

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMY ROCK, conservator of JP
and individually,

Plaintiff-Appellant,

v.

Court of Appeals #: 13-1403
Originating Case #: 2:12-cv-00255

UNITED STATES OF AMERICA,

Defendant-Appellee.

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PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

CLARK, BRAY, CAMERON
& LARRABEE, P.C.

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 13-1403

Case Name: Rock v United States of America

Name of counsel: Richard C. Clark

Pursuant to 6th Cir. R. 26.1, Amy Rock, conservator of JP and individually conservator for JP
Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

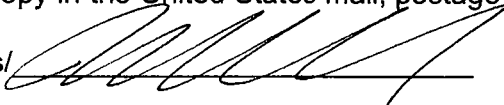
No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on April 9, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ 

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF APPELLATE JURISDICTION

District Court Jurisdiction:

This claim against the United States of America was filed as an original action in the U.S. District Court, Western District of Michigan, Northern Division, pursuant to the Federal Tort Claim Act.¹ The Federal Tort Claim Act applies to this action because it involves activities funded by a grant through the Tribally Controlled Schools Act.² On March 13, 2013, District Judge Robert Holmes Bell entered Judgment (Doc. #30, page ID #487), in favor of Defendant, and an Order Granting Defendant's Motion to Dismiss and an Order Dismissing Plaintiff's First Amended Complaint. Doc. #29, Page ID #486. The District Court's Opinion dated March 13, 2013, Doc. #28, Page ID #476, said the court did not have subject matter jurisdiction.

1. 28 U.S.C. §2671, *et seq.*

2. 25 U.S.C. §2501, *et seq.*

Appellate Jurisdiction:

This Court has jurisdiction pursuant to FRAP 3 and 4. The District Court entered a judgment on March 13, 2013, granting Defendant's FRCP 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Plaintiff's Notice of Appeal was filed on March 28, 2013.³

Plaintiff brings this appeal from a final order and judgment disposing all claims.

3. Doc. #30.

STATEMENT OF ISSUES PRESENTED

- I. Does the Federal Tort Claim Act apply to the Hannahville Indian Community's 21st Century Community Learning Center?

- II. Did the District Court err when it found that the agent responsible for injury to Amy Rock's minor, JP, was an employee of the Bureau-funded school performing functions related to a charter school sharing a campus with the Bureau-funded school when that agent's negligence lead to the injury of Amy Rock's minor, JP?

**STATEMENT OF THE CASES -- NATURE,
PROCEEDINGS AND DISPOSITION**

Plaintiff filed a Federal Tort Claim Act (FTCA) case on behalf of herself and her minor, JP. Plaintiff was permitted to file her claim because the Tribally Controlled School Act (TSCA) applied the FTCA to claims arising from functions performed under TSCA grants. The United States filed a FRCP 12(b)(1) motion claiming lack of subject matter jurisdiction. It said that an appropriation bill exempted the FTCA's waiver of immunity. Plaintiff filed a First Amended Complaint and Defendant renewed its motion. On March 13, 2013, the District Court ruled in Defendant's favor on FRCP 12(b)(1).

STATEMENT OF FACTS

Event. Amy Rock's minor, JP, participated in the Hannahville Indian Community's¹ 21st Century Community Learning Center (21st CCLC) after school program, Kidzone. About 6:00 p.m., at the conclusion of the Hannahville Indian Community's after school Kidzone, an employee/agent of the 21st CCLC program, which was responsible for Kidzone, drove children in a van from the Kidzone program to a dark parking lot to catch a bus from local church. The van driver left the children alone in the winter darkness to wait for the church bus. When the church bus entered the parking lot JP ran to the bus and slid under the back wheels. The bus ran over JP causing severe injuries.

FTCA. Amy Rock filed a FTCA² negligence claim on behalf of her injured minor, JP, and a negligent infliction of emotional distress claim in her own right. District courts have jurisdiction of FTCA suits.³ The FTCA applies

1. Hannahville Indian Community is not synonymous with Hannahville Indian School.

2. 28 U.S.C. §§2671-2680.

3. 28 U.S.C. §1346.

to this case because the TSCA,⁴ extended the FTCA to activities funded by TSCA grants. The van driver who was negligent was the agent of the 21st CCLC, a TSCA grant recipient.

4. 25 U.S.C. §2501, *et seq.*

SUMMARY OF ARGUMENT

The FTCA applied to the Hannahville 21st CCLC. The 21st CCLC was an entity separate from the Hannahville Charter School. If for the sake of argument, the 21st CCLC was a Bureau-funded school sharing a campus with Hannahville's Charter School, the van driver behavior was not exempted from the FTCA. The appropriation bill relied upon by the United States required that the van driver be performing functions related to the Hannahville Charter School at the time she was negligent. The van driver was not performing any charter school operation nor any action relating to a charter school operation when she was negligent. The Hannahville School was closed for the evening.

ARGUMENT

I. THE FTCA APPLIES TO TCSA CLAIMS.

Standard of Review.

This Court reviews the District Court's interpretation of the FTCA and jurisdiction *de novo*.⁵

The FTCA applies to the 21st CCLC as it was funded by the TSCA

The TSCA incorporated the FTCA into actions by employees for an Indian tribe, tribal organization or Indian contract while acting within the scope of a TSCA grant.

With respect to claims resulting from the performance of functions . . . under a contract, grant agreement or cooperative agreement authorized by the . . . [TSCA] . . . an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior . . . while carrying out any such agreement and its employees are deemed part of the Bureau . . . while acting in the scope of their employment in carrying out the contract or agreement: Provided, That . . . any civil action or proceeding involving such claim brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General

5. *Hertz v United States*, 560 F3d 616 (CA6 2009).

and afforded the full protection and coverage of the [FTCA].⁶

Through its Tribal Chair, Kenneth Meshigaud, the Hannahville Indian Community applied for a TSCA grant for its 21st CCLC.⁷ The Bureau of Indian Education approved the TSCA grant to the Hannahville Indian Community,⁸ naming the “Grant Organization” as the

TSCA Grant Award Doc. #22, Page ID #373

Amendment #9
FY 2010

GRANT AWARD/AMENDMENT DOCUMENT

1. Effective Date: July 01, 2009	2. <input type="checkbox"/> Initial Start <input checked="" type="checkbox"/> Amendment #9	3. Initial Fund Level: 3,051,961 Amendment +/-: 131,450 Grant Total: 3,193,411
4. Grant Number: GTFBUX55510	<input type="checkbox"/> Part A - Administration Cost Grant <input checked="" type="checkbox"/> <u>Part B - Tribally Controlled School Grant</u>	
6. Bureau Organization & Address: Bureau of Indian Education Bishop Henry Whipple Federal Building One Federal Drive - Room 550 Ft. Snelling, MN 55114-0077	7. Grantee Organization & Address Hannahville Indian Community N 14911 Hannahville B-1 Road Wilson, MI 49896	
7. Bureau Administrator: Name: Title: Education Line Officer Phone: 612.725.4591 Fax: 612.725.4438	9. Grantee Administrator Thomas Miller School Administrator 906.466.2952 906.466.2556	
10. Conditions This agreement/amendment is subject to the conditions of the applicable documents which are incorporated as a part of this grant. A. Grant Conditions B. General Provisions In the event there is a conflict of consistency in any of the above referenced documents, the order of the precedent will be as follows; Grant Conditions; General Provisions; and Grantee's application.	11. Appropriations Data and Amount The attached 09-10 Grant Conditions are hereby incorporated by reference.	
12. Offer This grant agreement/amendment is offered under the authority of Title V, Augustus F. Hawkins-Robert T. Stafford Elementary & Secondary School Improvement Amendments of 1988 (ESEA - 105-301)	13. Acceptance Grantee accepts this grant agreement/amendment. The undersigned represents to be duly authorized to act on behalf of the Grantee.	
United States of America <i>Mary Scubone</i> SIGNATURE Education Line Officer Date 10/12/09	Name of Grantee <i>Kenneth Meshigaud</i> SIGNATURE Grantee Administrator Date 10/28/09	

Date	Pages
To: Mary Scubone	From: Molly Tyson
Phone #: 906.466.2952	Phone #: 612.725.4592
Fax #: 906.466.2556	Fax #: 612.725.4438

6. *Mentz v. United States*, 359 F.Supp.2d 856, 859-860 (D.N.D. 2005).

7. Grant Application, Doc. #21-5, Page ID #346. The application is ambiguous naming the applicant as Hannahville Indian School, but the application was signed by the tribal chair not governing member of the Hannahville Indian School.

8. Grant Award/Amendment Document, Doc. #22, Page ID #373. The application for the grant listed Hannahville School as the applicant but the tribal chair signed and the grant award lists the grantee organization as Hannahville Indian Community.

“Hannahville Indian Community,” not the Hannahville School. As a TCSA, granted activities under the grant were governed by the FTCA.

II. The Charter School Exemption Did Not Apply.

The Charter School Employee Exception to the FTCA. The United States says that the FTCA did not apply here because of an appropriation bill. It said that bill exempted FTCA coverage that would otherwise apply to certain people participating in charter schools. The United States cited this language:

...Employees of Bureau-funded schools sharing a campus with a charter school and performing functions related to the charter schools operation and employees of a charter school shall not be treated as Federal employees for purposes of chapter 171 of title 28, United States Code...⁹

The Charter School Employee Exception to the FTCA did not apply in this case for two (2) reasons. First, the van driver was not an employee of the Bureau-funded school or the tribal charter school. Second, assuming arguendo, that the van driver was an employee of a Bureau-funded school, she was not performing functions related to charter school operations at the time of the event causing JP his severe injuries.

The 21st CCLC was a Separate Entity. 21st CCLC programs started when regular school stopped. The Hannahville 21st CCLC conducted Kidzone, an after school and summer program, when school was out of

9. Pub. L. No. 111-88, 123 Stat. 2919.

session. The grant application stated that Kidzone met from 3:00PM - 5:15 PM Monday through Thursday. Summer Kidzone had 74 students, and began the second week of June.¹⁰ It was the Kidzone after school program that JP attended.

21st CCLCs supported education by funding enrichment programs for Indian communities. While 21st CCLC programs shared goals with the schools they were separate entities. The United States Department of Education stated the purpose of the 21st Century Community Learning Centers:

This program supports the [creation of community learning centers](#) that provide academic enrichment opportunities during [non-school hours for children](#), particularly students who attend high-poverty and low-performing schools. The program helps students meet state and local student standards in core academic subjects, such as reading and math; offers students a broad array of enrichment activities that can complement their regular academic programs; and offers literacy and other [educational services to the families](#) of participating children.¹¹

Emphasis Supplied

The above description parallels the description of the program in the authorizing statute.¹²

10. Grant Summary Doc. #21-5, Page ID #364-365, BIE Packet on 21st CCLC Doc. #21-1, Page ID #336.

11. <http://www2.ed.gov/programs/21stcclc/index.html>

12. 20 U.S.C. §7171.

In this case the Hannahville Indian Community applied for a TSCA grant to fund its 21st CCLC program. The applicable regulations allowed for grants to be made to Indian tribes and tribal organizations that operated a school under 25 USC 450, *et seq*, a tribally controlled school or a Bureau-funded school.¹³

The purpose of the TSCA grant to the Hannahville Indian Community was to fund Hannahville's 21st CCLC.¹⁴

Through its Tribal Chair, Kenneth Meshigaud, the Hannahville Indian Community applied for a TSCA grant for its 21st CCLC.¹⁵ The Bureau of Indian Education approved the TSCA grant to the Hannahville Indian Community,¹⁶ naming the "Grant Organization" as the "Hannahville Indian Community," not the Hannahville School.

13. 25 C.F.R. §44.103.

14. Reimbursement Authorization, Doc. #22, Page ID #375.

15. Grant Application, Doc. #21-5, Page ID#346. The application is ambiguous naming the applicant as Hannahville Indian School, but the application was signed by the tribal chair not a governing member of the Hannahville Indian School.

16. Grant Award/ Amendment Document, Doc. #22, Page ID #373. The application for the grant listed Hannahville School as the applicant but the tribal chair signed and the grant award lists the grantee organization as Hannahville Indian Community.

The Hannahville 21st CCLC program included students from schools other than the tribal school and the program referred to the building housing the 21st CCLC as the “21st Century Community Learning Center building.”

Approximately two-thirds of Hannahville school age youth attend the Hannahville Indian School. The other one-third attends one of three public schools that border the reservation. Our proposal is designed to provide services to all these tribal youth within the [21st Century Community Learning Center building](#)...¹⁷

The 21st CCLC was not part of the Hannahville school. The Hannahville school was adjacent to the Bark River School District and about 12 miles from Escanaba Schools. While all Hannahville school children were eligible for the Hannahville 21st CCLC programs, not all children needed to be students at Hannahville school. The target community was the Hannahville Indian Community regardless of which schools that the participants attended.

The 21st CCLC “is an actual physical structure built in 2005.”¹⁸ The structure was attached directly to the Hannahville Indian School’s gymnasium and cafeteria.

17. Grant Summary, Doc. #21-5, Page ID #354.

18. Grant Application for 21st CCLC, Doc. #21-5, Page ID #352.

The 21st CCLC director and four assistance were funded by Hannahville tribe. The 21st CCLC program coordinator and two assistants were funded with a 21st CCLC Grant. An office of Juvenile Justice and Delinquency Prevention grant funded another key staff member.¹⁹ None were funded by the Hannahville school.

The Hannahville grant application stated that the 21st CCLC program “leverages the resources of the Hannahville Indian School’s kitchen staff, transportation staff and busses....” The grant application always referred to the Hannahville School in the third person, never in the first person. In the grant application, the 21st CCLC was treated as a separate entity from the Hannahville School.

The 21st CCLC Department incorporated the the 21st CCLC and the Hannahville Employee Handbook.²⁰ It did not use the Hannahville School Handbook.²¹

In a discussion of 21st CCLC administration, the grant proposal stated that “Hannahville’s Director of Youth Services will continue to direct the 21st

19. Grant Summary, Doc. #21-5, Page ID #352.

20. Grant Summary, Doc. #21-5, Page ID #365.

21. Grant Summary, Doc. #21-5, Page ID #366.

CCLC Program as he has done for the last five years.”²² The 21st CCLC Director controlled the activities of the program. He was charged in playing “...a key role in ensuring that the program supports the overall success of the students and the school.”²³ The Hannahville Indian School principal worked closely with 21st CCLC by providing curriculum guidance and helping the program network.²⁴ The grant application did not treat the 21st CCLC and the Hannahville Schools as a unified organization.

In a recently discovered web page²⁵ Hannahville Indian School jobs are listed. None refer to any of the jobs performed in the 21st CCLC program.²⁶ Additional “clicking” shows that none of the employees listed at the Hannahville Indian School have supervisory obligations to the 21st CCLC program, not the superintendent, the principal or the maintenance apprentice.

22. Grant Summary, Doc. #21-5, Page ID #367.

23. Grant Summary, Doc. #21-5, Page ID #368.

24. Grant Summary, Doc. #21-5, Page ID #367-368.

25. At least by this writer.

26. http://hannahvilleschool.net/index.php/ntw_pages/docs/schoolDocuments.

Job Listings on Hannahville
School Website - May 30, 2013 -
[http://hannahvilleschool.net/
index.php/ntw_pages/docs/
schoolDocuments](http://hannahvilleschool.net/index.php/ntw_pages/docs/schoolDocuments)

Position Descriptions

[Custodian](#)
[Custodian: Assistant Head Custodian](#)
[Custodian: Head Custodian](#)
[Custodian: Shift Supervisor](#)
[Discipline Coordinator](#)
[Discipline: In School Separation Monitor](#)
[FACE Coordinator](#)
[Financial Assistant](#)
[Financial Director](#)
[Gifted and Talented Coordinator](#)
[Higher Education Director](#)
[K-12 Guidance Counselor](#)
[Kitchen Assistant](#)
[Kitchen Supervisor](#)
[Language Resource Media Developer](#)
[Maintenance and Repair Supervisor](#)
[Maintenance Apprentice](#)
[Principal](#)
[School Nurse](#)
[Secretary](#)
[Secretary: Principal](#)
[Special Education: Administrator](#)
[Special Education: Coordinator](#)
[Special Education: Instructional Aide](#)
[Special Education: Social Work Services Provider](#)
[Special Education: Teacher](#)
[Special Education: Teacher, Early Education](#)
[Superintendent](#)
[Teacher](#)
[Teacher: Potawatomi Language](#)
[Teacher Aide](#)
[Teacher Aide: Culture](#)

[Technology Assistant](#)
[Technology Coordinator](#)
[Title One Teaching Assistant](#)
[Transportation: Bus Driver](#)
[Transportation: Supervisor](#)



[LINK TO THE HANNAHVILLE SCHOOL WEBSITE](#)

The van driver was not performing functions related to the charter schools operation. Assuming, for arguments sake, the van driver was considered an employee of a Bureau-funded school at the time of JP's injury, the Charter School exemption still did not apply.

PUBLIC LAW 111-88—OCT. 30, 2009:²⁷

...Employees of Bureau-funded schools sharing a campus with a charter school and performing functions related to the charter schools operation and employees of a charter school shall not be treated as Federal employees for purposes of chapter 171 of title 28, United States Code...²⁸

This exception to the FTCA must be carefully construed. It should not defeat the purpose of the FTCA under the TCSA.

29. The Act is described: "Making appropriations for the Department of the Interior, environment, and related agencies for the fiscal year ending September 30, 2010, and for other purposes."

30. Federal Tort Claim Act.

*Dolan v United States Postal Service.*²⁹ The United States

Supreme Court wrote:

...Finally, it should be noted that this case does not implicate the general rule that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign," *Lane v. Péna*, 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996). As *Kosak* explains, this principle is "unhelpful" in the FTCA context, where "unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute..."³⁰

The plaintiff in *Dolan* tripped over mail left on her porch by postal employees. In the context of United States Postal Service the United States waived immunity in the FTCA. The FTCA contained 13 exceptions to its waiver of immunity.³¹ One exception applied to the Postal Service. The Court in *Dolan* reviewed the exception that applied to the Postal Service.

The provisions of this chapter and section 1346(b) of this title shall not apply to . . . [a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.³²³¹

31. *Dolan v United States Postal Service*, 546 US 481, 126 S Ct 1252, 163 L Ed 2d 1079 (2005).

32. *Dolan*, at 491 - 492.

33. 28 U.S.C. §2680.

34. 28 U.S.C. §2680(b).

Finding against the Postal Service, the Court concluded that “both context and precedent require a narrower reading,” than that relied upon by the lower courts and the United States. The Court:

The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.³³

The Charter School exception to the TSCA set the following criteria:

- That the agent involve be an employee of a charter school - not relevant to the inquiry here, or
- An employee of a Bureau-funded school
 - Sharing a campus with a charter school, and
 - Performing functions related to charter schools operation

If Congress wanted to exempt all actions related to a charter school it could have said so. It did not. In another context, Congress exempted “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”³⁴

35. *Dolan*, at 486.

36. 28 U.S.C. §2680(i) - See *Dolan*, 489.

In the appropriations bill relied upon by the Defendant, Congress separated the obligations and responsibilities of the charter school from a Bureau-funded school. Here is the language preceding the language relied upon by the United States in the appropriation bill:

Funds made available under this Act may not be used to establish a charter school at a Bureau-funded school (as that term is defined in section 1146 of the Education Amendments of 1978 (25 U.S.C. 2026)), except that a charter school that is in existence on the date of the enactment of this Act and that has operated at a Bureau-funded school before September 1, 1999, may continue to operate during that period, but only if the charter school pays to the Bureau a pro rata share of funds to reimburse the Bureau for the use of the real and personal property (including buses and vans), the funds of the charter school are kept separate and apart from Bureau funds, and the Bureau does not assume any obligation for charter school programs of the State in which the school is located if the charter school loses such funding...³⁵

Congress wanted to keep charter school funding, which comes from the state, and BIE funding separate.

It makes sense Congress would choose not to extend FTCA coverage to the functions of a state supported charter school. Even if the van driver in this case was an employee of a Bureau-funded school, she was not performing functions relating to charter school operations.

35. Public Act 111-88—OCT. 30, 2009.

Had Congress wanted exempt all activities of programs funded by the TSCA it could have so stated in the appropriations bill. The appropriation bill in question stated:

Employees of Bureau-funded schools sharing a campus with a charter school and performing functions related to the charter schools operation...

Had the last word of the quoted section been omitted, the meaning may support Defendant's position.

Employees of Bureau-funded schools sharing a campus with a charter school and performing functions related to the charter school operation...

or

Employees of Bureau-funded schools sharing a campus with a charter school and who perform functions related to the charter school...

In the first instance the person would not have needed to be perform duties related to the charter school's operation. It could have covered a person performing functions related to the charter school's goal of education, for example. In the second instance, the employee would not have needed to perform a function related to the school at the time of injury. The person could have been someone who, at times, performs functions related to the charter school.

Congress only indicated its intent to exclude actions by employees while in the performance of functions relating to charter school operations. None of the activities alleged in this case relate to performing functions to the operations of the charter school.

RELIEF REQUESTED

Find subject matter jurisdiction in the Federal District Court for Plaintiff's claims and remand to the District Court to process the Plaintiff's FTCA claim.

Respectfully submitted,

CLARK, BRAY, CAMERON
& LARRABEE, P.C.

Dated: May 31, 2013

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