon  
22 Amy M. Condon, CRR, CSR, RPR  
23 U.S. Official Court Reporter  
24  
25