

(Rodney K. Nelson)
 Abeyta Nelson P.C.
 1102 West Yakima Avenue
 Yakima, WA 98902-3029
 (509) 575.1588

**UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF WASHINGTON**

DANIEL R. FARMER, a married person,

Plaintiff,

vs.

**UNITED STATES OF AMERICA, and
 RON SHAFFER AND REBECCA
 SHAFFER, husband and wife,**

Defendants.

NO. CV-13-00251-LRS

**PLAINTIFF'S
 MEMORANDUM IN
 OPPOSITION TO
 DEFENDANT'S MOTION
 TO DISMISS**

Plaintiff Daniel Farmer through his counsel Rodney K. Nelson of Abeyta Nelson, P.C. responds to the defendant's Motion to Dismiss as follows:

I. FACTS

This case involves a claim for injuries to Daniel Farmer's hand as a result of being hit by a sledge hammer swung by Ronald Shaffer, an employee of the Colville Confederated Tribe, who, as defendant's Memorandum indicates, was working under a Contract under the Indian Self-Determination and Education Assistance Act. Mr. Farmer was working for Jones Construction, which was constructing a pole building for use by the emergency medical services of the Colville Tribe in furtherance of the Contract. Mr. Ronald Shaffer has been deposed and excerpts of his deposition are attached to the Declaration of Rodney K. Nelson submitted herewith. The new pole building was being built to house the

1 fire engine and the ambulance to allow the emergency medical technicians to better
2 provide emergency services pursuant to the Contract. (Page 15 of Shaffer Deposi-
3 tion attached as Exhibit 208 to the Declaration of Rodney K. Nelson.) The sole
4 purpose of the building was to house the ambulance and fire trucks and to hold
5 other gear necessary to provide the emergency services. (Page 16 of Shaffer
6 Deposition) While Mr. Shaffer was on duty as an Emergency Technician he did
7 help with the construction of the pole building "every now and then." (Page 23 of
8 Shaffer Deposition at lines 20-21) Shaffer described numerous smaller tasks he
9 would perform to help the contractor move the pole building project along: start up
10 a vehicle, move a vehicle, kick a board out of the way, or help with the man lift.
11 (Shaffer Deposition Page 24) He sometimes held the end of a tape measure.
12 (Shaffer Deposition Page 25) On the day that Mr. Farmer was injured, October 25,
13 2011, he was helping the contractor put trusses in place. He gave the following
14 answer to the following question:

15 Q. And this other work, did you feel like you were benefitting
16 your employer by helping move the construction along?

17 A. I thought so.

18 (Shaffer Deposition Page 26 lines 16-19)

19 He was trying to help Mr. Farmer with one of the trusses when he hit Mr.
20 Farmer's hand. (Shaffer Deposition Page 34, lines 22-24)

21 Mr. Shaffer's superior, Christopher McCuen, has also been deposed. He is the
22 Commander of the EMS Fire and Rescue. Mr. McCuen is familiar with the terms
23 of the Contract between the Colville Tribe and the United States Government. He
24 indicated that: "It requires us to provide 24 hour a day, 7 day coverage for ambu-
25 lance services to tribal members of the reservation is a paraphrasing of it." (McCu-
26 en Deposition attached as Exhibit 209 to the Declaration of Rodney K. Nelson,
Page 7.)

1 Part of the Contract under a section entitled Description/Specifications Work
 2 Statements Part I- The Schedule, under item B (2) provides: "Provide and manage
 3 the personnel, **materials** and equipment required for the total program operation."
 4 (Emphasis supplied. See Declaration of Rodney K. Nelson submitted herewith
 5 Exhibit 206.) Mr. McCuen was asked how he interpreted this and whether or not
 6 this included buildings necessary for the ambulance service. He responded in the
 7 affirmative. The following dialog is contained at pages 7 - 8 of the McCuen
 8 Deposition:

9 Q. What's your interpretation of it?

10 A. My interpretation is, when we're given the funding by the
 11 federal government, we use what we can because it is a small part of our
 12 budget, to provide the necessary materials and resources to complete our
 13 jobs.

13 Q. And would that include the buildings?

14 A. If necessary, yes, if we have to upgrade any buildings.

15 In addition, Mr. McCuen stated the following:

16 Q. And I assume it also means you supply the place to house the
 17 ambulance?

18 A. Yes sir.

19 Q. And the personnel to drive the ambulance?

20 A. Yes sir.

21 Q. The personnel to maintain the building?

22 A. We supply - yes, with contractors, as whatever we need to do
 23 with that.

24 McCuen Deposition Page 8 line 24-Page 9, line 6)

25 Mr. McCuen had helped with the request to build a new building to house the
 26 ambulance. It was necessary because the EMT and firefighters were housed in one
 location and all of the equipment was housed in another and they needed to be
 within a reasonable distance. With the housing in one location and the ambulances

1 500 yards away, Mr. McCuen felt they were not providing as good of service.
2 (McCuen Deposition Page 10)

3 Mr. McCuen indicated there were difficulties with the construction because
4 Inchelium is in a remote spot and it is hard to get materials there in a timely
5 fashion. For that reason the construction took longer than he would like. There
6 was frustration on the part of the EMT's about how long the construction was
7 taking. There was also the problem that it was late October when the incident
8 happened and the construction was not very far along and with Winter coming on,
9 the project was late. (McCuen Deposition Pages 14-15)

10 Mr. Farmer recalls that Mr. Shaffer hit his hand with the sledge hammer while
11 he was trying to help with the trusses. (See Farmer Deposition attached as Exhibit
12 207 to the Declaration of Rodney K. Nelson Pages 49-52)

13 II. LEGAL ARGUMENT

14 As set forth in the defendant's briefing, Mr. Shaffer would be covered by the
15 Federal Tort Claims Act so long as he was working within the scope of his employ-
16 ment and within the boundaries set forth by the Contract between the federal
17 government and the Colville Tribe.

18 As indicated in Mr. McCuen's deposition, the Contract between the Colville's
19 and the United States Government provided that the Colville's were to provide
20 ambulance services and further "provide and manage the personnel, **materials and**
21 **equipment** required for the total program operation." Certainly the pole building,
22 which was to house the ambulance near the quarters where the ambulance atten-
23 dants resided during their 48 hour work shift, is part of the materials and equipment
24 required for the total program operation. As both Mr. McCuen and Mr. Shaffer
25 detailed in their deposition testimony, having the new building close to the quarters
26 allowed the tribe to provide good ambulance service in this remote area. So,

1 clearly, construction of the pole building is a necessary part of the Contract
2 requirements for the Colville tribe.

3 In addition, Mr. Shaffer was clearly within the course and scope of his employ-
4 ment at the time of this injury. There is no question but that he was on-the-job and
5 on-the-clock. In a case cited by the defendant, *Dickinson v. Edwards*, 105 Wn.2d
6 457, 467, 716 P.2d 814 (1986) Justice Robert Brachtenbach of the Washington
7 Supreme Court indicates that the test in Washington for determining whether the
8 employee was, at any given time, in the course of his employment is:

9 whether the employee was, at the time, engaged in the perfor-
10 mance of the duties required of him by his contract of employ-
11 ment, **or** by specific direction of his employer; **or**, as some-
times stated, **whether he was engaged at the time in the
furtherance of the employer's interest.** (Emphasis added.)

12 *Dickinson v. Edwards*, 105 Wn.2d 457, 467, citing *Elder v. Cisco Constr. Co.*, 52
13 Wn2d 241, 245, 324 P.2d 1082 (1958) (citing *Greene v. St. Paul-Mercury Indem.*
14 *Co.*, 51 Wn.2d 569, 573, 320 P.2d 311 (1958)).

15 Justice Brachtenbach further states:

16 In following this test we have emphasized the importance of
17 the benefit to the employer in the determination of the scope of
employment.

18 *Dickinson v. Edwards*, supra, at 467.

19 More recently, the Washington Supreme Court addressed this issue in *Rahman*
20 *v. State of Washington*, 170 Wn.2d 810, 246 P.3d 182 (2011). In that case, the
21 Washington Supreme Court found that an employee was acting within the course
22 and scope of his employment while operating a motor vehicle even though he had
23 allowed his wife to ride with him in a State vehicle, which was clearly contrary to a
24 State policy not allowing transport of passengers that are not on official State
25 business. The State employee's negligence had caused an automobile accident and
26 injuries to his wife. His injured wife was seeking to establish vicarious liability on

1 the part of the State of Washington for her husband, a State employee's, negli-
2 gence. The Supreme Court determined that there was vicarious liability because
3 the employee was acting on official State business at the time of the accident, even
4 though he was in violation of a specific direction of his employer not to provide
5 rides to unauthorized individuals.

6 Here, Mr. Shaffer was on-the-job and on-the-clock when he hit Mr. Farmer
7 with a sledge hammer. He was not acting for any personal benefit or on a lark, but
8 was simply helping as best he could with a construction project to build a pole
9 building to house ambulances necessary for his work as an Emergency Medical
10 Technician. Because of the remote area, there had been difficulties getting material
11 to the job site in a timely fashion and the building project was running quite late. It
12 was late October and Winter was near. Mr. Shaffer was helping the contractor by
13 moving the project along so that it could be done in time for Winter. This was
14 clearly to the benefit of his employer. As Justice Brachtenbach indicated in
15 *Dickinson v. Edwards*, supra, a case cited by the defendant, this is a key element in
16 determining whether or not an individual was acting within the scope of his
17 employment. As Justice Brachtenbach indicated in the *Dickinson v. Edwards*
18 decision, the important thing is the benefit to the employer:

19 The court of appeals analysis leads the way into the quag-
20 mire of exceptions based on employer involvement. This court
21 has sought to avoid this path by its emphasis on the benefit to
the employer rather than on the control or involvement of the
employer.

22 *Dickinson v. Edwards*, supra, at 468.

23 III. CONCLUSION

24 The Contract between the Colville's and the United States Government
25 provides that the Colville's are to provide not only the personnel, but the materials
26 and equipment necessary for the "total program operation of providing ambulance

1 services.” This, of necessity, includes a building to house the ambulance and the
2 equipment necessary for the EMT program. Clearly the construction of the pole
3 building was within the work description provided by the Contract between the
4 Colville’s and the United States. Furthermore, when Mr. Shaffer was helping with
5 the construction project he was working in the furtherance of his employer’s
6 interests and certainly benefitting his employer. He was, under Washington law, in
7 the course and scope of his employment. The defendant’s Motion should be
8 denied.

9 DATED: August 25 2014.

11 **ABEYTANELSON P.C.**
12 Attorneys for Plaintiff

13 By: _____
14 Rodney K. Nelson
15 WSBA 9587
16 1102 West Yakima Avenue
17 Yakima, WA 98902
18 Telephone: (509) 575-1588
19 Fax: (509) 457-8426
20 Email: rnelson@abeytanelson.com
21
22
23
24
25
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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

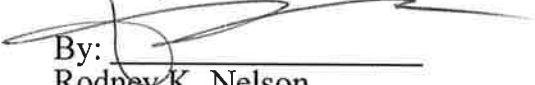
Timothy Durkin

United States Attorney

P.O. Box 1494

Spokane, WA 99210-1494

ABEYTA NELSON, P.C.
Attorneys for Plaintiff

By: 
Rodney K. Nelson
WSBA 9587
1102 West Yakima Avenue
Yakima, WA 98902
Telephone: (509) 575-1588
Fax: (509) 457-8426
Email: rnelson@abeytanelson.com