

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**Dec 14, 2020**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JAMES BURNELL, an individual,

Plaintiff,

v.

MICHAEL KUJALA and JANE DOE

KUJALA, individually and the marital

community comprised thereof,

Defendants.

No. 2:20-CV-00271-SAB

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS FOR LACK OF  
JURISDICTION**

Before the Court is Defendants' Motion & Memorandum to Dismiss for Lack of Jurisdiction, ECF No. 5. The motion was considered without oral argument. Plaintiff is represented by Doug Weinmaster, and Defendants are represented by Derek Taylor and Timothy Durkin. Defendants argue that this case should be dismissed without prejudice because the Court lacks subject-matter jurisdiction over Plaintiff's claims. Plaintiff opposes the motion and insists that the Court does have jurisdiction over this case. He also asks that, if the Court does grant the motion, the Court also equitably toll the statute of limitations on his claims so that he may refile them in the proper court. Having reviewed the briefing and the relevant caselaw, the Court grants Defendants' motion and dismisses this case for lack of subject-matter jurisdiction.

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**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION \* 1**

## Facts and Procedural History

The following facts are pulled from Plaintiff's Complaint, ECF No. 1-2, and Defendants' Statement of Jurisdictional Facts in Support of Rule 12(b)(1) and (h)(3) Motion to Dismiss, ECF No. 6.

On August 24, 2018, Plaintiff and Defendant Michael Kujala were involved in a car accident on Highway 2 in Leavenworth, Washington. Michael Kujala is a law enforcement officer with the United States Forest Service ("USFS") and was on duty at the time of the accident. When the collision occurred, Officer Kujala was responding to a local law enforcement request for assistance and was driving a marked USFS vehicle. Officer Kujala pulled out of the Leavenworth Forest Service ranger station with his emergency lights activated, crossed the westbound lane and the shared turn lane, and collided with the driver's side of Plaintiff's vehicle in the eastbound lane. Drivers in the westbound lane stopped to let Officer Kujala cross, and Officer Kujala alleges he did not see Plaintiff's car before beginning his turn. Plaintiff alleges he did not see the emergency lights on Officer Kujala's vehicle and thought the vehicle was going to merge into the shared turn lane. Plaintiff alleges that Officer Kujala was negligent in causing the accident and Plaintiff's personal injuries.

In September and October 2018, Plaintiff submitted two separate SF-95 forms to the U.S. Department of Agriculture Forest Service claims center in Albuquerque, New Mexico. On September 20, 2018, Plaintiff himself submitted a form for approximately \$4,100 in body repair costs to his 2011 Volkswagen Jetta. A second form was submitted by the Phillips Law Firm on Plaintiff's behalf on October 23, 2018. The second form sought personal injury damages arising out of the August 2018 car accident. The parties attempted to resolve these claims, and the USFS was under the impression that the claims were settled. But on June 26, 2020, Plaintiff filed a personal injury lawsuit against Officer Kujala and his wife in Chelan County Superior Court.

1 Defense counsel contacted Plaintiff's counsel in early July 2020 to try and  
2 resolve Plaintiff's claim and address what Defendants saw as jurisdictional issues  
3 with the state court action. Plaintiff's counsel did not respond. Defendants then  
4 removed the case to federal court on August 4, 2020, pursuant to 28 U.S.C. § 1442.

### 5 Legal Standard

#### 6 1. Rule 12(b)(1) Standard

7 Defendants' motion arises under Rule 12(b)(1) and (h)(3). Federal courts  
8 assume subject-matter jurisdiction is lacking unless and until the party asserting  
9 jurisdiction demonstrates otherwise. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S.  
10 375, 376 (1994). Courts have an ongoing duty to examine the existence of  
11 jurisdiction in their cases, and challenges to subject-matter jurisdiction may be  
12 raised at any time in the proceedings. *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004).  
13 Subject-matter jurisdiction can neither be waived nor consented to by the parties.  
14 *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694  
15 (1982). Where subject-matter jurisdiction is found to be lacking, the claim or  
16 lawsuit must be dismissed at the first instance. *See* Fed. R. Civ. P. 12(h)(3).

17 There are two types of Rule 12(b)(1) attacks: a facial attack and a factual  
18 attack. A facial attack accepts the truth of the plaintiff's allegations but asserts that  
19 they are insufficient on their face to invoke federal jurisdiction. *Safe Air for*  
20 *Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In contrast, a factual  
21 attack contests the truth of the plaintiff's factual allegations by introducing  
22 evidence outside the pleadings. *Safe Air for Everyone*, 373 F.3d at 1039. The  
23 plaintiff must support her jurisdictional allegations with competent proof under the  
24 same evidentiary standard that governs in the summary judgment context. *Leite v.*  
25 *Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Thus, the plaintiff bears the  
26 burden of proving by a preponderance of the evidence that each of the  
27 requirements for subject-matter jurisdiction. *Id.* (citing *Harris v. Rand*, 682 F.3d  
28 846, 851 (9th Cir. 2012)). Unless the jurisdictional issue is so intertwined with the

1 substantive issues that resolution of jurisdiction goes to the merits of an action, the  
2 court may resolve factual disputes itself. *Leite*, 749 F.3d at 1121-22 (citing *Safe Air*  
3 *for Everyone*, 373 F.3d at 1039-40); *Robinson v. United States*, 586 F.3d 683, 685  
4 (9th Cir. 2009).

## 5 2. The Federal Tort Claims Act and Derivative Jurisdiction

6 In the context of suits against the United States or its employees acting in  
7 their official capacities, the plaintiff must establish both subject-matter jurisdiction  
8 and personal jurisdiction. 28 U.S.C. § 1346(b). The United States is immune from  
9 suit for damages except for where Congress has specifically waived its immunity.  
10 *See Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). The Federal Tort Claims Act  
11 contains a limited waiver of sovereign immunity. 28 U.S.C. § 1346(b). It also  
12 provides federal district courts with exclusive subject-matter jurisdiction over civil  
13 actions against the United States for money damages for personal or property  
14 damage caused by the negligent or wrongful act or omission of any federal  
15 employee while she is acting within the scope of her office or employment if a  
16 private person would be liable to the plaintiff under the laws of the place where the  
17 challenged conduct occurred. 28 U.S.C. § 1346(b).

18 By its text, the FTCA does not include a waiver of sovereign immunity for  
19 suits brought in state courts. *Id.*; *see also Rodriguez v. United States*, 788 Fed.  
20 Appx. 535, 536 (9th Cir. 2019) (citing *Cox v. U.S. Dep't of Agric.*, 800 F.3d 1031,  
21 1031 (9th Cir. 2015) (*per curiam*)). The derivative jurisdiction doctrine provides  
22 that, if a state court lacks jurisdiction over a case, a federal court does not acquire  
23 jurisdiction upon removal. *Minnesota v. United States*, 305 U.S. 382, 389 (1939).  
24 Although Congress abolished the doctrine with respect to the general removal  
25 statute, the Ninth Circuit recently reaffirmed that the doctrine still applies to  
26 federal officer removal. *Cox*, 800 F.3d at 1032 (citing *In re Elko Cty. Grand Jury*,  
27 109 F.3d 554, 555 (9th Cir. 1997)). Thus, if the state court from which a case was  
28 removed lacked jurisdiction over a case, the federal court must dismiss the case.

## Discussion

1  
2 According to Defendants' Statement of Jurisdictional Facts, Defendants are  
3 mounting a factual attack on Plaintiff's case. *See* ECF No. 6 at ¶ B. Thus, no  
4 presumptive truthfulness attaches to Plaintiff's allegations, and the existence of  
5 disputed material facts does not preclude the Court from evaluating the merits of  
6 Plaintiff's jurisdictional claims. In his response, Plaintiff introduces no evidence in  
7 support of his claims that subject-matter jurisdiction existed at the Chelan County  
8 Superior Court. In contrast, Defendants have produced evidence indicating that  
9 jurisdiction is lacking because Officer Kujala was acting in his official capacity at  
10 the time of the accident and was sued in a court that lacked jurisdiction to hear  
11 claims against him. Accordingly, and for the reasons discussed below, Defendants'  
12 motion is granted.

13 First, Plaintiff argues that the motion should be denied because Officer  
14 Kujala was not acting in his official capacity at the time of the accident because he  
15 was turning out of a "private" driveway he uses for "personal" use. *See* ECF No.  
16 11 at 2. However, Plaintiff introduces no evidence beyond these conclusory  
17 allegations to counter Defendants' evidence that Officer Kujala was (1) in his fully  
18 marked USFS law enforcement vehicle, (2) was pulling out of the Ranger Station's  
19 driveway at the time of the accident, and (3) was responding to an emergency call  
20 for assistance from local law enforcement. *See* ECF No. 7-1 at 9. Indeed,  
21 Plaintiff's prior certified statements contradict his version of events and support  
22 Defendants'. *See* ECF No. 6-1 at 3. Conclusory allegations of this nature are  
23 insufficient to meet Plaintiff's burden to survive the motion to dismiss. *See Savage*  
24 *v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (noting that  
25 the non-moving party on a factual motion to dismiss must furnish affidavits or  
26 other evidence to establish subject-matter jurisdiction).

27 Second, Plaintiff argues that this case should not be dismissed under the  
28 derivative jurisdiction doctrine because the state court did, in fact, have

1 jurisdiction. With all due respect, Plaintiff is incorrect. As discussed above, the  
2 language of the FTCA specifically grants federal district courts exclusive  
3 jurisdiction to hear cases under the Act. 28 U.S.C. § 1346(b)(1); *see also Jerves v.*  
4 *United States*, 966 F.2d 517, 518 (9th Cir. 1992). The Chelan County Superior  
5 Court where this case originated lacked subject-matter jurisdiction over these  
6 claims, and this Court cannot acquire jurisdiction over the claims now after  
7 removal. *See Merkulov v. U.S. Park Police*, 75 F. Supp. 3d 126, 129 (D.D.C. 2014)  
8 (finding that the district court lacked jurisdiction over driver’s claim against U.S.  
9 Park Service Police upon removal and dismissing case). Because derivative  
10 jurisdiction was preserved for cases removed under 28 U.S.C. § 1442(a)(1) and  
11 because the state court lacked jurisdiction to hear cases under the FTCA, the case  
12 is dismissed.

13 Finally, Plaintiff argues that, if this case is dismissed, the Court should  
14 preemptively toll the statute of limitations on his claims. However, the Court has  
15 no power to toll the statute of limitations in case where it has no jurisdiction to act  
16 at all. *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858  
17 F.2d 1376, 1380 (9th Cir. 1988). Thus, Plaintiff’s request for equitable tolling is  
18 denied.

19 Even if the Court did have authority to toll the statute of limitations on  
20 Plaintiff’s claims, he has not fulfilled the grounds for such relief. Equitable tolling  
21 is generally not available as a form of relief. *See Quick Korner Market v. U.S.*  
22 *Dep’t of Agric.*, 180 F. Supp. 3d 683, 692 (S.D. Cal. 2016). A litigant is entitled to  
23 equitable tolling only if they can show (1) that they have been pursuing their rights  
24 diligently and (2) that some extraordinary circumstances stood in their way and  
25 prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010). To count as  
26 “extraordinary,” the circumstances that caused a litigant’s delay in timely filing  
27 must have been out of their control; a party’s own misunderstanding of law or a  
28 tactical litigation mistake is not sufficient. *Harris v. Carter*, 515 F.3d 1051, 1055

1 (9th Cir. 2008); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)  
2 (noting that ordinary neglect is not grounds for equitable tolling). Plaintiff cannot  
3 establish either requirement for tolling. Plaintiff's counsel mistakenly filed his  
4 complaint in the wrong court and was mistaken in believing that Officer Kujala  
5 was not covered by the FTCA. Plaintiff's counsel also made the tactical decision to  
6 rebuff the Government's attempts to resolve the claims here or get the case filed in  
7 the correct court. Plaintiff is therefore not entitled to equitable tolling.

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. Defendants' Motion & Memorandum to Dismiss for Lack of Jurisdiction,  
10 ECF No. 5, is **GRANTED**.

11 2. This matter is **DISMISSED without prejudice** and without any tolling of  
12 the statute of limitations.

13 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
14 this Order, provide copies to counsel, and **CLOSE** the file.

15 **DATED** this 14th day of December 2020.



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A handwritten signature in blue ink that reads "Stanley A. Bastian".

21 Stanley A. Bastian  
22 Chief United States District Judge  
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