

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

TOM and MICHELLE TEN EYCK,)	Civ. No. 4:19-cv-04007-LLP
GUARDIANS OF MORGAN TEN)	
EYCK,)	
Plaintiffs,)	
)	
vs.)	PLAINTIFFS MEMORANDUM IN
)	OPPOSITION TO ROBERT
UNITED STATES OF AMERICA,)	NEUENFELDT'S MOTION TO
ROBERT NEUENFELDT,)	DISMISS
individually)	
and UNKNOWN SUPERVISORY)	
PERSONNEL OF THE UNITED)	
STATES, individually,)	
)	
Defendants.)	

Plaintiffs, through undersigned counsel, respectfully submits Plaintiffs Memorandum in Opposition to Robert Neuenfeldt's Motion to Dismiss.

PRELIMINARY STATEMENT

Defendant Neuenfeldt's Motion to Dismiss relies entirely on the Federal Torts Claims Act for the proposition that Neuenfeldt is immune from suit. (*See generally* Doc. 9.) However, Neuenfeldt seems to gloss over Plaintiffs' claim brought pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). (Doc. 1, ¶¶ 3, 41-54.) A claim brought pursuant to the United States Supreme Court's decision in *Bevins* allows an injured plaintiff to recover damages against an individual federal agent for an alleged violation of plaintiff's Fourth Amendment rights. 403 U.S. at 397, 91 S. Ct. at 2005; *see also Davis v. Passman*, 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979) (extending a *Bivens* cause of

action to a violation of plaintiff's rights guaranteed by the Fifth Amendment); *Carlson v. Green*, 446 U.S. 14, 100 S. Ct. 1468, 64 L. Ed. 2d 15 (1980) (extending a Bivens cause of action to an alleged violation of a plaintiff's Eighth Amendment right). Because the United States Supreme Court has authorized a cause of action against federal employees who violate a plaintiff's established constitutional rights, Neuenfeldt's Motion to Dismiss should be denied.

FACTUAL BACKGROUND

In the early morning hours of June 18, 2017, the Flandreau Tribal Police Officers, along with the Moody County Deputy Sheriffs, the South Dakota Highway Patrol, and the City of Flandreau Police Department stopped a vehicle driven by Tahlen Bourassa. (Doc. 1, ¶ 13.) Micah Roemen and Morgan Ten Eyck were passengers in the vehicle driven by Tahlen Bourassa. (*Id.* ¶ 11-12.) Robert Neuenfeldt, Chief of Police for Flandreau Santee Sioux Tribe, threatened to take Bourassa to jail, and as a result, Bourassa fled. (*Id.* ¶ 14.) Neuenfeldt and Logan Baldini, an uncertified deputy for Moody County Sheriff's Office, both got in Neuenfeldt's tribal police cruiser and initiated pursuit of Bourassa. (*Id.* ¶ 15.) Sargent Kurtz of the South Dakota Highway Patrol was also initially involved in the pursuit. (*Id.* ¶ 16.)

It is believed that Tahlen Bourassa, Micah Roemen, and Morgan Ten Eyck had not committed any crimes to justify the pursuit. (*Id.* ¶ 17.) At the time the Bourassa vehicle was stopped, Neuenfeldt, and the other officers at the scene, knew the identity of the driver—Tahlen Bourassa. (*Id.* ¶ 18.) Neuenfeldt and the other officers at the scene were aware that Bourassa was

actively being monitored by the South Dakota Parole Board through a GPS ankle bracelet. (*Id.* ¶ 19.) Regardless of the facts that the officers knew specifically who was driving the vehicle, that there had been no violations of the law, and that two innocent passengers were in the vehicle, a high-speed pursuit took place for over thirty minutes, reaching speeds in excess of 100 miles per hour on gravel roads. (*Id.* ¶ 20.)

With the improper pursuit ongoing, spike strips were laid out on two occasions without proper authorization. (*Id.* ¶ 21.) These spike strips and a barricade of police cars forced Bourassa to drive down a dead-end gravel road. (*Id.* ¶ 22.) Neuenfeldt knew that forcing Bourassa down a dead-end road would result in an accident. (*Id.* ¶ 23.) It is believed that Neuenfeldt disregarded orders to terminate the pursuit. (*Id.* ¶ 25.) Even the South Dakota Highway Patrol aborted the pursuit. (*Id.* ¶ 24.) It is also clear that Neuenfeldt violated numerous pursuit policies set forth by the Bureau of Indian Affairs. (*Id.* ¶ 33.) Nonetheless, Neuenfeldt and Baldini continued the pursuit causing Bourassa's vehicle to lose control and roll several times throwing all three occupants from the vehicle. (*Id.* ¶ 26.) Plaintiff, along with the other occupants, suffered incapacitating injuries and was life flighted from the scene. (*Id.* ¶ 27.) Plaintiff sustained a serious traumatic brain injury, a broken femur, and severe injury to her liver. (*Id.* ¶ 28.)

As a result of Neuenfeldt's actions, and those of the other named Defendants, Plaintiffs brought suit on January 14, 2019. (Doc. 1.) Plaintiffs allege as one of their causes of action that Neuenfeldt violated their rights

under the Fourth and Fifth Amendments to the United States Constitution by using excessive, unreasonable, and unwarranted force during the unnecessary pursuit. (Doc. 1, ¶ 43-44.) As stated directly in Plaintiff's Complaint, this cause of action is brought against Neuenfeldt pursuant to *Bivens* and not under the Federal Torts Claims Act. (*Id.*)

ARGUMENT

Neuenfeldt brought his motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). On a motion to dismiss pursuant to Rule 12(b)(1), this Court must determine whether the attack on subject matter jurisdiction is facial or factual. *Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990).

A facial attack requires a court to determine if a plaintiff has sufficiently alleged a basis for subject matter jurisdiction. As with a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court evaluating a facial challenge under Rule 12(b)(1) must accept all facts in the complaint as true and view the complaint in the light most favorable to the non-moving party. In a factual attack, however, a court does not presume the allegations to be true because the jurisdictional facts themselves are challenged.

Riveretz's Auto Care v. Citi Cards, No. Civ. 08-4208, 2009 WL 2825383, at *2 (D.S.D. Aug. 27, 2009) (citations omitted). Because Neuenfeldt is basing his challenge to subject matter jurisdiction on his inability to be held individually liable under the Federal Torts Claims Act, Neuenfeldt challenge is a facial attack. Thus, the facts in Plaintiff's complaint must be accepted as true and viewed in the light most favorable to the Plaintiff. *Id.*

In ruling on a motion to dismiss under Rule 12(b)(6), a court again “must accept the plaintiff’s factual allegations as true and draw all reasonable inferences in the plaintiff’s favor. *Id.* (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S. Ct. 1598, 1609, 26 L. Ed. 2d 142 (1970)). “Because the pleading rules require only ‘notice’ pleading, rather than detailed fact pleading, a court must construe a plaintiff’s allegations liberally, and should only dismiss a complaint if a plaintiff has failed to plead ‘enough facts to state a claim to relief that is plausible on its face.’” *Id.* (quoting *Bel Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)).

Neuenfeldt is correct in that the Federal Torts Claims Act (FTCA), 28 U.S.C. § 1346(b)(1), “contains a waiver of sovereign immunity, and gives federal courts jurisdiction over civil actions involving, among other things, personal injuries caused by government employees’ negligence while acting within their scope of employment.” *Holthusen v. U.S.*, 498 F.Supp.2d 1236, 1239 (D. Minn. 2007). “Courts have FTCA jurisdiction ‘under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place’ where the claimed negligence occurred.” *Id.* (citing 28 U.S.C § 1346(b)(1)). “To this end, the United States is the proper defendant for an FTCA claim regarding acts performed by individual federal employees during the course and scope of their employment.” *Loring v. United States*, No. Civ 18-4034, 2018 WL 6622214, at *3 (D.S.D. Dec. 18, 2018). Despite the United States being the proper defendant for Plaintiff’s FTCA claim, which Plaintiff is in agreement with, Neuenfeldt fails to address the actual cause of action

alleged against him and how it is improper—i.e., Plaintiff’s cause of action under *Bivens*.

A *Bivens* claim is closely analogous to those suits against state officials under 42 U.S.C. § 1983, and they both are often treated the same. *See Butz v. Economou*, 438 U.S. 478, 499, 98 S Ct. 2894, 2907, 57 L Ed. 2d 895 (1978); 6 James Buchwalter, et al., *Federal Procedure*, L. Ed. § 11:244, Westlaw (database updated March 2019). Under *Bivens* and its progeny, “a plaintiff may pursue a lawsuit for damages against federal officials in their personal capacities for constitutional violations.” *Jiggetts v. Cipullo*, 285 F. Supp. 3d 156, 163 (D.D.C. 2018). In *Bivens*, the plaintiff was searched and arrested by agents of the Federal Bureau of Narcotics acting in their official capacity. 403 U.S. at 389, 91 S. Ct. at 2001. The agents entered plaintiff’s home and arrested him for alleged narcotics violations. *Id.* The plaintiff was restrained by the agents in front of his wife and children. *Id.* The agents also threatened to arrest plaintiff’s entire family. After the agents conducted a strict search and arrested the plaintiff, the plaintiff was interrogated and subjected to a visual strip search. *Id.* The plaintiff asserted in his suit against the agents that the search of his apartment was warrantless and that the agents used unreasonable force in making his arrest in violation of the Fourth Amendment. *Id.* The Federal District Court dismissed the plaintiff’s claims against the agents for failing to state a cause of action, and the Court of Appeals affirmed. *Id.* at 390, 91 S. Ct. at 2001.

However, the United States Supreme Court reversed the lower courts' decisions. *Id.* at 398, 91 S. Ct. at 2005. The Court pointed out that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 392, 91 S. Ct. at 2002 (quoting *Bell v. Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 777, 90 L. Ed. 939 (1946)). The Court went on to note that just because Congress has not fashioned an explicit remedy or declared a lack of such remedy, the plaintiff was entitled to recover money damages for the violations of his rights under the Fourth Amendment by the agents as the Court "may use any available remedy to make good the wrong done." *Id.* at 397-97, 91 S. Ct. at 2004-2005.

Here, Plaintiffs have brought suit under a *Bivens* cause of action against Neuenfeldt individually for his violations while acting under the color of his federal authority of Plaintiff's rights guaranteed by the Fourth and Fifth Amendment. The Supreme Court has made clear that this cause of action is viable. *Id.* at 397, 91 S. Ct. at 2005. The purpose of this *Bivens* action is to deter the officer. *F.D.I.C. v. Meyer*, 510 U.S. 471, 485, 114 S. Ct. 996, 1005, 127 L. Ed. 2d 208 (1994). While Neuenfeldt only argues his motion under the FTCA, the Supreme Court has also noted that a *Bivens* action against federal officials individually is a more effective deterrent than an action brought pursuant to the FTCA against the United States. *Carlson*, 446 U.S. at 21, 100 S. Ct. at 1473. Nonetheless, the Supreme Court has explicitly stated that the FTCA is not the only remedy afforded to a plaintiff seeking redress for

constitutional violations against a federal actor. *Id.* at 23, 100 S. Ct. at 1474. Thus, Plaintiffs have a viable claim under *Bivens* against Neuenfeldt, and Neuenfeldt has not presented any authority to the contrary.

CONCLUSION

For the aforementioned reasons, Plaintiffs' Bivens cause of action should be allowed to proceed, and Defendant Neuenfeldt's Motion to Dismiss should be denied.

Respectfully submitted this 3rd day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May, 2019, a true and correct copy of the foregoing has been served on the following by the following means:

John Nooney	<input type="checkbox"/>	First Class Mail
Robert J. Galbraith	<input type="checkbox"/>	Hand Delivery
Nooney & Solay	<input checked="" type="checkbox"/>	CM/ECF System
632 Main Street	<input type="checkbox"/>	Electronic Mail
Rapid City, SD 57709		

Seth Perman	<input type="checkbox"/>	First Class Mail
Flandreau Santee Sioux Tribe	<input type="checkbox"/>	Hand Delivery
603 W. Broad Avenue	<input checked="" type="checkbox"/>	CM/ECF System
Flandreau, SD 57028	<input type="checkbox"/>	Electronic Mail

Meghan K. Roche	<input type="checkbox"/>	First Class Mail
Assistant U.S. Attorney	<input type="checkbox"/>	Hand Delivery
PO Box 2638	<input checked="" type="checkbox"/>	CM/ECF System
Sioux Falls, SD 57101-26387	<input type="checkbox"/>	Electronic Mail

/s/ Michael S. Beardsley
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