UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

MICAH ROEMEN; TOM TEN EYCK, Guardian of Morgan Ten Eyck; and MICHELLE TEN EYCK, Guardian of Morgan Ten Eyck, Plaintiffs, v. UNITED STATES OF AMERICA, ROBERT NEUENFELDT, individually and UNKNOWN SUPERVISORY PERSONNEL OF THE UNITED STATES, individually, Defendants.	4:19-CV-04006-LLP **PLAINTIFFS' RESPONSE TO UNITED STATES OF AMERICA'S CROSS MOTION FOR SUMMARY JUDGEMENT AND RESISTANCE TO PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, by and through undersigned attorneys, respectfully submit their Response to United States' Cross Motion for Summary Judgement and Resistance to Plaintiffs' Partial Motion for Summary Judgement.

I. PRELIMINARY STATEMENT

No issue of material fact exists that the Government negligently trained, supervised, and retained Officer Robert Neuenfeldt. The Government's duty to ensure Officer Neuenfeldt was trained properly was clearly identified in its contract with the Flandreau Santee Sioux Tribe ("Tribe") and the numerous federal regulations within the same contract. The Government was wholly aware of its failure to adequately train Neuenfeldt; yet, it chose not to ensure that Neuenfeldt was properly trained. Instead, the Government allowed Officer

Neuenfeldt to operate as the rogue untrained officer that he was. The Government's failure to prevent Officer Neuenfeldt from operating as a rogue untrained officer licensed his authority. As such, the Government's failure to train and supervise Officer Neuenfeldt warrants summary judgement for negligent training and supervision.

Further, the Government failed to perform a mandatory background check on Officer Neuenfeldt before hiring him as a tribal officer and promoting him to Tribal Chief of Police for the entire Flandreau Santee Sioux Reservation ("FSS Reservation"). If the Government had performed a background check, it would have been aware of Neuenfeldt's history of jurisdictional failures and negligent conduct. Even if the Government were to still retain him as a tribal officer, at the very least the Government would have addressed Neuenfeldt's negligent patterns, which foreseeably led to the events of June 17-18, 2017. The Government's conscious ignorance of Neuenfeldt's background warrants summary judgement for negligent retention.

Lastly, Officer Neuenfeldt lacked jurisdiction to exercise any authority outside the bounds of the FSS Reservation on the night in question. Given this maxim, the Government's Cross Motion for Summary Judgement on Count I fails. From the moment Officer Neuenfeldt jumped Deputy Carl Brakke's call for a non-tribal ambulance, he was negligent. The severity of his negligence was compounded by the fact he was not aware of a single pursuit policy that required his consideration. Regardless of his failure of all of those same pursuit policies, he was miles beyond the perimeter of his jurisdiction: the FSS

Reservation. Thus, the Government's Cross Motion for Summary Judgement cannot be sustained, because there are clearly genuine issues of material fact regarding Neuenfeldt's negligence.

II. FACTUAL BACKGROUND

a. Factual History

In an attempt to avoid repetition, Plaintiffs incorporate by reference the Factual History from their Memorandum in Support of Plaintiffs' Partial motion for Summary Judgment (Docket 84, at pgs. 8-46) and Plaintiffs' Response to United States' Motion to Dismiss. However, Plaintiffs wish to address Plaintiff Micah Roemen and Morgan Ten Eyck's actions on the night and morning of June 17-18, 2017, as well as law enforcement's knowledge of Tahlen Bourassa's identity during the pursuit.

i. Morgan Ten Eyck and Micah Roemen's Knowledge of Tahlen Bourassa's History with Law Enforcement is Irrelevant.

In June of 2017, Micah Roemen was a twenty-year-old young man who had aspirations of going to aviation school. (Beardsley Aff. Ex. A, at 15:2-17:9: Micah Roemen Deposition, taken 2/25/2021.) He enjoyed mechanics and had a background in the trade. (*Id.* at 11:24-12:9.) He was an active young man who participated in sports in high school and enjoyed riding his four-wheeler in his spare time. (*Id.* at 6:9-7:13-33:2.) Micah and Tahlen Bourassa were acquaintances that hung out on occasion, dating back to their days attending high school together in Dell Rapids, South Dakota. (*Id.* at 31:19-33:2.) Micah

was aware of Tahlen's run-ins with law enforcement through third-parties, but never spoke to Tahlen directly about the topic. (*Id.* at 44:16-45:23.)

Morgan Ten Eyck was born on November 14, 1997. Morgan was twenty-years-old on June 17, 2017. By all accounts, she was considered a happy and normal young adult. Phone records indicate that Morgan "googled" Tahlen's name and found two news stories regarding Tahlen's previous run-ins with police. (Docket 91-17, at pg. 2.) She was dating Tahlen in June of 2017. (Beardsley Aff. Ex. XX at 56:22-56:25: Micah Roemen Deposition, taken 2/25/2021.)

On the night of June 17, 2017, Tahlen and Morgan went to Micah's house, as Micah was working on an old Ford truck. Tahlen asked Micah if Micah wanted to ride around in his truck with, he and Morgan, which Tahlen often enjoyed doing. (*Id.* at 43:12-44:12.) Tahlen told Micah they were just going to hang out and drive around for thirty minutes. (*Id.*) At no point did Tahlen tell Micah or Morgan that he was intending to go to a high school party or to pick up teenagers from a high school party. (*Id.* at 187:17-188:20.) Tahlen drove with Morgan sitting in the middle and Micah in the passenger seat. (*Id.* at 64:9-64:19.)

Sometime into this drive, Tahlen came within the proximity of the high school party that was taking place at 24364 484th Avenue in Dell Rapids, South Dakota. While approaching the party, Tahlen never slowed down or stopped his truck to pick anyone up running from the high school party, which began the chain of events that gave rise to this lawsuit. (*Id.* at 61:9-62:10.)

Once Tahlen began approaching the high school party on 484th Avenue, Trooper Isaac Kurtz passed Tahlen in his cruiser. (*Id.* 63:11-64:3); (*see also* Docket 85-16, at 111:3-111:23.) Kurtz then flipped his cruiser around and began initiating a traffic stop, alleging that he had reasonable suspicion that Tahlen had stopped and picked up somebody running from the high school party. (Docket 85-16, at 111:3-111:23.) Once Tahlen noticed Kurtz' emergency lights, he did not speed up, but rather began slowing as he approached the high school party. (Beardsley Aff. Ex. XX at 65:6-66:7: Micah Roemen Deposition, taken 2/25/2021.)

Tahlen brought his truck to a complete stop as he approached the location of Officer Neuenfeldt and Deputy Logan Baldini, near the end of the driveway of the high school party. (*Id.* at 66:5-66:7.) Once Tahlen stopped for Trooper Kurtz, Officer Neuenfeldt sprinted across the front of Tahlen's truck to the driver's side. (*Id.* at 69:14-70:1.) Officer Neuenfeldt immediately began threatening Tahlen through Tahlen's driver's side window:

75:14 Q. Okay. And when you said that Rob Neuenfeldt gave commands. What were his commands?
75:16 A. No, I don't remember – I don't remember exactly on his commands. I do remember him threatening Tahlen that he would arrest him if he did not unlock his doors.

. . .

76:23 Q. And so Rob Neuenfeldt runs across the road, and Tahlen locks the doors, correct?
76:25 A. Yes.
77:1 Q. And then Rob says something to Tahlen threatening to arrest him?
77:3 A. After he – Tahlen had locked the doors, Rob came around the front of the truck and he gave him a command to

> get out. No response from Tahlen. And at that point after telling him to get out, Rob did reach for the door handle.
> 77::7 Q. And said, unlock your door or I'm going to arrest you?
> 77:9 A. Yes.

(Beardsley Aff. Ex. A, at 75:14-75:18 and 76:23-77:9: Micah Roemen Deposition, taken 2/25/2021.) Without any jurisdiction or reasonable suspicion, Officer Neuenfeldt continued to attempt and break into Tahlen's truck and threaten Tahlen. (*Id.* at 79:14-81:1.); (*see also* Docket 85-16, at 113:9-114:15.) Officer Neuenfeldt then pulled his gun out and pointed it at Tahlen. (Docket 85-4 at 152:9-152:25.) Fearing for his life, Tahlen accelerated his car away from Officer Neuenfeldt and took off. (Beardsley Aff. Ex. A, at 79:14-81:1: Micah Roemen Deposition, taken 2/25/2021.)

During the pursuit Tahlen briefly stopped his truck twice. (*Id.* at 115:12-115:17.) The first stop was when Officer Neuenfeldt threatened Tahlen and attempted to break in through his door. (*Id.* at 79:14-81:1 and 115:15-115:17.) The second stop was for less than a minute when Tahlen turned the headlights to his truck off momentarily before continuing to drive. (*Id.* at 96:12-97:2.) Plaintiffs never had a safe opportunity to exit Tahlen's truck on the night in question. As has been thoroughly briefed in this case, the pursuit of Tahlen's truck had been safely terminated by Trooper Kurtz—only to be recklessly continued by Officer Neuenfeldt.

iii Tahlen Bourassa's Identity was Known One Minute and Twenty-Five Seconds into the Pursuit.

One minute and twenty-five seconds into the pursuit of Tahlen Bourassa, officers indicated Tahlen's identity over the radio:

> 1:25 TROOPER KURTZ: Occupants of my vehicle advise it's possibly is a Tahlen Bourassa from Dell Rapids who was involved in a stand off a year ago.

(Docket 63-4 at 1:25). Tahlen, because of his previous run-in with law enforcement, was on probation and wearing a GPS tracker bracelet. (Docket 85-16, at 109:23-110:10); (Beardsley Aff. Ex. A, at 75:14-75:18 and 76:23-77:9: Micah Roemen Deposition, taken 2/25/2021); (Beardsley Aff. Ex. B, at Plf.Prod.00298-00303: Veritracks Enrollee Track.) Regardless of the fact that Tahlen could have been tracked down by means less dangerous than Officer Neuenfeldt's reckless hot pursuit, Officer Neuenfeldt, without authority, re-started the terminated pursuit and continued to recklessly chase Tahlen. (Docket 85-4, at 279:4-280:7.) Officer Neuenfeldt's pursuit of Tahlen ended tragically with the unnecessary injuries that preceded this lawsuit.

b. Procedural History

On November 15, 2020, Brad Booth of Precision Mapping & Reconstruction, LLC, procured an expert report for Plaintiffs regarding the events of June 17-18, 2017, as they relate to this lawsuit. (Beardsley Aff. Ex. C: Brad Booth Expert Report, 11/15/2020.) Booth, a former sergeant and detective with over 35 years' experience in investigation, forensics, and law-enforcement-focused instruction, was asked by Plaintiffs' counsel to investigate whether Officer Neuenfeldt's actions on the night in question were both accurate and justified. (*Id.* at pg. 1.) Booth's 14-page report, among other findings, concluded:

> (1) "Neuenfeldt had no jurisdiction or cause of action to order Bourassa to stop before a pursuit began." (*Id.* at pg. 11);

(2) "Seargeant Kurtz asked for a supervisor to monitor the pursuit . . . [which] is a common policy so that an adult not involved in the pursuit can weigh the risk." (*Id.*);

(3) "At no time during the second pursuit did Neuenfeldt request a Supervisor monitor the pursuit." (*Id.* at pg. 12);

(4) "[t]he Bourassa vehicle did not fishtail until it began to flee" from Neuenfeldt's threats. (*Id.*);

(5) "[Bourassa] was identified one minute and twenty five seconds into the pursuit. He was known. He was also wearing a GPS ankle monitor." (*Id.* at pgs. 12-13); and

(6) "Neuenfeldt was outside of his jurisdiction and had no authority and should have never began a second pursuit after Kurtz ended the initial pursuit." (*Id.* at pg. 13.)

Given these expert findings and the arguments below, the Government's Cross Motion for Summary Judgement on Count I cannot be sustained because there are genuine issues of material fact that still exist. However, this Court should grant Plaintiffs' Partial Motion for Summary Judgment on Count V because the Government has failed to create an issue of material fact as to their negligent training, supervision, and retention of Officer Neuenfeldt. The Government has failed because the evidentiary record demonstrates Neuenfeldt received zero training, absolutely no supervision, and should not have been retained as a tribal officer to begin with.

III. DISCUSSION

a. The Mandatory Directives Required of the Government Gave Rise to a Duty Under *Kirlin v. Halverson.*

Under South Dakota law, the Government absolutely failed in their duties to train and supervise Officer Neuenfeldt and were wholly negligent in

their decision to retain him. *Kirlin v. Halverson*, 2008 S.D. 107, ¶¶ 44-45, 758 N.W.2d 436, 452. As a contracting party with the Tribe, and given their trust relationship with the Tribe, the Government was required to ensure the Tribe's compliance with numerous federal directives and regulations, as thoroughly identified in Plaintiffs' Partial Motion for Summary Judgment. (*See e.g.* Docket 84.) As such, the Government cannot hide from these duties as the principal of their agent, the Tribe, by arguing its failure of the numerous federal directives, which it assented to ensure compliance with, is immaterial to its duty under *Kirlin v. Halverson.* (*See* Docket 99, at pg. 27.)

In *Kirlin*, the defendant ran a heating, ventilation, and air conditioning ("HVAC") company and had a contract with the Empire Mall in Sioux Falls, South Dakota. *Kirlin*, 2008 S.D. 107, ¶ 2, 758 N.W.2d at 441-42. The scope of its work for the Empire Mall included working on the roof of the mall. *Id.* The defendant became aware that plaintiff had secured an HVAC contract with the Empire Mall, and as a result, defendant's HVAC services would no longer be needed. *Id.* at ¶ 3, 758 N.W.2d at 442. Regardless of this knowledge, defendant still proceeded to send workers to the rooftop of the Empire Mall and never advised their employees of plaintiff's contract. *Id.* at ¶ 6, 758 N.W.2d at 442.

One of defendant's employees, Halverson, confronted one of plaintiff's employees, Kirlin, on the rooftop of the Empire Mall, when Halverson thought Kirlin was stealing plaintiff's air filters. *Id.* at ¶ 7, 758 N.W.2d at 442. Halverson proceeded to beat Kirlin un-conscious. *Id.* Halverson was subsequently arrested on a number of assault charges and plaintiffs brought a

civil action against defendants. *Id.* at ¶ 8, 758 N.W.2d at 443. The plaintiffs alleged negligence theories based on defendants' negligence in hiring, training, supervision, and retention, in regards to defendants' employee Halverson. *Id.* at ¶ 9, 758 N.W.2d at 443. The issues of duty and breach, as to plaintiffs' negligence claims, were considered by the South Dakota Supreme Court. *Id.*

The court first recognized that the claims of negligent hiring and retention closely include the same basic traits. *Id.* at ¶ 46, 758 N.W.2d at 452. One of those traits is the performance of a background check. *Id.* at ¶ 47, 758 N.W.2d at 452. The court held that where an employee has frequent contact with the public there is a duty as a matter of law for the employer to perform a background check. *Id.* at ¶¶ 47, 49, 758 N.W.2d at 452-53. In *Kirlin*, the court held there was no duty to perform a background check by the defendant because of Halverson had minimal involvement with the public, as an HVAC maintenance man. *Id.* at ¶ 49, 758 N.W.2d at 453.

Further, the court held that the defendant was under no duty to fire Halverson because Halverson lacked a history of violent behavior, which would have made defendant aware that Halverson's assault was foreseeable. *Id.* at ¶ 52, 758 N.W.2d at 453-54; *but see Brown v. Youth Services Intern. of South Dakota, Inc.*, 89 F.Supp.2d 1095, 1103 (D.S.D. March 15, 2000) (holding where an employer is aware of an employee's propensity to commit misconduct and that employer fails to take remedial measures to ensure the safety of others, the employer may be held liable for negligent retention). Halverson's history was littered with criminal behavior, but none of the behavior related to assault

or violent propensity. *Id.* at ¶ 52, 758 N.W.2d at 453-54. The court found the defendant was not negligent in retaining Halverson because Halverson's criminal history did not contain any indication that his violent behavior was reasonably foreseeable. *Id.*

As to the plaintiffs' negligent training claims, the court required there be more than a mere "suggestion" that an employer "should train" an employee, in order for any plaintiff to succeed under a negligent training theory. *Id.* at 2008 S.D. 107, ¶ 54, 758 N.W.2d at 454. Where training is simply a suggestion, a negligent training claim is "inexact." *Id.* However, where there is even a suggestion that an employer train their employee and the employer fails to do so, the employer's failure to do so may be considered negligent supervision. *Id.*; *see also Finkle v. Regency CSP Ventures Ltd. P'ship*, 27 F.Supp.3d 996, 1001 (D.S.D. June 18, 2014) (holding where training is incidental to the function of an employee's job and an employer is aware of such training, a duty to train may be impressed upon the employer).

Lastly, the court held that a fact finder could find that defendant failed its duty of reasonable care to supervise Halverson, because defendant never advised Halverson that plaintiff might have employees on the rooftop of the Empire Mall doing HVAC work. *Id.* at ¶ 55, 758 N.W.2d at 454; *see also McGuire v. Curry*, 2009 S.D. 40, ¶ 23, 766 N.W.2d 501, 509 (holding employer had duty to supervise employee when employee's misconduct was foreseeable). If defendant had advised Halverson of plaintiff's contract or presence on the rooftop, the assault may not have occurred. *Id.* Since defendant failed to advise

Halverson, the court held its failure may be considered negligent supervision. *Id.* at ¶ 56, 758 N.W.2d at 454.

Where a government entity agrees to ensure compliance with directives and regulations, those same directives and regulations can give rise to a state common law duty.[1] In the context of the Government's 638-contract with the Tribe, its duties as to training, supervision, and retention were clearly identified and agreed to.[2] *See Steven v. Wood Sawmill, Inc.*, 426 N.W.2d 13, 15 (S.D. 1988); *Smith v. Gilbert Yards et al.*, 16 N.W.2d 912, 913 (S.D. 1944) (discussing how negligence can be proved by circumstantial evidence). Those same federal directives and regulations gave rise to the duty of reasonable care that the Government owed under *Kirlin. See Kristenson v. United States*, 372 F.Supp.3d 461, 469 (D.W.D. Tex. Jan. 31, 2019). Those duties were clearly breached by the Government in this case.

Additionally, the Government's trust relationship with the Tribe further cements its obligation to ensure compliance with the federal directives they assented to in their 638-contract with the Tribe.[3] The Government's duties

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[1] Plaintiffs' argument is strikingly similar to the *Kristenson* case, an FTCA case where the Government failed to uphold federal regulations and rules, and the court found those regulations gave rise to an actionable state common law duty. *See Kristenson v. United States*, 372 F.Supp.3d 461, 469 (D.W.D. Tex. Jan. 31, 2019) (holding that federal regulations and rules may give rise to a state common law duty where plaintiffs identified multiple regulations and rules adopted by the Army and Department of Defense, of which both entities agreed to comply with, but negligently failed to do so).

[2] In fact, ASAC Chino even knew that the federal directives at issue in this case can give rise to the Government's duty under the 638-contract. (Beardsley Aff. Ex. D at 24:21-25:4: Joel Chino Deposition, taken 2/4/2022.)

[3] As discussed in Plaintiffs' Partial Motion for Summary Judgment, (Docket 84, at pg. 47), the Government has an additional obligation outside of their 638-contract with the Tribe to provide for the public safety of tribal communities, which includes ensuring adequate tribal law

under *Kirlin*, given the 638-contract at issue and its trust relationship with the Tribe, were clear. As such, there is no material issue of fact as to the Government's absolute breach of its duties to train and supervise Officer Neuenfeldt and its duty of reasonable care, as to retention, when it chose to keep Officer Neuenfeldt as a tribal officer and promote him to Tribal Chief of Police.

i. The Government's Failure to Train and Supervise Officer Neuenfeldt Warrants Summary Judgement.

Officer Neuenfeldt was never trained by the Tribe or any tribal official, the BIA or any BIA official, and received *zero* training in federal jurisdiction, federal law, and how those areas might intersect with his duties as an officer on the FSS Reservation. (Docket 85-4, at 27:16-27:23, 44:24-45:14, and 112:7-113:7; *see also* Docket 85-7.) Additionally, Officer Neuenfeldt never waived-in his state law enforcement training under 25 C.F.R. Part 12.36, (Docket 85-4, at 27:16-27:23), and Officer Neuenfeldt was never provided a BIA Manual. (Docket 85-4, at 47:18-47:21.) The Government has not and cannot dispute these facts.

Unlike in *Kirlin*, the Government's duty to ensure the training of Officer Neuenfeldt was unequivocal and mandatory. *See Kirlin*, 2008 S.D. 107, ¶ 54, 758 N.W.2d at 454. The federal regulations stated the training was mandatory, and the Government assented to ensuring compliance with these mandatory directives. *See* 25 C.F.R. Parts 12.12, 12.35. The Government's historical trust

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enforcement. *See also Necklace v. U.S.*, Civ. No. 06-4274, 2007 WL 3389926, at *4 (D.S.D. Nov. 14, 2007) (discussing because of this unique relationship the federal government "must provide liability insurance to the tribal government").

relationship with tribal entities mandated it. (Docket 84, at pgs. 46-48.) Its 638-contract with the Tribe mandated training. (Docket 85-1, at USA001313-14.) The Tribe's BIA Manual mandated training. (Docket 85-3, at USA000632, 635.) There are no facts suggesting the Government facilitated or attempted to facilitate the mandatory training outlined by the numerous federal directives and regulations involved in this case.[4]

In fact, the Government was well aware of its failure to train Neuenfeldt and did nothing to ensure he was trained. Rather than ensuring Neuenfeldt was behind a desk until he was adequately trained, the Government chose apathy and wrote letters without consequence. (Beardsley Aff. Ex. D, at 60:24-62:18: Joel Chino Deposition, taken 2/4/2022.) Officer Neuenfeldt was never even told he was supposed to be behind a desk not enforcing federal law or tribal law. (Beardsley Aff. Ex. D, at 174:14-175:11: Joel Chino Deposition, taken 2/4/2022.) These facts are undisputed by the Government.

Additionally, because the Government was aware of Neuenfeldt's lack of mandatory training and did nothing to ensure he was adequately trained, it failed its duty to supervise Officer Neuenfeldt adequately under *Kirlin*. *See Kirlin*, 2008 S.D. 107, ¶ 55, 758 N.W.2d at 454. The Government never advised Officer Neuenfeldt to remove himself from his federal cruiser, turn in his federal gun, and sit behind a desk until he was in compliance with numerous federal

[4] The Government cannot argue that Officer Neuenfeldt's 13 weeks of state training in Pierre, South Dakota, waived its obligations to train Neuenfeldt under the numerous mandatory directives in place because Neuenfeldt never waived his state training in under 25 C.F.R. Part 12.36. (Docket 86, at ¶ 13); (Docket 102, at ¶ 13.)

directives and mandates at issue in this case. (Beardsley Aff. Ex. D, at 174:14-175:11: Joel Chino Deposition, taken 2/4/2022); (Beardsley Aff., Ex. E, at 13:3-14:4: Robert Neuenfeldt's Second Deposition, taken 2/25/2022.) Instead, Officer Neuenfeldt was in his cruiser jumping calls on the night of June 17, 2017, which resulted in the tragedy bringing rise to this lawsuit. The Government's negligent supervision was the reason he was not behind a desk on the night in question.

ii. The Government's Decision to Retain Officer Neuenfeldt Warrants Summary Judgement.

Neither the Tribe nor the Government ever performed a background check on Officer Neuenfeldt prior to hiring him as a tribal officer. (Docket 85-6, at USA001154-55.) Federal regulations mandated a background check be done prior to hiring Neuenfeldt. *See* 25 C.F.R. Part 12.32. The 638-contract with the Tribe re-iterated the background check was mandatory. (Docket 85-1, at USA001313-14; *see also* Docket 85-2, at USA001324, 1330-31.) These facts are undisputed by the Government. (Docket 86, at ¶ 9); (Docket 102, at ¶ 9.)

Neuenfeldt's law enforcement history was littered with jurisdictional issues and negligent behavior. (Docket 85-4, at 64:10-66:22 and 68:24-71:2.) Instead of being aware of his issues, which were extremely material to his job function and an accelerant to the catastrophic events of June 17, 2017, the Government authorized Neuenfeldt to continue with his rogue and negligent behavior and then promoted to him to Tribal Chief of Police. If the Government didn't fire him on account of his history, at the very least, the Government would have been aware of his lack of mandatory training and history of issues,

prompting them to train and supervise him closely. The Government's conscious decision to ignore Neuenfeldt's negligent background warrants summary judgement for Plaintiffs' negligent retention claim.

iii. Expert Testimony is not Required for Count V Because the Government's Undeniably Breached Duties Involves a Standard of Care Within the Common Knowledge and Experience of an Ordinary Person.

No expert testimony is required for Count V because the Government's failure to train and supervise, and decision to retain Neuenfeldt is within the common knowledge and experience of an ordinary person.[5] The Government did nothing to alleviate the risk that Neuenfeldt presented as an officer and that is undisputed. There is no question before this Court regarding whether the Government's actions were "adequate." The Government did absolutely nothing to ensure minimum compliance with the federal directives and regulations at issue. As a result, Plaintiffs' causation evidence and arguments provided in their Partial Motion for Summary Judgement is adequate and warrants summary judgement. (Docket 84, at pgs. 64-66.)

iv. Even if this Court Finds that Expert Testimony is Necessary for Count V, Discovery has been Stayed and Plaintiffs Plan to Name Experts.

Even if this Court finds that expert testimony is required for Plaintiffs' negligence claims, Plaintiffs' expert disclosure deadline has not passed. The

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[5] The Government cites *Sheard* for the proposition that expert testimony is needed for causation on Count V. (Docket 99, at 31.) However, in *Sheard*, the Supreme Court of South Dakota held expert testimony was required on plaintiff's duty to train, where there is a question of whether training was *adequate*, not *whether the training took place at all. Sheard v. Hattum*, 2021 S.D. 55, ¶¶ 28-29, 965 N.W.2d 134, 143. In the case at bar, Neuenfeldt was not trained at all.

Government asserts that "Plaintiffs' failure to disclose expert testimony is fatal to their motion and claim." (Docket 99, at pg. 31.) However, the parties stipulated on September 28, 2021, to "stay discovery in this matter pending the resolution of the Plaintiffs' Motion for Partial Summary Judgment." (Docket 81, at pg. 2.) Within the Stipulation to Stay Discovery, the parties agreed that following the Court's ruling on Plaintiffs' Motion for Partial Summary Judgment, expert discovery deadlines would be established. (*Id.* at pg. 3.) Plaintiffs intend to disclose experts and have not waived any opportunity to do so.

b. Officer Neuenfeldt's Actions on June 17, 2017, Lacked Legal Authority Because He had no Jurisdiction of the FSS Reservation.

At no point outside of the FSS Reservation on the night of June 17, 2017, did Officer Neuenfeldt have jurisdiction to assert any legal authority.[6] The Government has already admitted Officer Neuenfeldt's assistance was not requested on the night in issue, which moots any argument that he received conferred jurisdiction under the Assist Agreement, because there was no proper request. (Docket 99, at pg. 7.) Thus, all of Neuenfeldt's actions outside of the reservation on the night in issue lacked legal authority. This wanton and reckless behavior is the basis of Plaintiffs' negligence allegations against Officer

[6] A tribal officer's jurisdiction is confined to the boundaries of their given reservation. *F.T.C. v. Payday Financial, LLC*, 935 F.Supp.2d 926, 932 (D.S.D. March 28, 2013). Further, tribal officers do not retain any inherent criminal jurisdiction over non-Indian individuals outside the reservation, with a few exceptions that do not apply to this case. *Id.*

Neuenfeldt. As to these allegations, the Government has failed to prove there is no issue of material fact.

In support of its Cross-Motion for Summary Judgment on Count I, the Government purports that the duty of care owed to Plaintiffs is that of the duty owed to criminal suspects, like in *Blacksmith v. United States.*[7] (Docket 99, at pg. 19.); *see* Civ. 06-5022-AWB, 2008 WL 2001975, at *3 (D.S.D. May 6, 2008). While Morgan Ten Eyck and Micah Roemen were unquestionably not criminal suspects on the night and morning of June 17-18, 2017, for the purposes of responding to the Government's Summary Judgement argument for Count I, Plaintiffs will assume the *Blacksmith* standard of care applies.[8] In regards to the standard the Government offers, Officer Neuenfeldt's numerous failures on the night and morning in question, clearly breached his duty of ordinary and reasonable care owed to the Plaintiffs. *Blacksmith*, 2008 WL 2001975, at *3; *see also Schreiner v. United States*, Civ. 03-5069-KES, 2005 WL 1668429, *3 (D.S.D. July 18, 2005) (finding the appropriate standard of care for an officer within their jurisdiction in a motor vehicle pursuit to be of ordinary care skill not to injure another). As Brad Booth found in his expert report:

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[7] The Government attempts to intertwine Plaintiffs argument for summary judgment on Count V with Plaintiffs' argument for Count I by stating that Plaintiffs do not state a duty under South Dakota law for Counts I and V, but rather only allege failure of the mandatory federal policies at issue in this case. (Docket 99, at pgs. 16-17.) However, the mandatory pursuit policies Plaintiffs identify as relevant to Count I are merely circumstantial evidence of the seriousness and severity of Officer Neuenfeldt's negligence, because he was not aware of any of these relevant policies. (Docket 85-4, at 48:13-48:18.) Additionally, as stated in Plaintiffs' Response to Motion to Dismiss, these mandatory provisions only apply *within an officer's jurisdiction.*

[8] Plaintiffs' are not conceding that Tahlen Bourassa was even a criminal suspect on the night in question.

(1) "Neuenfeldt had no jurisdiction or cause of action to order Bourassa to stop before a pursuit began." (*Id.* at pg. 11);

(2) "Seargeant Kurtz asked for a supervisor to monitor the pursuit . . . [which] is a common policy so that an adult not involved in the pursuit can weigh the risk." (*Id.*);

(3) "At no time during the second pursuit did Neuenfeldt request a Supervisor monitor the pursuit." (*Id.* at pg. 12);

(4) "[t]he Bourassa vehicle did not fishtail until it began to flee" from Neuenfeldt's threats. (*Id.*);

(5) "[Bourassa] was identified one minute and twenty five seconds into the pursuit. He was known. He was also wearing a GPS ankle monitor." (*Id.* at pgs. 12-13); and

(6) "Neuenfeldt was outside of his jurisdiction and had no authority and should have never began a second pursuit after Kurtz ended the initial pursuit." (*Id.* at pg. 13.)

(Beardsley Aff. Ex. XX: Brad Booth Expert Report, 11/15/2020.) The Government cannot hide from Officer Neuenfeldt's numerous failures.

i. Officer Neuenfeldt Breached His Duty of Ordinary Care by Jumping a Call Outside of His Jurisdiction.

Officer Neuenfeldt's habit of jumping calls outside of his jurisdiction is a clear breach of the ordinary care a reasonable officer should exercise in regards to their jurisdictional authority. (Docket 85-16, at 79:17-79:23); (Beardsley Aff. XX at 13: Brad Booth Expert report, 11/15/2020.) Case law has clearly established the boundaries of a tribal officer's jurisdiction. *See F.T.C.*, 935 F.Supp.2d at 932. Neuenfeldt had a duty to abide by the limits of his authority. However, he had a habit of defying his jurisdictional limits as a law enforcement officer and this habit reared its head on the night of June 17, 2017.

Exercising ordinary care in regards to jurisdiction means an officer stays within the bounds of their authority. In this case, Officer Neuenfeldt's boundary was the edges of the FSS Reservation. Even Trooper Kurtz testified he would not have defied a tribal assist agreement if he were in Officer Neuenfeldt's position:

79:17	Q. Sure. And then if they do exist and there's an agreement, you would abide by the words of those agreements?
79:19	MS. ROCHE: Objection, calls for speculation, calls for a legal conclusion. You can answer, if you know.
79:22	THE WITNESS: I would if it were me, but I don't know.

(Docket 85:16 at 79:17-79:23.) He further testified that the entire pursuit was outside the bounds of the reservation and Officer Neuenfeldt's jurisdiction. (*Id.* at 74:7-74:17.) Kurtz never authorized Officer Neuenfeldt with any sort of authority on the night in question:

95:17	Q. And he was not authorized by the state highway patrol to do anything at this point. He hadn't – I don't know if you would call it a deputization or authorized. You didn't authorize him to do anything, did you?
95:21	A. No.

(*Id.* at 95:17-95:21.)

Neuenfeldt's assistance was never requested on the night of June 17, 2017, and the the Government has already admitted his assistance was not requested. (Docket 99, at pg. 7.) The standard of ordinary care owed to Plaintiffs was breached the second Neuenfeldt attempted to assert his authority outside the reservation.

ii. Officer Neuenfeldt Breached His Duty of Ordinary Care by Joining in a Pursuit Outside His Jurisdiction and Re-Starting a Pursuit that was Already Terminated.

Similarly, Officer Neuenfeldt's decision to join in Trooper Kurtz's pursuit of Tahlen Bourassa's truck was a clear breach of the ordinary care a reasonable officer should exercise in regards to their jurisdictional authority. (Beardsley Aff. Ex. C, at 13: Brad Booth Expert report, 11/15/2020.) A reasonable officer would have understood that no authority to join a pursuit exists outside the boundaries of their jurisdiction. (*Id.*) Again, Officer Neuenfeldt was never even requested to be at the scene on June 17, 2017, and no one authorized him to join in the pursuit. (Docket 85-16, at 95:17-95:20.)

Trooper Kurtz terminated the pursuit of Tahlen Bourassa four minutes and ten seconds into the pursuit. (Docket 85-16, at 88:1-88:24); (*see also* Docket 91-12, at pg. 4, ¶ 2.) Kurtz never authorized Officer Neuenfeldt to become the primary pursuer and re-start the pursuit. (Docket 85-16, at 95:17-95:20.) Officer Neuenfeldt did not have any authority to join in the pursuit to begin with, but certainly had no authority to become the primary pursuer after the pursuit was already terminated. (Beardsley Aff. XX at 13: Brad Booth Expert report, 11/15/2020.) He was never authorized or requested to be authorized by any supervising officer. (*Id.*)

Neuenfeldt's decision to join in and restart the pursuit of Tahlen Bourassa breached the ordinary care he owed to the Plaintiffs in this case.

Even if Neuenfeldt had not lied and was actually struck by Tahlen's truck,[9] he should have considered the unquestionably innocent passengers in Tahlen's truck: Morgan Ten Eyck and Micah Roemen, as a reasonable officer might. However, he did not.

iii. Officer Neuenfeldt Breached His Duty of Ordinary Care by Recklessly Continuing His Pursuit of Tahlen, Even Though Tahlen's Identity was Known One Minute and Twenty-Five Seconds into the Pursuit.

Tahlen Bourassa, a non-Indian with a GPS ankle monitor on outside the FSS Reservation, was identified as the driver of the truck one minute and twenty-five seconds into the pursuit on the night in question. (Docket 63-4 at 1:25.) Tahlen could have been located the next day by other means. (Beardsley Aff. Ex. B, at Plf.Prod.00298-00303: Veritracks Enrollee Track.) The continued pursuit of Tahlen after this fact was known demonstrates Officer Neuenfeldt's clear negligence. Neuenfedlt's decision to continue an unnecessary unauthorized pursuit of innocent teenagers when the identity of the alleged criminal suspect, a non-Indian outside the FSS Reservation who was known from the beginning of the pursuit, is an absolute breach of his duty of ordinary care owed to Plaintiffs. (Beardsley Aff. Ex. C, at 13: Brad Booth Expert report, 11/15/2020.)

[9] (*See* Docket 63-6 (the dashcam footage clearly shows Neuenfeldt was never struck by Tahlen's truck); (*see also* 63-5 Ex. 8 (where expert Maher concludes Neuenfeldt was never struck by Tahlen's truck.)

iv. The Government has Failed to Show there is no Genuine Issue of Material Fact on Plaintiffs' Negligence Allegations for Count I.

The Government continually attempts to re-frame Plaintiffs' arguments to focus Officer Neuenfeldt's negligence solely on the mandatory pursuit policy failures that took place on the night in question. (Docket 99, at pgs. 18-19.) However, Plaintiffs' have only alleged those failures to show the severity and seriousness of Officer Neuenfeldt's negligence, because those policies exhibit the considerations a reasonable and ordinary officer must make while in hot pursuit of an individual *within their jurisdiction.* (Docket 60, Ex. 2c at pg. 276, otherwise marked 2-24-04.)

Neuenfeldt did not consider these policies and was not even aware those policies existed. (Docket 85-4, at 48:13-48:18.) All the while, Officer Neuenfeldt was miles beyond the boundary of his own jurisdiction with no authority to even be in hot pursuit. Count I of Plaintiffs' complaint centers on the allegation that Neuenfeldt had no jurisdiction to be exercising any authority on the night and morning in question. His failure and ignorance of the numerous mandatory pursuit policies underscore why his jurisdictional failure should matter to this Court's assessment of his negligence. As such, the Government has failed to show there is no issue of material fact as to Count I.

c. The Government Cannot Point to Tahlen, a Non-Party, as a Defense for Its Negligence.

Throughout its Brief in Support of its Cross Motion for Summary Judgement, the Government attempts to point to Tahlen as the proximate cause of Plaintiffs' injuries. (Docket 99, at 22 and 29-30.) However, the

Government cannot point to Tahlen as a proximate cause of Plaintiffs' injuries, because the Government has not named Tahlen as a party to this action:

> There may be more than one legal cause of an injury. If you find that the defendant was negligent and that the defendant's negligence was a legal cause of the plaintiff's injury, it is not a defense that the negligence of some third person, not a party to this action, was also a legal cause of plaintiff's injury.

South Dakota Pattern Jury Instructions 2008 Edition No. 20-30-40. If the Government had named Tahlen as a party to this action, they could attempt to point to his actions and apportion liability. *See Blacksmith*, 2008 WL 2001975, at *4 (discussing the *plaintiff's*, not an unnamed third-party, concurrent negligence as it related to the proximate causation of his injuries.) Given the fact the Government has not included Tahlen in this action, all arguments attempting to assign blame to him for the Government and Officer Neuenfeldt's negligence on the night of June 17, 2017, must be disregarded.

d. Plaintiffs' were not Contributorily Negligent for their Horrific Injuries.

Knowledge of an individual's prior criminal history, which had no relation to what occurred on June 17-18, 2017, and driving around with friends in a truck after midnight, cannot possibly amount to contributory negligence or assumption of the risk under South Dakota law. The Government asserts that this Court should find the Plaintiffs contributorily responsible for the actions of the Government and its rogue officer either by contributory negligence or assumption of the risk. (Docket 99, at pgs. 24-26.) The Government encourages this Court to endorse innocent teenagers jumping out of a speeding truck, rather than mandate the Government address both their

own and Officer Neuenfeldt's negligent behavior. (Docket 99, at pg. 25.) This Court cannot allow this argument to be justified when the Government and its rogue officer put these innocent teenagers in this harrowing predicament.

e. SDCL 3-21-9 does not Apply to Plaintiffs.

The Government further argues that SDCL 3-21-9 bars Plaintiffs' recovery. (Docket 99, at pgs. 33-35.) Again, Plaintiffs were not on parole and never resisted any unlawful or alleged arrest. The Government cannot point to Tahlen, a non-party, to apportion their liability and blame. *See* South Dakota Pattern Jury Instructions 2008 Edition No. 20-30-40. Even if the Government could point to Tahlen, he is allowed to use all reasonable force to resist an unlawful arrest. *See People Ewumi v. State*, 727 S.E.2d 257, 265 (Ga. App. April 18, 2012). Officer Neuenfeldt had no jurisdiction to arrest Tahlen, Tahlen had not committed a crime, and Tahlen reasonably drove away from Officer Neuenfeldt, after Neuenfeldt's baseless threats.

IV. CONCLUSION

This Court should grant Plaintiffs' Motion for Partial Summary Judgement on Count V because there is no issue of material fact that the Government did not train Officer Neuenfeldt under the numerous mandatory provisions required of the Government and failed to supervise Neuenfeldt appropriately, by not forcing him to sit behind a desk until he was properly trained. Further, the Government is liable for negligent retention, because there is no issue of material fact that the Government did not perform a

mandatory background check on Neuenfeldt, which would have informed them of the numerous deficiencies it needed to address.

Lastly, there are clearly issues of material fact as to Count I of Plaintiffs' allegations. While the Government continues to try and re-frame Plaintiffs' arguments, Plaintiffs' theory is based upon Officer Neuenfeldt's absolute lack of authority on the night and morning of June 17-18, 2017. The numerous failures that followed Officer Neuenfeldt's decision to jump a call outside of his jurisdiction are certainly important in considering the magnitude of his negligence—but do not make up the whole of Plaintiffs' negligence theories against him.

For these and the aforementioned reasons, Plaintiffs' request this Court grant their Motion for Partial Summary Judgment (Docket 84) and deny the Government's Cross Motion for Summary Judgment (Docket 99).

Respectfully submitted this 15th day of April, 2022.

BEARDSLEY, JENSEN & LEE, Prof. L.L.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2022, a true and correct copy of the foregoing has been served on the following by the following means:

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Steven C. Beardsley

CERTIFICATE OF COMPLIANCE

Pursuant to S.D.C.L. §15-26A-66(b)(4), I certify that Plaintiffs' Response to United States of America's Cross Motion for Summary Judgement And Resistance to Plaintiffs' Partial Motion For Summary Judgment complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 7068 words and 37,607 characters. I have relied on the word and character count of our processing system used to prepare this Brief. The original Appellant's brief and all copies are in compliance with this rule.

Dated this 15th day of April, 2022.

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