

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

NICOLE JOHNS,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT
UNITED STATES OF AMERICA’S MOTION TO DISMISS**

INTRODUCTION

The Defendant United States of America, through the Department of the Interior (“DOI”), has moved to dismiss Plaintiff’s Federal Tort Claims Act (“FTCA”) suit, arguing that the administrative claim was improperly presented under the FTCA. Specifically, the DOI contends that Ms. Nicole Johns (“Ms. Johns”) failed to give the DOI evidence that she had been appointed as a wrongful death trustee under Minnesota law, and that the letter of representation she submitted was insufficient to establish Attorney Oliver E. Nelson, III’s authority to sign and file the FTCA claim on her behalf. However, in making these arguments, the DOI has ostensibly added to the FTCA presentment requirements that neither the FTCA nor the Eighth Circuit have mandated.

To be sure, Eighth Circuit precedent confirms that Plaintiff's letter of representation and affirmative declarations that Ms. Johns had been appointed as trustee over her son, Joseph Fairbanks Jr.'s ("Mr. Fairbanks") wrongful death case, documentation that Plaintiff submitted contemporaneously with her signed SF-95 Form, is enough to satisfy the FTCA's legal capacity requirements. The DOI's motion should be denied.

FACTUAL BACKGROUND

Mr. Fairbanks died on May 29, 2022, while in custody at the Red Lake Detention Center. Mr. Fairbanks, who suffered from hereditary angioedema, experienced severe abdominal pain and vomiting during his detention. *See* Plaintiff's Compl. at ¶¶ 18-28. Despite notifying the detention center staff of his medical condition and his need for Firazyr injections, Mr. Fairbanks did not receive the timely and adequate medical attention that his condition required. *Id.* Tragically, he passed away after a series of delays and failures by the detention center staff to address his medical needs. *Id.*

Letter of Representation and Trustee Appointment Confirmation

On November 9, 2022, Ms. Johns, Mr. Fairbanks's mother, was appointed trustee for the next of kin under Minnesota law, empowering her to pursue a wrongful death action on behalf of her son's estate. *See* Trustee Appointment Order, attached as Exhibit A to O. Nelson Declaration ("Decl.") at ¶ 1. This Order was a matter of public record. In an effort to hold those responsible for her son's death accountable, on September 18, 2023, Ms. Johns' attorney, Oliver E. Nelson, III ("Attorney Nelson"), submitted a SF-95 form, which he signed on Ms. Johns' behalf, to the DOI. *See* SF-95 form with accompanying documents, attached to Exhibit B to O. Nelson Decl. at ¶ 2. In addition,

Attorney Nelson, contemporaneous with the SF-95 form, also filed a letter of representation, which clearly identified the claim as follows:

- **Claimant:** Nicole Johns (mother of Joseph Fairbanks Jr.)
- **Date of Loss:** 05/29/2022

The letter of representation to the DOI explicitly stated: “*Our law firm represents Nicole Johns, the mother of the late Joseph Fairbanks, Jr., in relation to an incident that occurred on 05/29/2022.*” (emphasis added). This language unequivocally confirmed Attorney Nelson and Ms. Johns’ attorney-client relationship. *Id.*

Also, accompanying the letter of representation to the DOI was a demand letter, previously sent to Tribal First, the third-party administrator for the Red Lake Band of Chippewa Indians’ insurer. *Id.* This demand letter further clarified Ms. Johns’ legal status by stating: “*Ms. Johns has been appointed as trustee in a potential wrongful death case against the Red Lake Tribe referenced above.*” (emphasis added). This information was provided to the DOI to substantiate Ms. Johns’ legal authority and the nature of her claim.

On March 12, 2024, the DOI responded by denying Ms. Johns’ claim, asserting that the United States was not liable under the FTCA. *See* DOI Denial Letter, attached as Exhibit C to O. Nelson Decl. at ¶ 3. In its denial letter, the DOI acknowledged that Mr. Nelson represents the Estate of Joseph Fairbanks, Jr., stating: “We have reviewed the above-referenced claim dated September 18, 2023, and submitted to the Bureau of Indian Affairs (BIA), Department of the Interior on behalf of your client—the Estate of Joseph Fairbanks.” *Id.*

Furthermore, the DOI advised Ms. Johns of her right to file suit, indicating:

"After a complete review of the claim file, we cannot determine that the United States is liable under the FTCA or Minnesota law. Therefore, we must deny your claim. If you disagree with this final denial, you may:

- File a written request for reconsideration with the undersigned, for receipt at the above address no later than six (6) months after the date on which this letter was mailed, stating why you disagree with the denial... or
- File suit in an appropriate United States District Court no later than six (6) months after the date on which this letter was mailed..."

In response to the DOI's denial, Ms. Johns elected to pursue legal action, filing suit as advised within the designated timeframe. *Id.*

SF-95 FORM

On its back page, the SF-95 form which Plaintiff filed with the DOI describes when a claimant has properly presented a claim under the FTCA:

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN A FEDERAL AGENCY RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, AN EXECUTED STANDARD FORM 95 . . . ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES IN A SUM CERTAIN FOR . . . PERSONAL INJURY THE CLAIM MUST BE PRESENTED TO THE APPROPRIATE FEDERAL AGENCY WITHIN TWO YEARS AFTER THE CLAIM ACCRUES.

See SF-95 Form, attached as Exhibit B to O. Nelson Decl. at ¶ 2.

The form goes on to state that:

The claim may be filed by a duly authorized agent or other legal representative, *provided evidence satisfactory to the Government is submitted with the 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. (emphasis added). *Id.*

STANDARD OF REVIEW

The Defendant here is challenging the factual basis of this Court's subject matter jurisdiction. Where the moving party attacks the factual basis for the Court's subject matter jurisdiction, the Court may evaluate extrinsic evidence outside of the pleadings to determine whether jurisdiction exists. *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 915 (8th Cir. 2015). This extrinsic evidence may include testimony and affidavits. *Id.*

ARGUMENT

A. Plaintiff's Administrative Claim Was Properly Presented Under the FTCA.

Plaintiff fully complied with the FTCA's presentment requirements, as set forth in 28 U.S.C. § 2675(a). The FTCA mandates that an administrative claim be presented to the appropriate federal agency before a lawsuit can be initiated. The regulations, specifically 28 C.F.R. § 14.2(a), require that the claim be in writing, include a demand for a sum certain, and be accompanied by evidence of the claimant's authority if the claim is presented on behalf of another.

Ms. Johns' submission of her wrongful death claim met all of these requirements:

1. **Proper Identification of Parties and Scope of Representation:** The SF-95 form, letter of representation and the accompanying demand letter clearly identified Ms.

Johns as the mother of Mr. Fairbanks and the trustee for the next of kin, establishing her legal capacity to bring the wrongful death claim. The SF-95 form and letter of representation identified Attorney Oliver E. Nelson, III as her legal representative, thereby satisfying the requirement to disclose the attorney-client relationship. This formal identification aligns with the FTCA's requirements, ensuring that the DOI was fully informed of the parties involved and their respective roles.

2. **Formal Authorization of Representation:** The letter of representation authorized Attorney Nelson to act on Ms. Johns' behalf. This authorization was clear and unambiguous, fulfilling the requirement under 28 C.F.R. § 14.2(a) for an agent or legal representative to provide evidence of their authority to present the claim. The DOI's acknowledgment of Attorney Nelson's representation in its denial letter further affirms that this requirement was satisfied.
3. **Sufficiency of the Letter of Representation:** The letter of representation is sufficient to establish Attorney Nelson's authority to submit the claim. Courts in this circuit have recognized such letters as valid legal documents which confirm the attorney-client relationship, thereby authorizing the attorney to act on the claimant's behalf. The District Court, in *Puetz vs. United States*, 22-cv-02870 * 20 (D. Minn. June 26, 2023), provided clarity on this point:

The Court again recognizes that the Eighth Circuit has not defined the evidence sufficient to demonstrate an attorney's authority to bring an administrative claim on behalf of a beneficiary. The cases that mention this issue suggest that attorneys commonly provide the agency with a simple letter of representation.

See also Rollo-Carlson, 2019 WL 1243017, at *3 (describing submission of letter of representation); *Winn*, 2020 WL 7630685, at *1 (same); *McMillon v. United States Dep't of Veteran Affairs*, No. 2:18-cv-02412 (RFB/NJK), 2019 WL 4738019, at *3 (D. Nev. Sept. 28, 2019) (same). Defendant argues that for this presentation requirement to be met, Ms. Johns' attorneys needed to have submitted a signed retainer agreement, or a letter of representation signed by Ms. Johns. However, in interpreting the FTCA, this Circuit has never required such forms of proof for an attorney to establish that the he or she has the legal authority to act on claimant's behalf. Nor can Defendants point to any explicit language within the SF-95 form itself that requires this type of proof to establish legal authorization. In short, here, to support their argument, what Defendant has plainly done is manufacture requirements to establish legal capacity that the FTCA itself does not require.

B. Plaintiff Nicole Johns Properly Disclosed Her Legal Capacity as a Court-Appointed Trustee.

The Defendant argues that the Plaintiff failed to present a proper administrative claim because she did not provide evidence that she had been appointed as a wrongful death trustee under Minnesota Statutes § 573.02. This argument is flawed for several reasons.

First, contrary to the Defendant's assertion, Plaintiff disclosed her legal capacity as a trustee in the materials submitted to the DOI. Accompanying the letter of

representation sent to the DOI was a demand letter, previously submitted to Tribal First, the third-party administrator for the Red Lake Band of Chippewa Indians' insurer. This demand letter explicitly stated: "*Ms. Johns has been appointed as trustee in a potential wrongful death case against the Red Lake Tribe referenced above.*" (emphasis added). The letter further detailed Ms. Johns' legal status and her capacity to act on behalf of the next of kin, thereby clearly disclosing her role as trustee.

Second, Defendant's argument that Ms. Johns failed to provide the DOI with proof of her appointment as a wrongful death trustee is misleading. The demand letter signed by Attorney Nelson, who is an officer of the court, and which affirmatively declared Ms. Johns' trustee appointment, serves as competent evidence of Ms. Johns' legal capacity to act on behalf of her deceased son. Additionally, the Defendant itself acknowledges that the appointment order is a matter of public record. This publicly available information also shows Attorney Nelson as the attorney of record in that matter. Therefore, the Defendant cannot reasonably claim ignorance of Ms. Johns' legal status or her authority to act as trustee.

Moreover, Defendant's questioning of whether Ms. Johns filed the required oath under Minnesota Statutes § 358.06 is irrelevant to the validity of her administrative claim. Under Minnesota law, the timing of a trustee's oath generally aligns with the commencement of their duties. However, case law, such as *Ariola v. City of Stillwater*, 899 N.W.2d 340, 349-352 (Minn. Ct. App. 2017), has established that while the oath requirement is mandatory, it is not jurisdictional. The court in *Ariola* determined that noncompliance with the oath requirement does not nullify a trustee's actions or the

wrongful death claim itself. *Id.* The court further emphasized that procedural flexibility exists, allowing for remediation of any technical noncompliance, particularly if such noncompliance does not compromise the trustee's ability to fulfill their duties or the integrity of the legal process. *Id.*

Even if the oath had not been timely filed, this would not affect the validity of the administrative claim filed with the DOI. The purpose of the oath is to ensure the trustee's commitment to faithfully executing their duties, not to serve as a jurisdictional barrier to maintaining a wrongful death action. The courts have recognized that the absence of the oath does not strip the trustee of their authority, and such issues can be remedied without nullifying the underlying claim.

Finally, the Defendant's attempt to dismiss Ms. Johns' claim based on the timing of her oath overlooks the substantive compliance she achieved with the FTCA's presentment requirements. The demand letter submitted by Ms. Johns' attorney clearly disclosed her appointment as trustee, thereby fulfilling the requirement to disclose her legal capacity under 28 C.F.R. § 14.2(a). Furthermore, the DOI's subsequent actions—acknowledging the representation by Attorney Nelson and advising Ms. Johns of her right to file suit—demonstrates that the agency recognized her authority as trustee.

C. Once a Claimant Provides Proof of Legal Capacity, the Government Then Has the Burden to Inform the Claimant if the Government Finds Such Proof Unsatisfactory.

Here, as established above, Plaintiff's attorney unquestionably provided the DOI with proof of his legal authority to act on Ms. Johns' behalf by providing a letter a representation. Plaintiff's attorney also provided the DOI with proof of Ms. Johns'

authority to act on Mr. Fairbank's behalf by provided documentation confirming that that Ms. Johns had been appointed as trustee over her deceased son's wrongful death action. The language on the back of the SF-95 form itself states clearly that once this proof is provided, it then becomes the government's burden to inform the claimant if the provided proof is unsatisfactory:

The claim may be filed by a duly authorized agent or other legal representative, *provided evidence satisfactory to the Government* is submitted with the claim establishing express authority to act for the claimant. (emphasis added).

The key phrase in this instruction is "provided evidence satisfactory to the Government" has been submitted. Unlike every case Defendant has cited where courts in this Circuit have ruled that the presentment requirement was not met because no evidence of either an attorney's capacity to act on a claimant's behalf, or evidence of the claimant's capacity to act on behalf of a deceased individual was provided, that simply was not the case here. If such evidence is provided, as it was in this case, this instruction then clearly places the onus on the government to inform the claimant if the legal capacity evidence claimant submitted was unsatisfactory. The Defendant did not do that in this case, and denied Plaintiff's claim on the sole basis that it could not determine whether the United States was liable for Plaintiff's claim.

If Defendant had an issue with the legal capacity proof that Claimant submitted, Defendant should have said so. And although Plaintiff, after filing the SF-95 form with the contemporaneous documents, later provided a copy of the Trustee Order that was signed by state court, Plaintiff did so simply to supplement the record. Neither

the SF-95 form nor Eighth Circuit precedent required Plaintiff to submit this Order when Plaintiff first presented her claim. And, as previously stated, Defendant cannot claim ignorance of this Order while it evaluated Plaintiff's claim because Plaintiff told Defendant that Ms. Johns had been appointed, and the Trustee Order itself was a matter of public record.

D. The DOI's Reliance on *Mader v. United States* is Misplaced.

The DOI heavily relies on *Mader v. United States*, 654 F.3d 794 (8th Cir. 2011), to argue that the administrative claim was improperly presented because it was not accompanied by additional evidence of Attorney Nelson's authority. In *Mader*, the Eighth Circuit held that an administrative claim submitted by a legal representative must include evidence of the representative's authority to act on the claimant's behalf. However, *Mader* is distinguishable from the present case. In *Mader*, the claimant's representative failed to provide any evidence of their authority, and the claim was ultimately dismissed because of this failure. In contrast, in this case, Attorney Nelson provided a letter of representation that explicitly authorized him to act on Ms. Johns' behalf. This letter, which was acknowledged by the DOI in its denial letter, constitutes sufficient evidence of Attorney Nelson's authority to act on Ms. Johns' behalf under the FTCA. See *Puetz*, 22-cv-02870 * 20; *Rollo*, 2019 WL 1243017 , * 3.

The cases cited in *Puetz* suggest that a simple letter of representation is commonly accepted as sufficient evidence of an attorney's authority to file an administrative claim under the FTCA, and sign the SF-95 form on behalf of his or her client. In light of this,

the letter of representation provided by Attorney Nelson meets the requirements set forth in *Mader* and 28 C.F.R. § 14.2(a), distinguishing this case from the facts of *Mader*.

In *Mader*, the Eighth Circuit was particularly concerned about the potential for multiple attorneys to file claims on behalf of the same claimant without proper authorization, which could lead to confusion and undermine the administrative process. The court emphasized that the requirement to provide evidence of authority is fundamental to ensuring that federal agencies can meaningfully consider and settle claims under the FTCA. The court's decision rested on the absence of any documentation establishing the representative's authority, which ultimately led to the dismissal of the claim.

By contrast, in this case, the facts are markedly different. Here, Attorney Nelson provided a clear and explicit letter of representation that unequivocally established his authority to act on behalf of Ms. Johns. The submission to the DOI included a letter of representation, which identified the claimant and the nature of the claim. The letter to the DOI also explicitly stated: “Our law firm represents Nicole Johns, the mother of the late Joseph Fairbanks, Jr., in relation to an incident that occurred on 05/29/2022.” This language confirmed the attorney-client relationship and made clear that Attorney Nelson was acting with express authorization from Ms. Johns. Furthermore, the submission included a demand letter that had previously been sent to Tribal First, the third-party administrator for the Red Lake Band of Chippewa Indians' insurer. This demand letter further clarified Ms. Johns' legal status by stating: “As you are aware, our firm represents Nicole Johns, mother of the deceased, Joseph Fairbanks, Jr. (‘Mr. Fairbanks’). Ms. Johns

has been appointed as trustee in a potential wrongful death case against the Red Lake Tribe referenced above.” This information was provided to the DOI to substantiate Ms. Johns's legal authority and the nature of the claim.

In fact, the DOI acknowledged this representation in their denial letter dated March 12, 2024. In that letter, the DOI stated: “We have reviewed the above-referenced claim dated September 18, 2023, and submitted to the Bureau of Indian Affairs (BIA), Department of the Interior *on behalf of your client—the Estate of Joseph Fairbanks.*” (emphasis added) The DOI further advised Ms. Johns of her right to file suit, indicating: “After a complete review of the claim file, we cannot determine that the United States is liable under the FTCA or Minnesota law. Therefore, we must deny your claim.”

The DOI's acknowledgment of Attorney Nelson's representation and their advisement to Ms. Johns to file suit in federal court serve as implicit confirmations that the DOI considered the administrative claim to be properly presented. By advising Ms. Johns of her right to file suit, the DOI indicated that it recognized the legitimacy of the submission and the authority of Attorney Nelson to act on her behalf. This acknowledgment underscores that the administrative claim met the necessary requirements under the FTCA, further discrediting the Defendant's current attempt to argue otherwise.

In summary, unlike in *Mader*, the attorney-client relationship and the express authority of Attorney Nelson to act on behalf of Ms. Johns were clearly established through the submission of the letter of representation and the accompanying documentation to the DOI. The DOI's acknowledgment of this representation in its denial

letter further affirms that the requirements under 28 C.F.R. § 14.2(a) were fully satisfied. Therefore, the Defendant's reliance on *Mader* is inapplicable, and the motion to dismiss should be denied.

CONCLUSION

Plaintiff Nicole Johns, mother of Joseph Fairbanks, Jr., fully complied with the FTCA's presentment requirements. The DOI's acknowledgment of Mr. Nelson's representation and its substantive evaluation of the claim affirm that the submission was proper and complete. Given these factors, the Defendant's motion to dismiss should be denied, as the claim was properly presented and meets all jurisdictional requirements under the FTCA.

For the foregoing reasons, the Court should deny the Defendant United States of America's Motion to Dismiss. Ms. Johns has met all the requirements of the FTCA in presenting her claim, and the Defendant's arguments to the contrary are without merit. The case should proceed to address the substantive issues of negligence and wrongful death raised by the Plaintiff.

Respectfully submitted,

Dated: August 20, 2024

Magna Law Firm LLC

By: /s/ Oliver E. Nelson III
Oliver E. Nelson III
(#0347280)
ATTORNEY FOR THE PLAINTIFF
2915 South Wayzata Boulevard

Minneapolis, Minnesota 55405-2246
Telephone: 763-438-3032