PROGRAM MATERIALS
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Practitioners Take Note: Don't Get Bitten by the Federal Tort Claims Act

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PRACTITIONERS TAKE NOTE:

DON'T GET BITTEN BY THE FEDERAL TORT CLAIMS ACT

MONDAY, MAY 18, 2026

PRESENTED BY:

CLIFFORD RIEDERS, ESQ.

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SECTION 1

WHAT IS THE FEDERAL TORT CLAIMS ACT?

FEDERAL AGENCY

THE FEDERAL TORT CLAIM ACT CAN BE FOUND AT 28 U.S.C. CHAPTER 171 SECTIONS 2671-2680

- Section 2671: New Cause of Action Related to Water at Camp LeJeune North Carolina.
- Concerns definitions and defines a "Federal agency" including executive departments, judicial and legislative branches, military department, independent establishments of the U.S., and corporations primarily acting as instrumentalities or agencies of the U.S., but does not include any contractor with the U.S.

EMPLOYEES OF GOVERNMENT

THE FEDERAL TORT CLAIM ACT CAN BE FOUND AT 28 U.S.C. CHAPTER 171 SECTIONS 2671-2680

- Employee of the Government includes: 1) officers or employees of any federal agencies, members of the military or navy forces of the United States, members of the National Guard while engaged in training or duty, and persons acting on behalf of federal agency in official capacity, temporarily or permanently in the service of the United States, with or without compensation, and 2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under 3006A of Title XVIII.

LIABILITY

THE FEDERAL TORT CLAIM ACT CAN BE FOUND AT 28 U.S.C. CHAPTER 171 SECTIONS 2671-2680

- Section 2672: Administrative adjustment of claims under $25,000.
- Section 2673: Reports To Progress.
- Section 2674: U.S. shall be liable in same manner as a private individual but shall not be liable for interest prior to judgment or for punitive damages.
- In any case where death was caused, the law of the place where the act or omission complained of occurred provides or has been construed to provide for damages only punitive in nature the United States shall be liable, or actual or compensatory damages measured by the pecuniary injuries resulting from such death to the persons collectively for whose benefit the action was brought.

DEADLINES

THE FEDERAL TORT CLAIM ACT CAN BE FOUND AT 28 U.S.C. CHAPTER 171 SECTIONS 2671-2680

- Section 2675: Disposition by federal agency as a prerequisite. The failure of an agency to make final disposition of a claim within six (6) months after it is filed shall, at the option of the claimant and any time, thereafter, be deemed a final denial of the claim for purposes of this section.
- Section 2676: Judgment is Bar. The judgment in any action under Section 1346(b) of this Title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.
- Section 2677: Compromise. The Attorney General or his designee may arbitrate, compromise, or settle any claim.
- Section 2678: Maximum of 25% contingent fee.

REMEDY

THE FEDERAL TORT CLAIM ACT CAN BE FOUND AT 28 U.S.C. CHAPTER 171 SECTIONS 2671-2680

- **Section 2679: Exclusiveness of remedy.** If defendant acts within the scope of his office or employment, any civil action shall be deemed an action against the United States.
- In the event that the Attorney General has refused to certify scope of office or employment, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his employment or office. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding against the United States.

EXCEPTIONS

THE FEDERAL TORT CLAIM ACT CAN BE FOUND AT 28 U.S.C. CHAPTER 171 SECTIONS 2671-2680

- **Section 2680: Exceptions as Set Forth in the Statute** (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused, is not something for which an action can be brought.

UNITED STATES POSTAL SERV. V. KONAN

2026 U.S. LEXIS 1100 (FEBRUARY 24, 2026)

THOMAS, J.

- Under the Federal Tort Claims Act Postal Exception, the United States retains sovereign immunity for claims arising out of intentional non-delivery of mail.
- The allegation here was a postal worker intentionally refused to deliver mail.
- Federal Tort Claims Act Postal Exception retains sovereign immunity for all claims "arising out of the loss, miscarriage, or negligence of letters or postal matter."
- This case concerns whether the exception applies when postal workers intentionally fail to deliver the mail. We hold that it does.
- In this case, there was no attempted "carriage."
- Konan's claims did not arise from the "negligence transmission" of mail because "the postal workers' were intentional."

UNITED STATES POSTAL SERV. V. KONAN

2026 U.S. LEXIS 1100 (FEBRUARY 24, 2026)

THOMAS, J.

- Both “miscarriage” and “loss” of mail under the Postal Exception can occur as a result of the Postal Services intentional failure to deliver the mail.
- The majority disagreed with Konan’s attempt to limit “miscarriage” to negligent failure to deliver mail to arrive properly.
- The majority agrees that the miscarriage of mail can be unintentional but the fact that the phrase was commonly used in a particular context does not show that it is limited to that context.
- A miscarriage of mail includes failure of the mail to arrive at it’s intended destination, regardless of the carrier’s intent or where the mail goes instead.
- A loss of mail is a deprivation of mail.

UNITED STATES POSTAL SERV. V. KONAN

2026 U.S. LEXIS 1100 (FEBRUARY 24, 2026)

THOMAS, J.

- The majority holds that the Postal Exception covers suits against the United States for the intentional non-delivery of mail.
- The majority did not decide whether all of Konan's claims are barred by the Postal Exception or which arguments Konan adequately preserved.
- Dissent claimed that the majority held that one exception, the Postal Exception, prevents individuals from recovering for injuries based on postal employees' intentional misconduct, including when an employee maliciously withholds mail because of race.

POSTAL; TAXES

THE FEDERAL TORT CLAIM ACT CAN BE FOUND AT 28 U.S.C. CHAPTER 171 SECTIONS 2671-2680

- (b) Any claim arising out of loss, miscarriage, negligent transmission of letters or postal matters. (c) Any claim arising out in respect of the assessment or collection of any tax or customs duty or detention of any goods, merchandise or other property and Section 1346(b) applies to any claim based on injury or loss of goods, merchandise or other property in the possession of the U.S.

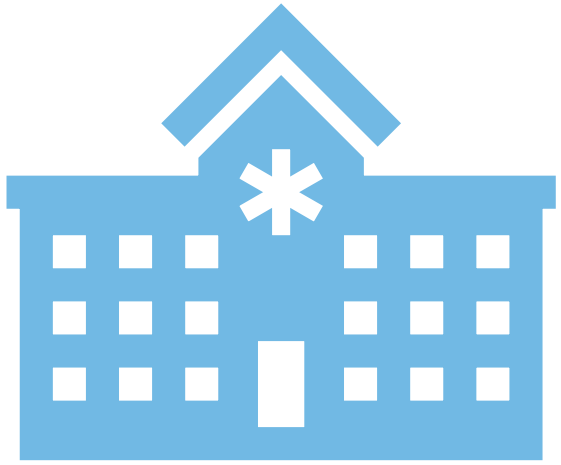
ASSAULT

THE FEDERAL TORT CLAIM ACT CAN BE FOUND AT 28 U.S.C. CHAPTER 171 SECTIONS 2671-2680

- h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, liable, slander, misrepresentation, deceit or interference with contract rights. Provided that with regard to acts or omissions of investigative or law enforcement officers of the United States, provision of this Chapter and 1346(b) of this Title shall apply to any claim arising on or after the date of enactment of this provision out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. (j) No claim arising out of combatant activities of the military or naval forces or the Coast Guard during time of war. (k) No claim arising in a foreign country.

SECTION 2

FEDERAL ENTITIES UNDER FTCA



THERE ARE SITUATIONS WHERE DOCTORS AND HOSPITALS MAY BE “DEEMED” FEDERAL ENTITIES UNDER THE FTCA.

LOMANDO V. UNITED STATES OF AMERICA

IN THIRD CIRCUIT CASE DEALING WITH WHEN A FACILITY IS "DEEMED" TO BE UNDER THE FTCA, A MUST-READ CASE IS *LOMANDO V. UNITED STATES OF AMERICA*, 667 F.3D 363 (3RD CIR. 2011) GREENBERG, C.J. THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES MAY DEEM PHYSICIANS TO BE PUBLIC HEALTH SERVICE EMPLOYEES PURSUANT TO A PROVISION OF THE PUBLIC HEALTH SERVICE ACT AS AMENDED, 42 U.S.C. § 233(O).

M.R. V. TEMPLE UNIV. HEALTH SYS., INC.

2026 U.S. DIST. LEXIS 13885 (JANUARY 26, 2026)

ALEJANDRO, U.S.D.J.

- Plaintiff by and through her parents/natural guardians that in her individual capacity, instituted a medical malpractice tort action in the Philadelphia County Court of Common Pleas against Defendants Temple University Health System, Inc. and Temple University Hospital, Inc.
- United States of America, on behalf of Dr. Turner, filed a notice of removal of this matter to this Court.
- Federal Rule 21 governs misjoinder and nonjoinder of parties. Rule 21 provides that misjoinder of parties is not a ground for dismissing an action.
- Motion before the court was to substitute the Government for Dr. Turner and dismiss plaintiff's claims against him.
- Government argued that Dr. Turner must be dismissed, and the Government substituted for him.

M.R. V. TEMPLE UNIV. HEALTH SYS., INC.

2026 U.S. DIST. LEXIS 13885 (JANUARY 26, 2026)

ALEJANDRO, U.S.D.J.

- Government's motion to substitute its self-wrong claims against Dr. Turner, and to dismiss the claims against Dr. Turner, is granted.
- Upon the Government's substitution, plaintiff's claims against the Government are dismissed.
- Court makes it clear that "deemed" Federal employee invokes the right only to sue the Government and not the individual.
- Plaintiffs argued facts that suggest that Dr. Turner may have held dual employment with the Government and Temple. The court found that unpersuasive.
- Evidence was unrefuted. Plaintiffs failed to meet their burden of rebutting the certification as prima facie evidence that Dr. Turner's challenge conduct occurred within the scope of his federal program.
- Based upon the materials submitted by the Government, the Court finds Dr. Turner acted within the scope of his Federal Employment for the purpose of this action.

PHYSICIANS

BY VIRTUE OF THAT DESIGNATION, THE PHYSICIANS FALL WITHIN THE SCOPE OF THE FEDERAL TORT CLAIMS ACT, 28 U.S.C. §§ 1346, 2671-2680, WHICH PRECLUDE A SUIT AGAINST THEM INDIVIDUALLY FOR THEIR SERVICES AT A HEALTH ENTITY AND SUBSTITUTED A SUIT AGAINST THE UNITED STATES AS THE EXCLUSIVE REMEDY FOR THEIR ALLEGED MALPRACTICE.

KNOWLEDGE

EVEN A CAREFUL ATTORNEY MAY NOT NECESSARILY KNOW WHEN AN ENTITY IS "DEEMED" TO BE A FEDERAL ENTITY AND FALL UNDER THE AUSPICES OF THE FEDERAL TORT CLAIMS ACT.

ENTITIES THAT RECEIVE FEDERAL FUNDING TO SERVE MEDICALLY UNDERSERVED POPULATIONS MAY BE SO DEEMED.

“HEALTH PRACTITIONERS” THAT SUCH ENTITIES EMPLOY MAY BE DEEMED EMPLOYEES OF THE PUBLIC HEALTH SERVICE.

EXCLUSIVE REMEDY

AN ACTION AGAINST THE UNITED STATES UNDER THE FTCA IS THE EXCLUSIVE REMEDY FOR PERSONS ALLEGING PERSONAL INJURY RESULTING FROM THEIR PERFORMANCE OF MEDICAL FUNCTIONS BY PUBLIC HEALTH SERVICES EMPLOYEES ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT.

SECTION 3

STATUTE OF LIMITATIONS

D.J.S.-W. V. UNITED STATES OF AMERICA
962 F.3D 745 (3RD CIR. 2020)

THE *D.J.S.* CASE WAS AN OPINION BY FORMER PENNSYLVANIA ATTORNEY GENERAL MICHAEL FISHER OF THE THIRD CIRCUIT.

PRIOR AUTHORITY

HE DISTINGUISHED PRIOR AUTHORITY AND DETERMINED THAT A LAWYER DID NOT PROPERLY INVESTIGATE WHO THE DOCTOR'S EMPLOYER REALLY WAS.

VISIT TO HEALTH CARE FACILITY

PLAINTIFF'S COUNSEL IN THIS CASE WAS CRITICIZED FOR NOT DOING HIS JOB, INCLUDING NOT VISITING THE HEALTH CARE FACILITY TO ASSURE WHETHER THE DOCTOR REALLY WORKED AND WHO HE WAS EMPLOYED BY.

TRAP FOR THE UNWARY

MORE AND MORE FACILITIES ARE DEEMED FEDERAL FACILITIES, MEANING THAT SUITS AGAINST THEM ARE FTCA CASES, CREATING A TRAP FOR THE UNWARY.

DUTY OF DILIGENCE

IF THE ATTORNEY DOES NOT KNOW OR HAS NEVER RUN INTO A SPECIFIC DOCTOR OR HOSPITAL BEFORE, THE DUTY OF DILIGENCE TO CLOSELY INVESTIGATE THE EMPLOYER'S STATUS IS CRUCIAL.

CALL; WRITE

MAKE IT A PRACTICE TO CALL, WRITE, AND CHECK THE INDICES AND DO EVERYTHING YOU CAN TO ASSURE WHO THE EMPLOYEE IS AND WHAT THE STATUS IS.

WEBSITE

THAT MAY MEAN CHECKING THE WEBSITE OF THE SECRETARY OF STATE, THE PROFESSIONAL LICENSURE BOARD, AND VISITING THE FACILITY AND ASKING AS WELL AS CALLING COUNSEL.

MINORS TOLLING RULE

UNDER THE *D.J.S.* CASE, YOU ABSOLUTELY CANNOT RELY ON PENNSYLVANIA'S MINOR'S TOLLING RULE BECAUSE IT DOES NOT APPLY IN FTCA CASES. ONLY EQUITABLE TOLLING APPLIES.

EQUITABLE TOLLING

D.J.S.-W. INVOLVED A MINOR'S ACTION AGAINST A HOSPITAL AS A RESULT OF BIRTH TRAUMA DISMISSED BASED ON FAILURE TO SATISFY EQUITABLE TOLLING REQUIREMENTS OF FEDERAL TORT CLAIMS ACT.

CASE ORIGINALLY BROUGHT IN STATE COURT, AND PLAINTIFF'S COUNSEL WAS RELYING UPON PENNSYLVANIA'S MINOR'S TOLLING RULE.

APPLICATION IN FEDERAL COURT

MINOR'S TOLLING RULE DOES NOT APPLY IN FEDERAL COURT UNDER FTCA.

TWO PART TEST

FOR FEDERAL EQUITABLE TOLLING TEST TO APPLY, THERE MUST BE: (1) PURSUIT OF RIGHTS DILIGENTLY; AND (2) SOME EXTRAORDINARY CIRCUMSTANCES STANDING IN THE WAY AND PREVENTING TIMELY FILING. *BOTH* MUST BE SATISFIED.

REASONABLE STEPS

THE COURT WAS CRITICAL OF PLAINTIFF'S COUNSEL BECAUSE HE DID NOT TAKE REASONABLE STEPS TO CONFIRM THE DEFENDANT DR. GALLAGHER'S EMPLOYMENT STATUS.

NOTHING EXTRAORDINARY

THERE WAS NOTHING EXTRAORDINARY THAT PREVENTED PLAINTIFF'S COUNSEL FROM DISCOVERING DR. GALLAGHER'S TRUE AFFILIATIONS.

SECTION 4

STATUTE OF LIMITATIONS - DISTINGUISHING SANTOS

SANTOS EX REL. BEATO V. UNITED STATES, 559 F.3D 189 (3D CIR. 2009)

THE THIRD CIRCUIT CASE OF *SANTOS EX REL. BEATO V. UNITED STATES*, 559 F.3D 189 (3D CIR. 2009) WAS DISTINGUISHED.

IN *SANTOS*, THE COURT SAID THAT A TRAP HAD BEEN SET FOR PLAINTIFF'S COUNSEL; BUT NOT SO IN D.J.S. CASE

FLAGS

THERE WERE NUMEROUS RED FLAGS, ACCORDING TO THE COURT, THAT WOULD HAVE CAUSED A DILIGENT PLAINTIFF OR HER COUNSEL TO INVESTIGATE DR. GALLAGHER'S EMPLOYMENT STATUS.

ADDRESSES

DR. GALLAGHER HAD TWO DIFFERENT ADDRESSES, ONE OF WHICH WAS PRIMARY HEALTH NETWORK.

EASY DISCOVERY

IT COULD EASILY HAVE BEEN DISCOVERED THAT DR. GALLAGHER WAS EMPLOYED BY PRIMARY HEALTH NETWORK.

PRIMARY HEALTH NETWORK

HAD COUNSEL INVESTIGATED PRIMARY HEALTH NETWORK HE COULD HAVE DISCOVERED THAT IT WAS A “DEEMED” FEDERAL ENTITY.

DEEP DIVE

COUNSEL HAD AN OBLIGATION TO DISCUSS THE ISSUE WITH HIS CLIENT, EXPAND THE TEMPORAL SCOPE OF HIS RECORDS REQUEST, CALL SHARON HOSPITAL WHERE THE BABY WAS DELIVERED, OR DR. GALLAGHER, OR INVESTIGATE THE ADDRESS TO WHICH HE SENT ONE OF HIS RECORDS REQUESTS AND WHICH APPEARED ON SOME OF THE RECORDS HE RECEIVED.

ADEQUATE INVESTIGATION

COUNSEL DID NOT DO AN ADEQUATE INVESTIGATION, ACCORDING TO THE COURT.

SEVEN YEARS LATE

THE PARTIES AGREED THAT PLAINTIFF'S CASE, WHICH WAS ORIGINALLY FILED IN STATE COURT ALMOST SEVEN YEARS AFTER THE MINOR'S BIRTH, THE DATE ON WHICH THE CLAIM ACCRUED, WAS NOT TIMELY PRESENTED TO THE APPROPRIATE AGENCY IN ACCORDANCE WITH THE REQUIREMENTS OF THE FEDERAL TORT CLAIMS ACT.

DELIBERATE DELAY

ALTHOUGH PLAINTIFF'S COUNSEL DELIBERATELY DELAYED FILING HER CASE IN RELIANCE UPON PENNSYLVANIA'S TOLLING STATUTE FOR MINORS, THAT LAW CANNOT SAVE PLAINTIFF MINOR'S UNTIMELY CLAIM AGAINST THE UNITED STATES BECAUSE STATE LAW TOLLING STATUTES DO NOT APPLY TO THE FEDERAL TORT CLAIMS ACT LIMITATIONS PERIOD.

SOLE ISSUE

THE SOLE ISSUE THUS WAS WHETHER MINOR PLAINTIFF HAD SHOWN THAT SHE WAS ENTITLED TO THE EXTRAORDINARY REMEDY OF EQUITABLE TOLLING OF THE FTCA'S LIMITATIONS PERIOD.

TWO REQUIREMENTS

THE TWO REQUIREMENTS FOR TOLLING, EXTRAORDINARY CIRCUMSTANCES AND DILIGENCE, ARE DISTINCT ELEMENTS BOTH OF WHICH MUST BE SATISFIED FOR A LITIGANT TO BE ELIGIBLE FOR TOLLING.

TWO ELEMENTS

FOR A LITIGANT TO BE ENTITLED TO EQUITABLE TOLLING SHE MUST ESTABLISH TWO ELEMENTS: (1) THAT SHE HAS BEEN PURSUING HER RIGHTS DILIGENTLY; AND (2) THAT SOME EXTRAORDINARY CIRCUMSTANCE STOOD IN HER WAY AND PREVENTED TIMELY FILING. BOTH MUST BE SATISFIED.

BEYOND CONTROL

THE COURT CLARIFIED THAT, FOLLOWING THE SUPREME COURT'S GUIDANCE, A LITIGANT WILL ONLY MEET THE EXTRAORDINARY CIRCUMSTANCES PRONG OF THE TEST FOR EQUITABLE TOLLING ONCE SHE SHOWS THAT HER DELAY WAS ATTRIBUTABLE TO CIRCUMSTANCES THAT WERE BOTH EXTRAORDINARY AND BEYOND HER CONTROL.

FAILURES

IN *D.J.S.*, THE MINOR PLAINTIFF FAILED TO SATISFY EITHER PRONG OF THE TEST. SHE DID NOT DILIGENTLY PURSUE HER RIGHTS BECAUSE SHE FAILED TO TAKE REASONABLE STEPS TO CONFIRM DR. GALLAGHER'S EMPLOYMENT STATUS. NOR DID ANY CIRCUMSTANCES BOTH EXTRAORDINARY AND OUTSIDE HER CONTROL STAND IN THE WAY OF PREVENTING HER FROM DISCOVERING DR. GALLAGHER'S TRUE AFFILIATIONS.

DIFFERENCES

THE COURT DISTINGUISHED THIS CASE FROM *SANTOS*, SUPRA. SANTOS WAS ALSO A MINOR. SANTOS OBTAINED MEDICAL RECORDS AND YET DID NOT HAVE A CLUE AS TO THE FEDERAL INVOLVEMENT. SANTOS' COUNSEL WENT TO FURTHER LENGTHS TO CONFIRM THE ALLEGED TORTFEASOR'S EMPLOYMENT STATUS THAN THE MINOR PLAINTIFF'S COUNSEL DID HERE. SANTOS PERFORMED A PUBLIC RECORDS SEARCH ON, CORRESPONDED WITH AND VISITED YORK HEALTH AS PART OF THE INVESTIGATION.

ASSUMPTIONS

IN *D.J.S.-W.*, COUNSEL MERELY ASSUMED THAT DR. GALLAGHER WAS EMPLOYED BY SHARON HOSPITAL, WHICH HE KNEW TO BE A PRIVATE ENTITY, BECAUSE THE MINOR WAS BORN THERE, AND DR. GALLAGHER WAS LISTED AS A "TEAM MEMBER" ON ITS WEBSITE. COUNSEL ADMITTED THAT HE NEVER CORRESPONDED WITH, CALLED OR VISITED SHARON HOSPITAL OR DR. GALLAGHER TO CONFIRM THIS BELIEF.

RED FLAGS

THE COURT ALSO RELIED UPON NUMEROUS RED FLAGS THAT WOULD HAVE CAUSED A DILIGENT PLAINTIFF OR HER COUNSEL TO INVESTIGATE DR. GALLAGHER'S EMPLOYMENT STATUS.

VERY STRANGE

THE COURT WROTE THAT IT WAS STRANGE THAT COUNSEL DID NOT ASK THE MINOR'S MOTHER WHERE SHE NORMALLY SAW DR. GALLAGHER FOR HER PRENATAL CARE OR EXPAND THE TEMPORAL SCOPE OF HIS RECORD REQUEST TO ENSURE THAT DR. GALLAGHER HAD NOT TREATED HER AT ANOTHER FACILITY.

RECORD REQUESTS

PLAINTIFF'S OWN COUNSEL SENT RECORD REQUESTS TO SHARON HOSPITAL AND DR. GALLAGHER AT DIFFERENT ADDRESSES.

VISIT

HAD COUNSEL VISITED OR SEARCHED THE ADDRESSES TO WHICH HIS OFFICE SENT THE REQUEST TO DR. GALLAGHER, HE WOULD HAVE DISCOVERED THAT IT WAS A STREET ADDRESS FOR PRIMARY HEALTH NETWORK.

HEIGHTENED ALERT

PLAINTIFF'S COUNSEL SHOULD HAVE BEEN ON HEIGHTENED ALERT GIVEN HIS OWN PERSONAL EXPERIENCE IN LITIGATING A MALPRACTICE CASE INVOLVING THE SUBSTITUTION OF THE UNITED STATES FOR A DEFENDANT PHYSICIAN BECAUSE HE WAS AN EMPLOYEE OF A "DEEMED" FEDERAL ENTITY.

COUNSEL DID NOT INVESTIGATE THESE RED FLAGS.

A BAD GOOF

IN THE COURT'S OPINION, PLAINTIFF'S COUNSEL COULD HAVE EASILY DISCOVERED THAT DR. GALLAGHER WAS EMPLOYED BY PRIMARY HEALTH NETWORK AND THEN WOULD HAVE INVESTIGATED PRIMARY HEALTH NETWORK AND DISCOVERED THAT IT WAS A "DEEMED" FEDERAL ENTITY.

DUE DILIGENCE

IN SUM, PLAINTIFF'S COUNSEL DID NOT EXERCISE DUE DILIGENCE TO MEET THE EQUITABLE TOLLING STANDARD, AND THE CASE WAS DISMISSED. THE COURT OPINED THAT THERE WAS NO TRAP SET FOR PLAINTIFF AS THERE WAS IN THE *SANTOS* CASE. RATHER, THE COURT AGREED WITH THE DISTRICT COURT THAT "[T]HE REAL TRAP. . . [C]OUNSEL FELL INTO WAS THE ASSUMPTION THAT A DOCTOR WHO HAS A BIOGRAPHICAL PAGE ON A PRIVATE HEALTHCARE FACILITY'S WEBSITE . . . CANNOT BE EMPLOYED BY ANOTHER FACILITY OR ENTITY." *D.J.S.-W., SUPRA, AT *21*(INTERNAL CITATION OMITTED).

THE BOTTOM LINE: COUNSEL BEWARE!

SECTION 5

CERTIFICATE OF MERIT

CERTIFICATE OF MERIT

Berk v. Choy
2026 U.S. LEXIS 497 (January 20, 2026)
Barrett, C.J.

- District Court and Third Circuit said that Delaware Certificate of Merit applies in a medical malpractice case which is in Federal Court because of a diversity of citizenship.
- U.S. Supreme Court reversed.
- Plaintiff did try to comply with the Delaware Certificate of Merit rule but “the clock ran out” and hence Berk filed his medical records under seal.
- Berk argued that the Delaware Certificate of Merit rule was not enforceable in Federal Court.
- Aase was reversed because Rule 8 prescribes information a plaintiff must present about the merits of this claim at the outset of the litigation. Rule 8 does not require anything more than a short and plain statement.

CERTIFICATE OF MERIT

Berk v. Choy
2026 U.S. LEXIS 497 (January 20, 2026)
Barrett, C.J.

- Rule 12 reinforces the point. It provides only one ground for dismissal based on the merits and that is a failure to state a claim upon which relief can be granted
- It should be relatively easy for plaintiffs to subject defendants to discovery, even for claims that are likely to fail.
- Courts sometimes try to require more information for certain kinds of claims, such as discrimination cases, prisoner suits and the United States Supreme Court has consistently rejected such efforts.
- Defendants attempt a workaround to rewrite Delaware law, and they argue that the Federal Rules contain a loophole.

CERTIFICATE OF MERIT

Berk v. Choy
2026 U.S. LEXIS 497 (January 20, 2026)
Barrett, C.J.

- Defendants argue that Rule 11 makes affidavit laws applicable in Federal Court, even if they conflict with other Federal Rules.
- Even if Rule 11 incorporates state affidavit laws, it does not incorporate this one.
- Rule 8 and Rule of Decision 6853 provide the same answer. Rule 8 governs so long as it is valid under the Rules Enabling Act which requires a Federal Rules be procedural rather than substantive.
- Erie R. Co. v. Tompkins works in coordination with the Rules Enabling Act.
- Judgment of the Court of Appeals is reversed.
- Justice Jackson concurred in the judgment.

CERTIFICATE OF MERIT

Wilson v. United States
79 F.4th 312 (2023)
Chagares, C.J.

- *Pro se* inmate sued under Federal Tort Claims Act for medical negligence.
- No requirement to comply with PA Rule of Civil Procedure 1042.3 concerning certificates of merit in FTCA matter.
- Although this is a substantive law, it does not apply.
- Grant of summary judgment reversed.

CERTIFICATE OF MERIT

Wilson v. United States
79 F.4th 312 (2023)
Chagares, C.J.

- Rule 1042.3's certificate of merit requirement does not apply in FTCA cases.
- FTCA's incorporation of state law is limited in scope.
- Court seems to believe this is a procedural and not a substantive rule.
- Just because a state rule of civil procedure is outcome determinative, does not necessarily mean that it informs the state law merits-based liability determination as required for FTCA incorporation.

SECTION 6

BIVENS CLAIMS

BIVENS CLAIMS

Xiaxong Xi v. Haugen
2023 U.S. App. LEXIS 12784 (3d Cir. May 24, 2023)
Krause, C.J.

- No *Bivens* case for mistreatment of a foreign individual by FBI.
- In view of the Supreme Court precedent declining to extend *Bivens* is a national security realm and limited circumstances in which Congress has opted to provide a remedy, *Bivens* is dismissed.
- FTCA claim dismissed, however is reversed.
- District court is reversed and FTCA claim remanded for further proceedings.

BIVENS CLAIMS

Xiaxong Xi v. Haugen
2023 U.S. App. LEXIS 12784 (3d Cir. May 24, 2023)
Krause, C.J.

- District court had dismissed the FTCA claim on the ground that Xi failed to demonstrate a violation of "clearly established" constitutional rights.
- At the motion to dismiss stage, all plaintiff must do is negate the discretionary function exception and plausibly allege a constitutional violation.
- Xi has done this
- Discretionary function exception provides no bar to the pursuit of FTCA claims.

SECTION 6

DISCRETIONARY FUNCTION

DISCRETIONARY FUNCTION

Berkovitz v. U.S.
486 U.S. 531 (1988)

- Whether discretionary function exception of the Federal Tort claims Act bars a suit based on the Government's licensing of an oral polio vaccine and on its subsequent approval of a specific lot of that vaccine to the public.
- The exception was designed to discover not all acts of regulatory agencies and their employees, but only such acts as are "discretionary" in nature.
- The discretionary function bars any claims that challenge the Bureau's formulation of policy as to the appropriate way in which to regulate the release of vaccine lots.

DISCRETIONARY FUNCTION

Berkovitz v. U.S.
486 U.S. 531 (1988)

- If the polices formulated by the Bureau allow room for implementing officials to make independent policy judgements, the discretionary function exception protects the acts taken by those officials in the exercise of their discretion.
- The discretionary function exception **does not apply** if the acts complained of do not involve the permissible exercise of policy discretion.
- Thus, if the Bureau's policy leaves no room for an official to exercise judgement in performing a given act, or if the act simply does not involve the exercises of such judgement, the discretionary function exception does not bar a claim where the act ins negligent or wrongful.

DISCRETIONARY FUNCTION

Berkovitz v. U.S.
486 U.S. 531 (1988)

- If the Plaintiff's allegations are correct, and the Bureau policy did not allow the challenged action to release a non-complying lot on the basis of policy considerations, then the discretionary function exception does not bar the claim.
- The Court of Appeals erred in holding that the discretionary function exception required dismissal of the claim, as to the licensing of the vaccine and the release of a particular vaccine lot.
- The Court of Appeals was reversed and case for the proceedings consistent with the opinion.

DISCRETIONARY FUNCTION

Martin v. United State
145 S. Ct 1689 (June 12, 2025)
Gorsuch, J.

- Eleventh Circuit must undertake an assessment without reference to the mistaken view that the law enforcement provision applies to the claim.
- Should some or all of plaintiff's claims survive the discretionary function exception, the Eleventh Circuit must then ask whether under state law, a private individual underlying circumstances would be liable for the acts and omissions the plaintiff allege subject to the defenses that are available.
- There is no supremacy clause defense.

DISCRETIONARY FUNCTION

Altomare v. United States
2025 U.S. Dist. LEXIS 28968 (February 18, 2025)
Diamond, J.

- Veteran sues VA claiming he was not brought a wheelchair when he arrived at the hospital.
- The discretionary exception of the Federal Tort Claims Act does not bar this claim.
- However, the Court found that because an individual cannot be named, a claim cannot be brought.
- Court also found lack of causation because there was not a long period of time elapsed between the time the veteran arrived and the time when the wheelchair should have been brought to him.

DISCRETIONARY FUNCTION

Thacker v. TVA
2019 U.S. App. LEXIS 21100 (11th Cir. Ala. May 24, 2023)
Krause, C.J.

- Rejects the view pressed by the government that the TVA remains immune from tort suits arising from its performance of so-called discretionary functions.
- The TVA's sue-and-be-sued clause is broad and contains no such limit.

DISCRETIONARY FUNCTION

Thacker v. TVA
2019 U.S. App. LEXIS 21100 (11th Cir. Ala. May 24, 2023)
Krause, C.J.

- TVA is in the same position as a private corporation supplying electricity. But the TVA might have immunity from suits contesting one of its governmental activities, of a kind not typically carried out by private parties. Case remanded. See if that limited immunity applies.
- FTCA's exception for discretionary functions does not apply to the TVA.

DISCRETIONARY FUNCTION

Thacker v. TVA
2019 U.S. App. LEXIS 21100 (11th Cir. Ala. May 24, 2023)
Krause, C.J.

- Even without the "discretionary function" bar under the FTCA, the TVA may be entitled to governmental immunity under the constitution or otherwise.

SECTION 8

FERES

DOCTRINE

FERES DOCTRINE

Carter v. United States
2025 U.S. LEXIS 835 (2025)
Thomas, J.

- In *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 1950, the court created an exception to the Federal Tort Claims Act for claims based on "injuries, incident and military service."
- Because the cause was not articulated, the parameters of this exception resulted in the courts arbitrarily depriving injured servicemembers and their families of a remedy that Congress provided them.
- The purpose of the FTCA is to make the United States liable for suits in tort in the same manor of the like circumstances
- The Act does bar claims based on "combatant activities… during time of war," claims "arising in a foreign country," and claims "based on employee's execution of a statute or regulation" or performance of a "discretionary function." §§ 2680 (a), (j), (k)

FERES DOCTRINE

Carter v. United States
2025 U.S. LEXIS 835 (2025)
Thomas, J.

- The law contains no general exceptions for claims by a military personnel.
- *Feres* carved out a broad new exception in a case considering medical malpractice claims regarding solders harmed by Army surgeons.
- Supreme Court held that sovereign immunity barred the claims because the soldiers' "injuries were incidents of military service."
- Justice Thomas believes it is time to review the *Feres* Doctrine. Of course, the risk of *Feres* being overruled is that Congress will enact something Draconian. Thomas said, "*Feres* is indefensible as a matter of law, and senseless as a matter of policy."
- Thomas offered advice to the lower courts: Do not look for a principled explanation for the *Feres* case; there is nothing to find. Instead, simply ask whether a controlling decision has held that the *Feres* Doctrine barred suit under materially indistinguishable circumstances. If not, allow the suit to proceed.

SECTION 9

INDEPENDENT CONTRACTORS

INDEPENDENT CONTRACTORS

Fitch v. Valor Healthcare
2025 U.S. LEXIS 37683 (March 3, 2025)
Horan, J.

- Independent contractors who are doctors are not covered under the Federal Tort Claims Act.
- Plaintiff was granted leave to amend to try to show an employment relationship.

INDEPENDENT CONTRACTORS

Mummert v. United States
2023 U.S. Dist. LEXIS 190216 (M.D. Pa. October 23, 2023)
Rambo, J.

- Under FTCA, a person must be employed by the federal government to be sued.
- Independent Contractors cannot be sued.
- No such thing as direct negligence against the government for breach of a non-delegable duty notwithstanding employment status of physicians.
- Allowing theories of liability would frustrate the purpose of the independent contractor exception.

SECTION 10

WHAT IS A FEDERAL AGENCY?

WHO IS A FEDERAL EMPLOYEE?

GIORDANO V. HOHNS

2025 U.S. APP. LEXIS 30115 (NOVEMBER 18, 2025)

KRAUSE, J.

- Appellees are three members of the United States Semi quincentennial Commission, who made statements critical of the Commission's then Chairman and Executive Director, the Appellants here.
- Those who were asked to step down from the commission brought a tort action against the Defendants in the Court of Common Pleas in Philadelphia County.
- Attorney General certified the case under the Westfall Act and removed the case to federal court.
- Case was dismissed on the basis of sovereign immunity.
- Giordano and DiLella argue their dismissals were in error because the Defendants do not qualify as employees of the government and even if they did, their statements were not made in the course of their employment.
- Third Circuit affirmed.
- This is a very good discussion of the history and function of the Westfall Act.

GIORDANO V. HOHNS

2025 U.S. APP. LEXIS 30115 (NOVEMBER 18, 2025)

KRAUSE, J.

- Court also had a thorough discussion of when an agency is a government agency and when statements made are made in the course and scope of employment.
- Court will look at, among other things, finding arrangements and whether they reveal the close relationship of the federal government.
- The commission fits neatly into the Federal Tort Claims Act definition of federal agency as an independent establishment, with each of the four federal-control factors favoring that status.

GIORDANO V. HOHNS

2025 U.S. APP. LEXIS 30115 (NOVEMBER 18, 2025)

KRAUSE, J.

- All factors reflect the control over the Commission necessary to make it a federal agency:
  - 1. It is congressionally created with a national purpose;
  - 2. It is governed by federal leaders and appointees;
  - 3. It receives significant appropriations and financial oversight from Congress;
  - 4. Its day-to-day operations are either directed by the Commission Act or controlled, directly or indirectly, by Congress.
- The Commission qualifies as a federal agency under the FTCA and the Westfall Act.
- Case was properly dismissed.

SECTION 11

INMATES

CURRENT &

RELEASED BIVENS

INMATES

Freeman v. Unit Manager J. Lincalis
2025 U.S. App. LEXIS 28298 (October 29, 2025)
Roth, C.J.

- Court reversed throwing this case out under the Federal Tort Claims Act.
- Appellant contends the government is liable under the Federal Tort Claims Act for negligence transmission of his PSR and failure to correct it.
- Was proper to throw out the case based upon Bivens v. Six Unknown Name Agents of the Federal Bureau of Narcotics.
- Government did not contest that the USPO breached a duty when it transmitted a PSR falsely attributing the SOSA murder to Freeman.
- Government does not contest that if Freeman's conditions of confinement were heightened as a result of the misstatement in the PSR, this would constitute an injury.

INMATES

Freeman v. Unit Manager J. Lincalis
2025 U.S. App. LEXIS 28298 (October 29, 2025)
Roth, C.J.

- Government contended that Appellant could not show causation.
- There is no reason the USPO should be immunized for its alleged failure to abide by a direct court order, or its ministerial transmission of the wrong report to the BOP.
- Because Freeman's asserted claim is not an analogue to any recognized Bivens claim, the Third Circuit said that there were no special factors indicating that the judiciary is at least arguably less equipped than Congress to weigh the cost and benefits of allowing a damage action to proceed.
- Bivens access will generally not be permitted in connection with inmates, even if the inmate is currently out of prison.

SECTION 12

SEVERANCE

FLOYD V. WAYNE MEM'L HOSP.

2025 U.S. DIST. LEXIS 267965 (DECEMBER 31, 2025)

MEHALCHICK, U.S.D.J.

- Before the Court is a motion to dismiss brought by Third-Party Defendant the United States of America (the "United States").
- United States removed this action from the Lackawanna County Court of Common Pleas to Federal Court.
- Federal Court entered an order severing Plaintiffs Carolyn Floyd ("Floyd") and Logan Hall's ("Hall") state law claims and remanding them to state court, while staying the remaining federal claims against the United States.
- Defendant's motion to dismiss the remaining federal claims was DENIED.

FLOYD V. WAYNE MEM'L HOSP.

2025 U.S. DIST. LEXIS 267965 (DECEMBER 31, 2025)

MEHALCHICK, U.S.D.J.

- A third-party action may be commenced in the interest of judicial economy before it is technically ripe.
- Third-party complaint, in this case, against the United States remains properly before this Federal court.
- It is in the interest of judicial economy that this action remains stayed while the state action is pending, rather than be dismissed and potentially refiled.
- Case involved a medical malpractice claim against a hospital deemed to be a Federal Actor, but there were also State actors.

SECTION 13

WAR - PREEMPTION

WAR - PREEMPTION

Hencely v. Fluor Corp.
2026 U.S. LEXIS 1868 (April 22, 2026)
Thomas, J.

- A Taliban operative working for Fluor Corporation, military contractor, carried out a suicide-bomb attack in Afghanistan.
- Army Specialist Hencely confronted the bomber and received injuries in which he was permanently disabled.
- Hencely sued Fluor bringing state-law tort claims for negligently retaining and supervising the attacker.
- According to Hencely and the United States Military, Fluor's conduct was not authorized by the military and even violated instructions the military had given it as a condition of operating on the base.
- Fluor argues that federal law preempts Hencely's suit.

WAR - PREEMPTION

Hencely v. Fluor Corp.
2026 U.S. LEXIS 1868 (April 22, 2026)
Thomas, J.

- No statute or constitutional provision expressly commands preemption.
- Supreme Court precedent suggests State law is generally not preempted when the contractor could comply with both his contractual obligations to the military and state law, unlike when the state-imposed duty is precisely contrary to the duty imposed by the government contract, citing Boyle v. United Technologies Court, 487 U.S. 500, 509 (1988).
- United States Court of Appeals for the Fourth Circuit held that Federal law preempts Hencely's suit based on a different rule: during wartime, all state-law claims against military contractors under military command arising out of combatant activities are preempted regardless of whether any conflict existed between the military instructions and state law.
- United States Supreme Court disagreed. The preemption rule in which the Fourth Circuit relied lacks any foundation on the constitution, federal statutes, or Supreme Court precedent.