UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NUMBER: 03-81110-CIV-HURLEY/HOPKINS

MAUREEN STEVENS, as Personal Representative of the Estate of ROBERT STEVENS, Deceased, and on behalf of MAUREEN STEVENS, Individually, NICHOLAS STEVENS, HEIDI HOGAN and CASEY STEVENS, Survivors,

Plaintiffs,

vs

UNITED STATES OF AMERICA,

Defendant.
_____/

DEFENDANT UNITED STATES' MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION (BASED ON THE FTCA'S ASSAULT AND BATTERY EXCEPTION) OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT (BASED ON THE FTCA'S ANALOGOUS PRIVATE LIABILITY REQUIREMENT AND A CORRESPONDING LACK OF CAUSE-IN-FACT) WITH MEMORANDUM OF LAW IN SUPPORT

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MOTION

With a two-year period of fact discovery now complete, the United States moves to dismiss Plaintiffs' Federal Tort Claims Act (FTCA) claims based on the FTCA's assault and battery exception, 28 U.S.C. § 2680(h). In the alternative, the United States moves for summary judgment based on the FTCA's analogous private liability requirement, 28 U.S.C. §§ 1346(b)(1), 2674, and a corresponding complete failure of proof concerning cause-in-fact, an essential element of all tort claims under Florida law. The United States is required to make this motion in the alternative, in part, because Plaintiffs have declined to answer any of the government's most recent discovery requests, which were propounded in an attempt to narrow Plaintiffs' potential theories of liability.[1]

MEMORANDUM IN SUPPORT

INTRODUCTION

Plaintiffs' FTCA claims allege that government negligence caused the death of Robert Stevens, who was killed in October 2001, when an assailant prepared and mailed respirable spores of *Bacillus anthracis*, or anthrax, to Mr. Stevens' place of work in Boca Raton, Florida. According to Plaintiffs, the source material for the attack-spores was obtained from the United States Army Medical Research Institute for Infectious Diseases (USAMRIID), a medical research facility in Fort Detrick, Maryland. At the eleventh hour of this litigation, Plaintiffs have placed themselves in a dilemma.

On one hand, if Plaintiffs contend, as one of their two retained experts opines,[2] that the government negligently allowed its employee, Dr. Bruce Ivins, to murder Mr. Stevens, then 28 U.S.C. § 2680(h), which eliminates jurisdiction over all FTCA claims "arising out of an assault [or] battery," bars Plaintiffs' claims.[3] This assault and battery exception serves not only to shield the government from any *respondeat superior* liability for batteries committed by government

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[1] Aside from the government's pending motion to compel written discovery responses from Plaintiffs, U.S. Mot. to Compel [DE# 147], fact discovery closed on June 15, 2011. Amended Scheduling Order [DE# 143]. A bench trial is scheduled for the Court's December 2011 trial docket. Order Resetting Trial [DE# 118]; Amended Scheduling Order [DE# 143].

[2] U.S. Ex. AB-1 (Dr. Dietz Report, Excerpts) at 73.

[3] The United States concedes that the evidence would show, more likely than not, that, "[a]s was announced on August 6, 2008 by the U.S. Department of Justice, Dr. Bruce Ivins was the person who sent the anthrax to which . . . Robert Stevens was exposed." *See* Notice of Joint Stipulation [DE# 85] at 3 ¶ 6 (withdrawn by Plaintiffs through Pls.' Mot. to Withdraw [DE# 139]).

employees, but it also broadly bars ***all*** negligence claims premised on a failure to prevent such attacks (*e.g.*, alleged negligence in hiring, screening, or supervising an employee-assailant). There is no exception to this jurisdictional bar unless the duty breached by the "negligence of other Government employees . . . is ***entirely independent*** of [the tortfeasor's] employment status."[4] Here, the duty under Florida law to exercise "reasonable care to the public to avoid an unauthorized interception and dissemination of ultrahazardous material,"[5] cannot be considered "entirely independent" of the government's employment relationship with the assailant (Dr. Ivins). First, the parties have agreed that Dr. Ivins was "a federal employee scientist who worked with anthrax in the course of his regular duties at [USAMRIID]," and whose employment required that he grow, store, experiment with, and disseminate anthrax.[6] Second, unlike its duty to prevent an unauthorized interception and dissemination by "an unemployed . . . visitor,"[7] any duty owed by the government to prevent unauthorized use of anthrax by one of its scientists, such as Dr. Ivins (who was otherwise authorized to access and use anthrax), is inextricably intertwined with the employment relationship.

Plaintiffs' own contentions and the jurisdictional facts reflect a consensus that the "security procedures" used to protect the public from an insider-threat like Dr. Ivins are woven into how a laboratory hires, screens, and supervises its employees. The physical security measures a laboratory might employ to protect against the possibility of an outsider committing an unauthorized interception and dissemination of biological material are either inapplicable or scientifically irrelevant to preventing an insider with authorized access from nefariously walking out of a laboratory with microorganisms that are so small, they are invisible to the naked eye.[8] In other words, even if the government could have prevented Dr. Ivins from committing the attacks, the only viable preventative measures cannot be separated from the employment relationship (*e.g.*, the elimination or restriction of Dr. Ivins' authorized employee access to the

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[4] *Acosta v. United States*, 207 F. Supp. 2d 1365, 1369 n.1 (S.D. Fla. 2001) (emphasis added) (quoting *Sheridan v. United States*, 487 U.S. 392, 401 (1988)).
[5] *United States v. Stevens*, 994 So. 2d 1062, 1070 (Fla. 2008).
[6] Notice of Joint Stipulation [DE# 85] at 2-3, ¶¶ 5, 7.
[7] *See Sheridan*, 487 U.S. at 402.
[8] One spore of anthrax is approximately one micron (or 1/1000 of a millimeter) in diameter. Additionally, a normal human's hands and arms can be home to as many as 10 million bacteria. *See* U.S. Ex. AB-17 (Spradlin Article: *Bacterial Abundance on Hands*) at 390.

laboratory and the anthrax therein). As a result, the "entirely independent of employment status" exception to § 2680(h) does not apply.

On the other hand, if Plaintiffs contend (in an apparent attempt to evade § 2680(h)) that an "unknown assailant," not Dr. Ivins, perpetrated the attacks, they cannot meet the FTCA's requirement of analogous private liability, 28 U.S.C. §§ 1346(b)(1), 2674, because the record is devoid of evidence reflecting that government negligence was the but-for cause of Plaintiffs' harm. Unless Plaintiffs can prove essential facts regarding the nature of the attacks and how they were the product of government negligence, they cannot establish that government negligence was the actual cause-in-fact of Mr. Stevens' death, and cannot meet their burden under Florida law to show that there was "a natural, direct and continuous sequence between the negligent act and the injury that it can reasonably be said that but for the act the injury would not have occurred."[9] Once Plaintiffs jettison the notion that Dr. Ivins murdered Mr. Stevens, there are insufficient facts to create even a possible causal chain connecting the alleged harm to government negligence. Although the government has agreed that it "owned, managed, grew, [and] experimented" with a batch of anthrax (known as RMR-1029) that was "genetically similar, but dissimilar in its form, to the anthrax that resulted in the death of Robert Stevens,"[10] and that this anthrax was "produced by Dr. Bruce Ivins,"[11] the record is clear that, prior to the attacks, anthrax from this same batch was lawfully sent to a number of different private medical research facilities.[12] The government did not have exclusive control over RMR-1029, the parent material of the attack-spores.

If Plaintiffs are intent on rejecting the government's concession that Dr. Ivins was the anthrax assailant, they open the door to a scenario whereby the attack-spores came from RMR-1029 anthrax that was in the legitimate possession of a non-government facility. A "possibility" that government negligence could have caused Plaintiffs' alleged harm is not sufficient to establish causation under Florida law.[13] In the absence of facts that show how government

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[9] *See Gresham v. Strickland*, 784 So. 2d 578, 582 (Fla. 4th DCA 2001) (citations omitted).
[10] Notice of Joint Stipulation [DE# 85] at 3 ¶ 7.
[11] *Id.* at 2 ¶ 5.
[12] U.S. Ex. AB-2 (RMR-1029 Reference Material Receipt Record) at ARMY02-010387-88 (reflecting that, in the years preceding the September/October 2001 attacks, portions of the RMR-1029 batch were provided to private laboratories operated by BioPort and Battelle); *see* U.S. Ex. AB-16 (Dr. Friedlander Depo., Excerpts) at 56:22-57:17.
[13] *See Greene v. Flewelling*, 366 So. 2d 777, 781 (Fla. 2d DCA 1978).

negligence actually allowed an unknown assailant to intercept the very material that was modified and used to murder Mr. Stevens, summary judgment for lack of cause-in-fact is appropriate.

Even if Plaintiffs could avoid complete dismissal or summary judgment based on the foregoing analysis, their claims cannot proceed based on two additional fully dispositive bases – Plaintiffs cannot establish jurisdiction in light of the FTCA's discretionary function exception,[14] nor can they come forward with sufficient proof to avoid summary judgment for lack of proximate cause. These two arguments are the subject of two additional separate motions filed on this date. Ultimately, while the death of Robert Stevens was a tragedy, the FTCA's limited waiver of sovereign immunity does not allow for recovery.

FACTUAL & PROCEDURAL BACKGROUND

"Robert Stevens . . . was exposed to anthrax and died as a result on October 5, 2001."[15] "At the time of his death . . . from anthrax infection, inhalation type, Robert Stevens [age 63] was . . . survived by his wife Maureen Stevens . . . [and his adult children]."[16] The State of Florida concluded that Mr. Stevens was a "victim of intentional anthrax dissemination" and that his probable manner of death was "Homicide."[17]

On December 2, 2003, Mr. Stevens' survivors filed an FTCA action against the United States demanding a judgment exceeding $50,000,000.00.[18] Through their Complaint, Plaintiffs alleged claims based on "strict liability for ultra-hazardous activity" (which were subsequently dismissed)[19] and "negligence." Specifically, Plaintiffs alleged that the United States negligently failed to properly: "monitor employees who had access to . . . anthrax"; "act in a reasonable, prudent, and careful manner in conducting background investigations prior to hiring personnel

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14 The separation of powers doctrine requires a federal court to determine whether it has jurisdiction before reaching the merits of case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

15 Notice of Joint Stipulation [DE# 85] at 2 ¶ 4.

16 *Id.* at 2 ¶ 2.

17 U.S. Ex. AB-3 (Pls.' Resp. to First Set of RFAs) at Nos. 45, 46. Similarly, "the Office of the District Medical Examiner, District 15, State of Florida, Palm Beach County, found that the manner of Robert Stevens' death was 'Homicide.'" *Id.* at No. 47.

18 Compl. [DE# 1] ¶¶ 1, 20(C).

19 Order [DE# 47] at 2 n.1 (dismissing Plaintiffs' strict liability claims premised on the ultra-hazardous activity doctrine for lack of subject-matter jurisdiction under the FTCA); *see Laird v. Nelms*, 406 U.S. 797, 801 (1972) ("Congress intended . . . to exclude liability based solely on the ultrahazardous nature of an activity undertaken by the Government.").

and placing them in a position of authority and having access to the anthrax"; "maintain a hiring system that adequately involved background investigation, interviewing, checking of references, the checking of curriculum [vitaes], or other mechanisms to insure job applicants . . . were suitable for employment in a position where they would have access to anthrax"; and "make sure that its employees . . . were properly supervised and trained . . . [and not allow] them to work and handle . . . anthrax, without proper supervision and/or training."[20] In addition, Plaintiffs generally pleaded that the government negligently failed to properly: "maintain and store" as well as "inventory, warehouse, or catalog" anthrax; "maintain its premises precluding unauthorized individuals from having access to the anthrax"; "implement" or "employ proper security measures . . . [and] establish appropriate procedures or protocols"; supervise and train "independent contractors"; and have an "adequate system in place to track the anthrax it forwarded to other laboratories . . . ."[21]

In August 2008, the U.S. Department of Justice announced its conclusion that a government scientist named Dr. Bruce Ivins, a senior microbiologist at USAMRIID, was the anthrax assailant.[22]

ARGUMENT

I. The FTCA's assault and battery exception jurisdictionally bars Plaintiffs' claims that the United States negligently failed to prevent Dr. Ivins (or any other government employee) from murdering Mr. Stevens.

A. Plaintiffs' primary theory of liability presumes that a government employee-insider, with authorized access to anthrax, perpetrated the anthrax attacks.

Although there is no longer a binding stipulation that the evidence would show, more likely than not, that "Dr. Bruce Ivins was the person who sent the anthrax to which Robert Stevens was exposed,"[23] this does not mean that Plaintiffs have abandoned the theory that Mr.

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[20] Compl. [DE# 1] ¶¶ 18(C), 18(J), 18(K), 18(L).

[21] *Id.* ¶¶ 18(A), 18(B), 18(D), 18(E), 18(F), 18(G), 18(H), 18(I), 18(L), 18(M), 18(N).

[22] U.S. Ex. AB-15 (Amerithrax Investigative Summary, Excerpts) at USAO-000116.

[23] On June 5, 2009, prior to the exchange of initial disclosures and the opening of discovery in this matter, the parties filed a notice containing joint stipulations of fact. Notice of Joint Stipulation [DE# 85]. One of the ten stipulations reflected the parties' agreement that the evidence would show, more likely than not, that "Dr. Bruce Ivins was the person who sent the anthrax to which to [sic] Robert Stevens was exposed." *Id.* at 3 ¶ 6. For almost two years, from June 15, 2009, when discovery opened, until April 8, 2011, when Plaintiffs (likely in anticipation of this motion) moved to withdraw the stipulation, the government operated under the

Stevens died because the government negligently failed to prevent its employee, Dr. Ivins, from perpetrating the attacks. To the contrary, Plaintiffs still maintain that the government negligently failed to properly hire, investigate, monitor, train, and supervise its employees.[24] Additionally, Plaintiffs' expert submissions specifically contend that the government is liable because it negligently hired, screened, retained, or supervised Dr. Ivins, thereby allowing him to perpetrate the anthrax attacks.[25] For example, Dr. Park Dietz, Plaintiffs' retained expert in forensic psychiatry, has specifically addressed the "adequacy of hiring and retention decisions regarding Bruce Ivins"; reviewed Dr. Ivins' mental health history; and opined that the government was negligent because its hiring and retention of Dr. Ivins allowed him to perpetrate the attacks.[26] In his report, Dr. Dietz states:

> ***Assuming for purposes of this report that the anthrax attacks were committed by Dr. Ivins***, I have reached the conclusion with reasonable certainty that ***USAMRIID was negligent in hiring, supervising, and retaining Dr. Ivins***, who was psychiatrically unfit to work with weapons of mass destruction throughout his tenure at USAMRIID.[27]
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> Obtaining Dr. Ivins' mental health records would have revealed he was unfit to be hired and unfit for duty.[28]

Even after Plaintiffs were allowed to withdraw their stipulation that the evidence would show, more likely than not, that Dr. Ivins was the person who sent the anthrax to which Mr. Stevens was exposed, Dr. Dietz did not amend these opinions. Instead, he offered a supplemental report (June 17, 2011) where he specifically reaffirmed his opinions that:

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proposition that the identity of the anthrax assailant was established for purposes of this action. *See* Pls.' Mot. to Withdraw [DE# 139]; Minute Entry [DE# 141] (granting Plaintiffs' motion to withdraw stipulation number six). In their own words, Plaintiffs opted to withdraw the stipulation, in part, because it would "impair the [Plaintiffs'] ability to rebut the defenses of the Defendant." Pls.' Mot. to Withdraw [DE# 139] at 8. Nonetheless, Plaintiffs cannot be allowed to sidestep the government's motion based on the assault and battery exception simply by withdrawing the stipulation, only to offer evidence at trial that the government negligently caused Mr. Stevens' death through acts or omissions related to its employment relationship with Dr. Ivins.

[24] Compl. [DE# 1] ¶¶ 18(C), 18(J), 18(K), 18(L).

[25] *See, e.g.* U.S. Ex. AB-1 (Dr. Dietz Report, Excerpts) at 73.

[26] *Id.* at 1.

[27] *Id.* at 73 (emphasis added).

[28] *Id.* at 74.

> Personnel security practices . . . would have prevented Dr. Ivins or anyone else who was equally impaired or equally dangerous from having access to the anthrax laboratory.[29]
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> Negligence in hiring, retention, and personnel security practices at USAMRIID were a proximate cause of the anthrax attacks.[30]

Similarly, Plaintiffs' other retained expert, Dr. Richard Wade, notes in his report that a panel of renowned psychiatrists "found that Dr. Ivins had deeply rooted mental health problems that were contributory to his alleged perpetration of the crime of murder."[31] Although Dr. Wade contends that his opinions "will not address issues of guilt or innocence of any individual," he stresses that the "National Academy of Sciences and FBI reports on these topics speak for themselves."[32] Importantly, the FBI report specifically concluded that Dr. Ivins was the anthrax assailant, and the National Academy of Sciences did not take issue with this ultimate conclusion.[33]

Finally, Plaintiffs' own interrogatory answers reflect their intent to pursue employment-based negligence claims premised on the assailant's status as a government employee. In response to interrogatories seeking additional information regarding their negligence claims, Plaintiffs answered by identifying the theory of negligent "retention and hiring," and stressing that the government "had a man who was a paranoid schizophrenic handling dangerous pathogens," and "should have been aware of the fact that one of its employees, at least, had a long psychiatric history and was on psychoactive drugs."[34]

Regardless of whether there is a stipulation on the identity of the assailant, these examples illustrate that Plaintiffs seek to establish government liability by attempting to prove that the government negligently failed to prevent Dr. Ivins or some other government employee (*e.g.*, through negligent hiring, retention, or supervision) from perpetrating the attacks and murdering Mr. Stevens.[35]

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[29] U.S. Ex. AB-4 (Dr. Dietz Supp. Report, Excerpts) at 2.
[30] *Id.* at 4.
[31] U.S. Ex. AB-5 (Dr. Wade Report, Excerpts) at 6 ¶ 26.
[32] *Id.* at 3 ¶ 13.
[33] U.S. Ex. AB-15 (Amerithrax Investigative Summary, Excerpts) at USAO-000116.
[34] U.S. Ex. AB-6 (Pls.' Verified Interrog. Ans.) Nos. 3, 20.
[35] In July 2004, the government moved to dismiss Plaintiffs' Complaint on threshold legal grounds, including the assault and battery exception. U.S. Mot. to Dismiss [DE# 33]. In

B. The FTCA's assault and battery exception broadly bars all FTCA claims that arise out of assaults or batteries committed by government employees.

The FTCA's intentional tort exception expressly bars recovery for specified intentional torts, including "[a]ny claim arising out of . . . assault [or] battery . . . ."[36] 28 U.S.C. § 2680(h). The broad reach of this section was emphasized in the plurality opinion of four Justices in *United States v. Shearer*, where the mother of an Army private alleged that the government negligently allowed her son to be kidnapped and murdered by an off-duty serviceman:

> Respondent cannot avoid the reach of § 2680(h) by framing her complaint in terms of negligent failure to prevent the assault and battery. Section 2680(h) does not merely bar claims ***for*** assault or battery; in sweeping language it excludes any claim ***arising out of*** assault or battery. We read this provision to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee.

473 U.S. 52, 55 (1985) (emphasis in original).[37] Important to the *Shearer* plurality was the fact that, beneath any legal dressings, the plaintiff's claims arose from an excepted intentional tort. *Id.* ("No semantical recasting of events can alter the fact that the battery was the immediate cause of [death].").

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response, Plaintiffs wholly failed to grapple with the authority cited by the government, instead opting to argue that "it would be premature to engage in a case-dispositive analysis premised on Defendant's arguments." Pls.' Mem. in Oppo. [DE# 36] at 10. In its April 2005 ruling on actionable duty, the Court found that, "[i]f it is determined that the perpetrator was a government employee, the [assault and battery exception asserted by the government] may be revisited. It is simply premature to consider its application at this juncture of the proceedings." Order [DE# 47] at 18-19. In light of Plaintiffs' contentions and the advanced stage of this litigation, it is now appropriate to revisit the FTCA's assault and battery exception.

[36] "Absent a waiver, sovereign immunity shields the Federal Government . . . from suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Through the FTCA, Congress chose to waive the government's sovereign immunity and, thus, authorize jurisdiction, for certain tort suits; but in providing this remedy, Congress was careful to carve out a number of specific exceptions. *See United States v. Orleans*, 425 U.S. 807, 814 (1976) (because the United States "can be sued only to the extent that it has waived its immunity, due regard must be given to the [FTCA's] exceptions"). These exceptions (*e.g.*, the assault and battery exception) "***must be strictly construed in favor of the United States***." *JBP Acquisitions, LP v. U.S. ex rel. FDIC*, 224 F.3d 1260, 1263 (11th Cir. 2000) (emphasis added).

[37] Although the relevant portion of the *Shearer* opinion was joined by only four of the eight sitting Justices, the Eleventh Circuit has found that the plurality's analysis is consistent with the Supreme Court's holdings in *Block v. Neal*, 460 U.S. 289 (1983), and *Kosak v. United States*, 465 U.S. 848 (1984). *See Metz v. United States*, 788 F.2d 1528, 1533 (11th Cir. 1986) (adopting the language from the *Shearer* plurality in its holding).

The Supreme Court revisited the nature of the exception through its limited ruling in *Sheridan v. United States*, 487 U.S. 392 (1988). In *Sheridan*, an intoxicated off-duty service member fired shots into the Sheridans' automobile while they were driving on a public street near Bethesda Naval Hospital. *Id.* at 393-94. The Court made clear that (1) the assault and battery exception does not bar liability where the assailant is not a government employee, but also found that, (2) even where the assailant is a government employee, the negligence of other government employees still "may furnish a basis for Government liability that is ***entirely independent*** of [the assailant's] employment status." *Id.* at 401-02 (emphasis added). In other words, the *Sheridan* majority found a narrow "exception to the exception" exists "where the employment status of the assailant ***has nothing to do with*** the basis for imposing liability on the Government." *Id.* (emphasis added). Notably, the *Sheridan* majority expressly declined to decide whether a plaintiff who has been injured by an assault or battery by a government employee can ever recover by alleging that another government employee negligently hired, trained, or supervised the assailant. *Id.* at 403 n.8. Nonetheless, in a concurring opinion, Justice Kennedy stated that he would hold that kind of a claim is ***always*** barred. *Id.* at 406-08 (explaining that "[o]therwise . . . litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors"). The three dissenting Justices also stated that they would hold that negligent supervision-type claims are ***always*** barred. *Id.* at 411 (O'Connor, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) (describing this type of negligence claim as being at the "core" of what must be barred by the assault and battery exception). On remand, the Fourth Circuit held that the plaintiffs' FTCA claim remained "nothing more than a negligent supervision claim which is barred by the intentional tort exception" and stated that dismissal for lack of subject-matter jurisdiction based on the exception was "not foreclosed by the Supreme Court's decision." *Sheridan v. United States*, 969 F.2d 72, 74 (4th Cir. 1992).

Almost all Circuits that have addressed the issue have found that these types of negligence claims (*e.g.*, negligent hiring, retention, or supervision) are ***always*** barred by § 2680(h) because they can never be wholly independent (as required under *Sheridan*) from the employment relationship between the United States and the employee-assailant. For example, the Eleventh Circuit, following Justice Kennedy's reasoning in *Sheridan*, has held that

negligence claims that underlie excepted intentional torts committed by government employees (*e.g.*, claims for negligent hiring, retention, and supervision) are squarely barred by 28 U.S.C. § 2680(h).[38] *See O'Ferrell v. United States*, 253 F.3d 1257, 1266 (11th Cir. 2001) (finding a negligence claim based on the government's alleged failure to properly supervise the conduct of its employees to be subsumed by the § 2680(h) bar on claims for libel and slander); *Foster v. United States*, No. 00-10139 (11th Cir. Aug 30, 2000), *cert. denied*, 532 U.S. 904 (2001) (decision attached to [DE# 34] at 56-59) (where plaintiff sustained injuries after being shot in a postal service parking lot by a postal service employee, affirming dismissal of plaintiff's negligent management and security claims because they arose out of an assault and battery). In *O'Ferrell*, the Eleventh Circuit explained that the bar set forth in § 2680(h) is "not limited to the torts specifically named therein, but rather encompasses situations where 'the underlying governmental conduct which constitutes an excepted cause of action is essential to plaintiff's claim.'" 253 F.3d at 1266 (quoting *Metz v. United States*, 788 F.2d 1528, 1534 (11th Cir. 1986)); *see, e.g. JBP Acquisitions*, 224 F.3d at 1264 (holding that a plaintiff cannot raise a negligence claim when an excepted cause of action "is central to its claims for damages"); *Rey v. United States*, 484 F.2d 45, 49 (5th Cir. 1973) (looking to whether the excepted intentional tort, *e.g.*, the battery, is "the crucial element in the chain of causation from defendant's negligence to plaintiffs' damages"). The assault and battery exception clearly applies to bar more than potential *respondeat superior* liability for intentional torts. "It is the substance of the claim and not the language used in stating it which controls" whether the claim is barred by § 2680(h). *JBP Acquisitions*, 224 F.3d at 1264 (quoting *Gaudet v. United States*, 517 F.2d 1034, 1035 (5th Cir. 1975)).

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[38] For many years, the Eleventh Circuit's decisions have consistently barred theories of negligence liability designed to evade the intentional tort exception. In 1965, the former Fifth Circuit held that a claim that the government negligently supervised a member of the military by negligently issuing him a pistol that he used to shoot his recently divorced wife was "a 'claim arising out of assault,' which is, in those words, specifically excepted from recovery under the [FTCA], 28 U.S.C. § 2680(h)." *United States v. Shively*, 345 F.2d 294, 297 (5th Cir. 1965); *United States v. Faneca*, 332 F.2d 872, 875 (5th Cir. 1964) ("[A]llegations of negligence are not sufficient to avoid section 2680(h)."). After the Eleventh Circuit was established, the new Fifth Circuit applied its earlier precedents to conclude that claims for "negligent supervision" cannot be utilized to evade the intentional tort exception. *Garcia v. United States*, 776 F.2d 116, 117 (5th Cir. 1985); *see also Leleux v. United States*, 178 F.3d 750, 757 n.5 (5th Cir. 1999).

Recently, the Eleventh Circuit again applied this principle and affirmed the dismissal of a plaintiff's negligent hiring claims because they arose from an assault and battery committed by a federal employee. *Reed v. Postal Service*, No. 07-15801, 2008 WL 2944633, at *2 (11th Cir. Aug. 1, 2008). In *Reed*, the plaintiff, a government employee, alleged that the government negligently hired a fellow employee who later attacked the plaintiff. *Id.* at *1. Distinguishing *Sheridan*, the court stressed that "[w]ere the government aware of the assailant's purportedly violent history, it would only be as a result of the knowledge it gained as his employer," thus, "any liability on the part of the government would inure solely because of its status as . . . the assailant's employer." *Id.* at *2. Ultimately, a "claim for negligent failure to prevent an assault . . . arise[s] from the assault" and, therefore, must be barred under § 2680(h). *Garcia v. United States*, 776 F.2d 116, 118 (5th Cir. 1985); s*ee also Miele v. United States*, 800 F.2d 50, 51-52 (2d Cir. 1986) ("Allowing claims against the government that are stated in negligence, but actually arise from an assault and battery would defeat Congress' purpose to bar suits against the government for injuries caused by a government employee's commission of an assault and battery.").

C. Plaintiffs' claims are barred by the FTCA's assault and battery exception and must be dismissed for lack of jurisdiction.

Plaintiffs cannot pursue their theory that government negligence allowed Dr. Ivins (or any other government employee) to perpetrate the attacks because all such claims lack subject-matter jurisdiction and must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).[39]

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[39] As the party averring jurisdiction, Plaintiffs bear the burden of proof and must establish that the Court possesses subject-matter jurisdiction over all of their FTCA claims. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (because federal courts are inherently courts of limited jurisdiction, the law starts with the presumption that "a cause lies outside this limited jurisdiction . . . and the burden of establishing the contrary rests upon the party averring jurisdiction"); *McKenzie v. Davenport-Harris Funeral Home, et al.*, 834 F.2d 930, 932 (11th Cir. 1987); *Young v. West Pub. Corp.*, 724 F. Supp. 2d 1268, 1269 (S.D. Fla. 2010). In deciding a motion to dismiss for lack of jurisdiction, a court "may inquire by affidavits or otherwise, into the facts as they exist." *Land v. Dollar*, 300 U.S. 731, 735 n.4 (1947); *Williams v. United States*, No. 08-11397, 2009 WL 323074, at *2 (11th Cir. Feb. 10, 2009) ("In deciding whether subject matter jurisdiction exists, we may consider the pleadings and matters outside the pleadings such as testimony and affidavits, in order to satisfy ourselves as to our power to hear the case."). Because the application of § 2680(h) is not intertwined with the merits in this action, the government's motion should be considered under Fed. R. Civ. P. 12(b)(1). Nonetheless, in the alternative, the government also moves for summary judgment based on the assault and battery exception. The standards for summary judgment are set forth *infra* at 26 n.62.

1. The anthrax attack that killed Mr. Stevens was a "battery."

Whether conduct constitutes an excepted tort for purposes of § 2680(h) hinges on the "traditional and commonly understood definition" of the tort. *See United States v. Neustadt*, 366 U.S. 696, 706 (1961). Here, the assailant's use of the mail to send the anthrax that killed Mr. Stevens constituted a battery. The Restatement of Torts, in effect when Congress legislated § 2680(h), defines a battery as "[a]n act which, directly or indirectly, is the legal cause of a harmful contact with another's person . . . [that] . . . is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person . . . ." Rest. Torts § 13 (1934); *accord* Rest. (2d) Torts § 13 (1965). Under Plaintiffs' theory that government negligence allowed Dr. Ivins (or some other employee-assailant) to murder Mr. Stevens, the act of sending anthrax through the mail in order to make harmful contact with persons at various targets must be considered squarely within the traditional definition of this excepted tort.[40]

2. Plaintiffs' negligence claims "arise" out of a battery.

Plaintiffs' FTCA claims based on the government's alleged negligence in failing to prevent Dr. Ivins (or some other government employee) from perpetrating the attacks squarely "arise" from an excepted tort under § 2680(h). As set forth *supra*, Plaintiffs' expert has spent considerable time and effort discussing how the government breached its standard of care as a reasonable employer in allegedly failing to properly hire, screen, supervise, and monitor Dr. Ivins. According to Dr. Dietz, these negligent failures in the employment relationship were one of the causal factors that led to Dr. Ivins committing the anthrax attacks.[41] To allow these liability theories to proceed is inconsistent with the purpose of § 2680(h). *See CAN v. United States*, 535 F.3d 132, 149 (3d Cir. 2008) (holding that claims that do not involve negligence independent of the employment relationship cannot survive § 2680(h)). As the Seventh Circuit made clear in *LM ex rel. KM v. United States*, 344 F.3d 695, 700 (7th Cir. 2003), "***negligent hiring, supervision and retention [are] off the table***." By any measure, the alleged negligence giving rise to these types of claims is inextricably intertwined with the employment relationship

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[40] Plaintiffs cannot avoid § 2680(h) by arguing that Dr. Ivins lacked the mental capacity to form the requisite intent to commit a battery. *See Miele*, 800 F.2d at 51-52; *Spaulding v. United States*, 621 F. Supp. 1150, 1154 (D. Me. 1985) (barring claim that the government was negligent in enrolling and supervising a trainee who shot and killed another trainee even though the assailant was later deemed to have a mental disorder).

[41] U.S. Ex. AB-1 (Dr. Dietz Report, Excerpts) at 73.

between the United States and the assailant-employee. *See, e.g. Franklin v. United States*, 992 F.2d 1492, 1498-99 (10th Cir. 1993); *Guccione v. United States*, 847 F.2d 1031, 1037 (2d Cir. 1988) (barring claim that the government negligently failed to supervise its undercover agent who committed an assault because the claim was not independent of the government's employment relationship with the assailant). For example, in *Miele*, the Second Circuit affirmed the dismissal of a claim under the assault and battery exception where the government failed to assess and evaluate the mental condition of a solider (later deemed to be mentally defective) who threw acid in a child's face. *Miele*, 800 F.2d at 51-52. Here, any attempts by Plaintiffs to prove that the government allowed Dr. Ivins to perpetrate the attacks by negligently permitting him to have continued authorized access to anthrax as part of his employment would be at the core of what § 2680(h) bars. *See McNeily v. United States*, 6 F.3d 343, 347 (5th Cir. 1999) (a plaintiff cannot avoid the reach of § 2680(h) by alleging a negligent failure to prevent the excepted harm). Even if Plaintiffs argue that the government knew or should have known that Dr. Ivins was unstable or had violent propensities, the government would have only acquired such information through the employment relationship. *See Reed*, 2008 WL 2944633, at *2. Regardless of whether Dr. Ivins was mentally fit to have authorized access to anthrax, the alleged negligence giving rise to claims that the government should have more closely monitored him or taken steps to remove him from the laboratory is inextricably intertwined with the employment relationship between the United States and the assailant-employee. *See Saks, Inc. v. United States*, No. 06-60379, 2007 WL 557495, at *1-2 (5th Cir. Feb. 15, 2007) (barring claims for negligent monitoring and supervision because the claims arose from an excepted tort under § 2680(h)).

This Court's ruling in *Acosta v. United States*, 207 F. Supp. 2d 1365 (S.D. Fla. 2001), *aff'd*, 552 Fed. Appx. 486 (11th Cir. 2002) (Table), is instructive. In *Acosta*, plaintiffs brought an FTCA action based on the conduct of a deranged post office employee who shot and killed one victim and injured another in the lobby of the post office. *Id.* at 1366. According to plaintiffs, the government failed to prevent the two victims from being shot despite the fact that the assailant had received counseling for mental problems (including paranoia and depression) in the past and that the government knew, or by the exercise of reasonable care, should have known, that the assailant-employee was a man of violent and dangerous disposition (the employee had exhibited 15 of 16 warning signs described in a postal service "Threat Management Plan" concerning potentially dangerous employees). *Id.* at 1366. After discovery,

this Court found that all of plaintiffs' negligence claims arose out of an assault and battery, and stated, "***It is clear that the Eleventh Circuit has taken an expansive reading of § 2680(h)*** and has used the provision to universally find a lack of jurisdiction over negligence claims asserted against the government that arise from an assault and battery." *Id.* (emphasis added) (citing *Metz*, 788 F.2d at 1528; *JBP Acquisitions*, 224 F.3d at 1260; *O'Ferrell*, 253 F.3d at 1257). As a result, this Court ruled that it lacked subject-matter jurisdiction over plaintiffs' claims for negligent hiring, supervision, failure to warn, and failure to maintain premises in a safe condition. *Acosta*, 207 F. Supp. 2d at 1368. It also stressed that the shooting was "only foreseeable to the Defendant because it happened to be the assailant's employer." *Id.* at 1369. The Court quoted with approval Justice Kennedy's concurring opinion in *Sheridan*, cited above, *supra* at 9, stating that:

> If the allegation is that the Government was negligent in the supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception of § 2680(h) bars the claim. Otherwise, litigants could avoid the substance of the exception because it is likely that many, if not all, intentional torts of Government employees plausibly could be ascribed to the negligence of the tortfeasor's supervisors. To allow such claims would frustrate the purposes of the exception.

Acosta, 207 F. Supp. 2d at 1369-70 (quoting *Sheridan*, 487 U.S. at 407) (Kennedy, J., concurring). Here, as in *Acosta*, Plaintiffs' claims that the government negligently enabled its employee to murder Mr. Stevens cannot proceed. To allow Plaintiffs to establish government liability by "dressing up the substance" of a battery in the "garments" of negligence would be to "judicially admit at the back door that which has been legislatively turned away at the front door." *Laird*, 406 U.S. at 802.

3. The independent negligence exception to § 2680(h) does not apply.

Regardless of how they cast their claims, if Plaintiffs' theory of liability posits that Dr. Ivins (or some other government employee) was the anthrax assailant, all of their FTCA negligence claims must be dismissed. First, it cannot be argued that the claims stressed by Plaintiffs' expert witness, namely, that the government negligently hired, retained, and supervised the anthrax assailant (Dr. Ivins) are unrelated to the government's employment relationship with the assailant. All of these claims relate to whether the government breached the standard of care required of a reasonable employer. Because the assailant's employment status

has an obvious bearing on these claims, they fall squarely within the exception. *See Reed*, 2008 WL 2944633, at *2. Second, because the means the government utilized to prevent unauthorized use of anthrax by its employees who were otherwise authorized to access anthrax (as opposed to security measures directed at outsiders) were personnel security measures inextricably intertwined with the employment relationship, Plaintiffs cannot establish their negligence claims are entirely independent of the assailant's employment status. As the Supreme Court held in *Sheridan*, the only situation in which an FTCA claim may proceed notwithstanding that a government employee has committed a battery is where "the employment status of the assailant has nothing to do with the basis for imposing liability on the government." *Sheridan*, 487 U.S. at 401-02.

Plaintiffs may seek to argue that, separate and apart from the government's duty to act as a reasonable employer of Dr. Ivins, the government breached a wholly independent duty of reasonable care to Mr. Stevens to avoid an unauthorized interception and dissemination of anthrax. Although the Court previously found the government owed a duty to the public, this was based, in large part, on the foreseeable zone of risk created by allegedly missing anthrax. *See* Order [DE# 47] (stressing that the Court had to accept as true Plaintiffs' allegations that USAMRIID had a "history of missing samples of anthrax bacterium . . . dating back to 1992"); *Stevens*, 994 So.2d at 1068 (considering whether the government had an actionable duty "in conjunction with the further allegations of the complaint regarding the facility's history of missing samples of anthrax bacterium . . . ."). This duty to prevent the interception of missing anthrax (although there was never, in fact, any missing anthrax) [42] is inapposite where the posited government negligence relates to an attack carried out by an insider with authorized access to

[42] Plaintiffs pleaded that the United States historically "failed to adequately secure" anthrax based on a government memorandum that states "as early as 1992, samples of this formidable, dangerous, and highly lethal [anthrax] organism were known to be missing from the lab at Ft. Detrick, Maryland." Compl. [DE# 1] ¶ 9 (setting forth allegations that this Court and the appellate courts were required to accept as true for the purpose of the pre-discovery motions related to actionable duty). Yet, as explained in the government's motion for summary judgment based on lack of proximate cause, discovery has confirmed the government's contention that there was never any missing anthrax. *See* U.S. Ex. AB-14 (USAM Documents) at USAM-19804 (the "missing" samples "were non-viable, non-infectious"), USAM-19788 ("[A]ny material that was reported 'missing' was dead."), USAM-19803-04 ("The missing electron microscopy blocks Mr. Brown refers to in his memorandum have been located or accounted for . . . these samples were located in the archives or accounted for via Pathology logs in 2002 . . . Mr. Brown's allegation of lost samples is unfounded.").

anthrax as part of his employment. If Plaintiffs' theory relies on Dr. Ivins being the anthrax assailant, any duty to prevent unauthorized interception is not "entirely independent" of the employment relationship. The only way the government could have possibly prevented Dr. Ivins from perpetrating the attacks (and the claimed breach of its duty) was through the employment relationship.

Because Dr. Ivins was a USAMRIID scientist tasked with researching vaccines and treatment strategies related to anthrax, the growing, harvesting, and dissemination of anthrax was an authorized (and critical) component of his government employment.[43] Thus, based on his status as a government employee, Dr. Ivins had unique access to anthrax that never would have been granted to "an unemployed . . . visitor." *See Sheridan*, 487 U.S. at 402. If Dr. Ivins was the anthrax assailant, it follows that the government's alleged failure to protect Mr. Stevens was uniquely related to Dr. Ivins' employment and his corresponding access to the material that was later fashioned into a murder weapon. Unlike a visitor off the street, Dr. Ivins had specialized knowledge regarding anthrax that was intertwined with his employment. Once Dr. Ivins was granted authorized access to anthrax as part of his job, any steps the government might have or should have taken to prevent him from using anthrax for nefarious purposes would stem from the employer-employee relationship.

The government's alleged failure to secure its anthrax from unauthorized interception by an insider-employee cannot be considered wholly independent of the employment relationship where the only measures that could have prevented an insider such as Dr. Ivins from using anthrax for malevolent purposes were intertwined with how the government, hired, supervised, and retained its insiders. The kind of non-employment-based physical security measures (*e.g.*, locked doors, perimeter security, and storage practices) that might be used to protect the public from an outsider intercepting anthrax are universally regarded in the scientific community as having no bearing on insiders with authorized access. In other words, these measures are irrelevant to keeping insiders from leaving facilities with biological material and carrying out attacks. Because anthrax bacteria are living microorganisms (capable of multiplying exponentially in a short period of time), they cannot be catalogued or inventoried using methods that might be appropriate for other substances (*e.g.*, nuclear material). Bacteria such as anthrax are small enough to be invisible to the naked eye and cannot easily be differentiated from the

[43] U.S. Ex. AB-7 (Dr. Eitzen Depo., Excerpts) at 138-39.

millions of other bacteria that accumulate on the human body from normal everyday activities.[44] Even if a facility were to conduct searches at every door – including strip searches – a scientist who had been inoculated to safely work with certain microorganisms could walk out of a facility undetected with one spore under his or her fingernail or with biological material injected into his or her bloodstream.[45] There is no detection system or screening device that can spot unauthorized microorganisms upon exit and protect the public from authorized insiders diverting material for malicious purposes. Once outside the secured location, an authorized insider can grow one self-replicating organism into millions of additional organisms or furnish the material to someone with the requisite expertise.[46]

The consensus of the scientific community is that the risk of the "insider-threat" can only be limited by hiring the right personnel and properly monitoring them in the workplace. "The 'insider threat' generally refers to the misuse of [ ] pathogens by an individual who has access to them as part of his or her job."[47] Unlike perimeter and physical security measures that are used to prevent outsiders from intercepting biological materials,[48] separate personnel security measures, including the screening, monitoring, and managing of employees, are seen as the only feasible way for laboratory employers to reduce the risk of an insider-employee with authorized access either carrying out a theft or acting to assist others.[49] These types of measures are

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44 *See* U.S. Ex. AB-17 (Spradlin Article: *Bacterial Abundance on Hands*) at 390.

45 U.S. Ex. AB-9 (Report of the Defense Science Board, Excerpts) at 20. It is for this very reason that an attack carried out by an insider could occur even in the absence of negligence.

46 U.S. Ex. AB-8 (Dr. Salerno Depo., Excerpts) at 66-67 ("Detailed accounting for individual microorganisms is unachievable . . . ."), 220 (with "the right growth media and the right technical expertise, you can amplify that single organism into hundreds, thousands, and millions of organisms"); U.S. Ex. AB-11 (NRC Report, 2009, Excerpts) at 115 (explaining that the self-replicating nature of biological pathogens renders the counting of vials or organisms to be "not a biologically relevant means of inventory"), *id.* ("Unlike nuclear materials, biological organisms have the ability to replicate . . . . Because a new culture can be prepared with as little as a single microorganism, an individual would need only a miniscule – and undetectable – amount from a single vial to establish a new culture and grow up large volumes of the agent in a matter of hours or a day.").

47 U.S. Ex. AB-12 (NSABB Report, Excerpts) at 2.

48 *See, e.g.* U.S. Ex. AB-10 (GAO Report: Biosafety Laboratories, September 2008, Excerpts) at 3, 14 ("A strong perimeter security system uses layers of security to deter, detect, and deny ***intruders***." (emphasis added)).

49 U.S. Ex. AB-11 (NRC Report, 2009, Excerpts) at 9-10.

inextricably intertwined with the employment relationship.[50] Plaintiffs' own expert, Dr. Dietz, testified that, "I think everyone who has looked at this . . . all saw that ***the key to preventing an insider from making use of these pathogens had to do with making sure the right people were there and the wrong people weren't.***"[51]

Further, the scientific community has agreed that perimeter and physical security measures (*i.e.*, measures that are used to prevent outsiders from "intercepting and disseminating" biological material) are obviously inapplicable against employee-insiders, or otherwise technically infeasible (*e.g.*, testing the millions of bacteria on each employee's body as he or she leaves the facility). For example, the recent Report of the Defense Science Board Task Force states, "There was general agreement that an insider could remove [biological select agent and toxin (BSAT)] material without detection."[52] This is true, "regardless of defensive countermeasures."[53] Dr. Reynolds Salerno, author of the first and only book in the emerging field of biosecurity (published 2007) and head of a team from Sandia National Laboratories that conducted a security review of USAMRIID in 2002, testified that once a bad actor is hired and allowed inside a facility, if he or she wants to take pathogens for illicit or aggressive purposes, the amount of physical security at the facility or the detail in tracking the amounts of biological material will not make a difference.[54] According to Dr. Salerno, "Biological scientists know the material they are working with, and how to remove the material from the facility, if they want . . . even a strip search would not prevent a determined insider from removing biological agent from

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50 For example, personnel security measures comprising a formal personnel reliability program can include background investigations, security clearances, medical examinations, psychological evaluations, polygraph testing, drug and alcohol screening, credit checks, and systems of ongoing monitoring. U.S. Ex. AB-12 (NSABB Report, Excerpts) at iii. All of these measures are intertwined with the employer-employee relationship.

51 U.S. Ex. AB-13 (Dr. Dietz Depo., Excerpts) at 23:3-24:3 (criticizing USAMRIID for spending "all of [its] attention . . . [and] funds and energy . . . [on] nonbehavioral strategies for prevention; [including] containment suites, locked doors, biometric identification, key card access, roaming guard, arming the guards, moving the parking more remotely, inventory controls," rather than monitoring employee behavior).

52 U.S. Ex. AB-9 (Report of the Defense Science Board, Excerpts) at 19, 25 (" . . . the insider could provide knowledge of laboratory layouts, access to facilities, and could steal BSAT without detection").

53 *Id.* at 25 ("Detection of an insider threat is difficult even with extensive monitoring of the emotional and mental state of BSAT-certified employees . . . .").

54 U.S. Ex. AB-8 (Dr. Salerno Depo., Excerpts) at 53-54.

[the] laboratory."[55] Similarly, "a determined insider could divert material, even if there were cameras in the room . . . ."[56] "[E]ven if the number of vials in an inventory" of pathogens "were correct, an insider could remove a sample, amplify it, divert the amplified portion, and return the original amount to the freezer."[57] Security and accountability can only be achieved by controlling who is granted authorized access to biological materials.[58] Given this consensus, it becomes clear that the only way to prevent an insider-employee (like Dr. Ivins) from carrying out an attack is through personnel security measures (effective screening, monitoring, and managing of the insider-employee), all of which are intertwined with the employment relationship.

If Dr. Ivins was the anthrax assailant, any duty on the part of the government to exercise reasonable care in attempting to prevent a nefarious dissemination of anthrax by this kind of insider cannot be separated from the employment relationship. In *Sheridan*, the "entirely independent" duty identified by the Supreme Court was a "Good Samaritan" duty incurred by three servicemen who allegedly found Carr, an off-duty serviceman, in a drunken stupor in a naval hospital. The three servicemen allegedly attempted to take Carr to the emergency room but fled the scene and took no further action after they saw that Carr had a rifle. *Sheridan*, 487 U.S. at 395. Shortly thereafter, Carr shot and injured the plaintiffs, who contended that the United States was liable for the three servicemen's negligent breach of their duty to perform their voluntarily-assumed Good Samaritan task in a careful manner. *Id.* at 401. Because the three servicemen would have had the same Good Samaritan duty even "if Carr had been an unemployed civilian patient or visitor in the hospital," the United States' duty was "entirely independent of Carr's employment status." *Id.*

Here, the facts do not pass the "unemployed civilian" test. *See id.* Assuming Dr. Ivins was the anthrax assailant, Plaintiffs may contend that the government still owed an independent duty to the public – but in the process, they cannot ignore how any actual breach of duty may have occurred (and the corresponding ways in which the government could have avoided such a breach).

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[55] U.S. Ex. AB-8 (Dr. Salerno Depo., Excerpts) at 239-41.
[56] *Id.* at 252-54.
[57] *Id.* at 249-50.
[58] U.S. Ex. AB-11 (NRC Report, 2009, Excerpts) at 9-10, 115.

In *Sheridan*, the danger to the public posed by the intoxicated serviceman was obvious to ***anyone*** in his vicinity (not just his employer with unique knowledge regarding his background and mental faculties). *See* 487 U.S. at 393-94. The government's alleged breach was based on the failure of government employees to do what any bystander could have done – stop an obviously intoxicated individual (unlike here, possible prevention of the attack would not have required the government to alter or terminate the assailant's employment). *Id.* The government employees fled the scene without taking any action and allowed the would-be assailant to walk about unattended with an obvious likelihood of harm. *Id.* The government in *Sheridan* also had an alleged duty to stop anyone who may have tried to walk out of the government hospital with a loaded gun because the government, as operator of the hospital, had a role as custodian of the would-be-assailant (regardless of whether he was an employee or not). Here, if Dr. Ivins was the assailant, the government had no control over Dr. Ivins outside of the employer-employee relationship, and unlike an intoxicated assailant who walks out of a hospital with a rifle, it is impossible for a laboratory operator to appreciate whether an authorized insider is leaving a facility with microorganisms for nefarious purposes. *See supra*. The danger to the public of an intoxicated individual brandishing a gun would be apparent to anyone, bystander or employer alike. *See Sheridan*, 487 U.S. at 401 (stressing that the assailant was "visibly drunk and visibly armed"). In contrast, even assuming the danger posed by Dr. Ivins was foreseeable (which it was not), the government's knowledge of this danger only would have been apparent (or according to Plaintiffs, should have been apparent) through its hiring, screening, and monitoring practices.[59]

Had the assailant in *Sheridan* been in a drunken stupor in a non-government building surrounded by non-government personnel who let him walk unabated out of their facility with a gun, those persons, rather than the government, would face potential tort liability. In other words, there was no nexus between the assailant's status as a government employee and the attack. Here, the employment relationship was the very means through which Dr. Ivins was able to commit the attacks. Had Dr. Ivins simply been a visitor at USAMRIID, he never could have perpetrated the attacks because he never would have been in the limited group of persons with authorized access to anthrax material. *Id.* He did not just "happen[ ] to be a government

[59] *See* U.S. Ex. AB-13 (Dr. Dietz Depo., Excerpts) at 24:1-2 (stating that the key to preventing an attack by an insider is to "notic[e] behavior and follow[ ] up when it's noticed").

employee" that committed the attacks, nor was it mere "happenstance that [the assailant] was on a federal payroll." *Id.* at 395, 401. This is a far cry from the assailant in *Sheridan* – a "medical aide" who used a contraband rifle and ammunition that he retrieved from "his quarters" after he went off-duty to commit the attacks. *Id.* at 395. Unlike Dr. Ivins, whose use of anthrax was part of his government employment, the assailant in *Sheridan* was not working with the rifle as part of his employment at the hospital and, in fact, it was against Navy regulations for him to even have the firearm. *Id.* at 401, 402 n.5. This is why the majority in *Sheridan* stressed that the shooting "was not connected with [the assailant's] job responsibility or duties as a government employee."

Although the Court in *Sheridan* stated in a footnote that "[t]he Government's responsibility for an assault may be clear even though the identity of the assailant is unknown," the case cited for this proposition, *Doe v. United States*, 838 F.2d 220, 221 (1988), is also inapposite based on its facts. *See Sheridan*, 487 U.S. at 402 n.7. Here, the government has invoked § 2680(h) in an attempt to preclude liability based on a theory that Dr. Ivins, not an unknown person, was the anthrax assailant. Although discovery in *Doe* had failed to reveal the exact identity of the assailant, the essential facts regarding how the assault occurred and its connection to government negligence were clear. The case involved two minor children who were sexually molested by unknown parties while they were in the ***exclusive care*** of government employees running an Air Force base day care center. *Doe*, 838 F.2d at 221; *see also Doe v. Scott*, 652 F. Supp. 549, 550 (S.D.N.Y. 1987) (refusing to apply § 2680(h) where the government had exclusive care and custodianship over children who were later molested). Although the attacker was unidentified, the assailant's access to the children only could have occurred through government negligence that was unrelated to the employment status of the assailant. *Id.* In contrast, as set forth *infra*, Dr. Ivins had access via his employment to the anthrax material used to make the attack-spores, the government did not have exclusive access to this material, and the victims of the anthrax attacks were not under the exclusive care or custodianship of the government. Whereas the molester in *Doe* could have, by mere happenstance, been a federal employee, Dr. Ivins' ability to perpetrate the anthrax attacks was a direct product of his government employment. *See Doe*, 838 F.2d at 221 (holding that "it would be irrational to bar recovery if the assailant ***happened*** to be a Government employee" (emphasis added)). Finally, even the court in *Doe* described its decision as "narrow." *Id.* at 225. Had the only means

through which the government could have prevented the molestation been intertwined with the employment relationship (*e.g.*, if the assigned custodian of the children had also been the molester), *Doe* would have reached a different result.

A hypothetical illustrates the point. Assuming the government owed an overarching duty to protect the general public from harm, if the government left a loaded rifle in a place that was available for the public to access, the government would breach its independent duty to the public if a would-be assailant picked up the rifle and shot a bystander – regardless of whether the assailant happened to be a government employee. In such a scenario, the government's negligence could be considered independent of the employment relationship. In contrast, under the facts of this case (assuming Dr. Ivins was the assailant), Dr. Ivins only had the opportunity to access the kind of biological material that was used to murder Mr. Stevens as a direct product of his employment. Similarly, the only way the government could have prevented such access would have been to alter the terms of Dr. Ivins' employment. The weapon, opportunity, and expertise used to murder Mr. Stevens directly stemmed from Dr. Ivins' government employment. Therefore, it cannot be said that any government breach of duty "had nothing to do" with the government's employment relationship with Dr. Ivins. *See Sheridan*, 487 U.S. at 392; *see, e.g. Bruni v. United States*, No. 90-12227-Z, 1991 WL 128580, at *4 (D. Mass. July 10, 1991) (clarifying that the *Sheridan* exception to § 2680(h) only applies where the government, through a negligent breach of duty "entirely independent of employment status," allows an employee to commit a foreseeable assault and battery). Assuming Dr. Ivins was the assailant, the fact that a government employee, rather than a non-employee, committed the battery was not simply "fortuitous," nor was it mere "happenstance that [Dr. Ivins] was on a federal payroll," it was only because of the assailant's employment status (with authorized access to anthrax) that the assailant was able to commit the battery.[60] *See Johnson v. United States*, 788 F.2d 845, 853 n.8 (2d Cir. 1986); *Sheridan*, 487 U.S. at 402.

Because § 2680(h) bars all negligence claims premised on a theory that Dr. Ivins (or another government employee) perpetrated the anthrax attacks, the only way Plaintiffs can establish "an independent basis for tort liability," is by attempting to prove a chain of causation

[60] In any event, as set forth in a separate jurisdictional motion filed on this date, even if § 2680(h) were not in the FTCA, Plaintiffs' claims still would have to be dismissed under the FTCA's discretionary function exception, 28 U.S.C. § 2680(a).

whereby government negligence allowed a non-employee to murder Mr. Stevens. *See Sheridan*, 487 U.S. at 399. Although this basis for liability would not be barred by the FTCA's assault and battery exception,[61] any theory of liability premised on the hypothesis that an unknown assailant perpetrated the attacks falls short because there are insufficient facts to connect government negligence with Mr. Stevens' death.

II. If Plaintiffs reject the notion that Dr. Ivins perpetrated the attacks and attempt to proceed under an "unknown assailant" theory, the government is entitled to summary judgment because there is no genuine issue of material fact as to whether government negligence caused Mr. Stevens' murder.

A. Causation is an essential element of Plaintiffs' case.

Even where its exceptions do not apply, the FTCA only waives the government's sovereign immunity "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §§ 1346(b), 2674; *see Pate v. Oakwood Mobile Homes, Inc.*, 374 F.3d 1081, 1084 (11th Cir. 2004). Here, this means that Florida law is used to assess whether the government is liable. *Stevens v. Battelle Mem'l Inst.*, 488 F.3d 896, 899 (11th Cir. 2007).

Under Florida law, the plaintiff in a tort action has the burden to prove: "(1) a legal duty on the defendant to protect the plaintiff from particular injuries; (2) the defendant's breach of that duty; (3) the plaintiff's injury being actually and proximately caused by the breach; and (4) the plaintiff suffering actual harm from the injury." *Zivojinovich v. Barner*, 525 F.3d 1059, 1067 (11th Cir. 2008) (citing *Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003)); *United States v. Stevens*, 994 So. 2d 1062, 1066 (Fla. 2008). In considering whether an alleged breach "actually and proximately caused" the plaintiff's injury, "[i]t has long been held that a ***possibility*** of causation is not sufficient to allow a claimant to recover." *Greene v. Flewelling*, 366 So. 2d 777, 781 (Fla. 2d DCA 1978) (emphasis added) ("It is rudimentary that a claimant must . . . prove that the negligent act of the person against whom he seeks a recovery was the cause of his injuries."). "[W]hether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred" is primarily a factual matter. *Goldberg v. Fla. Power & Light Co.*, 899 So. 2d 1105, 1116-17 (Fla. 2005). This means that the allegedly negligent conduct must be both the cause-in-fact of the injury and it must be

[61] *See Sheridan*, 487 U.S. at 400 ("[T]he exception only applies in cases arising out of assaults by federal employees.").

reasonably foreseeable. The government moves for summary judgment for lack of cause-in-fact under Fed. R. Civ. P. 56.[62] Because Plaintiffs will bear the burden of proving causation at trial, the government may satisfy its summary judgment burden by merely pointing out that the factual record contains insufficient proof concerning causation. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). To avoid summary judgment, Plaintiffs must raise significant probative evidence that shows government negligence actually caused the alleged harm. *See LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835 (11th Cir. 1998).

B. Under an "unknown assailant" theory, the record contains insufficient proof that government negligence was the cause-in-fact of Plaintiffs' injury.

The government concedes that the evidence would show, more likely than not, that Dr. Ivins was the person who sent the anthrax to which Mr. Stevens was exposed.[63] Although Plaintiffs initially stipulated to this fact, they have since withdrawn the stipulation (likely in anticipation of this motion), and now contend that they are not required "to identify the particular perpetrators who engaged in an unauthorized interception and dissemination of the laboratory material," and that the identity of the perpetrator is "not critical to the issues to be decided."[64] In Plaintiffs' view, as long as they can prove that the government negligently failed to secure its anthrax (*e.g.*, negligently maintained, stored, catalogued, or tracked anthrax), they do not have to

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[62] If the dispositive issue is one where the nonmoving party will bear the burden of proof at trial (*e.g.*, causation), the moving party may satisfy its summary judgment burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (holding that the moving party need not produce evidence showing the absence of a genuine issue of material fact). It is not necessary for the moving party to supply affidavits or other similar materials negating the opponent's claim. *Id.* at 322-23. Once the moving party carries its initial burden, the nonmoving party must "go beyond the pleadings" and designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324. This means that the non-movant may not rely on mere allegations, but must raise ***significant probative evidence*** to avoid summary judgment. *LaChance v. Duffy's Draft House, Inc.*, 146 F.3d 832, 835 (11th Cir. 1998); *Loren v. Sasser*, 309 F.3d 1296, 1302 (11th Cir. 2002) ("A mere 'scintilla' of evidence supporting the opposing party's position will not suffice."). A complete failure of proof concerning an essential element of the non-movant's case necessarily renders all other facts immaterial and entitles the moving party to summary judgment. *See Celotex*, 477 U.S. at 323.

[63] As set forth *supra*, all claims where the causal chain posits Dr. Ivins (or any other government employee) as the assailant who murdered Mr. Stevens are barred by the FTCA's assault and battery exception, 28 U.S.C. § 2680(h)).

[64] Notice of Joint Stipulation [DE# 85] at 3 ¶ 6; Pls.' Obj. & Mem. [DE# 147-3] at 26; Pls.' Resp. [DE# 150] at 5-7.

prove how that negligence actually connects with an assailant's mailing of the anthrax that caused Mr. Stevens' exposure and death.[65] Plaintiffs are mistaken. Such an approach stands the entire concept of tort liability on its head.

If Plaintiffs reject the notion that Dr. Ivins was the person who sent the anthrax to which Mr. Stevens was exposed, even though they need not identify, by name, the assailant who murdered Mr. Stevens, they still have the burden to show that the assailant obtained the anthrax used in the attacks through government negligence. *See Beltran v. Rodriguez*, 36 So. 3d 725, 727 (Fla. 3d DCA 2010). They cannot meet this burden. Unless Plaintiffs accept that Dr. Ivins was the perpetrator, the record is devoid of any evidence as to the nature of the attack and whether the attack was in any way related to actionable or tortious government conduct.

Under Florida law, a plaintiff is required to prove that the alleged negligence "more likely than not" caused the plaintiff's injury. *Goodling v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984). To assess cause-in-fact, Florida courts generally follow the "but-for" test: whether there is such a "natural, direct, and continuous sequence between the negligent act [or omission] and the [plaintiff's] injury that it can be reasonably said that but for the [negligent] act [or omission] the injury would not have occurred." *Stahl v. Metro. Dade Cnty.*, 438 So. 2d 14, 17-18 (Fla. 3d DCA 1983). Even if Plaintiffs could show that the government negligently secured its anthrax (which the government specifically denies), this negligence is not legally significant unless but for this negligence Mr. Stevens would not have been murdered. *See id.* Negligence that is not a but-for cause of the harm at issue cannot be actionable. In other words, Plaintiffs cannot prove their case unless they can show that the government's alleged negligent (and otherwise actionable) dealings with anthrax ***actually caused*** Mr. Stevens' death. Plaintiffs' own expert witness, Dr. Dietz, has echoed this very principle. In discussing a number of alleged deficiencies in the government's dealings with anthrax, Dr. Dietz testified that "***I don't think one can identify which deficiencies underlie the attacks without, in this instance, knowing who did it*** . . . ."[66] Simply put, if Plaintiffs attempt to rely on an "unknown assailant" theory, Plaintiffs cannot factually prove, through admissible evidence, a "natural, direct, and continuous sequence," between alleged government negligence and the anthrax letter that killed Mr. Stevens. *See Stahl*, 438 So. 2d at 17-18.

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65 *See* Pls.' Resp. [DE# 150] at 3.

66 U.S. Ex. AB-13 (Dr. Dietz Depo., Excerpts) at 233:16-25.

Plaintiffs are unable to establish negligence, let alone causation, by arguing that, at the time of the attacks, the government had exclusive control over the particular batch of anthrax used to murder Mr. Stevens. Although Florida courts have occasionally recognized the doctrine of *res ipsa loquitor* to show negligence, such a presumption does not apply here. *See Goodyear Tire & Rubber Co. v. Hughes Supply, Inc.*, 358 So. 2d 1339, 1341-42 (Fla. 1978) (describing *res ipsa* as a doctrine of "extremely limited applicability"). In order to benefit from the doctrine, a plaintiff must show that (1) the defendant had exclusive control over the instrumentality that caused injury, and (2) the injury would not have occurred but for the negligence of the defendant in control.[67] *Id.*; *see City of New Smyrna Beach Util. Comm'n v. McWhorter*, 418 So. 2d 261, 263 (Fla. 1982) (declining to find a *res ipsa* presumption in the absence of evidence that the defendant had exclusive control over a damage-causing pipe at all times). Where a defendant's control is compromised by an intervening, illegal event, no *res ipsa* presumption can follow. *See Marrero v. Goldsmith*, 486 So. 2d 530, 532 (1986).

Here, Plaintiffs cannot show that the batch of anthrax used to murder Mr. Stevens (known as RMR-1029) was in the exclusive control of the government at the time of the alleged act or omission at issue. Although the parties have stipulated that, "the anthrax to which Mr. Stevens was exposed was produced by Dr. Bruce Ivins, a federal employee scientist who worked with anthrax in the course of his regular duties at [USAMRIID] at Ft. Detrick, Maryland,"[68] this

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[67] In *Wal-Mart Stores, Inc. v. Rogers*, 714 So. 2d 577, 578 (Fla. 1st DCA 1998), the Florida District Court of Appeal held that the exclusive control requirement is exacting. The court declined to apply *res ipsa* where, even though a customer was hit by a toy radio that fell from a display hook at the store, the radios were not under the exclusive control of the store because they could have also been accessible to customers. Beyond their inability to show exclusive control, Plaintiffs cannot show that this particular batch of anthrax, after leaving the government's control, was properly used or handled by others and not subjected to harmful forces or conditions. *See, e.g. Burkett v. Panama City Coca-Cola Bottling Co.*, 93 So. 2d 580, 583 (Fla. 1957). To the contrary, the anthrax that was used to murder Mr. Stevens was modified by the assailant through drying and pulverization (not shown to have occurred at USAMRIID) and was, thus, dissimilar in form to the anthrax that was in the possession of the government. *See* Notice of Joint Stipulation [DE# 85] at 3 ¶ 7. Finally, Plaintiffs cannot show that Mr. Stevens' murder would not have occurred in the absence of negligence. It is widely recognized that, regardless of security measures, an anthrax scientist can remove anthrax in the absence of negligence. *See, e.g.* U.S. Ex. AB-9 (Report of the Defense Science Board, Excerpts) at 19, 20, 40 ("An insider could probably transfer BSAT out of the facility or supply chain ***without being discovered, regardless of defensive countermeasures***." (emphasis added)).

[68] Notice of Joint Stipulation [DE# 85] at 2 ¶ 5.

particular batch of anthrax was properly shared, prior to the attacks, with a number of different facilities outside the control of the government, including private research laboratories at BioPort and Battelle.[69] This fact is clearly established through a Reference Material Receipt Record for the RMR-1029 batch that documents the amounts of RMR-1029 that were used or provided to others.[70] Upon the receipt of RMR-1029 spores, these private research laboratories could have in turn provided aliquots to other laboratory facilities for legitimate research purposes. *See* 42 C.F.R. § 72.6 (expressly authorizing the recipients of select agents and toxins to further disseminate any materials received to other qualified facilities), Pt. 72, App. A (including anthrax). Once Plaintiffs reject the government's concession that the evidence would show, more likely than not, that Dr. Ivins was the assailant, they open up the door to ***anyone*** having intercepted the kind of spores used in the attack (RMR-1029) during shipment or, more importantly, from one of the non-government-operated facilities. The fact that this particular batch of government-produced anthrax was used in the attacks does not mean *ipso facto* that there was actionable government negligence. Without Dr. Ivins as the assailant, Plaintiffs cannot prove that government conduct, as opposed to the conduct of countless non-government personnel who had access (or could have acquired access) to RMR-1029 spores, was actually the cause of Mr. Stevens' murder.[71]

Similarly, Plaintiffs cannot avoid having to prove cause-in-fact by relying on "unknown assailant" cases under Florida law. The facts in such cases run far afield from the facts in this

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69 U.S. Ex. AB-2 (RMR-1029 Reference Material Receipt Record). The Reference Material Receipt Record for RMR-1029 reflects a number of examples of pre-attack shipments to private facilities, for example: on December 4, 2000, 100 mL of RMR-1029 were provided to BioPort (a private biopharmaceutical and biotech company); on May 1, 2001, 90 mL of RMR-1029 were provided to Battelle (a private science and technology company); and on June 15, 2001, 50mL of RMR-1029 were provided to Battelle. *Id.*; *see* U.S. Ex. AB-16 (Dr. Friedlander Depo., Excerpts) at 56:22-57:17.

70 U.S. Ex. AB-2 (RMR-1029 Reference Material Receipt Record).

71 In support of their motion to withdraw the stipulation regarding the criminal investigation's ultimate conclusion that Dr. Ivins was the assailant, Plaintiffs cited substantial testimony that no one at USAMRIID could have created the spores that were sent to Mr. Stevens. *See* Pls.' Mot. to Withdraw [DE# 139] at 2-6. In light of that evidence, Plaintiffs' inconsistent theories as to the potential assailant place at issue all persons who could have had access to RMR-1029, including private facilities to which spores from RMR-1029 were sent. The United States adheres to the criminal investigation's ultimate conclusion, which eliminated everyone other than Dr. Ivins, but Plaintiffs' broadening of the universe of potential perpetrators implicates outside facilities, not just government employees.

case and none of these cases relax the but-for causation requirement. Once Plaintiffs jettison the notion that Dr. Ivins perpetrated the attacks, the record becomes completely barren as to how RMR-1029 spores that were initially produced by the government left point "A" (USAMRIID) only to be modified and eventually sent to point "Z" (Mr. Stevens). Without Dr. Ivins as the assailant, it is not just that the specific name of the assailant becomes unknown; it is that there are ***no essential facts*** as to the nature of the crime and how government negligence actually led to the crime.[72] *See Shearn v. Orlando Funeral Home, Inc.*, 88 So. 2d 591, 593 (Fla. 1956) (requiring "essential facts" to be established in a negligence action).

This lack of essential facts stands in stark contrast to the other "unknown assailant" cases that have been discussed by Florida courts. First, nearly all of the "unknown assailant" cases involve a premises liability theory of recovery.[73] Second, and more importantly, these cases uniformly feature fact patterns where it is clear how the criminal attack was committed by the unknown assailant (often based on eyewitness evidence) and how the attack intersected with the defendant's alleged negligence. *See, e.g. Jones v. Budget Rent-A-Car Systems, Inc.*, 723 So. 2d 401, 402 (Fla. 3d DCA 1999) (negligence action where an unknown assailant grabbed the wheel of a rental car driven by a customer, immediately causing the car to careen into and damage a home). Here, if Plaintiffs reject the notion that Dr. Ivins was the assailant, the essential facts surrounding how Mr. Stevens was murdered and whether the attack stemmed from government

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[72] Plaintiffs cannot connect any "missing" material to the anthrax spores that actually killed Mr. Stevens. As set forth in the government's motion for summary judgment based on lack of proximate cause, there was never, in fact, any missing anthrax. *See supra* at 15 n.42.

[73] *See, e.g. Rosier v. Gainesville Inns Assocs., Ltd.*, 347 So. 2d 1100, 1102 (Fla. 1st DCA 1997) (holding that a landlord's breach of an implied duty to provide locks and maintain common areas in a safe condition may render the landlord liable to the tenant for injuries resulting from unauthorized entry by an unknown assailant); *Paterson v. Deeb*, 472 So. 2d 1210, 1220 (Fla. 1st DCA 1985) (holding that a landlord had a specific duty to provide a tenant with working door locks where the tenant was raped in the bathroom by an unknown assailant who allegedly would not have been able to gain entry had the locks worked); *Avakian v. Burger King Corp.*, 719 So. 2d 342, 343 (Fla. 4th DCA 1998) (discussing negligence action where a customer was assaulted by an unknown assailant while standing at the beverage counter of a restaurant); *Harrison v. Hous. Resources Mgmt., Inc.*, 588 So. 2d 64, 65 (Fla. 1st DCA 1991) (discussing premises liability case where a tenant at an apartment complex was sexually assaulted by an unknown assailant who had gained access to the premises due to allegedly unreasonable security measures including deficient locks and keys); *Green Co. v. Divincenzo*, 422 So. 2d 86, 87 (Fla. 3d DCA 1983) (discussing a premises liability case where the owner of an office building relaxed the building's security measures and allegedly allowed an unknown assailant to attack a man working in an office).

negligence are entirely absent.[74] Plaintiffs cannot cite a single "unknown assailant" case under Florida law that relaxes the requirement that a plaintiff has the burden to prove essential facts showing that the defendant's negligence actually and substantially caused the plaintiff's injury.

Because Plaintiffs cannot come forward with sufficient facts to show how government negligence actually led to an "unknown assailant" (or any assailant other than Dr. Ivins) acquiring anthrax and subsequently murdering Mr. Stevens, they cannot create a genuine issue of material fact as to causation. Once Plaintiffs reject Dr. Ivins as the murderer, they open up the possibility that the RMR-1029 spores used in the attack just as likely could have come from a non-government source, been lost in transport, or been removed by a scientist through scenarios devoid of government negligence. As a result, they cannot satisfy their burden of proving cause-in-fact as required under Florida law. *See Clay Elec.*, 873 So. 2d at 1185; *Pope v. Boat Co., Inc*, 380 So. 2d 1151 (Fla. 3d DCA 1980) (affirming summary judgment where the defendant's negligence was not the cause-in-fact of the harm). Thus, the United States is entitled to summary judgment.

CONCLUSION

Plaintiffs' election to pursue alternative, yet inconsistent theories does not change the ultimate outcome, which is final disposition of Plaintiffs' FTCA claims. If Plaintiffs argue that government negligence allowed Dr. Ivins, a government employee at the time of the attacks, to murder Mr. Stevens, their claims must be dismissed for lack subject-matter jurisdiction based on the FTCA's assault and battery exception. Alternatively, if Plaintiffs reject the government's concession that Dr. Ivins was the assailant and attempt to argue that government negligence allowed an unknown assailant to murder Mr. Stevens, they cannot satisfy their summary judgment burden to come forward with evidence that establishes how government negligence actually led to the crime.

[74] *See, e.g. Alvarez v. Metro. Dade Cnty.*, 378 So. 2d 1317, 1318 n.1 (Fla. 3d DCA 1980) (where a paying passenger on a county bus was attacked by an unknown assailant, noting the lack of an essential fact, and finding that the assailant could have entered the bus at any stop along the route, possibly one where there had never been a previous assault).

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NUMBER: 03-81110-CIV-HURLEY/HOPKINS

MAUREEN STEVENS, as Personal Representative of the Estate of ROBERT STEVENS, Deceased, and on behalf of MAUREEN STEVENS, Individually, NICHOLAS STEVENS, HEIDI HOGAN and CASEY STEVENS, Survivors,

Plaintiffs,

vs

UNITED STATES OF AMERICA,

Defendant.
_____/

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, I served the foregoing document via the Court's ECF system.

s/ *Adam M. Dinnell*
Adam M. Dinnell

SERVICE LIST

Stevens v. United States
Case No. 03-81110-CIV-HURLEY/HOPKINS
United States District Court, Southern District of Florida

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