

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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STATE FARM INSURANCE COMPANY,  
as Subrogee of Dennis Saladin,

Plaintiff,

v.

ALBERT ERNEST SIMON, and  
UNITED STATES POSTAL SERVICE,

Defendants.

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File No. G89-50658-CA

HON. ROBERT HOLMES BELL

MEMORANDUM OPINION

This is an action by plaintiff State Farm Insurance Company to recover, through subrogation, the amount of insurance proceeds (\$1,137.19) paid to its insured, Dennis Saladin, representing economic damages sustained in an automobile accident allegedly caused by the negligence of defendant Albert Ernest Simon. The action was originally filed in the 63rd District Court in Kent County. It was removed to this Court upon certification by the United States Attorney, pursuant to 28 U.S.C. § 2679(d)(2), that defendant Simon was an employee of the United States acting within the scope of his employment at the time of the accident. The certification was accompanied by notice of substitution of the United States as the only proper party defendant. The following day, the United States filed a motion to dismiss under Fed.R.Civ.P. 12(b)(6), asserting the defense of collateral estoppel. Plaintiff has filed objections to the certification and the motion to dismiss, contending there remain genuine issues

as to material facts.

I. CERTIFICATION OF SCOPE OF EMPLOYMENT

The full text of 28 U.S.C. § 2679(d)(2) provides:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the plan in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

Thus, upon certification that the defendant employee was acting within the scope of his employment, the action shall be removed; the action shall be deemed one brought against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq; and the United States shall be substituted as the party defendant. Further, for purposes of removal, the certification conclusively establishes that the employee was acting within the scope of his employment. The code language is mandatory, leaving the Court little discretionary authority. Plaintiff's bald objection that "there is a serious question of fact as to whether Mr. Albert Ernest Simon was acting within the scope of his employment" is thus ineffective to impede the removal of this action or the

substitution of the United States as defendant.'

## II. COLLATERAL ESTOPPEL

It having been determined that this action is properly brought in this Court against the United States, the Court now addresses the United States' motion to dismiss. The Government acknowledges that it has waived its sovereign immunity from suit under the Federal Tort Claims Act and may be held liable in tort in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. § 2674. The tort liability which plaintiff seeks to impose upon the Government, through

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'Not only is plaintiff's objection unsupported, but it is contradicted by the allegations of his own complaint. Paragraph 7 thereof alleges: "on or about October 8, 1988, . . . the defendant Albert Ernest Simon, as employee of defendant, U.S. Postal Service, was operating his vehicle in the course of his employment and backed into the vehicle operated by Ms. Roberta Saladin."

The Court notes further there is authority for the proposition that the Court is not absolutely bound by the U.S. Attorney's certification and may remand the action to state court upon finding that defendant was not, in fact, acting within the scope of his employment. Nasuti v. Scannell, 792 F.2d 264, 266 n.3 (1st Cir. 1986); Staple v. United States, 740 F.2d 766, 769 (9th Cir. 1984); McGowan v. Williams, 623 F.2d 1239, 1242 (7th Cir. 1980); Seiden v. United States, 537 F.2d 867, 870 (6th Cir. 1976). All these decisions construed and applied 28 U.S.C. § 2679(d) as it existed prior to its amendment by Pub.L. 100-694, (effective November 18, 1988, and applicable to all proceedings pending or commenced on or after that date) and are of questionable continuing vitality. Still, if it were made to appear prior to trial that the United States could not be liable because its employee was not acting within the scope of employment after all, then remand to the state court for suit against the employee in his individual capacity would nonetheless be appropriate. Here, at this juncture, however, plaintiff has neither presented nor proffered any facts tending to undermine the presumptive validity of the U.S. Attorney's certification. Under these circumstances, the substitution of party defendant and removal cannot be disturbed.

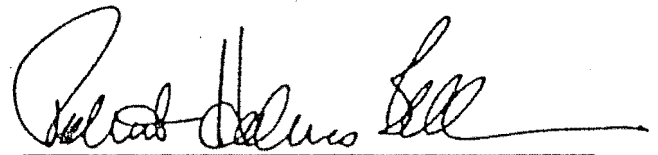
subrogation, is governed by Michigan's no-fault motor vehicle insurance law, M.C.L. § 500.3101 et seq.; M.S.A. 24.13101 et seq. Under this law, the Government contends, tort liability for economic loss caused by ownership, maintenance or use of a motor vehicle is abolished, M.C.L. 500.3135; M.S.A. 24.13135, and may no more be imposed upon the Government than upon a private person. Further, the Government contends, this precise issue has been finally decided, in its favor, in an action between these same two parties in this very Court. State Farm Mutual Automobile Ins. Co. v. United States, (W.D. Mich. File No. G85-991 Civil, Hon. Wendell A. Miles, Bench Ruling, December 1, 1986). Moreover, this ruling has since been deemed conclusive, barring relitigation of the same issue under the doctrine of collateral estoppel. State Farm Mutual Automobile Ins. Co. v. United States, (E.D. Mich. File No. 87-CV-10363-BC, Hon. James P. Churchill, Judgment of Dismissal, June 10, 1988).

The Government's arguments are unrefuted. Indeed, collateral estoppel may apply to preclude relitigation of an "unmixed question of law" between the same parties, even though the issue arises in successive actions involving unrelated subject matter, as long as the facts are virtually identical. United States v. Stauffer Chemical Co., 464 U.S. 165, 170-72, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984); 1B Moore's Federal Practice, ¶ 0.448. Here, the facts alleged are, in material respects, virtually identical to those addressed by Judge Miles and Judge Churchill in the above-cited cases. Plaintiff has not

even alleged any fact differentiation or subsequent change in the law which could possibly justify a departure from these past rulings. Accordingly, these rulings, in disputes between these very parties, that Michigan's no-fault insurance law protects the United States, in the same manner as any private individual, from tort liability for economic loss caused by its ownership, maintenance or use of a motor vehicle, are binding in this action.

The Court concludes, therefore, that plaintiff has stated a claim upon which relief cannot, due to collateral estoppel, be granted. Defendant, United States is entitled to an order of dismissal pursuant to Fed.R.Civ.P. 12(b)(6). The order shall issue forthwith.

Dated: September 21, 1989



HON. ROBERT HOLMES BELL  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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STATE FARM INSURANCE COMPANY,  
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ORDER OF DISMISSAL

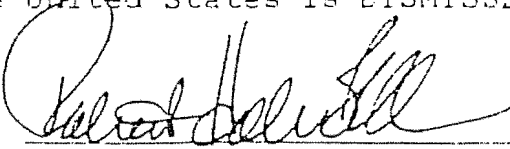
In accordance with the Court's Memorandum Opinion issued on September 21, 1989,

IT IS HEREBY ORDERED that plaintiff's objection to the United States Attorney's certification of scope of employment is REJECTED;

IT IS FURTHER ORDERED that the substitution of the United States as party defendant is APPROVED, and the claim originally brought against Albert Ernest Simon and the United States Postal Service is DISMISSED;

IT IS FURTHER ORDERED that the United States' motion to dismiss under Fed.R.Civ.P. 12(b)(6) is GRANTED; and that, accordingly, the claim against the United States is DISMISSED.

Dated: *September 21, 1989*

  
HON. ROBERT HOLMES BELL  
UNITED STATES DISTRICT JUDGE