UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

PAUL ARCHAMBAULT, Individually, and as Administrator of the Estate of HARRIET ARCHAMBAULT, Deceased, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	CIV NO. 12-1022 UNITED STATES' REPLY BRIEF

The United States of America, by and through its counsel, Brendan V. Johnson, United States Attorney, and Diana Ryan, Assistant United States Attorney, hereby files its reply to Plaintiff's Responsive Brief to Defendant's Motion for Summary Judgment. For the convenience of the court and the parties, references to documents filed in support or objection to factual arguments will be referred to by the Clerk's docket entry "DE."

I. The Plaintiff Failed To Present Proper Evidence of Authority

The United States is entitled to summary judgment as a matter of law because the plaintiff failed to properly present evidence of his authority to file an administrative FTCA claim on behalf of the estate of Harriet Archambault. The plaintiff does not challenge, or even discuss, the cases of *Mader v. United States*, 654 F.3d 794, 803-04 (8th Cir. 2011), *en banc,* or *Runs After v. United*

States, 511 Fed. App'x 596 (8th Cir. 2013). Instead, he denies factual allegations set forth in the United States' Statement of Undisputed Material Facts, "US-SOF", based upon an affidavit of attorney Rebecca Kidder. *See* Plaintiff's Responses and Objections to Defendant United States' Statement of Undisputed Material Facts, "PR-SOF." *See* DE 40 denying ¶¶ 7, 9, 11, 12, 14, 15, 16, 17 (referencing Kidder's affidavit, DE 43-38). Each one of these factual denials will be addressed in order to demonstrate that the Kidder affidavit falls short of creating **any genuine** issue of material fact that precludes summary judgment on this issue.

The federal rule requires that a party asserting a genuine dispute must support the denial of fact by citing to particular parts of materials in the record. Fed. R. Civ. P. 56(c)(1). The non-moving party may not simply rest on the allegations in the pleadings, but must set forth specific facts, supported by affidavit or other evidence, showing that a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Gates v. Black Hills Health Care Sys.*, 997 F. Supp. 2d 1024, 1029 (D.S.D. 2014) (citing *Gacek v. Owens & Minor Distrib., Inc.*, 666 F.3d 1142, 1145 (8th Cir. 2012). Plaintiff's denials to the US-SOF ¶¶ 22-25 are insufficient to create a genuine dispute because they do not cite to any contrary facts in evidence. For example, plaintiff often admits the testimony was given by the witness, but denies the facts without any contrary factual citations. *See* DE 40 at ¶¶ 22-25. Accordingly, the facts as established by witnesses through their testimony

stands unrefuted and there are no genuine factual issues remaining which would preclude summary judgment in this case.

A. Plaintiff's Alleged Factual Disputes Are Unsupported By Facts Contained in the Record

The plaintiff fails to refute evidence about documentation which was not provided to the agency during the administrative claim. For example, Plaintiff denied US-SOF ¶ 7, relying generally upon Kidder's affidavit. PR-SOF ¶ 7. Paragraph 7 of the US-SOF alleged: "On March 4, 2010, attorney Kidder responded to HHS by providing HHS with additional evidence, including an order from the Standing Rock Sioux Tribal Court titled "Interim Letters of Administration." Ryan Aff., Ex. 3; Ex. 4. The Interim Letters of Administration is dated April 14, 2008. *Id.* at Ex. 4. It appointed Paul Archambault "for the limited purpose of obtaining any medical records, including those held by the Indian Health Service, relating to the care and treatment of Harriet Archambault." *Id.* (*See* DE 33, ¶ 7, referring to DE 34-3 and 34-4).

Comparing the above facts with the affidavit of Kidder and the Interim Letters of Administration, it quickly becomes apparent that there is no genuine, or even *actual,* factual dispute. Kidder references the same date and the same document in her affidavit at ¶ 5. DE 43-38. Her affidavit says, "On March 4, 2010, I prepared and filed a cover letter with attached exhibits including the Interim Letters of Administration issued by the Standing Rock Sioux Tribal Court appointing Paul Archambault, and the Declaration of the Personal Representative Paul Archambault designating Abourezk & Zephier, P.C., as

attorneys for the estate." *Id.* Looking at the Interim Letters of Administration at DE 34-4, it is dated April 14, 2008, and provides Paul Archambault with authority "for limited purpose of obtaining any medical records, including those held by the Indian Health Service, relating to the care and treatment of Harriet Archambault." *See* Interim Letters of Administration, DE 34-4.

Kidder's affidavit adds fact that are wholly *unsupported* by evidence anywhere in the record in that she states she included a Declaration of the Personal Representative Paul Archambault designating Abourezk & Zephier, P.C., "*as attorneys for the estate.*" DE 43-38 (emphasis added). In comparison, the actual Declaration of Representation does not state that he is the Personal Representative of Harriet's estate, and it only authorizes the law firm to act "as my representative for any and all communications, representations, employment, personnel or legal matters and particularly as my representatives in all administrative proceedings or lawsuits before, with, and inquiries or correspondence to the Department of Veteran's Affairs, or its legal counsel in writing . . . " DE 34-5. The declaration is signed by Paul Archambault in his individual capacity. The word "estate" does not appear anywhere in the Declaration of Representation that was provided to the agency. *Id.*

Continuing with the analysis of whether plaintiff's denials create any genuine factual issues, US-SOF ¶ 9 is supported by the Affidavit of Daniel Mendoza, the paralegal specialist for the agency who handled the plaintiff's administrative claim. DE 34-6 at ¶¶ 1-2. According to Mendoza, the Interim Letters of Administration was the only information HHS received regarding the

appointment of Paul Archambault to handle the affairs of Harriet's Estate. *See* DE 34-6, at ¶ 7 (referring to DE 34-4).

Plaintiff generally denies those allegations, again based upon Kidder's affidavit. DE 40 at ¶ 9. However, Kidder's affidavit states she "prepared for filing a cover letter and additional evidence submitted to IHS including a part thereof Exhibit 7, which was a Motion to Amend the Letters of Administration issued by the court previously to clarify that Abourezk & Zephier, P.C. and not Mr. James Cerney was legal counsel." DE 43-38 at ¶ 6. Plaintiff points out that the Motion to Amend clearly stated, "Petitioner was appointed Administrator of the Estate of his deceased wife, Harriet Archambault on April 15, 2008 by order of this Court. Exhibit 1." *Id.*

Kidder does not state that she filed this motion to amend in tribal court. Rather, she states "Mr. Archambault filed this motion," but "if Exhibits 1 through 3 to the Motion to Amend the Letters of Administration filed as Exhibit 7 to the April 9, 2010 sent to IHS *were not filed*, this was solely a clerical error." (Emphasis added). In fact, the Motion to Amend the Letters of Administration was never filed in tribal court. *See* Affidavit of Standing Rock Sioux Tribal Court employee and Civil Activity Sheet for Case # ADM-08-171, Second Affidavit of Ryan, Ex. A.

An unsupported statement in a motion to amend (which was never filed), describing the existence of a document, such as Letters of Administration, is insufficient evidence to prove the actual existence or content of the Letters of Administration. Simply telling the agency that Paul Archambault was

appointed as the executor, without providing a copy of the court order itself, is insufficient. *Cf*. Fed. R. Evid. 1002, 1003 (requiring an original writing or duplicate document in order to prove its content). As the *Mader* case noted, it is far from burdensome to require a representative who is duly appointed to present evidence of that authority. *Mader*, 654 F.3d 803-04.

There is arguably a reason why a copy of the Letters of Administration was not provided to the agency. The Letters of Administration revoked Robin Zephier's authority to represent the estate. *See* DE 34-7. There is no dispute that Zephier and Kidder were law partners in Zephier's firm at that time. To be exact, the Letters of Administration stated "The estate has been represented by Robin Zephier of Rapid City. However, the administrator advised the Court that he has retained James Cerney to represent the estate, instead. The Court approved his retention and all papers in this file shall be served on Mr. Cerney. It will be necessary for Mr. Cerney to evaluate the chose [sic] in action and advise the Court as to any proceedings thereon." *Id*.

In order to present a proper administrative claim, an attorney who claims to represent a claimant must provide evidence of their authority to represent the claimant. Thus, the effect of the Letters of Administration would be to strip the Abourezk and Zephier law firm of authority to proceed any further with the administrative claim. This is consistent with the need for Kidder to prepare a Motion to Amend the Letters of Administration and to offer to provide the agency with a copy of the Amended Letters of Administration upon their receipt from the Standing Rock Sioux Tribe.

Kidder's April 9, 2010 letter stated:

> **Exhibit 7** is the recent Motion to Amend the Letters of Administration issued by the Standing Rock Sioux Tribal Court to confirm legal counsel to the Estate is Abourezk & Zephier, P.C. A copy of the Amended Letters of Administration will be sent upon receipt from the Standing Rock Sioux Tribe.

DE 34-9 at p. 5, ¶ 10(d). There is no mention of any exhibits being included with the motion. Kidder's affidavit does not refute Mendoza's declaration that the only document he received was the Interim Letters of Administration.

With regard to US-SOF ¶¶ 11 and 12, plaintiff denies that the 2008 Letters of Administration provided that the estate of Harriet Archambault was represented by James Cerney, or that after the hearing on April 15, 2008, the Standing Rock Sioux Tribal Court appointed Paul Archambault as the executor to prosecute any civil action on behalf of Harriet's estate and further ordered Cerney to keep the court apprised of the status. DE 40 at ¶¶ 11-12. A review of the Letters of Administration however, reveals no genuine factual dispute in that the Tribal Judge approved Paul's appointment as executor, but ordered the retention of attorney James Cerney "to represent the estate." DE 34-7. Plaintiff's denials should be wholly disregarded.

With regard to US-SOF ¶ 13, plaintiff admits that Attorney Cerney did not provide HHS with a copy of the Letters of Administration appointing Paul Archambault as the executor of Harriet's estate, but adds that Cerney provided an Affidavit to Kidder. Cerney's affidavit creates no factual dispute as his affidavit states only that he was not retained to represent the Estate of Harriet

Archambault or to represent Paul Archambault as the Administrator of the Estate. DE 34-11. Cerney's affidavit fails to refute the factual allegation that Cerney, who was duly appointed by the court to represent the estate, did not provide evidence of the Letters of Administration to the agency.

With regard to US-SOF ¶ 14, the factual allegations involve the April 9, 2010, letter sent to the agency, which plaintiff denies. *See* DE 33 and DE 40 at ¶14. Paragraph 14 alleges, "[o]n April 9, 2010, attorney Kidder sent additional documents to HHS." Ryan Aff., Ex. 9 [now DE 34-9]. Kidder provided HHS with a copy of a Motion to Amend the Letters of Administration issued by the Standing Rock Sioux Tribal Court "to confirm legal counsel to the Estate is Abourezk & Zephier, P.C." Kidder goes on to state, "A copy of the Amended Letters of Administration will be sent upon receipt from the Standing Rock Sioux Tribal Court." DE 33, ¶ 14. Again, a direct comparison of these allegations with the letter itself reveals that plaintiff's denial creates no factual issue. *Cf.* DE 34-9 (containing exact language quoted from Kidder's letter).

With regard to US-SOF ¶ 15, the factual allegation denied was "Kidder also provided HHS with a copy of the Motion to Amend Letters of Administration, dated March 16, 2010, which was provided to HHS." Ryan Aff., Ex. 10 [now DE 34-10]. No exhibits were attached to this Motion. *See Id.* at Ex. 6 [now DE 34-6]. These facts were addressed with respect to US-SOF ¶ 7 above, since the claims specialist indicated the only evidence he received in this case was the Interim Letters of Administration. DE 34-6, ¶¶ 7, 8, 10. Mendoza's declarations are consistent with the fact that the administrative file

the AUSA received from the agency did not contain letters appointing the Personal Representative. DE 34-8; DE 34-4. It is also consistent with the fact that the agency sent the denial letters to the Abourezk & Zephier law firm. If the agency had received a court order appointing Cerney as the attorney for the estate, they would have sent future correspondence to Cerney.

The failure to provide the agency with a copy of the Amended Letters of Administration was admitted by the plaintiff. See Affidavit of Mendoza, DE 34-6 at ¶10. To date there has never been any copy of the Amended Letters of Administration produced, which is due to the fact that the motion to amend the Letters of Administration was never actually filed with the Tribal Court.

Turning to the US-SOF ¶ 16, the factual allegations involves the Affidavit of James Cerney, which was provided by Kidder to the agency. It is a mystery why the plaintiffs would want to deny these facts. DE 40, ¶ 16. Kidder's affidavit states she does not know how the agency received the Cerney affidavit, which was Exhibit 3 to the Motion to Amend Letters of Administration. Her lack of knowledge does not create a genuine factual dispute. Cerney's affidavit goes to the issue of which law firm at which time period was hired to represent the Estate, not to the appointment of the Personal Representative of the Estate.

With regard to US-SOF ¶ 17 and the fact that the HHS never received a copy of the Amended Letters of Administration for Harriet Archambault's Estate, the plaintiff again denies this fact, but fails to offer any proof, either in Kidder's Affidavit or elsewhere, that the Amended Letters of Administration were obtained from the Standing Rock Sioux Tribal Court and then forwarded

to HHS. Once more, the denial is wholly unsupported and the facts should be deemed admitted. Kidder's affidavit supports, at best, plaintiff's argument that HHS was told in the motion to amend about the Letters of Administration and that they were seeking Amended Letters of Administration. However, the fact remains that plaintiffs were unable to provide a copy of the Amended Letters of Administration to HHS because they do not exist.

The bottom line is that through the confusion and error apparently caused by Paul Archambault's change of attorneys, the agency was not provided proper evidence of Paul Archambault's authority to represent the Estate. According to the claims specialist (Mendoza) and the unrefuted documents submitted in support of the United States' motion for summary judgment, the agency received a copy of the Interim Letters of Administration giving Paul access to Harriet's medical records, and a copy of a Motion to Amend the Letters of Administration. DE 34-4 and DE 34-10. Authority for the "limited purpose of obtaining any medical records, including those held by the Indian Health Service, relating to the care and treatment of Harriet Archambault" is clearly insufficient proof that Paul had court appointed authority to act as the Personal Representative on behalf of Harriet's Estate.

B. Plaintiff's Argument that the Agency Did Not Provide Proper Notice of Denial Fails As A Matter of Law.

Plaintiff protests that the agency never raised lack of personal representative "as reason for denial of the FTCA claim." Providing reasons for the denial of an administrative FTCA claim is discretionary. The regulations state "[t]he notification of final denial *may* include a statement of reasons for

the denial and shall include a statement that, if the claimant is dissatisfied with the agency action, he may file suit in the appropriate U.S. District Court not later than 6 months after the date of mailing of the notification." 28 C.F.R. § 14.9 (emphasis added). The use of the word "may" is permissive and not mandatory. The statement of reasons may be only partially given if a claim is denied on a factual basis as other bases may not have been fully considered by the claims specialist. In addition, the holding of the *Mader* case, confirming that the proper presentment of an FTCA administrative claim is jurisdictional, was a new change in the law which went into effect in 2011.

It is not uncommon for litigation to develop jurisdictional or factual defenses that were not noted as a reason in the agency's administrative denial. In fact, the Letters of Administration at issue in this case were only received by the government after they were requested by the AUSA as part of the discovery process after the case was filed. *See* DE 34-8. This fact was admitted by plaintiffs. DE 40, ¶ 10.

The need to develop further facts through discovery is also why the Answer filed by the United States in this case contained language sufficient in the Affirmative Defenses to preserve the jurisdictional defense that the plaintiff failed to properly exhaust administrative remedies. *See* DE 12 at ¶ 16 (this Court lacks jurisdiction because plaintiff failed to exhaust his administrative remedies pursuant to 28 U.S.C. § 2675(a)); ¶ 17 (Defendant asserts that it may have additional defenses which are not known at this time, but which may be

ascertained through discovery. Defendant specifically preserves these additional defenses as they are ascertained through discovery).

One of the main cases discussing the application of 28 C.F.R. § 14.9 is from the Ninth Circuit Court of Appeals in *Hatchell v. United States*, 776 F.2d 244 (9th Cir. 1985). In *Hatchell*, a prisoner alleged that the Bureau of Prisons did not issue a sufficient denial of his administrative claim; thus, his district court action was not barred by the applicable statute of limitations. The Court disagreed and concluded the agency's denial letter was permissible when it was sent to prisoner's attorney, it stated that the claim was denied, the letter stated it acted as notice of denial, it stated that suit must be brought within six months of the letter, and it "also contained the reasons for rejection of the claim." *Id.* at 245. The Court noted that these factors met the requirements contained within 28 C.F.R. § 14.9. Moreover, the Court said "[w]e decline to require any specific verbal formulation to ensure compliance with the regulations governing denial of claims." *Id.* at 245-46.

Other circuit courts have also interpreted other precise language within 28 C.F.R. § 14.9 and have strictly construed the actual language in the regulation. For instance, in *Jackson v. United States*, 751 F.3d 712 (6th Cir. 2014), the Sixth Circuit Court of Appeals analyzed whether the sixth month statute of limitations found within 28 U.S.C. § 2401(b) was triggered when a denial letter was mailed to the claimant's attorney, but it was never actually received by claimant's attorney. The Court concluded that the statute only required mailing rather than receipt of the denial letter. The claimant argued

that the denial letter should have been sent to both the claimant and claimant's attorney. The Court rejected this argument, finding that regulation § 14.9 only required that "[f]inal denial of an administrative claim shall be in writing and *sent to the claimant, his attorney, or legal representative by certified or registered mail*." *Id.* at 717 (emphasis in original) (citing 28 C.F.R. § 14.9(a)). The Court explained that to argue that the regulation mandated mailing the letter to **both** claimant and his or her attorney would amount to "reading an additional requirement into this regulation" and that such an interpretation "runs counter to a court's duty to construe waivers of sovereign immunity in favor of the government." *Id.* at 718 (citing *Lane v. Pena*, 518 U.S. 187, 192 (1996)). Likewise, to require the administrative denial here to contain a full and complete statement of reasons would be reading an additional requirement into the regulation that is not mandatory and would not be in accord with construing waivers of sovereign immunity in favor of the government.

After the *Mader* case, there can be no question that providing proper authority to present a wrongful death claim on behalf of an Estate is a jurisdictional requirement. *Mader,* 654 F.3d at 803-04. Because the facts support the finding that the agency in this case was not properly presented with evidence of Paul Archambault's authority to present a claim on behalf of Harriet's Estate, the United States is entitled to summary judgment as a matter of law, and plaintiff's case should be dismissed.

II. The Discretionary Function Exception Applies to Screening, Hiring, Investigating, Training and Supervising Medical Employees

At the beginning of his opposing brief, the plaintiff characterizes two different causes of action against the United States: 1) medical malpractice; and 2) "failing to reasonably screen hire, investigate, train, and/or supervise medical (federal) employees." It is only with respect to the failure to screen, hire, investigate or train its employees to which the discretionary function bars suit. The United States does not advocate that the employees had discretion as to the medical malpractice claim.[1]

The law in the Eighth Circuit is that the discretionary function exception to the FTCA bars suits arising out of allegations of negligent screening, hiring, training, or supervising employees. *Big Owl v. United States*, 961 F. Supp. 1304, 1308 (D.S.D. 1997) (finding that discretionary function exception precluded district court from second guessing tribally controlled school board's hiring decisions); *Red Elk v. United States*, 62 F.2d 1102, 1107 (8th Cir. 1995) (concluding that discretionary function precludes suit for negligent hiring and selection of police officers); and *Locke v. United States*, 215 F. Supp. 2d 1033, 1045 (D.S.D. 2002) (stating the discretionary function precludes negligent hiring and supervision claim). In order to refute this defense, the plaintiff must show there is a mandatory statute or regulation concerning the screening, selecting, or training of the federal employees.

[1] The medical standard of care and causation issues related to plaintiff's claims of malpractice will be addressed in the final portion of the government's reply brief.

Plaintiff's response is to refer generally to congressional mandates to provide health care services to Native Americans and to the Ft. Laramie Treaty of 1868.[2] However, nothing is cited that would take away the discretion of the IHS administrators concerning how to regulate and provide oversight of a health care clinic; including the screening, hiring, investigating, training, and supervision of employees. Such human resource-based decisions remain the product of discretionary administrative choices.

Plaintiff offers the December 27, 2007, memo as evidence to rebut the discretionary function exception. The memo was written by the McLaughlin IHS' clinic administrator. It stated, "At this time, the McLaughlin Health Center has only one provider, which limits the amount of patients that can be seen daily. There have been 10 patients seen in the morning and 10 patients in the afternoon." DE 34-19. Plaintiff maintains that it was "illegal" for the

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[2] With regard to physicians, the Ft. Laramie Treaty of 1868 states:

> "The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons." (Article XIII).
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> "At any time after ten years from the making of this treaty, the United States shall have the privilege of withdrawing the physician, . . . but in cases of such withdrawal, an additional sum thereafter of ten thousand dollars per annum shall be devoted to the education of said Indians, . . ." (Article IX). 15 Stat. 635.

This treaty language does not describe the manner or quantity or procedures by which said physician should be furnished, and thus, the manner in which the physician is furnished is left to the discretion of the agency.

administrator to post this memo because it circumvents the mandate to provide care to Native Americans. However, focusing on this memo only highlights that local administrators must make executive management decisions based upon changing staffing conditions. Such decisions or acts concerning the day-to-day operation of the clinic are by their very nature discretionary. Certainly, this memo is not evidence of the violation of any mandatory statute or regulation, nor is it illegal.[3]

Four cases cited by plaintiff are distinguishable because they do not involve allegations of negligent screening, hiring, investigating, training. or supervising employees. First, *Whisnant* involved an exposure to toxic mold at the Navy commissary where the court found that cleaning up mold involved professional and scientific judgment, not policy analysis. *Whisnant v. United States*, 400 F.3d 1177, 1183 (9th Cir. 2005). Second, *Medicine Bear* arose out of alleged negligent management of safety precautions by using untrained employees in an inherently dangerous timber logging operation in a high wind area. *Medicine Bear v. United States ex rel. Sec'y of Dep't of Interior*, 241 F.3d

[3] Plaintiff's reference to Emergency Medical Treatment and Active Labor Act (EMTALA) and those cases are not applicable since the McLaughlin IHS is not a hospital with an emergency room. EMTALA is a statute designed to prevent the practice of "patient dumping" which is the practice of hospitals refusing to treat patients who are unable to pay. 42 U.S.C. § 1395dd. EMTALA requires a hospital to provide the same medical screening and emergency stabilization services to all emergency room patients, regardless of their ability to pay. *Id.* Payment for services is not an issue at any IHS facility. Courts across the nation have observed that EMTALA is not intended to be used as a federal malpractice statute. *See Guzman v. Mem'l Hermann Hosp. Sys.*, 637 F. Supp. 2d 464, 479 (S.D. Tex. 2009)(collecting cases nationwide, including *Root v. Liberty Emergency Physicians, Inc.*, 68 F. Supp. 2d 1086 (W.D. Mo. 1999) *aff'd* 209 F.3d 1068 (8th Cir. 2000).

1208 (9th Cir. 2001). Next, *Gotha* involved the failure of the Navy to provide a railing and lights on a footpath leading to one of its buildings. *Gotha v. United States*, 115 F.3d 176 (3d Cir. 1997). Finally, the *Routh* case involved the failure of a backhoe used in a road clearing project in Alaska to have a falling object protection system. *Routh v. United States*, 941 F.2d 853 (9th Cir. 1991). Overall, these cases can be read to say that known and obvious safety precautions are not discretionary. However, none of those cases addressed the discretionary function exception as it applies to human resource-based decisions like hiring, screening, training or supervising an employee or staffing a remote clinic based on limited resources.

The other case cited by the plaintiff, *Fang*, actually supports the position taken by the government in this case because, the court did not apply the discretionary function to the medical malpractice claim, but held that the United States remained fully protected by the discretionary function defense with regard to decisions regarding where the rescue equipment is kept at the various Park stations and the EMT training level of the persons stationed at the various stations. *Fang v. United States*, 140 F.3d 1238, 1242 (9th Cir. 1998). The court found "park administrators must exercise their own policy-based judgment and discretion to determine how best to allocate available resources throughout the various park locations." *Id.*

Furthermore, in the *Gaubert* case, the U.S. Supreme Court held that decisions concerning the regulation and oversight of a bank are "fully grounded in regulatory policy." *Gaubert v. United States,* 499 U.S. 315, 325 n.7, 332-34

(1991). Our courts have likewise held that hiring, screening, supervision and training decisions involving the operations of a tribal school, a tribal police force, or the operation of a tribal child protection agency also fall within the discretionary duties performed by agency personnel. *See Big Owl*, 961 F. Supp. at 1308; *Locke,* 215 F. Supp. 2d at 1045; *Red Elk*, 62 F.2d at 1107; *Hinsley v. Standing Rock Child Protective Servs.*, 516 F.3d 668 (8th Cir. 2008) (finding the discretionary function bars suit for failure to warn about abuse history of child placed in plaintiff's home).

Similarly, the United States urges the court to find that the operation and oversight of the medical clinic as to the screening, hiring, training, investigation, and supervision of its employees is fully grounded in administrative and regulatory decisions that involve balancing a multitude of social, economic, and political policy decisions. The plaintiff's complaint that Harriet had difficulty being seen by the clinic arises from allegations that the IHS negligently staffed the clinic. Such decisions fall squarely within the decision-making authority that the discretionary function exception is designed to shield. In balancing IHS resources, agency guidance recognizes that choices involving allocation of resources "must reflect the best programmatic judgment of experienced senior officials as tempered by consideration of the IHS mission, legislative intent, and the expressed values and desires of Indian peoples and tribes." *See* IHS Circular 92-5 Budget Execution Policy (Allocation of Resources), DE 34-22 at 24-25. Circular 92-5 provides:

> A critical element in the delivery of health care to the American Indians and Alaska Natives is the management of the IHS program. The complexity and geographical dispersion of the IHS program requires a decentralized management system that permits decisions to be made at the organizational level closest to the sources of information and expertise thereby creating flexibility resulting in more timely and appropriate responses to unique situations.

DE 34-22 at p. 9, ¶ 5.

Agency decisions that involve how to allocate resources among the different IHS service units across the nation include hiring decisions, training, supervision, and investigatory decisions. These are all discretionary agency functions that do not give rise to tort liability. Certainly economic policy decisions come into play based upon Congressional appropriation levels, but so do things like geographic location, eligible patient populations, disease trends, the variety of health care programs and the facilities available (hospitals, emergency rooms, clinics, dental care, eye care, pharmacies), contract health service and tribal contracting options, and Native American hiring preferences. Staffing decisions are affected by all of these economic, social, and even political policy considerations. Accordingly, plaintiff's allegations as to negligent screening, hiring, investigating, training, or supervision of medical employees at the McLaughlin IHS should be dismissed for lack of subject matter jurisdiction. 28 U.S.C. § 2680(a); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984); and *Gaubert,* 499 U.S. 315, 325 (1991).

III. There Was No Violation of the Standard of Care

A. There Is No Liability For Failing to Treat Symptoms that Were Never Reported to IHS Staff

Dr. Bux's opinion is based upon the unsupported assumption that Harriett presented at the IHS clinic with acute changes in her medical condition after her October 25, 2007, appointment. Specifically, Dr. Bux claims Harriet repeatedly "presented at the clinic with shortness of breath, chest pain, dizziness and nausea," but she was turned away. DE 43-37. As set forth below, the evidence in this case does not support this factual assumption, and the plaintiff offers no proof that creates a genuine issue of fact.

Obviously, Dr. Bux would have no first-hand knowledge of the information regarding how Harriet presented herself at the clinic. The person with this knowledge of this would be the patient registration clerk, Trina Fischer. Fischer has no recollection of Harriet trying repeatedly to be seen at the clinic, but she did recall seeing Harriet waiting in line once and leaving when Fischer told the patients before Harriet that the clinic walk-in availability was full. Fischer did not speak with Harriet on that day. DE 33, ¶ 76.

In addition, Fischer recalls Harriet at the clinic on the afternoon of November 26, 2007, the day before she died. Harriet came to the clinic and asked to be seen as a walk-in patient. Fischer told her that the clinic had no availability for more walk-ins that day.[4] Harriet smiled politely and said, "O.K.,

[4] November 26, 2007, was an especially busy day at the IHS Clinic because the obstetrical specialist was there to see patients. The IHS patient resource system showed that on that day the three providers at the McLaughlin clinic

thank you," and left. DE 33, ¶ 77. Harriet did not tell Fischer that she was experiencing any chest pain, shortness of breath, dizziness, or nausea. *Id.* Fischer testified if Harriet would have indicated she was having chest pains, difficulty breathing, or dizziness, Fischer would have directed her to go to the nurses' station or called the nurse to come and get Harriet for evaluation. DE 33, ¶¶ 63, 79.

Fischer's testimony about how she would have handled a patient who complained of chest pain, shortness of breath, or dizziness is consistent with the testimony of Martinez, the provider who treated Harriet on October 25, 2007. Martinez explained that if a walk-in patient came to the McLaughlin clinic and complained of these symptoms, the nurse would have assessed them and informed the provider on duty so a decision could be made as to whether the patient needed to be sent by ambulance to a higher level of care. *Id.* ¶ 94. The former patient registration clerk at McLaughlin IHS, Debra Wimmer, also indicated that if a patient informed her that they were experiencing chest pain, shortness of breath, or dizziness, the patient was immediately taken to the nurses' station to be evaluated by a provider. *Id.*

Both Wimmer and Fischer confirmed that prior to, and during the time of Harriet's treatment in 2007, there was a sign posted at the patient registration window where walk-in patients signed up. The sign instructed patients who are experiencing shortness of breath, chest pain, or dizziness to notify the nurse or

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saw 43 patients. DE 33, ¶¶ 74-75. The regular providers saw 31patients, while an additional 12 patients were obstetrical patients treated by Dr. Obritsch. *Id.* ¶ 78.

seek immediate help. DE 33 ¶¶ 64, 80. A non-government witness, who also happens to be a cousin of Harriet's, verified the existence of this sign, stating that it has been at the McLaughlin IHS clinic as far back as he can remember, and that he has followed the directions in the sign and received immediate help for his symptoms. *Id.* at 66-68.

Plaintiff denies the testimony of Fischer, Wimmer and Martinez on these facts as "self serving" and "contradicted by the December 27, 2007 memo." *See* DE 40 ¶¶ 59-61, 69-80, 82-83, 85-87, 94, 114-115. However, the December 27, 2007, memo is nothing more than a general snapshot of what was happening at the McLaughlin IHS one month after Harriet's death at a time when the clinic had only one provider.

The memo does not refute what Harriet said when she came to the clinic. It sheds no light on the sign posted urging patients with chest pain, shortness of breath, or dizziness to seek immediate help, or to the process followed by the staff when a patient presents with an urgent need to be seen. The plaintiff's general denials are insufficient to contradict the factual testimony of witnesses or create genuine issues of fact. There is absolutely no evidence that Harriet ever presented herself at the McLaughlin IHS clinic and complained of chest pain, shortness of breath, dizziness, or nausea, and the United States is entitled to summary judgment in its favor as it cannot be held liable for failing to treat symptoms that were never reported to IHS staff.

B. Plaintiff's Expert Does Not Address Cardiology Standards of Care

Plaintiff contends that Harriet's complaint of heartburn at her visit on October 25, 2007, should have prompted nurse practitioner Martinez to order a cardiac workup. For this argument, the plaintiff cannot rely upon his expert because Dr. Bux's report does not even mention heartburn. The plaintiff contends that the government's expert, Dr. Rand, agreed that "heartburn symptoms can be an indicator of cardiac problems." However, a review of Dr. Rand's actual testimony reveals he stated "heartburn could be construed as pain in the chest." Rand dep. at 71:24, (Ryan Second Affidavit, Exhibit B); and DE 34-26. The difference between those two statements is critical.

First, the patient would, in fact, need to report chest pain before heartburn could be construed as chest pain. Factually, Harriet did not report her heartburn as being chest pain. Martinez noted that Harriet complained of "heartburn episodes." *See* DE 34-15 at 15-12 (medical records); Martinez dep. DE 34-29 at 23:4. Dr. Rand explained, "[h]eartburn is caused by gastroesophageal reflux. Excess acid production in the stomach causes irritation in the stomach or up into the esophagus and is sometimes associated with an ulcer." *Id.* at 71:19-22 (Ryan Second Affidavit, Ex. B).

Second, there are a variety of cardiac problems, but the relevant cardiac problem is the one which caused Harriet's untimely death. Both pathologists agree that Harriet died of a sudden arrhythmia brought on by cardiomegaly or left ventricular hypertrophy, i.e., an enlarged heart. When Dr. Rand was asked whether heartburn would be an indicator of an enlarged heart, his reply was,

"symptoms of an ulcer that a person has had for years would not indicate a higher likelihood of developing left ventricular hypertrophy or cardiomegaly." *Id.* at 22:17-23.

Dr. Rand testified that people who get a dilated cardiomyopathy are prone to developing symptoms of heart failure. *Id.* at 18:5-6. The symptoms of heart failure "include shortness of breath with exertion, sometimes chest pain, development of swelling in the abdomen or lower extremities, decreased exercise tolerance." *Id.* at 18:13-16; 29:11-14. However, in reviewing Harriet's medical record, Dr. Rand concluded "there was no notation of symptoms of those types." *Id.* at 18:20-22 and 29:3-21.

At the October 27, 2007, visit, Harriet denied any shortness of breath. DE 35-15 at 15-12; DE 34-29 (Martinez dep. at 23:3-5). Martinez testified that Harriet had no new symptoms—such as fluid retention, crackles in the lungs, or shortness of breath, dizziness, fatigue, or chest pain—that would have warranted a more extensive medical examination or additional tests. *Id.* at 62:8-25, 63:1-9. Dr. Rand agrees with Martinez's decision that further cardiac testing was unwarranted based upon Harriet's October 27, 2007, presentation. Without the presence of symptoms, ordering an echocardiogram would have fallen outside the standard of care. Ryan Second Affidavit, Exhibit B at 29:20-21. "In current practice, routine hypertension is not an indication for echocardiography." *Id.* at 29:25-30:1. The plaintiff offers no expert testimony in rebuttal to this testimony by Dr. Rand, and accordingly, there is no factual

dispute that the standard of care was not met with regard to the treatment provided to Harriet on October 25, 2007.

Dr. Rand further explained that even if the nurse practitioner had ordered an echocardiogram, which would have diagnosed Harriet's left ventricular hypertrophy, Harriet's treatment would have been to counsel her on the importance of taking her medication regularly to control her high blood pressure. Ryan Second Affidavit, Ex. B at 30:8-25. ("A patient who was found to have left ventricular hypertrophy due to hypertension would be counseled as to that blood pressure control is important, and having improved blood pressure control would be expected to help improve the thickening of the heart."). *Id.* at 21-25.

In Harriet's case then, even if she had a full cardiac workup, "she would be put on medications, most typically a diuretic and an ACE inhibitor." *Id.* at 31:1-6. This is the exact treatment she received. *Id.* Accordingly, the alleged failure to order an echocardiogram based upon Harriet's complaint of heartburn would not have changed the findings, treatment or outcome in this case, or even if there was a breach, there was no harm or injury.

Dr. Rand's opinion was that Harriet showed no symptoms at her October 25, 2007, visit that would have required a cardiac workup, but that even if one had been done to diagnose Harriet's enlarged heart, her treatment would not have been altered. Under these facts, the plaintiff cannot establish either negligence or causation, and the United States is entitled to summary judgment in its favor.

C. The Pharmacy Was Not Negligent

At page 13 of the opposition brief, plaintiff asserts that Harriet "was advised she needed to see a doctor in order to refill her prescription." There is no citation to the record supporting this allegation. Martinez testified that Harriet did not have to be seen in order to get her medication refilled. DE 34-29 at 24:9-12. The pharmacist confirmed that Harriet had two remaining refills on her prescription, so all Harriet had to do was let the pharmacy know she was out of medication, and the pharmacy would have refilled it. DE 34-33 at 12:17-25, 18:1-13. In addition, the pharmacist testified he would not have allowed Harriet to go without medication. If a patient is out of medication and is unable to be seen by a doctor, the pharmacist would give patients at least a week or two of medication to tide patients over so that they do not go without medication. *Id.* at 7:21-25, 8:1-6.

The plaintiff contends that Paul Archambault called the clinic on the morning of Harriet's death and spoke with someone in the pharmacy unit. He said someone in the pharmacy told him Harriet needed to be seen before her meds could be refilled, which is why he made an appointment for Harriet to be seen that afternoon. The citation for this is Paul Archambault's affidavit (Ex. 47), now DE 43-47. In that affidavit, however, he only states that he called the clinic and spoke to at least two or three different employees that morning and confirmed the medical appointment for Harriet.

The government does not dispute that Paul called the clinic on the morning of November 27 to make an appointment for Harriet because it

provided plaintiff with affidavits from the two employees who spoke with him, Jewell Schnell and Debra Wimmer. (DE 34:23, *see* Affidavit of Wimmer and Schnell). What is troubling, however, is that at his deposition, Mr. Archambault adamantly denied that he called the clinic on the morning of November 27, 2007, or ever, about Harriet, and he specifically denied making an appointment for Harriet on the day of her death. *See* Ryan Second Affidavit, Ex. C, Paul Archambault dep. at 45-49. His denials may are summarized as follows:

Q: That day [November 27, 2007] did you call the clinic?

A: No.

Q: Let me grab the affidavits.

A: No, I never called.

Q: (Reading Wimmer affidavit).

A: I don't recall ever calling them that morning because I wasn't home.

Q: You don't recall ever calling the clinic—

A: No.

Q: ---and talking to them about Harriet, ever?

A: No.

Q: (Reading Schell affidavit).

A: No.

Q: Did that happen?

A: No, because I left . . . . I did not call or make any appointments.

A: I don't recall or remember ever calling this – either one that day

A: . . . I don't recall or remember ever calling these guys that day.

There is no evidence that Mr. Archambault spoke with anyone in the pharmacy on the morning of November 27, 2007. At his deposition, Mr. Archambault said that one time, which might have been prior to October, he went to the IHS and personally spoke with pharmacist Mike Carter about Harriet getting medication. *Id.* at 49:13-24.

Mr. Archambault's former testimony seriously undermines his credibility that he now claims to remember calling the pharmacy on the morning of November 27, 2007, and being told that Harriet needed to be seen by a doctor. This is especially true in light of the pharmacist's testimony that the pharmacy records showed Harriet had two refills remaining on her prescription and Carter's testimony, "I don't know why she didn't just call me and have it refilled. That was my question, but no one will know the answer to that I don't think." DE-34-33 at 14:6-9. There was no negligence on the part of the IHS pharmacy employees who would have refilled Harriet's prescription upon being asked to do so.

Harriet had filled her medications at the McLaughlin clinic her entire life. She knew or should have known how to follow the refill procedures, which were not difficult. In addition, the police officer who responded to the Archambault residence after Harriet's death documented that she still had four tablets of Lisinopril left, which means that she still had her main high blood pressure medication available. DE 34-25. Thus, the plaintiff's causation argument also fails because Harriet still had high blood pressure pills remaining. Accordingly,

this aspect of plaintiff's case should also be resolved and the United States is entitled to summary judgment in its favor.

CONCLUSION

Based on the foregoing, the United States respectfully requests that summary judgment be entered for the defendant.

Dated this 29th day of October, 2014.

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WORD COUNT CERTIFICATION

The undersigned attorney hereby certifies that in accordance with local rules, the foregoing brief, which exceeds the court's page limit of 25 pages, does not exceed the word count limit of 12,000 words. According to MS Word software, the word count is 7,608 words.

/s/ Diana Ryan
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