

## **Bitten By The Federal Tort Claims Act** (07/07/20)

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*D.J.S.-W. v. United States of America*, 2020 U.S. Appl LEXIS 19311 (3<sup>rd</sup> Cir. June 22, 2020), is an extraordinarily important case for every practitioner to read who has ever thought of litigating a medical matter in state or federal court. Although it arose in the context of the Federal Tort Claims Act (“FTCA”), it deals with a situation where doctors or hospitals may be “deemed” federal entities under the FTCA. Even a careful attorney may not necessarily know that what was thought and assumed to be a private entity or a state actor is actually considered by law to fall under the auspices of the Federal Tort Claims Act.

Under federal law, entities that receive federal funding to serve medically underserved populations, as well as "health practitioners that such entities employ[,] 'shall be deemed to be [employees] of the Public Health Service." ... [A]n action against the United States under the FTCA is the exclusive remedy for persons alleging 'personal injury . . . resulting from the performance of medical . . . functions' by Public Health Service employees acting within the scope of their employment." *Id.*, at \*3 (internal citations omitted).

In an opinion written by former Attorney General Michael Fisher, the Third Circuit, distinguished prior authority and determined that a lawyer did not properly investigate who the doctor’s employer really was. Plaintiff’s counsel in this case was trashed for not doing his job, including not visiting the health care facility to assure where the doctor really worked and who he was employed by.

This is a highly significant case. More and more facilities are “deemed” federal facilities, meaning that suits against them are FTCA cases., creating a trap for the unwary. Particularly 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. In our office, we make it a practice to call, write, check the indices and do everything we can to assure who the employer is and what their status is. Nevertheless, it is not always easy to determine whether a facility has been “deemed” to be a federal entity.

The other important lesson of this opinion is that you absolutely CANNOT rely on Pennsylvania’s Minor’s Tolling Rule because it does not apply in FTCA cases. Only equitable tolling applies.

The following bullet points should be kept in mind:

- *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.
- **Minor's Tolling Rule does not apply in federal court under FTCA.**
- 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.
- The Court was critical of plaintiff's counsel because he did not take reasonable steps to confirm the defendant Dr. Gallagher's employment status.
- There was nothing extraordinary that prevented plaintiff's counsel from discovering Dr. Gallagher's true affiliations.
- 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 here.
- 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.
- Dr. Gallagher had two different addresses, one of which was Primary Health Network.
- It could easily have been discovered that Dr. Gallagher was employed by Primary Health Network.
- Had counsel investigated Primary Health Network he could have discovered that it was a "deemed" federal entity.
- 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.
- Counsel did not do an adequate investigation, according to the Court.

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. 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. 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.

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. 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. 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.

Here, 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.

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. 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.

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. 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. Plaintiff's own counsel sent record requests to Sharon Hospital and Dr. Gallagher at different addresses. 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. Finally, 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. 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.

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!**

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