

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Civil No. 0:24-cv-01892-JMB-LIB

NICOLE JOHNS,

Plaintiff,

v.

**BRIEF IN SUPPORT OF DEFENDANT
UNITED STATES OF AMERICA'S
MOTION TO DISMISS**

UNITED STATES OF AMERICA, et al.,

Defendants.

This case arises out of the death of Joseph Fairbanks, Jr., who was in custody at the Red Lake Detention Center in the days leading up to his death. Plaintiff Nicole Johns is Mr. Fairbanks's mother, and she sued the United States of America, the Department of the Interior ("DOI"), and the Bureau of Indian Affairs ("BIA") for wrongful death and constitutional violations. But Johns's claims against the federal government are barred by sovereign immunity. Thus, Johns has voluntarily dismissed her claims against the DOI and BIA, as well as her *Bivens* claims against the United States. Dkt. 18. What remains is a claim against the United States under the Federal Tort Claims Act ("FTCA").

This Court lacks subject matter jurisdiction over Counts I and II because Johns did not present a proper administrative claim before filing suit. Specifically, Johns did not provide the DOI with proof of her authority to pursue a wrongful death action under Minnesota law. Nor did the person who signed the administrative claim provide proof that Johns had authorized him to do so. As the FTCA is a limited waiver of sovereign immunity, the Eighth Circuit holds that strict compliance with these proof-of-authority requirements is jurisdictional. Johns overlooked the requirements, so her FTCA claim must be dismissed.

STANDARD OF REVIEW

The United States moves to dismiss Counts I and II pursuant to Federal Rule of Civil Procedure 12(b)(1). This is a factual challenge to the Court’s subject matter jurisdiction. Johns therefore does “not enjoy the benefit of the allegations in [her] pleadings being accepted as true,” and the Court can consider materials outside the pleadings to determine whether jurisdiction exists. *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 915 (8th Cir. 2015); *Rollo-Carlson v. United States*, 2019 U.S. Dist. LEXIS 43796, at *6 (D. Minn. Mar. 18, 2019), *aff’d*, 971 F.3d 768 (8th Cir. 2020). Accordingly, the United States draws the following factual background and procedural history from Johns’s Complaint and from the declaration and supporting materials filed with this motion.

FACTUAL BACKGROUND

I. Joseph Fairbanks’s Arrest and Detention

Joseph Fairbanks, Jr. was booked into the Red Lake Detention Center on May 27, 2022. Compl. ¶ 20.¹ At the time, Mr. Fairbanks had a rare genetic condition called hereditary angioedema, and the Complaint alleges that he notified Red Lake Detention Center staff about the condition during his intake. Compl. ¶¶ 19-20. On May 28, 2022, Mr. Fairbanks experienced abdominal pain and vomiting, which led detention center staff

¹ Johns alleges that the Red Lake Detention Center is “under the jurisdictional and operational oversight of the BIA” and that the United States is “responsible for the operation of the Red Lake Detention Center.” Compl. ¶¶ 1-2. None of that is accurate. The Red Lake Band of Chippewa Indians operates its own detention center pursuant to a Self-Governance Compact with the BIA, authorized by the Indian Self-Determination and Education Assistance Act. *See* 25 U.S.C. § 5301 *et seq.*

to contact Johns, his mother. Compl. ¶ 21. Johns came to the detention center later that day, and staff allowed her to administer a dose of Firazyr to Mr. Fairbanks. Compl. ¶ 21.

Mr. Fairbanks's condition deteriorated over the next day, so detention center staff contacted the Red Lake Hospital for advice. Compl. ¶ 22. The hospital recommended medical attention, and detention center staff arranged for EMS to transport Mr. Fairbanks to the hospital. Compl. ¶¶ 22-24. Despite the hospital's efforts, Mr. Fairbanks passed away just after noon on May 29, 2022. Compl. ¶ 24.

An autopsy confirmed that Mr. Fairbanks died of mixed drug toxicity. Compl. ¶ 25. But Johns disagrees with the autopsy: she alleges that detention center staff failed to provide Mr. Fairbanks with timely and adequate medical attention for his hereditary angioedema. Compl. ¶¶ 25-26. In Counts I and II, Johns alleges that Red Lake Detention Center staff were negligent and that they are liable for the wrongful death of Mr. Fairbanks. Compl. ¶¶ 29-37. That is an FTCA claim. *See* 28 U.S.C. §§ 1346(b), 2674.

II. Johns's Attempt to Present an Administrative Claim

Under the FTCA, a person seeking money damages against the United States for negligence or wrongful death must first present a proper administrative claim to the appropriate federal agency. 28 U.S.C. § 2675(a). To satisfy this presentment requirement, the claimant or her legal representative needs to provide the agency with “an executed Standard Form 95 . . . accompanied by a claim for money damages in a sum certain . . . and the title or legal capacity of the person signing, and . . . evidence of his authority to present a claim on behalf of the claimant.” 28 C.F.R. § 14.2(a).

Johns tried to present an administrative claim in September 2023, when an attorney sent a cover letter and Standard Form 95 (“SF-95”) to the DOI. Compl. ¶ 11; Declaration of Robin Deguara (“Deguara Decl.”) ¶ 5, Ex. A. The cover letter identified Johns as the “mother of Joseph Fairbanks Jr.” and explained that “there is a possibility that this claim may be treated as an action against the United States, with potential coverage and protections under the Federal Tort Claims Act.” Deguara Decl. Ex. A, at 1. According to the letter, Johns first sought damages from the Red Lake Nation’s commercial insurance carrier. Deguara Decl. Ex. A, at 1. But the claims administrator directed Johns to file an administrative claim under the FTCA instead. Deguara Decl. Ex. A, at 1.

The cover letter to the DOI enclosed an SF-95 seeking \$3,000,000 in damages for Mr. Fairbanks’s death. Deguara Decl. Ex. A, at 3-4. Johns did not sign the SF-95 herself—the signature was over a hand-written “Oliver Nelson, III.” Deguara Decl. Ex. A, at 3. The number written in the box for “phone number of signatory” matched the phone number for Mr. Nelson’s law firm listed on the cover letter. Deguara Decl. Ex. A, at 3. Neither Johns nor the attorney provided the DOI with a retainer agreement or representation letter signed by Johns and confirming that she had authorized Mr. Nelson to sign and present an administrative claim on her behalf. Deguara Decl. ¶ 6, Ex. A. Johns never followed-up to provide such proof while the claim was pending, either. Deguara Decl. ¶¶ 5-6. Likewise, Johns did not provide with her initial submissions any proof that she had been appointed a wrongful death trustee under Minnesota law or was otherwise authorized to pursue a wrongful death claim. Deguara Decl. ¶ 7, Ex. A. And she never provided proof of her appointment while the administrative claim was pending. Deguara Decl. ¶¶ 5, 7.

It was a mistake for Johns to omit proof of her authority to pursue a wrongful death claim under state law and proof of the attorney's authority to sign and present an administrative claim. The instructions on the SF-95 emphasized the proof-of-authority requirements for Johns and for anyone signing the form on her behalf:

The claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

Deguara Decl. Ex. A, at 4. The SF-95 also called Johns's attention to the regulations that contain the proof-of-authority requirement, noting that "[c]omplete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14." Deguara Decl. Ex. A, at 4.

The DOI investigated Johns's administrative claim and denied it in a letter dated March 12, 2024. Deguara Decl. ¶ 8, Ex. B. At that point, Johns had the option to request reconsideration or file a lawsuit. Deguara Decl. Ex. B, at 1; 28 C.F.R. § 14.9. She chose a lawsuit, filing her complaint in this case on May 21, 2024. *See* Dkt. 1.

After the lawsuit was underway, the same attorney who submitted Johns's initial claim sent another letter to the DOI. Deguara Decl. ¶ 9, Ex. C. The letter enclosed two documents and asked the DOI to add them to the claim file. Deguara Decl. Ex. C, at 1. The first attachment was a November 2022 order from a Minnesota state court, appointing Johns a wrongful death trustee. Deguara Decl. Ex. C, at 3. That was the first time Johns

provided any proof of her legal capacity to the DOI; it came three months after the DOI denied her administrative claim and almost a month after she filed this case. Deguara Decl. ¶¶ 5, 7. The second attachment was an SF-95 that Johns apparently submitted directly to the Red Lake Nation in February 2023. Deguara Decl. Ex. C, at 5-6. The older SF-95 had the same problems as the SF-95 that Johns submitted to the DOI in September 2023: (1) it was signed by an attorney without evidence that Johns had authorized him to act on her behalf; and (2) it did not identify Johns's capacity as a wrongful death trustee or include proof that she had been appointed a wrongful death trustee under Minnesota law. Deguara Decl. Ex. C, at 5. The DOI responded to the letter on July 9, 2024, refusing to add the new documents to an already-denied administrative claim. Deguara Decl. ¶ 10.

The United States now timely moves to dismiss.²

ARGUMENT

Sovereign immunity bars Johns's FTCA claim against the United States. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. Sovereign immunity is jurisdictional in nature. Indeed, the terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (citations, alterations, and internal quotation marks omitted). As the plaintiff, Johns bears the burden of proving to the Court that subject matter jurisdiction exists. *See Two Eagle v. United States*, 57 F.4th 616, 620 (8th Cir. 2023);

² The Department of Justice does not currently represent the individual defendants named in the Complaint, who are sued in their individual capacities. And the DOI and BIA are no longer parties to this case. Dkt. 20. Thus, the present motion is brought only by the United States.

Osborn v. United States, 918 F.2d 724, 730 (8th Cir. 1990). She must identify a waiver of sovereign immunity that allows her claims to proceed and prove that she complied with the conditions of that waiver. Because Johns cannot make this showing, the Court lacks subject matter jurisdiction over Counts I and II as alleged against the United States.

I. The Proof-of-Authority Requirement

Johns did not present a proper administrative claim before bringing suit. Presentment is a jurisdictional prerequisite, and the FTCA explicitly bars suit unless an administrative claim is first “presented” to the appropriate agency. 28 U.S.C. § 2675(a); *see also McNeil v. United States*, 508 U.S. 106, 112 (1993). In this case, the materials that Johns sent to the DOI in September 2023 suffered from two defects: (1) Johns did not provide evidence of her authority to pursue a wrongful death action on Mr. Fairbanks’s behalf; and (2) an attorney signed the SF-95 but did not provide evidence that Johns had authorized him to do so. Either deficiency standing alone would require dismissing Johns’s FTCA claim for lack of subject matter jurisdiction.

Proof of authority for the person signing the SF-95 and for the claimant herself are substantive requirements for presenting a proper administrative claim. Under the Attorney General’s regulations and Eighth Circuit law, a claim is deemed “presented” when the claimant or her authorized legal representative provides the appropriate agency with:

1. an executed Standard Form 95 or other written notification of an incident;
2. a claim for money damages with a sum certain; and
3. the title or legal capacity of the person signing, *accompanied by evidence of his authority to present a claim on behalf of the claimant.*

28 C.F.R. § 14.2(a) (emphasis added); *see also Mader v. United States*, 654 F.3d 794, 803-04 (8th Cir. 2011) (en banc). If a claimant fails to provide the required proof of authority with her administrative claim, then sovereign immunity bars a subsequent FTCA action arising out of that claim. *Mader*, 654 F.3d at 803-05; *Rollo-Carlson*, 2019 U.S. Dist. LEXIS 43796, at *3-4.

This Court routinely dismisses FTCA cases where proof of authority is not presented with the underlying administrative claim. For example, in *Rollo-Carlson v. United States*, the court granted a similar motion to dismiss that challenged subject matter jurisdiction over a wrongful death action brought by the decedent's mother. 2019 U.S. Dist. LEXIS 43796, at *1. The court explained that although the plaintiff

obtained authority to act on behalf of the asserted claim's beneficiaries by obtaining appointment as trustee under Minnesota's wrongful-death statute, the allegations of the complaint and the evidence submitted by the parties show that she did not timely present evidence of that authority to the VA before commencing this action. As a result, under 28 U.S.C. § 2675(a) and the Eighth Circuit's interpretation of that statute in *Mader*, subject-matter jurisdiction does not exist over this case.

Id. at *11. Or take *Puetz v. United States*, where the court concluded that a medical malpractice claim was not presented when it was signed by the claimant's attorney but did not include proof that the claimant had authorized the attorney to sign the SF-95. 2023 U.S. Dist. LEXIS 109379, at *25-26 (D. Minn. June 26, 2023), *aff'd*, 2024 U.S. App. LEXIS 9729 (8th Cir. Apr. 23, 2024) (per curiam). That conclusion required the *Puetz* court to dismiss the plaintiff's FTCA action for lack of subject matter jurisdiction. *Id.* at *27.

The District of Minnesota is not alone in enforcing jurisdictional proof-of-authority requirements. District courts across the Eighth Circuit dismiss FTCA actions where proof

of authority is missing. *See, e.g., Celeste Pretends Eagle v. United States*, 2023 U.S. Dist. LEXIS 165464 (D.S.D. Sep. 14, 2023) (wrongful death plaintiffs failed to provide proof of appointment as personal representatives); *Pipes v. Kirksville Mo. Hosp. Co.*, 2022 U.S. Dist. LEXIS 229569 (E.D. Mo. Dec. 21, 2022) (parents failed to provide proof of appointment to act on behalf of minor child); *Hennager v. United States*, 2020 U.S. Dist. LEXIS 223334 (D.N.D. Nov. 30, 2020) (grandfather failed to provide proof of guardianship of minor grandson); *Parrott v. United States*, 2019 U.S. Dist. LEXIS 120836 (W.D. Mo. July 18, 2019) (LLC organizer and registered agent failed to provide proof of authority to act on behalf of LLC). These decisions correctly adhere to Eighth Circuit precedent holding that a plaintiff must strictly comply with the requirements listed in 28 C.F.R. § 14.2. And these decisions dictate the resolution of Johns’s current FTCA claim.

II. Johns’s Missing Proof of Authority

There are two proof-of-authority defects in this case, both of which Johns would need to overcome to show that she presented a proper administrative claim.

The first problem is that Johns failed to give the DOI evidence that she had been appointed a wrongful death trustee under Minnesota Statutes § 573.02. In Minnesota, only a court-appointed trustee can bring a wrongful death action on behalf of a decedent. *See* Minn. Stat. § 573.02, subd. 1; *Christiansen v. Univ. of Minn. Bd. of Regents*, 733 N.W.2d 156, 159 (Minn. Ct. App. 2007). Johns needed to comply with this substantive aspect of Minnesota tort law because “[t]he ‘extent of the United States’ liability under the FTCA is generally determined by reference to state law.’” *Rollo-Carlson v. United States*, 971 F.3d 768, 770 (8th Cir. 2020) (quoting *Molzof v. United States*, 502 U.S. 301, 305 (1992)). Thus,

to present a proper administrative claim, Johns had to disclose the legal capacity in which she was presenting the claim and give the DOI proof of her appointment as a wrongful death trustee. *See Mader*, 654 F.3d at 803 (“[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.”). Johns did not do either of those things.

Starting with the failure to disclose her legal capacity, the SF-95 identified Johns as the claimant and indicated only that she was the “Mother of Deceased Joseph Fairbanks.” Deguara Decl. Ex. A, at 3. The cover letter to the DOI likewise identified Johns as “the mother of the late Joseph Fairbanks Jr.,” without any mention that Johns was presenting an administrative claim as a wrongful death trustee. Deguara Decl. Ex. A, at 1. In the narrative section of the SF-95, Johns explained the basis of her claim but never indicated that she was a court-appointed trustee for a wrongful death action. Deguara Decl. Ex. A, at 3. In other words, Johns did not disclose her legal status to the DOI as required under 28 C.F.R. § 14.2(a). Even if Johns did not review the regulations governing administrative claims before she submitted one, the instructions on the SF-95 emphasized the importance of disclosing her legal capacity. Deguara Decl. Ex. A, at 4. Johns simply failed to follow these instructions.

Missing disclosure aside, Johns did not give the DOI any proof that she had been appointed a wrongful death trustee under Minnesota law. Deguara Decl. ¶¶ 5, 7, Ex. A. This proof would have been easy to provide because the appointment process under Minnesota Statutes § 573.02 results in a court order appointing a wrongful death trustee. *See Mader*, 654 F.3d at 804 (“[T]he 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.”). Johns had an appointment order that she could have submitted with her administrative claim in September 2023. Deguara Decl. Ex. C, at 3. Yet she inexplicably chose not to do so. And to be clear: this Court's inquiry turns on whether Johns provided *proof* of the appointment, not whether she had in fact been appointed at the time she submitted an administrative claim.³ See *Runs After v. United States*, 2012 U.S. Dist. LEXIS 100265, at *25 (D.S.D. July 18, 2012) (“[T]he focus under *Mader* is not whether a plaintiff has actual authority to bring a claim, but whether the plaintiff has first presented to the appropriate federal agency evidence of his or her authority to act on behalf of the claims beneficiaries under state law.” (citations and internal quotation marks omitted)), *aff'd*, 511 F. App'x 596 (8th Cir. 2013) (per curiam).

Johns cannot cure this jurisdictional defect by pointing to the order that an attorney sent to the DOI after Johns filed this case. A plaintiff alleging claims under the FTCA must “complete exhaustion of Executive remedies *before* invocation of the judicial process.” *McNeil*, 508 U.S. at 112 (emphasis added); see also *Spanier v. U.S. Fish & Wildlife Serv.*, 2022 U.S. Dist. LEXIS 111092, at *6 (D. Minn. June 23, 2022) (proof of authority provided to agency after lawsuit was filed did not cure jurisdictional defect because “[a]

³ The June 2024 letter from Johns's attorney to the DOI confirms that no proof of authority was submitted before Johns filed the current lawsuit. The letter enclosed an appointment order from November 2022, under the auspices of “writing to ensure that the documentation for our client's FTCA claim is complete.” Deguara Decl. Ex. C, at 1. The obvious implication is that Johns understood her FTCA claim was not “complete” before she provided the missing appointment order.

jurisdictional precondition to filing an FTCA suit in federal district court is just that—a prerequisite to filing suit in federal court” (citations and internal quotation marks omitted)). Furthermore, it is not clear that Johns had even completed the appointment process as of June 2024. The state court order sent to the DOI provided that Johns would be appointed “upon the filing of oath pursuant to [Minnesota Statutes §] 358.06.” Deguara Decl. Ex. C, at 3. But the publicly available state court docket for Johns’s appointment petition does not show that she ever filed the required oath. *See In re Appointment of a Trustee for the Next of Kin of Joseph Fairbanks, Jr.*, Court File No. 04-cv-22-3132 (Minn. Dist. Ct. for Beltrami County filed Oct. 19, 2022). Equally important, Johns never gave the DOI proof that she had filed the required oath, either with her initial SF-95 or as part of her post-lawsuit letter trying to cure the jurisdictional defect. *See* Deguara Decl. Exs. A and C.

Ultimately, Johns cannot prove that she disclosed her legal capacity to the DOI or provided the agency with evidence of her authority to pursue a wrongful death action under Minnesota law. For those reasons alone, the Court lacks subject matter jurisdiction over Counts I and II.

The second proof-of-authority problem is that Johns did not sign the SF-95 herself. When someone other than the claimant signs an SF-95, that person must provide “evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.” 28 C.F.R. § 14.2(a). This rule applies to attorneys who sign and present administrative claims on behalf of their clients. *See Puetz*, 2023 U.S. Dist. LEXIS 109379, at *17-20 (collecting authority); *E.M. v. United States*, 2020 U.S. Dist. LEXIS 221751, at *8 (W.D. Mo. Nov. 25, 2020). As with proof of

Johns's own authority to pursue a wrongful death action on behalf of her son, proof of an attorney's authority to sign the SF-95 was a jurisdictional presentment requirement.

The documents submitted to the DOI in September 2023 did not include any evidence that Johns had authorized an attorney to sign the administrative claim on her behalf. Particularly in the context of attorney-client relationships, this Court has already observed that the proof-of-authority requirement should not be burdensome. *See Puetz*, 2023 U.S. Dist. LEXIS 109379, at *26 (“The requirement is even less onerous for an attorney, whose professional skillset is geared towards compliance with procedural hurdles. Moreover, it is standard practice for most attorneys to enter into a representation agreement with their clients.”). Nevertheless, Johns failed to comply with the requirement. She did not provide a retainer agreement or signed letter of representation, and she did not notify the DOI that anyone was authorized to sign and present an administrative claim on her behalf. Deguara Decl. ¶¶ 5-6, Ex. A.

Johns will presumably point to the cover letter sent to the DOI, which opened with “[o]ur law firm represents Nicole Johns.” Deguara Decl. Ex. A, at 1. Or she will point to the section of the SF-95 identifying Johns as the claimant and noting that she was “Represented By: Magna Law Firm.” Deguara Decl. Ex. A, at 3. Neither statement proved that Johns had expressly authorized an attorney to sign and present her administrative claim. Indeed, there was no evidence suggesting that Johns reviewed the cover letter or SF-95 before the attorney sent them to the DOI. *Cf. Puetz*, 2023 U.S. Dist. LEXIS 109379, at *5-6 (cover email from attorney was insufficient proof of authority). The en banc Eighth Circuit was worried about this exact issue in *Mader*, observing that the proof-of-authority

requirement guards against attorneys filing claims without having a bona fide attorney-client relationship. 654 F.3d at 803 (describing “representation problems” in attorney-client context, including multiple lawyers attempting to present claims on behalf of the same claimants). That is why the instructions on the SF-95 advised Johns that administrative claims submitted by agents or legal representatives must include evidence “establishing *express* authority to act for the claimant.” Deguara Decl. Ex. A, at 4 (emphasis added). Bald statements from the person who signed the SF-95 were insufficient; Johns needed to give the DOI evidence of an express authorization for someone to sign and present the SF-95 on her behalf. Because that did not happen, the Court lacks subject matter jurisdiction over Counts I and II.

CONCLUSION

Counts I and II cannot proceed. This Court lacks subject matter jurisdiction over Johns’s FTCA claim because she did not present a proper administrative claim before filing suit. By omitting proof of authority for two separate aspects of her administrative claim, Johns failed to comply with Congress’s conditions for waiving sovereign immunity under the FTCA. The Court should therefore dismiss Counts I and II as alleged against the United States and dismiss the federal government as a party to this case.

Respectfully submitted,

Dated: August 1, 2024

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