

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

LORETTA RUNS AFTER, next friend and legal guardian of T.M. (a minor child), Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 10-3019-RAL UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
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Comes now the United States, by and through its attorneys, Brendan V. Johnson, United States Attorney for the District of South Dakota, and Robert Gusinsky, Assistant United States Attorney, and respectfully moves this Court pursuant to Fed. R. Civ. 12(b)(1) to dismiss Plaintiff's Complaint because this Court lacks subject matter jurisdiction.

SUMMARY OF ARGUMENT

The United States is immune from suit absent an express waiver of its sovereign immunity. The Federal Tort Claims Act ("FTCA") provides a limited waiver of the United States' sovereign immunity to allow persons injured by federal-employee tortfeasors to sue the United States for damages in federal district court. 28 U.S.C. § 3146(b)(1). As a condition of the United States' waiver, the FTCA requires that the claim be properly presented to the federal agency prior to filing an action under the FTCA. 28 U.S.C. § 2675(a).

One of the presentment requirements imposed by the FTCA is submission of evidence that the plaintiff is authorized to act on behalf of the claimant. *Mader v. United States*, 654 F.3d 794, 803-04 (8th Cir. 2011) *en banc*. A claim that fails to satisfy the presentment requirements, remains inchoate, unperfected, and not judicially actionable. 28 U.S.C. § 2675(a); *Mader* at 807.

In the case at bar, the attorney for Loretta Runs After (“Runs After”) presented the claim to the administrative agency on behalf of Runs After who purported to be the legal representative of the claimant, T.M., a minor child. Runs After is T.M.’s grandmother. No evidence of authority for either Runs After or her attorneys to represent T.M. was provided. Accordingly, the agency requested such evidence in writing. Plaintiff’s attorney failed to respond to the agency’s requests for evidence of authority on three separate occasions, and the claim was ultimately denied.

Pursuant to the Eighth Circuit’s *en banc* opinion in *Mader v. United States*, 659 F.3d 794 (8th Cir. 2011), the plaintiff’s failure to provide evidence of authority to act on behalf of T.M. renders the administrative presentment of the claim inchoate, unperfected, and not judicially actionable. *Id.* Accordingly, the United States respectfully submits that because Plaintiff failed to comply with the presentment requirements of the FTCA, the United States has not waived its sovereign immunity, thus depriving this Court of jurisdiction over this matter.

ALLEGATIONS MADE IN PLAINTIFF’S AMENDED COMPLAINT

Plaintiff, Runs After, filed her initial Complaint on August 27, 2010. Runs

After amended her Complaint, with leave of Court, on September 29, 2010 (DKT #7). In her Amended Complaint, Runs After describes herself as “next friend and legal guardian of T.M. (a minor child).” The gravamen of Runs After’s Amended Complaint against the United States is that T.M., while staying in a tribal juvenile detention facility, operated by the Cheyenne River Sioux Tribe (“CRST”), was assaulted by fellow inmates and had a large “C” branded on his arm. The Amended Complaint also alleges that another juvenile inmate sexually assaulted T.M. Although T.M. does not provide an exact date for the alleged injuries, the Amended Complaint states that the assault occurred while T.M. was in the CRST Detention Center in Eagle Butte, South Dakota, in September 2008. (Amended Complaint p. 1).

Finally, Runs After asserts in the Complaint that “administrative remedies have been exhausted with the Bureau of Indian Affairs.” (Amended Complaint p. 1).

ADMINISTRATIVE CLAIM

Runs After submitted her administrative claim, via Standard Form 95 (“SF 95”), to the Office of the Field Solicitor, Ft. Snelling, Minnesota. The SF 95 was signed and submitted by Runs After’s attorney, James Cerney, on June 17, 2009, via U.S. Mail, and was received by the Solicitor’s Office in the Twin Cities on June 19, 2009. (See Affidavit of Sharon Pudwill (“Affidavit”) at ¶¶ 1 and 2).¹ Runs

¹ Personal identifier information has been redacted from the exhibits attached to the “Affidavit.”

After's claim did not provide any evidence that either the attorney who signed the SF 95 or Runs After had authority to act on behalf of the claimant, T.M. (Affidavit at ¶ 3). Upon receipt of the claim, the agency requested, via letter dated November 23, 2009, that Runs After provide authority verifying she was entitled to act on behalf of the claimant, T.M., within 20 days, in writing. (Affidavit at ¶ 4). Runs After failed to respond to the agency's request for evidence of authority. (Affidavit at ¶ 4).

The agency again requested evidence of authority by letter dated February 1, 2010. (Affidavit at ¶ 5). Instead of providing evidence of authority, Plaintiff's attorney provided a Retainer Contract/ Attorney Agreement signed by the attorneys and Runs After. (Affidavit at ¶ 6). However the retainer contract provided no evidence that Runs After was duly appointed to represent the interests of T.M. in this matter.

Subsequently, the administrative claim was denied by the United States Department of the Interior, Office of the Field Solicitor, and notification was mailed to Runs After's counsel on March 23, 2010. (Affidavit at ¶ 7). The March 23, 2010, denial specifically stated, "if a request for reconsideration is submitted, please also provide evidence that Ms. Runs After is the legal custodian of T.M." Runs After did not file a request for reconsideration, nor did she submit evidence of authority. (Affidavit at ¶ 8).

LEGAL DISCUSSION

A. Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1): Lack of

Subject Matter Jurisdiction.

A motion testing the jurisdiction of the court to hear a matter is a threshold question that should be decided at the outset of litigation. *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990). In a recently decided case, the South Dakota District Court held:

Because a 12(b)(1) motion challenges the court's power to hear the case, the trial court is free to weigh the evidence and satisfy itself as to its power to hear the case. Therefore, the Court may consider facts beyond the allegations to the complaint without converting the 12(b)(1) motion to a motion for summary judgment.

Dudley v. United States, 2011 WL 5102274 (D.S.D. 2011)(internal citations omitted), *citing*, *Deuser v. Vecera*, 139 F.3d 1190, 1992 n.3 (8th Cir. 1998). "A party invoking federal jurisdiction must establish that he has met the requirements of both constitutional and prudential standing." *Delorme v. United States*, 354 F.3d 810, 815 (8th Cir. 2004).

When a court considers a Rule 12(b)(1) motion, it has "broader power to decide its own right to hear the case than it has when the merits of the case are reached. . . . 'jurisdictional issues, whether they involve questions of law or fact are for the court to decide.'" *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990)(quoting, *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). Further, "no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will

have the burden of proof that jurisdiction does in fact exist.” *Id.* at 730 (citation omitted).

B. Federal Tort Claims Act.

“The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.” *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Najbar v. United States*, 649 F.3d 868, 870 (8th Cir. 2011). 28 U.S.C. § 1346(b)(1) confers exclusive jurisdiction to federal district courts for claims against the United States for money damages for “personal injury or death caused by the negligent or wrongful act or omission of ‘federal employees’ 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.” Congress has extended the FTCA coverage to include any civil action or proceeding involving claims resulting from the performance of functions under an Indian Self-Determination and Education Assistance Act contract (known as a “638 contract”). See Pub. L. 103-138, Title III § 308, Nov. 11, 1993, 107 Stat. 1416 (codified at 25 U.S.C. § 450(f), *Historical and Statutory Notes*). The CRST detention facility and its employees are tribal employees, not federal employees. However, the CRST detention facility operates pursuant to a 638 contract, and is, therefore, covered by the FTCA. Even though events giving rise to a tort may occur on Indian tribal lands, state law is to be applied for the purpose of the FTCA. The Eighth Circuit held:

. . . that where an act or omission occurs within the territorial boundaries of both a tribal reservation and the State, ‘the law of the place’ for purposes of the FTCA is the law of the State.

LaFromboise v. Leavitt, 439 F.3d 792, 796 (8th Cir. 2006).

C. Presentment Requirements.

The FTCA prohibits the filing of an action in the United States District Court unless the claimant first presents the claim to the appropriate federal agency, and the claim has finally been denied. 28 U.S.C. § 2675(a). Pursuant to 28 U.S.C. § 2672, the United States Department of Justice promulgated regulations addressing administrative claim requirements. 28 C.F.R. § 14.2(a), expressly requires that the claim presenter include “. . . evidence of his authority to present the claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.” *Id.*

The Eighth Circuit Court of Appeals recently had an opportunity to review the FTCA presentment requirements, and more specifically, requirements relating to evidence of authority. In an *en banc* decision, the Eighth Circuit held that the evidence of authority requirement is contained within the meaning of 28 U.S.C. § 2675(a), and therefore, failure to furnish evidence of authority during the presentment stage renders the administrative claim inchoate, unperfected, and not judicially actionable. *Mader v. United States*, 654 F.3d 794, 807 (8th Cir. 2011) *en banc*.

The relevant facts in the *Mader* case are strikingly similar to the case at bar.

Mr. Mader, a patient at the Veteran's Affairs Medical Center in Lincoln, Nebraska, tragically died of a self-inflicted gun shot wound approximately two months after the VA altered his course of treatment. *Id.* at 798. Ms. Mader, Mr. Mader's widow, presented an administrative claim to the VA purporting to act as the personal representative of the estate of Robert L. Mader, and sought to recover wrongful death damages from the VA. *Id.*

Just as in the present case, Ms. Mader presented her administrative claim through a Standard Form 95, which on its face required her to submit evidence of authority to present a claim on behalf of the claimant. Just as in the case at bar, Ms. Mader never presented such evidence to the VA. *Id.* at 799. Despite repeated requests, both in writing and telephonically, neither Ms. Mader or her attorney provided any evidence of Ms. Mader's authority to present a claim on behalf of her deceased husband. *Id.* Ultimately, Ms. Mader's claim was denied in writing due to her repeated failure to submit the required evidence of authority. In the alternative, the VA denied the claim on his merits. *Id.*

Following the denial of Ms. Mader's claim, she brought a wrongful death action against the United States in Federal District Court under the FTCA. *Id.* The district court dismissed the action pursuant to Fed. R. Civ. P. 12(b)(1) on the basis that Ms. Mader failed to present the requisite evidence of authority at the administrative level. In doing so, the district court applied the Eighth Circuit's holding in *Lunsford v. United States*, 570 F.2d 221 (8th Cir. 1977)(holding that a representative must submit evidence of authority to act on behalf of a claimant in

order to satisfy Section 2675(a)'s jurisdictional presentment requirements)). A divided panel reversed the district court choosing to follow the Eighth Circuit's holding in *Farmers State Sav. Bank v. Farmers Home Admin.*, 866 F.2d 276 (8th Cir. 1989)(applying the "minimal notice" interpretation of Section 2675(a)).^{2 3} The *en banc* appeal followed.

Sections 2672 and 2675 were enacted at the same time in 1966 when Congress amended the FTCA "to establish a new framework for administrative consideration in settlement of claims." *Mader* at 797. Section 2672 mandated that the Attorney General promulgate regulations in accordance with which agency heads could consider, ascertain, adjust, determine, compromise, and settle any FTCA claim. *Id.* Acknowledging that § 2675(a) itself does not expressly define the term "presented," the Eighth Circuit held that it must be read together

² The *Mader* court points out that the issue relating to evidence of authority was not before the court in *Farmers State Sav. Bank*. *Mader*, at n.5.

³ The United States wishes to alert the Court to a series of opinions and orders issued by several judges of the United States District Court for the District of South Dakota in which similar issues were considered, and over the objection of the United States, were decided in conformity with the minimal notice requirements set forth in *Farmers State Sav. Bank v. Farmers Home Admin.*, 866 F.2d 276 (8th Cir. 1989). See *Candice Waln-Chasing Hawk v. United States*, Civ. No. 06-3016, DKT# 51, filed on August 29, 2007 by the Honorable Charles B. Kornmann. (Exhibit 1).

Judge Kornmann's opinion makes reference to several cases decided pursuant to the minimal notice requirements articulated by *Farmers State Savings Bank*. See Exhibit 1, pp. 2-3. However as is demonstrated by the Eighth Circuit's *en banc* opinion in *Mader*, minimal notice requirements articulated in *Farmers State Bank* are not to be applied, and at least with respect to evidence of authority, strict adherence to the requirement that such evidence be presented at the administrative stage is required. *Mader* at 805.

with its sister statute § 2672 also enacted in 1966. *Id.* at 800. Reading both statutes together “it naturally follows, then, that § 2675(a) requires the presentment of evidence of a personal representative’s authority to act on behalf of a claim’s beneficiaries, something totally essential to meaningful agency consideration.” *Id.* at 801.

The Eighth Circuit explained: “Congress intended to give agencies the first opportunity to meaningfully consider and settle FTCA claims. And, as discussed above, agencies simply cannot meaningfully consider FTCA claims with an eye towards settlement if representatives fail to first present evidence of their authority to act on behalf of claim’s beneficiaries.” *Id.* at 803. In addition, the Eighth Circuit’s holding is not limited to wrongful death cases. “Similar representation problems may also extend beyond the wrongful death context. Indeed, FTCA claims involving questions of age, competency, and numerosity, among others, will often require the appointment of an agent or trustee.” *Id.* The Eighth Circuit held:

For the foregoing reasons, we hold that a properly ‘presented’ claim under § 2675(a) must include evidence of a representative’s authority to act on behalf of the claim’s beneficiaries under state law. The presentation of such evidence is not a pointless administrative hurdle—it is fundamental to the meaningful administrative consideration and settlement process contemplated in §§ 2675(a) and 2672. Moreover, we note that the presentation of such evidence is far from burdensome. Assuming a representative is, in fact, duly authorized to present an FTCA claim on behalf of beneficiaries under applicable state law, evidence of such authority is uniquely in the representative’s possession.

Id. at 803-04 (emphasis added).

* * *

. . . under the guidance of *Henderson*, we conclude that conformity with § 2675(a) is a jurisdictional term of the FTCA's limited waiver of sovereign immunity . . . *Id.* at 808 (emphasis added).

* * *

A claim that fails to satisfy § 2675(a)'s requirements remains inchoate, unperfected, and not judicially actionable. *Id.* at 807.

In this case, Runs After failed to provide the agency with evidence of authority to act on behalf of T.M. Evidence of authority to act on behalf of Runs After is not evidence of authority to act on behalf of T.M. The Eighth Circuit agreed with the government in *Mader* that strict compliance with section 2675(a) is a jurisdictional prerequisite to filing suit under the FTCA. *Mader* at 805.

Accordingly, the United States respectfully submits that Runs After failed to comply with the presentment requirements of § 2675(a), and therefore, this Court is without jurisdiction to consider this action because the United States has not waived its sovereign immunity.

CONCLUSION

The holding of the Eighth Circuit is that presentment of an FTCA claim to an administrative agency requires evidence of authority to act on behalf of a claimant. In this case, no evidence of authority was provided. The agency asked

for, but did not receive any response to its requests that evidence of authority be provided. Runs After did not comply with the presentment requirements in § 2675(a), therefore, this Court is without jurisdiction to hear this FTCA action.

The United States respectfully submits that the action must be dismissed for lack of subject matter jurisdiction.

Dated this 5th day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2012, I served the United States' Memorandum in Support of Motion to Dismiss, by electronic transmission on:

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