

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-1815

Cynthia Rollo-Carlson, as Trustee for Jeremiah Flackus-Carlson, deceased

Appellant

v.

United States of America

Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:18-cv-02842-ECT)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 23, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

No. 19-1815

Cynthia Rollo-Carlson, as Trustee for Jeremiah Flackus-Carlson, deceased

Plaintiff - Appellant

v.

United States of America

Defendant - Appellee

Appeal from United States District Court
for the District of Minnesota

Submitted: June 17, 2020

Filed: August 19, 2020

Before KELLY, ERICKSON, and STRAS, Circuit Judges.

KELLY, Circuit Judge.

Cynthia Rollo-Carlson brought a Federal Tort Claims Act (FTCA) claim against the government, alleging that the Department of Veterans Affairs (VA) provided negligent psychiatric care that resulted in her son's death. The district court¹ dismissed her complaint for lack of subject-matter jurisdiction. We affirm.

¹The Honorable Eric C. Tostrud, United States District Judge for the District of Minnesota.

I.

In October 2015, Jeremiah Flackus-Carlson, a veteran of the United States Army, died from an opiate overdose. Jeremiah developed post-traumatic stress disorder after he was sexually assaulted while stationed in Korea. Prior to his death, he was treated by the St. Cloud VA Medical Center in Minnesota.

In September 2017, approximately two years after Jeremiah's death, his parents, Cynthia Rollo-Carlson and Doug Carlson, filed a wrongful-death claim with the VA (the VA Claim). They submitted a Standard Form 95 (SF-95), claiming Jeremiah died from medical malpractice and that they were the proper claimants for his wrongful death claim. They also identified the value of the claim as \$10 million. After receiving the SF-95, the VA requested additional documentation, including medical and income records. The VA did not, however, request proof that either Rollo-Carlson or Carlson was an appointed trustee under the Minnesota wrongful-death statute.

While the claim was pending before the VA, Rollo-Carlson and Carlson filed a complaint in federal court, asserting a FTCA wrongful-death claim based on Jeremiah's death. Because of the pending federal complaint, the VA decided the VA Claim was not "amenable to administrative resolution" and issued a final denial on July 16, 2018. Rollo-Carlson and Carlson subsequently voluntarily dismissed their complaint in federal court.

Then, on October 2, 2018, Rollo-Carlson was appointed trustee under Minnesota's wrongful-death statute. The next day, as the sole plaintiff, she filed the underlying complaint in federal court, again alleging an FTCA claim against the government for the wrongful death of Jeremiah.

The government moved to dismiss the complaint for lack of subject-matter jurisdiction. It argued that the district court lacked jurisdiction because Rollo-Carlson

never presented the VA with her authority to act as a trustee, as required by FTCA, and that such presentment is a jurisdictional prerequisite. The district court agreed and dismissed Rollo-Carlson's complaint. Rollo-Carlson appeals. Having jurisdiction under 28 U.S.C. § 1291 and applying de novo review, we affirm. See ABF Freight Sys. v. Int'l Bhd. of Teamsters, 645 F.3d 954, 958 (8th Cir. 2011) (standard of review).

II.

The FTCA is a limited waiver of the United States' sovereign immunity. Molzof ex rel. Molzof v. United States, 502 U.S. 301, 305 (1992). It permits persons injured by federal employees to sue the United States for tort claims in federal district court. Id. The "extent of the United States' liability under the FTCA is generally determined by reference to state law." Id.; see also 28 U.S.C. §§ 1346(b)(1), 2674.

Before bringing an FTCA claim in federal court, a party must administratively exhaust their remedies under the FTCA. 28 U.S.C. § 2675(a). As part of this administrative process, the party "shall have first presented the claim to the appropriate Federal agency." Id. The presentment requirement is a jurisdictional prerequisite to filing an FTCA action in federal court. Mader v. United States, 654 F.3d 794, 808 (8th Cir. 2011) (en banc).

The FTCA does not specify what information must be included in a properly "presented" claim. Id. at 798. Instead, 28 C.F.R. § 14.2(a) provides the following clarification for the presentment requirement:

[A] claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, [1] an executed Standard Form 95 or other written notification of an incident, [2] accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the

incident, and [3] *the title or legal capacity of the person signing, and is accompanied by 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) (emphasis added).

Both parties agree that in this case Minnesota law governs whether a person has authority to present a claim. See 28 U.S.C. §§ 1346(b)(1), 2674; see also Mader 654 F.3d at 808; Goodman v. United States, 2 F.3d 291, 292 (8th Cir. 1993) (“In this FTCA case, we are, of course, bound to apply the law of the state in which the acts complained of occurred.”). The parties also agree that Minnesota’s wrongful-death statute requires a court-appointed trustee to bring a wrongful-death action. Minn. Stat. § 573.02; see also Regie de l’assurance Auto. du Quebec v. Jensen, 399 N.W.2d 85, 89–90 (Minn. 1987).

Rollo-Carlson concedes she was not the appointed trustee under Minnesota law and was only Jeremiah’s next-of-kin at the time she filed a claim with the VA. Nevertheless, she argues that she satisfied the presentment requirement.² First, she argues that under Minnesota law, there is a difference between a “claim” and an “action.” And because the wrongful-death statute requires that a wrongful-death *action*—not *claim*—be filed by an appointed trustee, her status as next-of-kin at the time she filed the VA Claim satisfied Minnesota law. But we are unaware of any legal authority stating that Minnesota law contemplates a distinction between a “claim” and an “action” for purposes of wrongful death cases, and Rollo-Carlson provides none. Indeed, Minnesota courts use “claim” and “action” interchangeably when discussing

²Rollo-Carlson also invites us to overrule Mader, an en banc decision, and hold that presentment is not jurisdictional. We cannot do so. United States v. Lucas, 521 F.3d 861, 867 (8th Cir. 2008) (“A panel of this court may not overrule the decision of the en banc court; only the en banc court may overrule prior circuit precedent.”).

the wrongful-death statute. See e.g., Ortiz v. Gavenda, 590 N.W.2d 119 (Minn. 1999); Jensen, 399 N.W.2d at 89–90.

Second, Rollo-Carlson contends the VA had actual notice of her authority to bring a claim because it granted her a burial allowance; acknowledged her claim for insurance; responded to her requests for medical records; provided information regarding the circumstance surrounding Jeremiah’s death; received a death certificate listing Jeremiah as single and never married; and replied to her request for Jeremiah’s file. As a result, she argues, the VA knew she had the authority to act on behalf of Jeremiah. But Rollo-Carlson’s status as next-of-kin is not synonymous with her status as appointed trustee under Minnesota law.³ To the extent she argues that she is excused from her obligation to show she was the appointed trustee because the VA had evidence indicating she had authority to act on Jeremiah’s behalf in another capacity and in other contexts, the presentment requirement contains no such exception, and Rollo-Carlson provides no legal support for one. See 28 C.F.R. § 14.2(a).

Third, she alleges that the government is precluded from arguing she failed to satisfy the presentment requirement because it did not raise the issue during the VA’s review. We disagree. Preclusion does not apply where, as here, a party must administratively exhaust her claim before filing suit in court. See Astoria Fed. Sav. & Loan Ass’n v. Solimino, 501 U.S. 104, 110–11 (1991).

For the foregoing reasons, the district court properly dismissed Rollo-Carlson’s complaint for lack of subject-matter jurisdiction. We affirm.

³The VA could not have had evidence of Rollo-Carlson’s authority as appointed trustee when she filed the VA Claim because she undisputedly was not the appointed trustee until October 2018—approximately one year after she filed the VA Claim and three months after the VA denied it.

7a

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Cynthia Rollo-Carlson, as trustee for
Jeremiah Flackus-Carlson, deceased,

File No. 18-cv-02842 (ECT/ECW)

Plaintiff,

v.

**MEMORANDUM OPINION
AND ORDER**

United States of America,

Defendant.

Brian Lewis, Francis White Law, Woodbury, MN, for plaintiff Cynthia Rollo-Carlson.

Ana Voss, Erica MacDonald, United States Attorney's Office, Minneapolis, MN, for defendant the United States of America.

Jeremiah Flackus-Carlson ("Jeremiah"), a veteran of the United States Army, died from an opiate overdose in October 2015. In this case, Jeremiah's mother, Plaintiff Cynthia Rollo-Carlson ("Cynthia"), asserts a claim under the Federal Tort Claims Act ("FTCA") alleging that Jeremiah's death resulted from negligent psychiatric care provided by the Department of Veterans Affairs ("the VA") through the VA Health Care System in St. Cloud, Minnesota. The Government seeks dismissal for lack of subject-matter jurisdiction because, it says, evidence of Cynthia's authority to act as trustee for the claim was not administratively presented to the VA as required by the FTCA. The requirement to present this evidence is jurisdictional, *Mader v. United States*, 654 F.3d 794 (8th Cir. 2011) (en banc), and because it was not met in this case, the Government's motion must be granted.

8a

I

The FTCA is “a limited waiver of the United States’s sovereign immunity” that allows “persons injured by federal-employee tortfeasors to sue the United States for damages in federal district court.” *Mader v. United States*, 654 F.3d 794, 797 (8th Cir. 2011) (en banc) (citing *Molzof ex rel. Molzof v. United States*, 502 U.S. 301, 304 (1992)). Federal courts have exclusive jurisdiction over claims for “death caused by the negligent or wrongful act or omission” of federal employees “where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1); *see id.* § 2674. Here, the parties agree that “the law of the place where the act or omission occurred” is Minnesota’s wrongful-death statute, Minn. Stat. § 573.02.

Though the FTCA incorporates state law to determine the Government’s liability, federal law governs the federal courts’ adjudicatory capacity over such claims. *See Goodman v. United States*, 2 F.3d 291, 292 (8th Cir. 1993) (“In this FTCA case, we are, of course, bound to apply the law of the state in which the acts complained of occurred.” (citation omitted)); *Mader*, 654 F.3d at 797 (discussing “the FTCA’s liability and jurisdiction-conferring language” that gives federal courts exclusive jurisdiction). On that front, the FTCA requires “complete exhaustion of [administrative] remedies before invocation of the judicial process.” *McNeil v. United States*, 508 U.S. 106, 112 (1993). An FTCA lawsuit “shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing” or the agency shall have failed “to make final disposition of a claim

within six months after it is filed.” 28 U.S.C. § 2675(a). The FTCA itself does not identify explicitly what particular information must be submitted to satisfy the presentment requirement of 28 U.S.C. § 2675(a). *See Mader*, 654 F.3d at 798. A regulation promulgated by the Attorney General under authority of the FTCA provides guidance. *Id.* (citing 28 C.F.R. § 14.2). The regulation identifies three components of presentment: (1) “an executed Standard Form 95 or other written notification of an incident”; (2) “a claim for money damages in 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 as agent, executor, administrator, parent, guardian, or other representative.” 28 C.F.R § 14.2(a).

In *Mader*, our Eighth Circuit Court of Appeals, sitting en banc, addressed the evidence-of-authority requirement and held that federal courts lack subject-matter jurisdiction over FTCA suits unless the claim presented to the agency includes evidence of the claimant’s authority to act on behalf of a claim’s beneficiaries. 654 F.3d at 801 (“[Section] 2675(a) requires the presentment of evidence of a personal representative’s authority to act on behalf of a claim’s beneficiaries, something totally essential to meaningful agency consideration.”), 805 (“We have long held that compliance with § 2675(a)’s presentment requirement is a jurisdictional precondition to filing an FTCA suit in federal district court.” (citations omitted)).

Determining what constitutes evidence of authority to act on behalf of a claim’s beneficiaries requires examining the law under which the claimant purports to have “authority to act.” *See Mader*, 654 F.3d at 801–02 (reviewing Nebraska law to conclude

“Mader lacked the requisite authority to file a claim with the VA or to file a wrongful death action against the United States in federal district court”). Here, Cynthia asserts that she has authority to act by virtue of her appointment as trustee pursuant to Minnesota’s wrongful-death statute, Minn. Stat. § 573.02. *See* Compl. ¶ 17 [ECF No. 1]. That statute says that only a trustee, “appointed as provided in subdivision 3,” may maintain a wrongful-death action. Minn. Stat. § 573.02, subd. 1. Subdivision 3, in turn, provides:

Subd. 3. **Trustee for action.** Upon written petition by the surviving spouse or one of the next of kin, the court having jurisdiction of an action falling within the provisions of subdivisions 1 or 2, shall appoint a suitable and competent person as trustee to commence or continue such action and obtain recovery of damages therein. The trustee, before commencing duties shall file a consent and oath. Before receiving any money, the trustee shall file a bond as security therefor in such form and with such sureties as the court may require.

Minn. Stat. § 573.02, subd. 3. The Minnesota Supreme Court has held that “next of kin” means “blood relatives who are members of the class from which beneficiaries may be chosen under the intestacy statute”—*i.e.*, those persons in the set created by Minn. Stat. § 524.2-103(2), not merely those who would actually recover at the moment of intestacy. *Wynkoop v. Carpenter*, 574 N.W.2d 422, 426–27 (Minn. 1998) (en banc) (citation omitted) (“[W]e concluded [in *Martz v. Revier*, 170 N.W.2d 83, 87 (Minn. 1969)] that a deceased child’s siblings could recover under the wrongful death statute even though they would not have been . . . beneficiaries under the intestacy statute because [the] father was still living.”).

To summarize, subject-matter jurisdiction exists over Cynthia's FTCA claim here if and only if: (1) she obtained authority to act on behalf of the asserted claim's beneficiaries by being appointed as trustee under Minnesota's wrongful-death statute; (2) she timely presented evidence of that authority to the Department of Veterans Affairs before commencing this action; and (3) the VA either denied the claim in writing or failed to make final disposition of the claim within six months after it was filed.

II

A

"Jurisdictional issues, whether they involve questions of law or of fact, are for the court to decide." *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990) (citation omitted). "A court deciding a motion under Rule 12(b)(1) must distinguish between a 'facial attack' and a 'factual attack.'" *Id.* at 729 n.6 (citations omitted). "In a facial attack, the court merely needs to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction." *Branson Label, Inc. v. City of Branson, Mo.*, 793 F.3d 910, 914 (8th Cir. 2015) (alteration, citation, and internal quotation marks omitted). "Conversely, in a factual attack, the existence of subject matter jurisdiction is challenged in fact, irrespective of the pleadings, and matters outside the pleadings . . . are considered." *Id.* at 914–15 (alteration, citation, and internal quotation marks omitted).

Here, a facial attack might have been appropriate because Cynthia's complaint creates serious doubt regarding her compliance with the FTCA's presentment requirement. The complaint pleads in one paragraph that the requirement was satisfied: "Pursuant to 28 U.S.C. §§ 2672 and 2675(a), the claims made herein were filed with and presented

administratively to the Defendant's agency, the Department of Veterans Affairs, on September 5, 2017." Compl. ¶ 9. Several paragraphs later, however, the complaint alleges that Cynthia was appointed trustee under Minnesota's wrongful-death statute on "October 2, 2018." Compl. ¶ 17. The complaint in this case was filed the very next day, on October 3, 2018. *Id.* at 27. If October 2, 2018, was the first day of Cynthia's appointment as trustee—in other words, if she never had been appointed as trustee under Minnesota's wrongful-death statute on some earlier date—then it would seem the one day between her appointment and the filing of this case could not have left enough time to present evidence of her authority as trustee to the VA and to permit the VA to consider and issue a final denial of the claim. This chronology plainly could not have resulted in a situation where the VA failed "to make final disposition of a claim within six months after it is filed." 28 U.S.C. § 2675(a).

Regardless of the potential for a facial attack, the United States characterizes its motion as a factual attack on subject-matter jurisdiction. Mem. in Supp. at 4 [ECF No. 9] ("This is a factual challenge to the jurisdiction of the Court to hear this claim."). It contends that Plaintiff failed in fact to present her claim because she failed to submit evidence to the VA of her authority as trustee. *Id.* at 6–10. In this procedural posture, a plaintiff does "not enjoy the benefit of the allegations in its pleadings being accepted as true." *Branson Label*, 793 F.3d at 915 (citation omitted). Instead, materials beyond the four corners of the complaint will be assessed to verify whether the presentment requirement was actually satisfied. *See Osborn*, 918 F.2d at 730 ("[T]he trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. . . . and the existence of

disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” (quoting *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977)); see also *Harris v. United States*, No. 18-0424-CV-W-BP, 2018 WL 5726212, at *2 (W.D. Mo. Nov. 1, 2018) (“[T]he Court can consider the SF-95 . . . when determining whether Plaintiff properly presented the claim.”).

The Parties’ submissions establish that Plaintiff failed to present evidence of her authority to act on behalf of the asserted claim’s beneficiaries to the VA as required by 28 U.S.C. § 2675(a). Before filing this action, Cynthia and her husband timely submitted a Standard Form 95 (“SF-95”) to the VA on September 5, 2017. Crewe-Allen Decl. ¶ 4 [ECF No. 10]; *id.*, Ex. 1 (“SF-95”) at 1 [ECF No. 10-1]; see 28 U.S.C. § 2401(b). The SF-95 identified the “claimant” as “Cynthia and Doug Carlson (Rep. by Brian K. Lewis, Esq.),” and described the nature of their claim as wrongful death due to medical malpractice. See SF-95 at 1. They identified \$10 million as the value of their claim. *Id.* The form was signed by Brian Lewis (“Lewis”), their attorney both then and now. *Id.* Attached to the form was a letter from Lewis, along with a copy of his “Letter of Representation,” verifying that he was “retained to prosecute Mr. & Mrs. Douglas Carlson’s claim for the wrongful death of their son.” *Id.* at 3. It is undisputed that proof of Cynthia’s appointment as trustee was not presented to the VA at that time. See Mem. in Opp’n at 2 [ECF No. 15] (“Subsequent to the denial of the administrative claim, the Plaintiff sought, and was granted by the Minnesota court, appointment as the trustee of the decedent in order to bring the wrongful death action.”). Again, assuming October 2, 2018, was the first day of Cynthia’s appointment as trustee, it would have been impossible for

her or anyone acting on her behalf to present that evidence with the SF-95 claim form when it was submitted to the VA almost a year prior on September 5, 2017.

The VA acknowledged receipt of the SF-95 form the next month. *See* Mem. in Opp'n, Ex. 1 [ECF No. 15-2]. The VA requested a variety of documentation, including medical records and income records, but did not request proof of Cynthia's status as trustee. *See id.* at 1-2; *cf.* Mem. in Opp'n at 2 ("During the administrative claim process, no issues were raised by the Defendant regarding presentment."). The VA's correspondence, however, warned: "[a] combination of Federal and state laws govern FTCA claims; some state laws may limit or bar a claim or lawsuit. VA legal staff handling FTCA claims work for the Federal government, and cannot provide legal advice on state or Federal law or on filing requirements." Mem. in Opp'n, Ex. 1, at 2.

On April 12, 2018, a little more than seven months after filing the SF-95, Cynthia and her husband filed a complaint in this judicial district asserting an FTCA claim arising from Jeremiah's death. That case was assigned file number 18-cv-00996 (WMW/LIB). Before the Government answered, however, the case was dismissed voluntarily under Federal Rule of Civil Procedure 41(a)(1)(A)(i). On October 2, 2018, Cynthia was appointed trustee by the Benton County District Court. Compl., Ex. 1 [ECF No. 1-1]; *see* Minn. Stat. § 573.02, subds. 1, 3; Compl. ¶ 17. As described earlier, this lawsuit was filed the very next day with Cynthia as the only plaintiff.

To summarize, though Cynthia 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.

B

Plaintiff asserts essentially four arguments to distinguish this case from *Mader*, but the law does not support these arguments. First, Plaintiff says that under the Minnesota Tort Claims Act ("MTCA"), Minn. Stat. § 3.736, "the administrative claim 'may be presented by the . . . next of kin,'" and that "[i]t is not until an action is commenced that a trustee must be appointed." Mem. in Opp'n at 3. Plaintiff argues that the FTCA should be interpreted in line with the MTCA not to require evidence of authority beyond a next-of-kin relationship at the administrative-presentment stage. *Id.* Assuming Plaintiff's interpretation of the MTCA is correct, this argument nonetheless misapprehends the interaction of federal and state law in FTCA cases generally and in this case in particular. *See* Reply Mem. at 3–4 [ECF No. 16]. The FTCA requires presentment of evidence of authority to act on behalf of a claim's beneficiaries, and determining what constitutes evidence of authority in this context requires examining the law under which the claimant purports to have obtained "authority to act." *See Mader*, 654 F.3d at 801–02. Cynthia does not contend that she obtained authority to act under the MTCA. (It would not make sense for her to have sought authority under the MTCA because that statute authorizes tort claims against the state, and Cynthia asserts no claim against the state.) As explained earlier, Cynthia maintains that she has authority to act by virtue of her appointment as trustee

pursuant to Minnesota's wrongful-death statute because that is the "law of the place where the act or omission occurred" that would have determined the liability of the United States if this case were to proceed. 28 U.S.C. § 1346(b)(1); *see id.* § 2674. Minnesota's wrongful-death statute says that only a trustee, "appointed as provided in subdivision 3," may maintain a wrongful-death action. Minn. Stat. § 573.02, subd. 1. Though it is clear that possessing a next-of-kin relationship to the decedent would make one eligible under subdivision 3 of the statute to seek appointment as trustee, it is just as clear that possessing a next-of-kin relationship alone is not enough to authorize an individual to prosecute a claim. *See id.*, subd. 3. For these same reasons, Plaintiff's request that "this Court certify the question [to the Minnesota Supreme Court] of whether or not the appointment of a trustee is necessary at the administrative claim stage in order to satisfy presentment issues" will be denied. *See* Mem. in Opp'n at 6 (citing Minn. Stat. § 480.065).

Second, Plaintiff argues that the VA had actual notice of her status as next of kin because it granted her application for Jeremiah's burial benefits, responded to her request for his medical records, and possessed a copy of Jeremiah's death certificate listing him as single and never married. Mem. in Opp'n at 4–5; *see id.*, Exs. 2–8. The notice Plaintiff describes is not the evidence of authority required by the FTCA. As explained earlier, a decedent's surviving parent is not automatically appointed trustee under Minnesota's wrongful-death statute. *See* Minn. Stat. § 573.02, subd. 3 ("Upon written petition by the surviving spouse or one of the next of kin, the court . . . shall appoint a suitable and competent person as trustee to commence or continue such action and obtain recovery of damages therein."). Though the "written petition" for appointment of a trustee must be

filed by the surviving spouse or one of the next of kin, the statute permits appointment of any “suitable and competent person” to serve as trustee. *Id.* In other words, notifying the VA that an individual is a decedent’s parent or other next of kin does not tell the VA that individual has authority to prosecute a claim under Minnesota’s wrongful-death statute. Plaintiff does not identify—and cites no authority that might justify attempting to fashion—an exception to the FTCA’s presentment requirement. *See Runs After v. United States*, 511 F. App’x 596, 597 (8th Cir. 2013) (per curiam) (“Because providing evidence to satisfy the presentment requirement is far from burdensome, and [plaintiff] presents no authority for this court to create an extenuating circumstances exception, we decline to create one here.” (alteration, citation, and internal quotation marks omitted)); *see also Runs After v. United States*, No. Civ 10-3019-RAL, 2012 WL 2951556, at *6 (D.S.D. July 19, 2012) (“There is nothing in . . . *Mader* to suggest that an effort by an FTCA claimant that falls short of providing proof of representative authority . . . is sufficient to avoid dismissal.”), *aff’d*, 511 F. App’x 596.

Third, Plaintiff cites a case from another district within the Eighth Circuit, *Dobrinska v. United States*, No. 3:11-cv-3015, 2012 WL 113037 (W.D. Ark. Jan. 13, 2012), that she says declined to follow *Mader*. Mem. in Opp’n at 4 n.17. Plaintiff suggests that here, as in *Dobrinska*, *Mader* need not be followed or applied to result in the dismissal of her claim. *Id.* at 4. In *Dobrinska*, the court cited *Farmers State Savings Bank v. Farmers Home Administration*, 866 F.2d 276 (8th Cir. 1989), for the rule that there is a two-part “minimal notice requirement” under the FTCA that includes merely written notice of (1) the alleged claim and (2) the alleged value of the claim. *Id.* at *2. It held that the

plaintiff, Dobrinska, satisfied that minimal requirement when her automobile-insurance carrier submitted correspondence to a federal agency describing Dobrinska's claim. *Id.* at *3. *Dobrinska* is distinguishable because it did not address the primary issue in this case—*i.e.*, whether an FTCA plaintiff had presented evidence of her authority to pursue a claim. Further, the case that *Dobrinska* cites for the rule that the FTCA has a “minimal notice requirement” (*Farmers*) was abrogated by *Mader*. *Id.* at *2–3; *see Mader*, 654 F.3d at 799–800.

Finally, Plaintiff argues that the Government is precluded by principles of collateral and judicial estoppel from challenging her failure to satisfy the FTCA's presentment requirement in this case because the VA purportedly denied her claim on other grounds during the administrative process. Mem. in Opp'n at 7–8. For collateral estoppel (or issue preclusion) to apply, an issue at least must have been decided in a prior proceeding. *See, e.g., B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015). Similarly, before judicial estoppel can apply, the party against whom it is sought at least must have taken a position in an earlier proceeding. *See Amtrust Inc. v. Larson*, 388 F.3d 594, 600–01 (8th Cir. 2004). Here, the VA did neither. It never decided that Plaintiff's evidence of authority was sufficient (or, for that matter, insufficient). The VA issued a written denial of the claim simply because Plaintiff “filed suit,” making the claim, in its judgment, “not amenable to administrative resolution.” Crewe-Allen Decl., Ex. 2 [ECF No. 10-2]. There is similarly no evidence that the VA ever asserted as a position or admitted in a proceeding that Plaintiff's evidence of authority was sufficient.

C

Cynthia's complaint contains detailed and unsettling allegations describing Jeremiah's military service, trauma he experienced while serving in the military, his health conditions, his treatment with the VA, and his death. *See* Compl. ¶¶ 18–211. These allegations likely would bear on the merits of Cynthia's claim under the FTCA that Jeremiah "died as a result of negligent, substandard, and inadequate psychiatric care by the [VA]." Compl. ¶ 213. But the Government's motion to dismiss for lack of subject-matter jurisdiction does not implicate the merits of Cynthia's claim. Rather, the Government challenges only Cynthia's compliance with the FTCA's presentment requirement. Mem. in Supp. at 1. With respect to that issue, it is not enough that evidence of Cynthia's relationship with Jeremiah or Lewis's authority as counsel were presented to the VA. To satisfy the FTCA's presentment requirement, the law is clear that Plaintiff was required to submit to the VA evidence of her authority under Minnesota law to act on behalf of the claim's beneficiaries before commencing this action. *Mader*, 654 F.3d at 801–02. And the evidence is clear that Plaintiff did not meet this requirement. Therefore, no subject-matter jurisdiction exists over this suit.

D

Although the Government seeks dismissal with prejudice, *see* Proposed Order [ECF No. 12], dismissal for lack of subject-matter jurisdiction is ordinarily without prejudice, *Hart v. United States*, 630 F.3d 1085, 1091 (8th Cir. 2011) (collecting cases) (modifying a district court's dismissal of an FTCA claim for lack of subject-matter jurisdiction to be without prejudice). "[A] court that lacks personal or subject-matter jurisdiction does not

have power to enter *any* kind of a judgment—summary or otherwise.” *Pope v. Elabo GmbH*, 588 F. Supp. 2d 1008, 1012 (D. Minn. 2008) (citing 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* § 2713 at 239 (3d ed. 1998) (“If the court has no jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action.”)). “That is why a dismissal for lack of personal or subject-matter jurisdiction is always without prejudice; such a dismissal implies nothing about the merits of the dismissed claims because the court is not empowered to address the merits of the dispute.” *Pope*, 588 F. Supp. 2d at 1012. Accordingly, this case will be dismissed without prejudice for lack of subject-matter jurisdiction.

ORDER

Based on the foregoing, and all of the files, records, and proceedings herein, **IT IS HEREBY ORDERED THAT:**

1. The Government’s Motion to Dismiss [ECF No. 7] is **GRANTED**.
2. Plaintiff’s action is hereby **DISMISSED WITHOUT PREJUDICE** in its entirety with each party to bear its own costs and attorney fees in connection with such claims.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 18, 2019

s/ Eric C. Tostrud

Eric C. Tostrud
United States District Court

VA

APPENDIX D
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Fax: (202) 273-6385

In Reply Refer To: GCL 285903

July 16, 2018

Certified Mail

Brian K. Lewis, Esq.
Francis White Law, PLLC
8362 Tamarack Village, Ste. 119-220
Woodbury, MN 55125

**RE: Administrative Tort Claim of Cynthia Rollo-Carlson and Douglas Carlson regarding
Jeremiah Flackus-Carlson, Deceased**

Dear Mr. Lewis:

This is in reference to Standard Form 95, Claim for Damage, Injury, or Death, signed by your clients and received in this office on September 5, 2017.

Since you have filed suit in Federal District Court for the District of Minnesota, we have determined that the claim is not amenable to administrative resolution. Accordingly, we must deny the claim. This notice constitutes final administrative action on this claim under the Federal Tort Claims Act (FTCA) against the United States.

As you are aware, when an agency denies an administrative FTCA claim, the claimant has the option of seeking reconsideration with the agency and seeking judicial redress in U.S. District Court. You must exercise either remedy within six months of this denial, as shown by the date of this letter, or those remedies are barred. You have chosen the judicial remedy.

Sincerely,

Pamela Crewe-Allen
Deputy Chief Counsel, Torts Law Group

APPENDIX E

VA



U.S. Department of Veterans Affairs
Office of General Counsel

Torts Law Group (02)
4800 Memorial Drive, Bldg. 92
Waco, TX 76711

Telephone: 214-857-0045
Fax: 202-495-6287

In Reply Refer To: GCL 285903

October 19, 2017

Brian K. Lewis, Esq.
8362 Tamarack Village, Suite 119-220
Woodbury, MN 55125

RE: Administrative Tort Claim for Jeremiah Flackus-Carlson

Dear Mr. Lewis:

The U.S. Department of Veterans Affairs (VA), Office of General Counsel - Torts Law Group, received your clients' Standard Form (SF) 95, *Claim for Damage, Injury, or Death*, on September 5, 2017. The claimant seeks \$10,000,000.00 in damages.

As you are aware, under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671-2680, VA has six months to consider a claim before you have the option to file suit on behalf of your client in U.S. District Court. 28 U.S.C. § 2675. We will make every effort to meet that goal while thoroughly investigating the claim.

Under 28 C.F.R. § 14.4, which implements the FTCA, we are requesting that you provide the following information to the investigator assigned as soon as possible unless previously provided:

1. Copies of any non-VA medical records related to the alleged injury or injuries, if applicable.
2. Copies of medical bills from non-VA providers related to the alleged injury or injuries, if applicable.
3. Sources and amounts of income to include Social Security, retirement, pensions, VA benefits and copies of past federal income tax returns.
4. If claiming any loss of time from employment, a written statement from the employer listing time off work and the wages lost because of the injury. If claiming a loss of self-employment, evidence of the earnings lost.

5. Any other information and documents that may support the claim, including a medical opinion, if obtained.

The investigator assigned to the claim is:

Lucy Gray, Attorney
810 Vermont Ave,
Washington, DC 20420
202-461-4900

Under 28 U.S.C. § 2678, attorney fees are limited to 20 percent of any award, compromise, or settlement of an administrative claim and to 25 percent of the recovery following the filing of a lawsuit.

A combination of Federal and state laws govern FTCA claims; some state laws may limit or bar a claim or lawsuit. VA legal staff handling FTCA claims work for the Federal government, and cannot provide legal advice on state or Federal law or on filing requirements.

If you have any questions or concerns, you may communicate directly with the investigator, who will be happy to assist. Thank you for your cooperation. We look forward to working with you to resolve your client's claim.

Sincerely,



LaDonis Alexander
Representational Paralegal Specialist
Torts Law Group

APPENDIX F

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 171. Tort Claims Procedure (Refs & Annos)

28 U.S.C.A. § 2672

§ 2672. Administrative adjustment of claims

Currentness

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of \$25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of \$2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of \$2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 983; Apr. 25, 1949, c. 92, § 2(b), 63 Stat. 62; May 24, 1949, c. 139, § 125, 63 Stat. 106; Sept. 23, 1950, c. 1010, § 9, 64 Stat. 987; Pub.L. 86-238, § 1(1), Sept. 8, 1959, 73 Stat. 471; Pub.L. 89-506, §§ 1, 9(a), July 18, 1966, 80 Stat. 306, 308; Pub.L. 101-552, § 8(a), Nov. 15, 1990, 104 Stat. 2746.)

Notes of Decisions (24)

28 U.S.C.A. § 2672, 28 USCA § 2672

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

End of Document

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United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 171. Tort Claims Procedure (Refs & Annos)

28 U.S.C.A. § 2675

§ 2675. Disposition by federal agency as prerequisite; evidence

Currentness

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 983; May 24, 1949, c. 139, § 126, 63 Stat. 107; Pub.L. 89-506, § 2, July 18, 1966, 80 Stat. 306.)

Notes of Decisions (879)

28 U.S.C.A. § 2675, 28 USCA § 2675

Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

27a
APPENDIX G

Code of Federal Regulations

Title 28. Judicial Administration

Chapter I. Department of Justice

Part 14. Administrative Claims Under Federal Tort Claims Act (Refs & Annos)

28 C.F.R. § 14.2

§ 14.2 Administrative claim; when presented.

Currentness

(a) For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, 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 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

(b) (1) A claim shall be presented to the Federal agency whose activities gave rise to the claim. When a claim is presented to any other Federal agency, that agency shall transfer it forthwith to the appropriate agency, if the proper agency can be identified from the claim, and advise the claimant of the transfer. If transfer is not feasible the claim shall be returned to the claimant. The fact of transfer shall not, in itself, preclude further transfer, return of the claim to the claimant or other appropriate disposition of the claim. A claim shall be presented as required by 28 U.S.C. 2401(b) as of the date it is received by the appropriate agency.

(2) When more than one Federal agency is or may be involved in the events giving rise to the claim, an agency with which the claim is filed shall contact all other affected agencies in order to designate the single agency which will thereafter investigate and decide the merits of the claim. In the event that an agreed upon designation cannot be made by the affected agencies, the Department of Justice shall be consulted and will thereafter designate an agency to investigate and decide the merits of the claim. Once a determination has been made, the designated agency shall notify the claimant that all future correspondence concerning the claim shall be directed to that Federal agency. All involved Federal agencies may agree either to conduct their own administrative reviews and to coordinate the results or to have the investigations conducted by the designated Federal agency, but, in either event, the designated Federal agency will be responsible for the final determination of the claim.

(3) A claimant presenting a claim arising from an incident to more than one agency should identify each agency to which the claim is submitted at the time each claim is presented. Where a claim arising from an incident is presented to more than one Federal agency without any indication that more than one agency is involved, and any one of the concerned Federal agencies takes final action on that claim, the final action thus taken is conclusive on the claims presented to the other agencies in regard to the time required for filing suit set forth in 28 U.S.C. 2401(b). However, if a second involved Federal agency subsequently desires to take further action with a view towards settling the claim the second Federal agency may treat the matter as a request for reconsideration of the final denial under 28 CFR 14.9(b), unless suit has been filed in the interim, and so advise the claimant.

(4) If, after an agency final denial, the claimant files a claim arising out of the same incident with a different Federal agency, the new submission of the claim will not toll the requirement of 28 U.S.C. 2401(b) that suit must be filed within six months of the final denial by the first agency, unless the second agency specifically and explicitly treats the second submission as a request for reconsideration under 28 CFR 14.9(b) and so advises the claimant.

(c) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the agency shall have six months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until six months after the filing of an amendment.

Credits

[Order No. 870-79, 45 FR 2650, Jan. 14, 1980, as amended by Order No. 960-81, 46 FR 52355, Oct. 27, 1981; 52 FR 7411, March 11, 1987]

SOURCE: Order No. 371-66, 31 FR 16616, Dec. 29, 1966; 52 FR 7411, March 11, 1987; 53 FR 37753, Sept. 28, 1988; 57 FR 21738, May 22, 1992; 73 FR 48299, Aug. 19, 2008; 73 FR 70276, Nov. 20, 2008; 73 FR 70277, Nov. 20, 2008; 73 FR 70278, Nov. 20, 2008, unless otherwise noted.

AUTHORITY: 5 U.S.C. 301; 28 U.S.C. 509, 510, and 2672.

Notes of Decisions (622)

Current through March 18, 2021; 86 FR 14803.