

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

NORMA SORACE, ET AL.,

Civ. No. 13-3021

Plaintiff,

PLAINTIFF'S OPPOSITION TO MOTION
TO DISMISS

v.

UNITED STATES OF AMERICA,

Defendant.

Plaintiff resists the government motion to dismiss this action for the reasons stated forth hereafter.

GOVERNING PRINCIPLES

Defendant moves to dismiss this action under Rule 12 (b) (6) alleging the complaint fails to state a claim upon which relief can be granted. However, when such a defense is asserted, the court presumes that all well pleaded allegations are true, resolves all reasonable doubts and inferences in the pleader's favor, and views the pleading in light most favorable to the non-moving party. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007); *Fitzgerald v. Barnstable School Comm.*, 555 U.S. 246, 249 (2009). No claim can be dismissed merely because the trial court disbelieves the allegations or feels that recovery is remote or unlikely. E.g., *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Defendant, at this stage of the proceeding is only entitled to fair notice of the claims and their grounds. See *Telltabs, Inc. v. Makor Issues & Rights, Ltd*, 551 U.S. 308, 319 (2007). Neither "detailed factual allegations," see *Ashcroft v.*

Iqbal, 556 U.S. 662, 668 (2009), nor evidentiary-level factual showing are required, see *Fowler v. UPMC Shadyside*, 578 F3d 203, 213 (3rd Cir. 2009), and plaintiff still enjoys “the benefit of imagination.” See *Bissessur v. Indiana Univ. Bd. of Trustees*, 581 F3d 599, 602-603 (7th Cir. 2009). The facts plead must be sufficient to give rise to a reasonably founded hope that the discovery process will reveal relevant evidence in support of the claims. See *Bell Atlantic*, *supra* at 1974. Plaintiffs are not required to anticipate affirmative defenses nor plead around them in the complaint. See *Richards v. Mitcheff*, 696 F3d 635, 637 (7th Cir. 2012); *Xechem, Inc. v. Bristol-Meyers Squibb Co.*, 372 F3d 899, 901 (7th Cir. 2004). Defendant bears the burden on the motion. See *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F2d 430, 323 (6th Cir. 2008).

In ruling on a motion to dismiss for failure to state a claim, a court focuses principally on the complaint itself, but may, *Davis v. HSBC Bank Nevada*, 691 F3d 1152, 1159-1160 (9th Cir. 2012) (not required but may), consider a small category of additional materials such as exhibits to the complaint if undisputed, *Free Speech v. Federal Election Commission*, 720 F3d 788, 792 (10th Cir. 2013), documents that the complaint incorporates by reference or are otherwise integral to the claim provided they are undisputed, *Young v. Wells Fargo Bank*, 717 F3d 224, 231 (1st Cir. 2013), information subject to judicial notice, *Newman v. Krintzman*, 723 F3d 308, 309 (1st Cir. 2013), matters of public record, *Saterdalen v. Spencer*, 725 F3d 838, 841 (8th Cir. 2013), and concessions by plaintiffs. *Newman v. Krintzman*, *supra*; *Phillips v. Prudential Ins. Co.*, 714 F3d 1017, 1019-1020 (7th Cir. 2013).

Here the government relies upon an affidavit by Edwin Young in support of the motion. This affidavit, as shown by the above authorities, is not of the small category of additional

materials that can be considered by the court unless the motion is converted to one for summary judgment. *Stahl v. U.S. Department of Agriculture*, 327 F3d 697, 701 (8th Cir. 2003)(if court in its discretion considers such material). If considered, the court is obligated to convert the motion to one for summary judgment, *Clatterbuck v. City of Charlottesville*, 708 F3d 549, 557-558 (4th Cir. 2013). Notice of the proposed conversion and opportunity to be heard must be given to the parties. *SBRMCOA, LLC. v. Bayside Resort, Inc.*, 707 F3d 267, 272-273 (3rd Cir. 2013). If the motion is converted, the parties must be given reasonable opportunity for discovery prior to ruling on the converted motion. *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council*, 721 F3d 267, 272-273 (3rd Cir. 2013). The court then determines the motion under summary judgment standards.

Even if the court determines that the motion fails to state a complaint upon which relief can be granted, plaintiff should be permitted to amend the complaint unless an amendment would be futile or inequitable. *Bogie v. Rosenberg*, 705 F3d 603, 608 (7th Cir. 2013). Even when the court doubts that the pleading defects can be overcome, plaintiffs are typically permitted to amend their dismissed pleading at least once. *In re New Jersey Title Ins. Litig.*, 683 F3d 451, 462 (3rd Cir. 2012). In this case, if the court grants the motion, plaintiff requests leave to amend the complaint to cure any defect.

COMPLAINT

The complaint in this case alleges at ¶ 6 and 7 that:

¶ 6. On or about June 30, 2011, numerous reports were made to the Rosebud Tribal Police that a pickup truck was driving erratically through Mission, South Dakota. These calls were ignored and the truck being driven by Shad Dillon was not stopped.

¶ 7. A short time thereafter, Shad Dillon crashed his pickup truck into the 1998 Dodge Intrepid being driven by Melanie Sorace, causing her death and death of her daughter Jahneva Cannaday. This accident also caused injury to the other children in the vehicle, Dominique Harris and Tamaya Sorace.

At ¶ 8, it is alleged that the defendant was negligent because its officers failed to stop the vehicle being driven by Dillon who was intoxicated, failed to stop the vehicle when it was advised that Dillon was driving dangerously, ignored information on Dillon's drunkenness, and failed to act on personal knowledge of erratic and drunken driving.

Under the pleading rules set forth above, the complaint clearly states a claim upon which relief can be granted. There can be no question that an action for negligence, as this case is, lies in this court. 25 USC 450f (d); Indian Appropriations Act, Pub. L. No. 101-512, § 314, 104 Stat. 1915; 28 USC 1346 (b). Claims against tribes, tribal organizations, Indian contractors, and tribal employees carrying out 638 contracts, such as we have in the present case, are covered under the Federal Tort Claims Act (FTCA). *Hinsley v. Standing Rock Protective Services*, 516 F3d 668, 672 (8th Cir. 2008)(applying FTCA to action brought against tribal program operating under Self Determination Act); *FGS Constructions, Inc. v. Carlow*, 64 F3d 1230 (8th Cir. 1995). Negligence actions against tribal police officers employed by tribal agencies receiving Self Determination funds, such as we have in this case, can only be sued under the FTCA. *Allender v. Scott*, 379 F.Supp. 2d 1206, 1220 (D. N.M. 2005). The government cites no case even slightly resembling the facts of this case establishing that this court has no subject matter jurisdiction over a negligence action based on negligence of a tribal police officer employed by a tribal agency receiving funding under the Self Determination Act. See *Goodlow v. U.S.*, 428 F3d 1126

(8th Cir. 2005) (negligence and contributory negligence of Tribal Police Officer).

The government in this case erroneously maintains that plaintiff must satisfy further requirements such as those set out in *Tipton v. Town of Tabor*, 567 NW2d 351 (SD 1997). First, no case is cited for such proposition. No case against a police officer for negligence under the FTCA has adopted or discussed such additional pleading or proof requirements beyond standard negligence pleading requirements. Second, federal law, as cited in the immediately preceding paragraph, provides a negligence cause of action based on a 638 contract, such as we have in this case, without requirement of further proof as the government argues in this case. The Indian Self Determination Act preempts any such requirements. Third, there is no law of the Rosebud Sioux Tribe (the local law to be applied) or even the United States that is analogous to the *Tipton* elements the government argues for in this case. See *Davis v. U.S.*, 536 F2d 758 (8th Cir. 1976) (duties required of OSHA officers are federally imposed and have no counterparts cognizable under Nebraska law).

The government erroneously asserts that pleading requirements in federal court are governed by State standards. Pleading requirements in federal court are governed by the Federal Rules of Civil Procedure, not the laws of South Dakota. Moreover, the government asserts, in effect, that police officers cannot act negligently giving rise to claims for money damages. Such is also not the law as shown by the authorities above.

The government confuses subject matter jurisdiction with failure to state a claim upon which relief can be granted. Without subject matter jurisdiction, there would be no need to file a motion for failure to state a claim upon which relief can be granted. The granting of a motion to dismiss for failure to state a claim upon which relief can be granted is a ruling on the merits and

once final constitutes res judicata. Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 399 (1981); PA Prison Soc. v. Cortes, 622 F3d 215, 247 (3rd Cir. 2010). A court cannot reach the merits of an action without having subject matter jurisdiction.

DUI ENFORCEMENT STANDARDS

1. Code of Federal Regulations

25 CFR 12.12 states that “(t)he Deputy Commissioner of Indian Affairs will ensure minimum standards are maintained in high risk activities where the Federal government retains liability and the responsibility for settling tort claims arising from contracted law enforcement programs. It is not fair to law abiding citizens of Indian country to have anything less than professional law enforcement programs.” 25 CFR 12.14 provides that the “BIA will ensure that all Indian country law enforcement programs are provided a copy of the most current policy manuals and handbooks. Every Indian country law enforcement program covered by the regulations in this part must maintain an effective and efficient law enforcement program meeting minimal qualitative standards and procedures specified in Chapter 68 Bureau of Indian Affairs Manual (BIAM) and the Law Enforcement Handbook.” If these rules are not followed, an officer’s commission can be revoked or any 638 contract for providing law enforcement services can be canceled. 25 CFR 12.13.

25 CFR 11.301 (b) (3) provides that a law enforcement officer shall arrest a person for a criminal offense when they have probable cause to believe that the person has committed an offense.

2. Bureau of Indian Affairs Manual (BIAM)

68 BIAM Supplement 1, Section 3.4, B. Evaluation Criteria, shows that police officers

are required to respond promptly to complaints, arrest and detain where appropriate, be alert on patrol, and know particular problems in an area.

3. Bureau of Indian Affairs Law Enforcement Handbook

BIA Law Enforcement Handbook, § 9, DUI Enforcement, General Information, ¶ 1, Law Enforcement Priority, states that “(t)he enforcement of laws related to operating motor vehicles under the influence of alcohol or drugs is a priority in Indian country.” Under this part dealing with Sobriety Checkpoints at ¶ 11, “(d)river’s are arrested and processed consistent with this section if the tests indicate that there is probable cause to believe the driver is impaired or under the influence of alcohol or drugs.”

The same Law Enforcement Handbook provides at § 3, Traffic Enforcement, General Procedures, ¶ 3, that “officers make a physical arrest in accordance with applicable local, tribal and state laws including but not limited to: A. Violations of traffic laws pertaining to driving under the influence of alcohol or other intoxicants including drugs.”

And the Handbook at Section 6, High Risk Stops, General Information, ¶ 1, states that “(o)fficers are required to stop vehicles that they believe are occupied by person(s) suspected of having committed serious crimes. These stops may create a high risk to the officers and the public.” Under definitions, ¶ 1, High Risk Stops, defines it as a “stop where there is reasonable suspicion leading officers to believe that the occupants of the vehicle are committing, have committed, or about to commit a crime, and circumstances are present which lead officers to believe a potential risk to their own safety or the safety of the public may be present.”

4. Rosebud Sioux Tribal Code

Rosebud Sioux Tribal Code, Title 6, Chapter 1, § 6-1-1, provides that “(a) person may

not drive or be in actual physical control of any vehicle while (1) There is 0.10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath, blood or other bodily substance; (2) Under the influence of an alcoholic beverage... . § § 6-2-1 and 6-3-1 set out the criminal offenses of reckless driving and exhibition driving.

Title 7, Chapter 1, IV (B) (6), states that any officer authorized to make arrests on the Rosebud Reservation may, without a warrant, arrest a person for any offense committed in the presence of the officer or upon probable cause that crime has been committed and that the person arrested committed it although the offense was not committed in the presence of the officer. Compare SDCL 1967 32-23-1.1; 23A-3-2; and 23A-3-2.1.

Title 8, Chapter 6, ¶ 8-6-1, provides that “(e)very person who suffers detriment from the unlawful act or omission may recover from the person in fault a compensation thereof in money, which is called damages. Detriment is a loss or harm suffered in person or property.”

5. South Dakota Compiled Laws

SDCL 1967 32-23-1.3 requires that any person arrested for driving or being in actual physical control of a vehicle while the weight of alcohol in the blood of the arrested person is 0.08 percent or greater, shall be charged with a violation of § 32-23-1.

Mandatory police department regulations have been held to impose a duty to those who could foreseeably be injured by failure to comply. E.g., *Florence v. Goldberg*, 369 N.Y.S.2d 794 (1975), *aff’d*, 375 NE2d 763 (1978); *Sullivan v. City of Sacramento*, 235 Cal. Rptr. 844 (1987); *Jefferson School Dist. v. Justus*, 725 P2d 767 (Colo. 1986). Duties regarding inebriated persons can be mandatory. E.g., *Busby v. Municipality of Anchorage*, 741 P2d 230 (Alaska 1987); *Leake v. Cain*, 720 P2d 152 (Colo. 1986); *Bailey v. Town of Fork*, 737 P2d 1257 (Wash. 1987); *Weldy*

v. Town of Kingston, 514 A2d 1257 (N.H. 1986). Once the government undertakes an activity, it is obligated to use due care to make certain the undertaking is properly carried out. See Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955).

AFFIDAVIT AND DECLARATION

1. Elizabeth Roubideaux Bordeaux. Her affidavit indicates that she was living with Shad Dillon, the inebriated driver of the vehicle that collided with the vehicle plaintiff's decedent was driving causing the damages in this case. She was living with Shad Dillon at the time of the incident. Shad Dillon had been drinking the night before and the day that the fatal collision occurred. Her affidavit indicates that she called the Rosebud Police Department several times reporting that Shad Dillon was drinking and speeding around in the vehicle he was driving. She heard from other people in the community that Shad was drunk, speeding, driving erratically, and running people off the road. After receiving this further information, she called the Rosebud Police Department again and reported Shad Dillon again. The person taking the call indicated that action would be taken. She was told others had reported Shad's erratic and drunken driving to the Rosebud Police Department also.

2. Luke Black Bear. His declaration states that he was a police officer on June 30, 2011, the date of the collision forming the basis of this lawsuit. His declaration indicates that the Rosebud Police Department prior to the collision had received phone calls reporting Shad Dillon's reckless driving near the Ampride Station and Buche's Parking Lot in Mission. Black Bear's brother also observed the reckless driving and reported it to the Rosebud Police Department.

TIPTON ANALYSIS

Even though Tipton elements are not applicable to this case, if they were they would be satisfied. The four elements are to be considered in combination. “Any combination of the following four factors are determinative.” 567 NW3d 355.

First, the affidavits submitted by plaintiff in this case shows that the Rosebud Police Department was called on an number of occasions concerning the danger presented by the drunken driving of Shad Dillon prior to the accident by no less than Dillon’s wife.

Second, there was no failure to use due care by plaintiff’s decedent in the operation of her vehicle that was crashed into by the Dillon vehicle. She was driving in a safe and non-negligent manner. She had not been drinking, but rather was in the vehicle with her children, one of which was killed also. There has never been any suggestion that plaintiff’s decedent failed to use due care.

Third, when reports are made to the police, one can rely from taking of the report that law enforcement will take action to protect from the danger reported.

Fourth, a single or combination of the DUI Enforcement Standards set forth above establish acts required to be taken to protect persons who are exposed to the conduct of people driving under the influence of alcohol. Citizen of Indian country have the right to professional law enforcement programs. Enforcement of laws relating to operating motor vehicles under the influence of alcohol is a priority in Indian country law enforcement. Police officers are required to respond promptly to complaints and to arrest and detain where appropriate. Driver’s who are operating motor vehicles under the influence of alcohol are required to be arrested. Vehicles occupied by persons suspected of having committed crimes and creating a risk to the safety of the

public must be stopped. Officers have the authority to arrest persons driving under the influence. Every person who suffers detriment from the negligent act or omission of another person has the right to seek damages.

The facts of this case under First, Second, and Third elements as set forth above in this brief, or in combination with each other, establish the Tipton factors here. There are sufficient provisions of policy and law requiring mandatory action when the police department received reports of the dangerousness of Shad Dillon.

CONCLUSION

For the above reasons, the motion to dismiss on the grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted must be denied.

Dated December 2, 2013.

/s/ Terry L. Pechota
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CERTIFICATE OF SERVICE

I certify that on the above time and date, I caused to have served a copy of the above opposition along with affidavits upon Cheryl Dupris by electronic transmission.

/s/ Terry L. Pechota
Terry L. Pechota