

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 24-5210**

**September Term, 2024**

**1:23-cv-03826-CJN**

**Filed On: February 7, 2025**

Allan Douglas Wilson,

Appellant

v.

United States of America,

Appellee

**BEFORE:** Childs, Pan, and Garcia, Circuit Judges

**ORDER**

Upon consideration of the motion for summary reversal and the motion for summary affirmance, the opposition thereto, and the reply, it is

**ORDERED** that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court correctly concluded that the United States is the proper defendant under the Westfall Act, and correctly denied appellant's motion to remand. See 28 U.S.C. § 2679(d)(2); Smith v. Clinton, 886 F.3d 122, 126-27 (D.C. Cir. 2018) (holding that "specific allegations of defamation" by a federal employee "do[] not take [the employee's] conduct outside the scope of employment"); Osborn v. Haley, 549 U.S. 225, 243 (2007) (holding that a Westfall certification "renders the federal court exclusively competent and categorically precludes a remand to the state court"). The district court also correctly dismissed appellant's case for lack of subject matter jurisdiction because appellant's libel claim falls under an exception to the government's waiver of sovereign immunity in the Federal Tort Claims Act. See 28 U.S.C. § 2680(h); Wuterich v. Murtha, 562 F.3d 375, 387 (D.C. Cir. 2009).

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Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:  
Clifton B. Cislak, Clerk

BY: /s/  
Selena R. Gancasz  
Deputy Clerk

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ALLAN DOUGLAS WILSON,

*Plaintiff,*

v.

Civil Action No. 1:23-cv-3826 (CJN)

UNITED STATES OF AMERICA,

*Defendant.*

**ORDER**

In a separate lawsuit before this Court, Allan Wilson sued the U.S. Department of State and the U.S. Embassy in the Philippines for denying his application for a passport. The defendants there filed a motion to dismiss. *See Wilson v. Dep't of State*, Civ. A. No. 23-216 (CJN). Wilson then initiated this suit against Sergio Sarkany—the Department of Justice’s lawyer who filed the motion to dismiss—in the Superior Court of the District of Columbia. Wilson alleges that Sarkany made defamatory statements about Wilson in the motion to dismiss. *See* ECF 1-1 at 1.

The U.S. Attorney’s Office certified that Sarkany acted within the scope of his employment when he filed the brief. *See* ECF 1-2. Under the Westfall Act, this meant that the case was removed to federal court and that the United States became the sole defendant, replacing Sarkany. *See* 28 U.S.C. § 2679(d)(1)–(2). The United States then moved to dismiss. Wilson responded with a motion to remand, in which he argues both that certification was improper and that his case can proceed on the merits.

Wilson first challenges the substitution of the United States as the defendant and asks the Court to remand this case to state court. Under the Westfall Act, certification “constitute[s] *prima facie* evidence that the employee was acting within the scope of his employment.” *Council on Am.*

*Islamic Rels. v. Ballenger*, 444 F.3d 659, 662 (D.C. Cir. 2006). The burden is on Wilson to rebut that certification. *Id.* Wilson has not met his burden.

“To determine whether an employee was acting within the scope of employment under the Westfall Act, we apply the respondeat superior law in the state in which the alleged tort occurred.” *Wilson v. Libby*, 535 F.3d 697, 711 (D.C. Cir. 2008). The alleged tort occurred in the District of Columbia, where Sarkany filed the brief. As relevant here, under D.C. law, an employee was acting within the scope of his employment if his conduct is “of the kind he is employed to perform,” “occurs substantially within the authorized time and space limits,” and “is actuated, at least in part, by a purpose to serve” the Government. *Id.* (quoting Restatement (Second) of Agency § 228(1) (1958)). Sarkany’s actions plainly meet this test; he is a Justice Department attorney employed in part to file briefs on behalf of the Government, acted within his authorization to file briefs in federal court on the Government’s behalf, and did so solely to further the Government’s position in its defense against Wilson’s other lawsuit. Wilson resists this conclusion by arguing that defamation cannot possibly be within the scope of a lawyer’s authorization, but our Court repeatedly has rejected that argument. *See id.* at 711–12. (Rightly so; every suit against a federal employee alleges wrongful conduct by the employee, and so holding that the Westfall Act’s protections do not apply when the employee is accused of wrongful conduct would effectively do away with those protections in all cases.)

Having determined that the United States appropriately replaced itself as the defendant and removed this case, the Court must dismiss the complaint. The United States is immune from suit except when it explicitly and unambiguously waives its immunity. *See Ballenger*, 444 F.3d at 666. A suit removed under the Westfall Act becomes a suit brought under the Federal Tort Claims Act (FTCA). *See* 28 U.S.C. § 2679(d)(4). The FTCA waives sovereign immunity for certain tort

claims against the Government, *see 28 U.S.C. § 1346*, but it expressly carves out from that waiver all claims “arising out of … libel, slander, [or] misrepresentation,” 28 U.S.C. § 2680(h). That carve-out applies to Wilson’s defamation claim, and so the Court lacks subject matter jurisdiction over it. *See Wuterich v. Murtha*, 562 F.3d 375, 380 (D.C. Cir. 2009).

Accordingly, it is **ORDERED** that the complaint is **DISMISSED** without prejudice. It is further **ORDERED** that Plaintiff’s motion to remand is **DENIED**. It is further **ORDERED** that Plaintiff’s motion for a CM/ECF Password is **DISMISSED** as moot.

This is a final appealable order.

The Clerk is directed to terminate the case.

DATE: September 5, 2024

  
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CARL J. NICHOLS  
United States District Judge

United States Court of Appeals  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24-5210

September Term, 2024

1:23-cv-03826-CJN

Filed On: April 11, 2025

Allan Douglas Wilson,

Appellant

v.

United States of America,

Appellee

**BEFORE:** Childs, Pan, and Garcia, Circuit Judges

**ORDER**

Upon consideration of the petition for writ of mandamus and the petition for rehearing, it is

**ORDERED** that the petition for writ of mandamus be denied. Appellant has not demonstrated a clear and indisputable right to the relief requested. See In re al-Nashiri, 791 F.3d 71, 78 (D.C. Cir. 2015). It is

**FURTHER ORDERED** that the petition for rehearing be denied.

**Per Curiam**

**FOR THE COURT:**  
Clifton B. Cislak, Clerk

BY: /s/  
Daniel J. Reidy  
Deputy Clerk