

No. 17-35724

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Jose Vera,

Plaintiff-Appellant,

v.

U.S. Department of Interior Bureau of Indian Affairs
And The United States of America,

Defendant-Appellees.

On Appeal from the United States District Court
For the Eastern District of Washington at Yakima
No. 1:17-CV-3005-RMP
Hon. Rosana Malouf Peterson

APPELLANT'S OPENING BRIEF

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I. Jurisdictional Statement

The United States Federal district trial court has original subject matter jurisdiction over this case because the United States is a defendant pursuant to 28 U.S.C. §1346. This Court has jurisdiction pursuant to 29 U.S.C § 1291 because this is an appeal of a final decision of the trial court. On August 16, 2017, the trial court granted summary judgment for Appellees and entered final judgment in favor of Appellees. On September 8, 2017, Appellant filed Notice of Civil Appeal. This is an appeal from a final order and there are no issues pending relating to this case in the lower court.

II. Statement of Related Cases and Corporate Disclosure

There are no related cases. Appellant is not a corporation.

III. Statement of issues presented

- a. Whether the district court had subject matter jurisdiction over Appellant's Federal Tort Claims Act ("FTCA") claim of negligence against the Appellee.
- b. Whether it was improper for the district court to reject Appellant's request to hold an evidentiary hearing pursuant to Fed. R. Civ. P. 12(i) on the issue of subject matter jurisdiction.

IV. Statement of the Case

The BIA is an agency within the U.S. Department of Interior. Excerpts of Record (“ER”) 47. The Bureau of Internal Affairs Road 140 (hereinafter “BIA 140”) runs from White Swan, Washington to Klickitat River Rd, entirely within lands owned by the United States of America in trust for the benefit of the Yakama Indian Nation. ER 25. The BIA provides direct service to roads on federally-recognized Indian Tribe land through the Tribal Transportation Program (hereinafter “TTP”) and the BIA Road Maintenance Program (“RMP”). ER 20. Kurt Fedenberg has been with BIA as the Regional Road Engineer since 1994 primarily responsible for overseeing the TTP and RMP, but failed to provide any records and/or documentation to demonstrate the extent of the BIA’s involvement in owning, designing, creating, maintaining, putting traffic signs and overseeing BIA 140. ER 20-27.

The BIA was responsible for creating, designing and/or maintaining BIA 140 during, at least some period, between approximately 1940 to 1990. ER 25. On September 28, 1990, the Yakama Indian Nation resolved to close BIA 140 and placed a moratorium on use of BIA funds for construction, operation and maintenance of the Road. ER 28. Ten months later, on July 23, 1991, the Yakama Indian Nation kept BIA 140 as a “closed road” on the reservation which was still owned by the United States in trust for the benefit of the Yakama Indian Nation, but lifted the prior moratorium on using BIA funds to provide road maintenance.

ER 30. On September 27, 1996, due to the fact that the Road was in “definite need of immediate maintenance and repairs,” it was further resolved that the roads (including BIA 140) were “officially made part of the BIA Roads System.” ER 31. None of the Yakama Indian Nation’s resolutions divested ownership of BIA 140 from the United States. ER 28-31.

The declaration of Appellee’s witness, Kurt Fredenberg, relies on a police report explain the location of Appellant’s crash, but fails to include the police report. ER 20-27. Mr. Fredenberg explains the resolutions of the Yakama Nation, but fails to provide any documentation that supports his contention that the BIA is responsible for using federal funding to create and maintain some roads, but not the portion of the road where Appellant crashed. *Id.*

On January 27, 2014, Appellant was driving a work logging truck on BIA 140 and when he came upon a sharp turn, he did not have enough time to slow down (due to the lack of speed limits and curve signs) and his vehicle slid and drove off the road and down a 60 foot embankment. ER 47. It is undisputed that the BIA did not have speed limit signs or warning signs before approaching this sharp curve. ER 47. Appellant’s passenger was killed instantly upon crashing and Appellant suffered severe and likely permanent injuries. ER 48.

On August 16, 2017, the district court granted Appellee's motion to dismiss concluding that it did not have subject matter jurisdiction over this case. ER 4-14. The district court did not decide Appellee's motion under Fed. R. Civ. P. 12(6) and did not decide whether there Appellee was excepted from liability under the FTCA by the discretionary function exception. *Id.* The district court completely disregarded Appellant's request for discovery and an evidentiary hearing on the issue of subject matter jurisdiction. ER 4-14; ER 33-45

V. Summary of the Argument

The district court has subject matter jurisdiction over Appellant's claims because Appellee had the duty to construct, maintain, repair, mark, establish proper signing, and to warn drivers of the sharp curves on BIA 140. Appellee breached its duty and caused damages to Appellant. Appellant met his burden of establishing a prima facie claim of negligence pursuant the FTCA to establish subject matter jurisdiction. The issue of subject matter jurisdiction is intertwined with the merits of the claim of this case (namely whether Appellee was responsible for constructing, designing and/or maintaining BIA 140) to the point that discovery and an evidentiary haring are required to resolve this matter.

VI. Argument

A district court's determination of lack of subject matter jurisdiction is reviewed de novo. *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir.1996).

Appellant is only required to make a prima facie showing of subject matter jurisdiction. *Societe de Codnitionnnement en Aluminium v. Hunter Eng. Co., Inc.*, 655 F2d 938, 942 (9th Cir. 1981). This is the same standard that is used to determine whether there is personal jurisdiction; namely that the plaintiff has produced admissible evidence which, if believed, would be sufficient to establish the existence of personal jurisdiction. *Rancheria v. Bonham*, 872 F.Supp.2d 964, 968 (N.D. Cal. 2012); *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F3d 1122, 1129 (9th Cir. 2003). Moreover, until an evidentiary hearing or trial on the merits, the complaint's uncontroverted factual allegations must be accepted as true, the court will draw reasonable inferences from the complaint in favor of Appellant; and any factual conflicts in the parties' declarations must be resolved in Appellant's favor. *Harris Rutsky*, 328 F3d 1122, 1129; *see Dorchester Fin'l Securities, Inc. V. Banco BRJ, S.A.* 722 F3d 81, 86 (2nd Cir. 2013)(error to resolve factual disputes in defendant's favor before evidentiary hearing).

“Whether a district court has subject matter jurisdiction is a question for the court, not the jury, to decide, even if the determination requires making factual findings, unless the jurisdictional issue is inextricably bound to the merits of the case. *Cameron v. Children's Hosp. Med. Ctr.* 131 F3d 1167, 1170 (6th Cir. 1997). The question of jurisdiction and the merits of an action are considered intertwined where the same statute provides the basis for both the subject matter jurisdiction of

the federal court and the plaintiff's substantive claim for relief. *Warren v. Fox Family Worldwide, Inc.* 328 F3d 1136, 1139 (9th Cir. 2003). In *Kerns v. United States*, for example, the court denied a motion dismiss for lack of subject matter jurisdiction where jurisdiction under the FTCA hinged on the issue of whether the alleged federal employee was acting within the scope of employment when he injured the plaintiff. 585 F.3d 187, 193 (4th Cir. 2009). In cases where the facts underpinning the subject matter jurisdiction issues are inextricably intertwined with the merits, defendants must proceed under Fed. R. Civ. P. 12 (b)(6) or Fed. R. Civ. P. 56, and "the court should resolve the relevant factual disputes only after appropriate discovery." *Id.* The Appellant's motion for lack of subject matter jurisdiction and its allegations that it does not own and is not responsible for the construction, design and maintenance of BIA 140 are the exact same argument, which makes the jurisdictional issue inextricably bound to the merits of this case. The most telling piece of evidence that Appellee owns and/or is responsible for the road is that it has Appellee's department name on it—"Bureau of Indian Affairs Road 140." Furthermore, by their own admission, Mr. Fredenberg declares that at some point between 1940 and 1990, the Appellee, through the Bureaus of Indian Affairs, "contributed to upgrading the road," (ER 25) which proves Appellant's claim that Appellee constructed, designed and/or maintained BIA 140. Even if Appellee constructed and or designed the road a long time ago, it would still be

liable for negligence to Appellant, assuming that Appellant proves the remaining portion of his claim. This also goes directly against Appellee's argument that it did not have any control over BIA 140. This makes it even more necessary to have discovery and an evidentiary hearing on this issue.

This Court has subject matter jurisdiction over Appellee USA pursuant to the FTCA, 28 U.S.C. § 2671 *et seq.*, 28 U.S.C. §§1331, 1332, 1346(a)(2), 2201, and 2202. The United States has waived its sovereign immunity with regard to tort liability under the FTCA “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.” 28 U.S.C. § 1346(b)(1). Appellee USA's claims of lack of subject matter jurisdiction go to the merits of Appellant's claim that alleges that the BIA and/or its agents negligently owned, constructed, designed, and/or maintained BIA 140. Appellant is alleging that Appellee had a duty to upkeep this road (including having proper speed limits and signs), that Appellee breached this duty by failing to have a speed limit or proper signs, and that this breach was the proximate cause of the Appellant's violent crash and damages. These claims are established by the limited information that is currently before this Court: BIA 140 is owned and controlled by USA, it was negligently constructed, designed, maintained and there were no speed limits or proper signs where Appellant crashed, and, as a direct proximate cause, Appellant crashed.

This is sufficient, when these facts are viewed in the light most favorable to the Appellant, to establish that the district court has subject matter jurisdiction.

Alternatively, if this Court is not satisfied that there was sufficient information to establish the lower court's subject matter jurisdiction, it should order the district court to allow discovery into these issues because the issue of jurisdiction is intertwined with the merits in this case—whether Appellee and/or its employees owed a duty to Appellant to have properly construct, and put up speed limits, signage and maintenance on BIA 140. Under this alternative the district court should be ordered to allow discovery and an opportunity to argue the issue with all the relevant information pursuant to Fed. R. Civ. P. 12(i). *See Commodities Export Co. v. U.S. Customs Service*, 888 F2d 431, 436 (6th Cir. 1989).

VII. Conclusion

Appellant prays that this Court find that the district court has subject matter jurisdiction over this case. In the alternative Appellant prays that this Court order the district court to allow discovery and an evidentiary hearing pursuant to Fed. R. Civ. P. 12(i).

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DATED this 7th day of December, 2017

Respectfully submitted,

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I hereby certify that the above brief contains no more than 14,000 words.

/S/ Favian Valencia

Favian Valencia

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