

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

NORMA SORACE, Administratrix)	
of the Estate of MELANIE SORACE,)	CIV. No. 13-3021 - RAL
Deceased, JAHNEVA CANNADAY,)	
Deceased, Guardian for)	DEFENDANT'S BRIEF IN
DOMINIQUE HARRIS and)	SUPPORT OF MOTION FOR
TAMAYA SORACE,)	SUMMARY JUDGMENT
)	
Plaintiff,)	
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Pursuant to Federal Rules of Civil Procedure (Fed. R. Civ. P.) 12(b)(1) and (b)(6) and Local Rule 7.1(B), Defendant United States of America, submits this Memorandum in Support of its Motion to Dismiss based on failure to state a claim upon which relief can be granted.

INTRODUCTION

This action is brought pursuant to the Federal Tort Claims Act (FTCA). Plaintiff, Norma Sorace (Sorace), Administratrix of the Estate of Melanie Sorace, Jahneva Cannaday and Guardian for Dominique Harris and Tamaya Sorace (Plaintiff), alleges that the Rosebud Sioux Tribe's Police Department (RST LES) was negligent in failing to stop a vehicle driven by an intoxicated driver, Shad Dillon (Dillon) before it collided with the vehicle being driven by Melanie Sorace, decedent. The United States contends that the complaint must be dismissed

for lack of subject matter jurisdiction, failure to state an actionable duty, and for failure to allege sufficient facts to state a cognizable claim.

UNDISPUTED FACTS

On June 30, 2011, around 8:00 p.m., Shad Dillon (Dillon) drove a pickup on a highway running through Antelope, Todd County, South Dakota. See Affidavit of Edwin Young (Young Affidavit) and attached Statement of Factual Basis (SFB). Dillon had been drinking alcoholic beverages, was under the influence of alcohol while driving the motor vehicle and was traveling in excess of the posted 45 miles per hour speed limit. *Id.* Melanie Sorace was driving a car and approached an intersection that crossed the highway. *Id.* As she proceeded through the intersection, Dillon engaged the brakes and skidded into the Sorace vehicle. *Id.* Dillon's pickup impacted the Sorace vehicle. Melanie Sorace and her minor daughter died as a result of the collision. Other children passengers were injured in the motor vehicle accident (MVA). *Id.* Dillon pleaded guilty to Involuntary Manslaughter and was sentenced to 40 months in prison. *Id.* (Amended Judgment- CR 11-30086).

DISCUSSION

a. Motion to Dismiss

Plaintiff bears the burden of proving the Court's subject matter jurisdiction. *Dakota, Minnesota & Eastern R.R. Corp. v. Schieffer*, 715 F.3d 712 (8th Cir. 2013) citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, (1994) ("Federal courts are of limited jurisdiction. . . . It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the

contrary rests on the party asserting jurisdiction.”). Subject matter jurisdiction cannot be waived or ignored. The Eighth Circuit Court of Appeals has “admonished district judges to be attentive to a satisfaction of jurisdictional requirements in all cases.” *Rock Island Millwork Co. v. Hedges-Gough Lumber Co.*, 337 F.2d 24, 26-27 (8th Cir. 1964). “A district court has the authority to dismiss an action for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.” *Johnson v. United States*, 534 F.3d 958, 962 (8th Cir. 2008) and *Deuser v. Vecera*, 139 F.3d 1190, 1191 n.3 (8th Cir. 1998).

Generally, allegations in the complaint are taken as true and disputed issues are construed and all reasonable inferences drawn in favor of the plaintiff. *Titus v. Sullivan*, 4 F.3d 590, 593 n.2 (8th Cir. 1993). However, when the facts in the pleadings are challenged: (1) the court may consider competent evidence outside the pleadings (such as affidavits) to determine the factual dispute; (2) no presumption of truthfulness attaches to the plaintiff's allegations; and (3) the plaintiff has the burden of proving that jurisdiction exists. *Id.* A court may grant a motion to dismiss a complaint under Fed. R. Civ. P. 12(b)(1) for lack of jurisdiction when it “appears beyond doubt that [the plaintiff] can prove no set of facts in support of his claim which would entitle him to relief.” *Carney v. Houston*, 33 F.3d 893, 894 (8th Cir. 1994) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

b. Plaintiff's Failure to Show a Duty Deprives the Court of Jurisdiction

In 28 U.S.C. § 1346(b), Congress gave the federal courts jurisdiction only over those tort claims in which "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." To prevail on a negligence claim in South Dakota, a plaintiff must establish a duty, the breach of that duty, proximate and factual causation, and actual injury. *Fisher Sand and Gravel v. State by and Through South Dakota Dept. of Transp.*, 558 N.W.2d 864, 867 (S.D. 1997). The existence of a duty is the first and often crucial step in determining whether a tort has been committed--for without it there can be no jurisdiction.

The existence of a duty under South Dakota law is a question of law to be determined by the trial court. *Erickson v. Lavielle*, 368 N.W.2d 624, 627 (S.D. 1985). It is the Plaintiff's burden to establish that the Defendant owed the Plaintiff, or in this case, the decedent and her children a duty. *Hoekman v. Nelson*, 614 N.W.2d 821, 824 (S.D. 2000). When the trial court resolves the issue of a duty in favor of the defendant, judgment in favor of the defendant is appropriate. *Id.* at 823.

Plaintiff fails to prove that the RST LES owed her a duty of care. Failure to show a duty under the law of South Dakota, the place where the conduct occurred, deprives the court of subject matter jurisdiction. *Davis v. United States*, 395 F. Supp. 793 (D. Neb. 1975), *aff'd* per curiam, 536 F.2d 758 (8th Cir. 1976).

c. Law Enforcement Has No Duty to Act for the Protection of Individuals

Under common law, there is no duty to protect another person from harm. *Restatement of Torts (Second)* § 314 (1965); see also *Abernathy v. United States*, 773 F.2d 184, 189 (8th Cir.1985). There are exceptions to this rule. A duty may arise from a statute “designed for the benefit of a class of persons which includes the one claiming to have been injured as the result of the nonperformance of the statutory duty.” *Albers v. Ottenbacher*, 116 N.W.2d 529, 531 (S.D. 1962); *Hendrix v. Schulte*, 736 N.W.2d 845, 847 (S.D. 2007) (citing *Kuehl v. Horner Lumber Co.*, 678 N.W.2d 809, 812 (S.D. 2004)) (a duty can be created by common-law or statute.).

The South Dakota Supreme Court holds that a “government owes a duty of protection to the public, not to particular persons or classes.” *Tipton v. Town of Tabor*, 567 N.W.2d 351, 356 (SD 1997) (Tipton II). This public duty doctrine “acknowledges that many ‘enactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm.’” *Id.* (quoting *Restatement (Second) of Torts* § 288 cmt. c (1965)). South Dakota has specifically refused to abrogate the public duty doctrine. *Gleason v. Peters*, 568 N.W.2d 482, 484 (S.D. 1997).

Plaintiff cites no statute establishing a particular or unique duty on the part of police officers (or private persons) to control the conduct of a third party (such as a drunk driver), in order to prevent him from causing the Plaintiff, decedent and her children harm.

d. A Special Relationship is Lacking

Law enforcement has no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless a “special relationship” or sufficient control exists between the actor and the third person which imposes a duty to control the third person’s conduct. *Tipton v. Town of Tabor*, 567 N.W.2d 351, 358 (S.D. 1997) (Tipton II). *Tipton* established a framework for determining whether the special relationship-- exception to the public-duty doctrine-- applies in a given situation. In *Tipton*, the South Dakota Supreme Court established the following factors for determining whether the government has a duty to act for the protection of specific individuals:

- 1) The government’s actual knowledge of the dangerous condition,
- 2) Reasonable reliance by persons on the government’s representations and conduct,
- 3) An ordinance or statute that sets forth mandatory acts clearly for the protection of a particular class of persons rather than the public as a whole, *and*
- 4) Failure to use due care to avoid increasing the risk of harm.

Tipton v. Town of Tabor, 538 N.W.2d 783, 787 (S.D. 1995) (Tipton I). Where allegations are made that a duty exists to prevent the misconduct of a third party, the plaintiff must show: 1) the existence of a “special relationship” between the parties, and 2) that the third party’s injurious act was foreseeable. *Kirlin v. Halverson*, 758 N.W.2d 436, 449 (S.D. 2008) (Employer-Employee); *Abernathy v. United States*, 773 F.2d 184 (8th Cir. 1985) (Mental hospital—

patient). For example, where law enforcement takes custody of a person, thus depriving the person of his power of self-protection, then places the person with persons likely to harm him, the officer may have a duty to exercise reasonable care to furnish the necessary protection, particularly if the presence of notorious desperate characters are likely to make the person incapable of adequately protecting himself.

None of the *Tipton* factors are present in this case. As for the first factor-actual knowledge, Plaintiff alleges generally that “numerous reports were made” to the police that “a pickup truck was driving erratically” through Mission, South Dakota, that “these calls” were ignored, and the truck was not stopped. Insufficient facts are alleged regarding the time these purported reports were made, what information was contained in any report of a dangerous condition, who reported it, and which RST LES employee received any purported report. A public entity “must be uniquely aware of the particular danger or risk to which a plaintiff is exposed. It means knowing inaction could lead to harm.” *Gleason*, 568 N.W.2d at 486 (citing *Tipton II*, 567 N.W.2d at 358).

Mere assertions and speculations do not constitute actual knowledge that any law enforcement officer had specific information regarding the erratic driving of an intoxicated driver prior to the accident. The affidavit of Acting Police Chief Edwin Young establishes that RST LES did not receive any communications regarding a pickup truck driving erratically prior to the accident. Young Affidavit ¶ 3. The first communication the RST LES received

was at 8:18 p.m., after the MVA had occurred. Young Affidavit ¶ 4. Thus, Plaintiff fails to establish that RST LES had any actual knowledge that Dillon was a danger to decedent prior to the MVA.

As to the second factor, Plaintiff has not alleged specific facts regarding any representations, promises or assurances that officers could or would respond.

As to the third factor, Plaintiff has not alleged that at the time of the incident a specific ordinance or statute established a clear procedure for protecting individuals from persons driving intoxicated.

Finally, allegations regarding a failure to use due care to avoid an increased risk of harm is lacking. In the absence of allegations regarding the factors required to show a special relationship, Plaintiff's complaint fails to state a claim.

The argument for absence of a duty is bolstered by South Dakota statutes which provide that a police officer's duty to prevent offenses is a discretionary one. S.D.C.L. § 23-13-1 ("Public offenses may be prevented by the intervention of the officers of justice. . . ."). This statutory classification of a discretionary duty is in accord with the public duty doctrine which refuses to recognize causes of action based on a general duty to provide police protection absent a special relationship (*e.g.*, custody or control over person or property). As recognized by the South Dakota Supreme Court:

Law enforcement entails more than simply reacting to violations; it encompasses the art of keeping the peace. Deploying finite resources to achieve these goals is a legislative function. To allow individuals to influence through private litigation how resources must be disposed would render government administration chaotic and enfeebled. Unrestricted liability might discourage communities from acting at all or encourage action merely to avoid suit, without regard to the common good. The [public duty] rule promotes accountability for offenders, rather than police who through mistake fail to thwart offenses. Otherwise, lawbreaker culpability becomes increasingly irrelevant with liability focused not on the true malefactors, but on local governments.

Tipton, 567 N.W.2d at 356; see also Jayson, *Handling Federal Tort Claims*, Chapter 9 “Duty to Protect” (1997).

The police have no common-law duty to protect individuals from harm inflicted by third parties or to prevent or to respond to crimes against individuals. The absence of a legal duty generally precludes claims for negligence for either failure to act or inadequate action.

* * *

[G]eneral police and other public-official statutory duties have often been held to be either non-mandatory or simply not designed to create private causes of action.

Id. at § 9.01. While there may be a special duty to protect an apparently inebriated individual over whom the police have custody, there is no duty to take an inebriated individual into custody. *Id.* at § 9.07[6]. As to the specific allegation that the police negligently responded to a call for aid, the general rule is that the police are not liable for a total failure to prevent, intervene against, or even respond to crime. *Id.* at § 9.06. In fact, even “an explicit refusal to protect creates no liability, even in the face of a known, clear, and present danger.” *Id.* So, while Plaintiff may argue under *Tipton* that the RST LES had a duty to respond to purported phone calls regarding Shad Dillon,

South Dakota statutes, South Dakota case law, and general principles of police civil liability preclude such a finding.

CONCLUSION

The deaths in this case were tragic. However, Plaintiff's vague allegations are insufficient to establish that the RST LES owed a special duty to protect the decedent (and her children) from the inebriated individual that caused this MVA.¹ Because the facts alleged are not sufficient to state a claim against the United States, the court lacks jurisdiction and the complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b).

DATED this 30th day of September, 2013.

Respectfully submitted,

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¹ Drivers of motor vehicles owe a duty toward all people to operate their vehicles in a reasonable fashion. *Bucholz v. City of Sioux Falls*, 91 N.W.2d 606, 612 (S.D. 1958).