IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

DAVID CHIPMON **PLAINTIFF**

v. **Civil Action No. 3:18-cv-223-CWR-FKB**

THE UNITED STATES OF AMERICA;
MISSISSIPPI BAND OF CHOCTAW INDIANS;
WAYNE WILLIAMS **DEFENDANTS**

Memorandum in Support of Motion to Dismiss Cross-Claims against the United States for Lack of Subject-Matter Jurisdiction

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Defendant, the United States of America ("Defendant"), by and through undersigned counsel, seeks dismissal of Defendants Wayne Williams and the Band of Choctaw Indians' (together the "tribal defendants") cross-claims filed against it pursuant to Federal Rule of Civil Procedure 12(b)(1).

Allegations against the United States

Plaintiff David Chipmon filed this suit on April 10, 2018, against the United States, alleging jurisdiction under the Federal Tort Claims Act ("FTCA"). *See* Docket No. 1 at 3, Compl. In that same complaint, he brought state law tort claims against the tribal defendants. *Id*. As set forth in the complaint, the basic facts underlying this case are as follows: Plaintiff alleges that he was injured in an automobile accident on May 5, 2010, when Williams, animal control

supervisor for the Band of Choctaw Indians (the "Tribe"), while driving a tribally-owned vehicle, failed to yield the right of way and collided his truck into Plaintiff's truck. Compl. at 3.

Plaintiff alleges the United States is liable for Williams' negligence under the FTCA because, at the time of the collision, Williams worked for animal control services, a function that Plaintiff alleges was contracted between the Tribe and the Department of Interior ("DOI" or "the Department") under the ISDEAA, Pub. L. 93–638, 25 U.S.C. § 5301 *et seq.*

The tribal defendants, on June 5, 2018, filed cross-claims against the United States, claiming that, because Williams was carrying out work pursuant to the 638 contract between Bureau of Indian Affairs ("BIA") and the Tribe, the United States should certify FTCA coverage for the Tribe and Williams. *See* Docket No. 11 at 7-12, Tribal Defendants' Cross-claims.

Legal Standard of Review

"A case is properly dismissed for lack of subject-matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). A district court may dismiss an action for lack of subject-matter jurisdiction under Rule 12(b)(1) on any one of three separate bases: "'(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the Court's resolution of disputed facts.'" *King v. U.S. Department of Veterans Affairs*, 728 F.3d 410, 413 (5th Cir. 2013) (quoting *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001)).

In deciding a Rule 12(b)(1) motion, the Court may review matters outside the pleadings without converting the motion into one for summary judgment. *Robinson v. TCI/US West Communications Inc.*, 117 F.3d 900, 904 (5th Cir. 1997). If a Rule 12(b)(1) motion is supported by evidence, the motion is deemed a factual attack on subject-matter jurisdiction. *Paterson v.*

Weinberger, 644 F.2d 521, 523 (5th Cir. 1981). In such a case, the court does not presume that the allegations in the complaint are true. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981).

The tribal defendants—that is, the party who seeks to invoke the jurisdiction of the federal court—"'must prove by a preponderance of the evidence that the court has jurisdiction based on the complaint and evidence.'" *Ramming*, 281 F.3d 158, at 161 (quoting *Ballew v. Cont'l Airlines, Inc.*, 668 F.3d 777, 781 (5th Cir. 2012)).

Argument

Because this Court lacks subject-matter jurisdiction over the United States under the FTCA, the tribal defendants' cross-claims against the United States are also due to be dismissed. Rule 13(g) contemplates cross-claims only as between "co-parties," meaning parties with a like status, such as co-defendants. *See Murray v. Haverford Hospital Corp.*, 278 F. Supp. 5, 6-7 (E.D. Pa. 1968); *see also* Wright & Miller, 6 Fed. Prac. & Proc. Civ. § 1431 (3d ed. April 2018 update). Once the United States is dismissed from Plaintiff's complaint for lack of subject-matter jurisdiction, it no longer will be a "co-party" subject to cross-claim. *Cf. IMFC Professional Svcs. of Florida, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152, 159 n.12 (5th Cir. 1982) (where the principal claim is dismissed for lack of subject-matter jurisdiction, then any ancillary claim must likewise be dismissed as never having been within the court's jurisdiction either).

But to the extent that the tribal defendants' "cross-claim" is asserted as a petition for certification pursuant to 28 U.S.C. § 2679(d)(3), that petition must be dismissed too.

Section 2679(d)(3) of title 28 provides, in relevant part, as follows:

> In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition

> the court to find and certify that the employee was acting within the scope of his office or employment.

28 U.S.C. § 2679(d)(3).

By its terms, § 2679(d)(3) is available only to federal employees. Thus, as a threshold matter, the Tribe itself is not entitled to invoke § 2679(d)(3). As discussed in the United States' motion to dismiss the complaint, a Tribe, or tribal contractor, is "deemed" to be "part of" the BIA only for functions carried out under a 638 contract. *See* Pub. L. 101-512, § 314; United States' Mem. in Supp. of Mot. to Dis. For Lack of Subj. Matter Juris. at 5-6. Here, the function that gave rise to suit was not one transferred under the 638 contract. Consequently, the Tribe cannot be considered "part of" the BIA, and none of the FTCA's protections are available.

But even if the Tribe or tribal contractor in this case were "deemed" to be "part of the BIA," that legal fiction designation does not make the Tribe or tribal contractor an "employee" entitled to petition for a scope of employment certification. The Westfall Act's certification mechanisms apply only to natural persons or individuals, not to corporations, artificial entities, or even federal agencies. *See Adams v. United States*, 420 F.3d 1049, 1053-54 (9th Cir. 2005). In any event, because the FTCA's protections are not extended under the circumstances presented in this case, the Tribe's petition for certification is due to be dismissed for the same reason that the United States itself must be dismissed: the conditions under which FTCA coverage is extended to tribal contractors and their employees are not satisfied here. *See* United States' Mem. in Supp. of Mot. to Dis. For Lack of Subj. Matter Juris. at 10-11.

As to Defendant Williams, he too is not entitled to petition for certification under § 2679(d)(3). Williams was not, under the circumstances presented, carrying out any functions under the applicable 638 contract at the time of the incident giving rise to suit. *See* United States' Mem. in Supp. of Mot. to Dis. For Lack of Subj. Matter Juris. at 11-12. Thus, he is not "deemed"

to be an employee of the BIA for purposes of the FTCA's protections. Because § 2679(d)(3) is available only to federal employees, and Williams was not deemed to be a federal employee of any kind, he cannot petition for certification.

Even if he could, however, that certification must be denied for the same reasons that the United States must be dismissed from this action. Williams was not carrying out functions under a 638 contract at the time of the incident giving rise to suit, so it necessarily follows that he was not within the scope of his employment *in* carrying out that contract either. Pub. L. 101-512, § 314.

For all of these reasons, the tribal defendants' cross-claims and/or petition for certification pursuant to 28 U.S.C. § 2679(d)(3) must be dismissed.

WHEREFORE, the United States respectfully requests that the Court grant its Motion to Dismiss the tribal defendants' cross-claims with prejudice.

DATE: August 3, 2018

Respectfully submitted,

D. MICHAEL HURST, JR.
United States Attorney

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CERTIFICATE OF SERVICE

I, ***Keith B. French, Jr.***, Assistant United States Attorney, do hereby certify that, on this date, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

DATE: August 3, 2018

By: */s/ Keith B. French, Jr.*
KEITH B. FRENCH, JR.