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.	Civ. 19-4006-LLP Civ. 19-4007-LLP **UNITED STATES' REPLY BRIEF IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT**

The United States of America, by and through its counsel of record, provides this reply in support of its cross motion for summary judgment on all claims against it. The Court should find that the United States was not negligent as a matter of law in Neuenfeldt's pursuit conduct or in the United States' alleged supervision, training, or retention of a tribal employee serving pursuant to a 638 contract. Thus, Counts I and V should be dismissed. The Court need not even resolve this motion, as the United States' Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h) should be resolved first to bar jurisdiction.

INTRODUCTION

In response to the United States' cross motion for summary judgment, Plaintiffs reargue that they are entitled to partial summary judgment because "the Government's duty to ensure Officer Neuenfeldt was trained properly was clearly identified in its contract with the Flandreau Santee Sioux Tribe and the numerous federal regulations within the same contract." Docket 111

at 1. This statement proves that Plaintiffs make no attempt to establish that the United States breached a known duty established by South Dakota law (as that of a private employer in South Dakota) when they solely allege the United States violated alleged federal mandates.

Plaintiffs fail to create a genuine dispute of material fact that remains for trial when Neuenfeldt's pursuit conduct was reasonable based on the circumstances and upon South Dakota law. A reasonable factfinder must conclude that Plaintiffs' injuries were instead caused by the independent negligent conduct of Bourassa in continuing the pursuit and ignoring his passenger's safety warning that the road was a dead end. Neuenfeldt's conduct cannot be the proximate cause of Plaintiffs' injuries. Plaintiffs further have not brought forth credible expert testimony to establish Neuenfeldt's conduct on June 18, 2017, fell below the standard of care expected of a similarly situated law enforcement officer or rebutted that an intervening cause harmed Plaintiffs. Plaintiffs further failed to provide any expert testimony establishing that the absence of a specific law enforcement training or act of supervision, a topic not within the expertise of a layperson, caused Neuenfeldt to negligently engage or pursue Bourassa's speeding pickup. Thus, their claim fails for each of these reasons.

The undisputed evidence shows that Plaintiffs were contributorily negligent more than slight or assumed the risk of their injuries when they willingly entered Bourassa's vehicle, with knowledge of his prior history of stand-offs with law enforcement, and did not attempt to exit the truck mid-pursuit or ask to get out of the truck, even with the ability to do so on multiple occasions. Even if these other arguments do not succeed, South Dakota substantive law provides immunity to the United States under SDCL 3-21-9, which precludes liability for any injury resulting from a person resisting arrest. Dismissal is appropriate.

ARGUMENT

In opposing summary judgment, a party may not simply rest on denials and contrary allegations, but must set forth specific facts, supported by affidavit, or other admissible evidence showing that a genuine issue of material fact exists. Federal Rule of Civil Procedure 56(c); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-48 (1986). Disputed facts having no bearing on legal issues do not prevent summary judgment. *Anderson*, 477 at 248. Likewise, a party cannot create sham issues of fact in an effort to defeat summary judgment. *American Airlines, Inc., v. KLM Royal Dutch Airlines, Inc.*, 114 F.3d 108, 111 (8th Cir. 1997). The nonmoving party must present "significant probative evidence" to show that there is a genuine dispute about a material fact from which a reasonable factfinder could return a verdict in her favor. *Anderson*, 477 U.S. at 249. This requires more than a scintilla of evidence, and there must be specific facts showing that there is a genuine issue for trial. *Id.* at 252.

The Federal Tort Claims Act ("FTCA") does not create liability. It merely waives sovereign immunity to the extent that state law would impose liability on a "private individual under like circumstances." 28 U.S.C. § 2674. Thus, to state a cognizable FTCA claim, a complaint must allege that a private person would be liable to the plaintiff under the tort law of the state where the act or omission occurred. *F.D.I.C. v. Meyer*, 510 U.S. 471, 477 (1994). When no comparable state law liability exists, sovereign immunity is not waived. The Supreme Court recently clarified that all elements of a plaintiff's meritorious FTCA claim is jurisdictional and though "a plaintiff need not *prove* a § 1346(b)(1) jurisdictional element for a court to maintain subject-matter jurisdiction over his claim, a plaintiff must plausibly allege all six FTCA elements not only to state a claim upon which relief can be granted but also for a court to have subject-matter jurisdiction over the claim." *Brownback v. King*, 141 S. Ct. 740, 749 (2021) (emphasis

added). As part of this analysis, a plaintiff must plausibly allege " 'the United States, if a private person, would be liable to the claimant' under state law both to survive a merits determination under Rule 12(b)(6) and establish subject-matter jurisdiction." *Id.* (internal citations omitted). Plaintiffs' Amended Complaint cannot survive *Brownback*'s scrutiny.

I. The Court Should Grant the United States' Motion for Summary Judgment for Any Allegations Pertaining to Neuenfeldt's Pursuit Conduct.

A. Plaintiffs Fail to State an Actionable Duty Other than A Reasonable Police Officer in South Dakota.

Plaintiffs do not clearly identify what Neuenfeldt's duty was, but instead skip right to the alleged breaches. At issue here, is the conduct[1] of law enforcement officers. Where the alleged negligent act involves conduct of law enforcement officers, identifying the appropriate private person analogue can be difficult. *Sorace v. United States*, 788 F.3d 758, 763 (8th Cir. 2015). However, in *Sorace*, this Court outlined two choices under South Dakota law that "[u]nder either the negligence standard for a private citizen or the public duty[2] rule" that police owe to the public at large, a Plaintiff must allege facts sufficient to state a claim for which relief should be granted. *Id.* However, "only the law of the State is relevant under our analysis of FTCA claims." *Id.* at 766.

As Judge Lange previously held in the *Sorace* district court opinion: "the violation of an internal policy contained in a BIA handbook or manual does not create an independent cause of action under the FTCA unless the challenged conduct is independently tortious under applicable

[1] Plaintiffs argue that the "Government's failure to prevent Officer Neuenfeldt from operating as a rogue untrained officer licensed his authority." Docket 111 at 2. To the extent Plaintiffs make an argument that apparent authority provides a duty under South Dakota law, the Eighth Circuit has concluded that apparent authority is not a viable claim in the context of the Federal Tort Claims Act. *See Primeaux v. United States*, 181 F.3d 876, 878 (8th Cir. 1999) ("Concluding that apparent authority is not a basis for FTCA liability in South Dakota[.]").

[2] Plaintiffs have not argued that the public duty rule is applicable to the facts of this case and have waived any argument on this topic.

state law." *Sorace v. United States*, No. CIV 13-3021-RAL, 2014 WL 2033149, at *7 (D.S.D. May 16, 2014), aff'd, 788 F.3d 758 (8th Cir. 2015) (internal quotation and citation omitted). Similarly, "even if specific behavior is statutorily required of a federal employee, the government is not liable under the FTCA unless state law recognizes a comparable liability for private persons." *Ayala v. United States*, 49 F.3d 607, 610 (10th Cir. 1995). It is axiomatic that "[t]he violation of a federal regulation in and of itself is not a basis for liability under the FTCA." *Black Hills Aviation, Inc. v. United States*, 34 F.3d 968, 973 n.2 (10th Cir. 1994); *see also Jayvee Brand, Inc. v. United States*, 721 F.2d 385, 390 (D.C. Cir. 1983) (violation of the government's duties under federal procurement regulations "is action of the type that private persons could not engage in and hence could not be liable for under local law.").

Plaintiffs' Amended Complaint fails to allege facts imposing liability upon a private citizen under South Dakota law. In *United States v. Olson*, the Supreme Court reiterated the importance of the plain words of 28 U.S.C. § 134(b), which waives sovereign immunity only "under circumstances where the United States, if a private person" would be liable. 546 U.S. 43, 45-46 (2005). The United States understands the test is not "if a state or municipal entity" would be liable. *Olson*, 546 U.S. at 45-46. Courts plainly acknowledge that the FTCA "allows those injured by the acts or omissions of a government employee to recover damages in the same way that they would if they were injured by the [conduct] of a private person . . . [and] follows that the Federal Tort Claims Act does not cover breaches of federal statutory or regulatory duties that do not apply to private parties." *Smith v. United States*, 14 F. 4th 1228, 1232 (11th Cir. 2021) (citations omitted).

Yet, the challenged conduct in this case, the officer's alleged failure to follow the Bureau of Indian Affairs Law Enforcement Handbook, the 638 contract, or federal regulations, does not meet the private person analogue. Furthermore, an allegation of negligence that a private person

was outside of his or her jurisdiction does not establish that the United States has waived sovereign immunity. Thus, the Amended Complaint fails to state a claim or establish jurisdiction.

Plaintiffs' only response is that sometimes when the government "agrees to ensure compliance with directives and regulations," those same directives and regulations can give rise to a state common law duty. Docket 111 at 12 (citing *Kristensen v. United States*, 372 F. Supp.3d 461, 469 (W.D. Tex. Jan. 31, 2019)). But other district courts in South Dakota already have rejected this argument. In *Larson v. United States*, Civ. 20-3019-RAL, 2021 WL 3634149, at *5 (D.S.D. Aug. 17, 2021), Judge Lange held that the United States did not have a duty to prevent a third-party's trespass when the alleged obligation stemmed from a contract[3] and federal trespass regulations, because "the Eighth Circuit has made clear that the United States's failure to fulfill a federally imposed obligation is not actionable under the FTCA." *Id.* (citing *Klett v. Pim*, 965 F.2d 587, 589 (8th Cir. 1992)). At bottom, Plaintiffs must prove as a matter of law that Neuenfeldt failed to act as a reasonable police officer in South Dakota, which they cannot do.

B. There is No Dispute in Material Fact that Neuenfeldt's Conduct Was that of a Reasonable Police Officer in the Same or Similar Circumstances.

Plaintiffs argue that "Officer Neuenfeldt lacked jurisdiction to exercise any authority outside the bounds of the FSS Reservation on the night in question" and "[f]rom the moment Officer Neuenfeldt jumped Deputy Carl Brakke's call for a non-tribal ambulance, he was negligent." Docket 111 at 2.

Plaintiffs' reliance on whether or not Neuenfeldt had "jurisdiction" is the wrong inquiry.

[3] Plaintiffs could not assert any contractual duties because they are neither parties to nor beneficiaries of the 638 contract, as they are not tribal members or residents or visitors of the Flandreau Santee Sioux Reservation. *Val-U Const. Co. of S.D., Inc. v. United States*, 905 F. Supp. 728, n. 1, 3 (D.S.D. 1995) (discussing that breach of contract claims are not cognizable under the FTCA and discussing valid parties to those actions).

Plaintiffs must pick a position on this argument. When dealing with the FTCA, the ISDEAA, and a tribal employee like Neuenfeldt, to establish that this Court has subject matter jurisdiction, Plaintiffs have the burden of "identify[ing] which [638] contractual provisions the alleged tortfeasor was carrying out at the time of the tort." *Shirk v. U.S. ex rel. Dep't of Interior*, 773 F.3d 999, 1006 (9th Cir. 2014). Instead, Plaintiffs take an opposite approach and argue that Neuenfeldt lacked authority to be on scene at all. Thus, they have not carried their burden to establish subject matter jurisdiction exists and do not respond to the *Shirk* argument at all. *See* Docket 117 (United States' Reply Brief to its Motion to Dismiss) at Section V.

Conversely, the United States has argued that Neuenfeldt was performing a function of the 638 contract on June 18, 2017. The undisputed evidence is that the 638 contract considers that "the contractor may be required to leave or operate outside of Indian country" and yet still be operating "within the scope of this contract." Docket 93-1 at USA001393. Plaintiffs argue that these contractual provisions are not material. Docket 112 ¶ 4 (Plaintiffs did not articulate the basis for their objection to the plain language of the contract, instead arguing it is not material). When Plaintiffs argue that Neuenfeldt lacked jurisdiction to leave the bounds of the FSST reservation, it seems quite material that the 638 contract that transforms Neuenfeldt into a federal employee also allows him to leave Indian Country and still provide services under the contract. The mutual assist agreement, which was an attachment to the 638 contract, also presumed that the Chief of Police could provide mutual aid to a Moody County deputy upon a direct request, whether informal or formal, due to the threat of an emergency. That is what Deputy Brakke, Sheriff Wellman, and Chief Neuenfeldt concluded occurred. *See* Docket 117 at 3-5 (discussing Deputy Brakke's and Sheriff Wellman's testimony that a general request for assistance was made, and if it was heard by Neuenfeldt the Tribe would be included in a request for any available unit).

Plaintiffs' unsupported allegation that Neuenfeldt "jumped" a call on June 18, 2017, is based solely on their own allegations and is not supported by record evidence. There is no dispute that certain witnesses testified that Neuenfeldt had "jumped" Moody County's calls in the past. Docket 111 at 19. However, Sheriff Wellman defined jumping calls as: "If [the County] were on a traffic stop outside of [Flandreau], we would not request any help. The deputies that I have and had at the time are capable of doing their job . . . If they need help, we'll ask for it, but there was times that Rob would show up on a call or on a traffic stop that he was not requested for backup or any kind of mutual aid at that point." Docket 85-17 at 25. Neuenfeldt's response to Deputy Brakke's two requests for assistance on June 18, 2017, is clearly not "jumping a call." This was not a traffic stop. There was a call for assistance to any available unit who could hear the request over the Moody County's radio channel and the State's inter-agency channel. Docket 91-3 at 47, 57 (Brakke Deposition). There was a second request for an ambulance or EMS when someone had a seizure. Docket 91-4 at 4; Docket 91-3 at 38-39. Deputy Brakke requested assistance multiple times and deemed the situation to be at least the "threat of emergency" pursuant to the mutual aid agreement. Docket 91-3 at 46. Thus, there is no dispute that Neuenfeldt was attempting to provide mutual aid, as requested.

Finally, no police officer ever gave Chief Neuenfeldt "10-22" or directed him to leave the scene once he responded to Moody County's request for assistance. Instead, when Sheriff Wellman was asked if he thought Chief Neuenfeldt's response to the scene was improper, he said: "I do not." Docket 85-17 at 72. Sheriff Wellman also testified that generally if one mutual aid party requests assistance from the other, the assisting party would help first and figure out the logistics after the fact. *Id.* at 57, 61-62. For all of these reasons, the Court can find as a matter of law that

Neuenfeldt had authority when he responded to the scene of the house party and acted reasonably[4] in his response.

Plaintiffs also allege that "[t]he severity of his negligence was compounded by the fact he was not aware of a single pursuit policy that required his consideration." Docket 111 at 2. This has no support in the record. While Neuenfeldt testified he was unaware of the particular language of the BIA Handbook's pursuit policy, he was aware of safety issues he needed to consider in a high-speed pursuit, and he would consider those safety issues. Docket 85-4 at 36. Neuenfeldt admitted that seriousness of the crime, the consequences of the pursuit, pedestrian and vehicle traffic in the area of the pursuit, the driver and passengers involved, and that he had to attempt to exercise sound judgment, would all be considerations when determining whether to engage in a high-speed pursuit. *Id.* at 43; 248-250, 274, 319-20. Neuenfeldt also testified that he did not have the privilege of hindsight during the pursuit. *Id.* at 248. He also testified that he relied on his knowledge, expertise, and training as a law enforcement officer in his daily functions as a tribal law enforcement officer. *Id.* at 320.

Plaintiff cannot establish that Neuenfeldt's lack of awareness of the particulars of a federal policy could establish the breach of a known duty under South Dakota law. Judge Duffy found in *Colombe* that even if the police officers did not actually consider or weigh the factors outlined in the BIA Handbook's pursuit policies, that it did not exclude their conduct from the exception to the waiver of sovereign immunity under 28 U.S.C. § 2680. *See Colombe v. United States*, Civ. 16-05094-JLV, 2019 WL 7629237, at *15 (D.S.D. July 30, 2019) (report and recommendation), *adopted in full,* 2019 WL 7628982 (Viken, J., Oct. 21, 2019) (stating the appropriate consideration

[4] *See also* the United States' Reply brief discussing that Neuenfeldt's decision to respond to the house party scene and his interpretation of the mutual assist agreement are discretionary decisions that are protected by the discretionary function exception to the FTCA. Docket 117 at Section II.

was the type of conduct associated with exercise of discretion rather than whether the government actually considered the relevant factors or possible outcomes). The discretionary function exception would equally apply to this alleged breach.

Plaintiffs also argue that Neuenfeldt breached his duty of care by re-starting a pursuit that had been terminated. The United States provided a substantial record of how Chief Neuenfeldt continued Trooper Kurtz's pursuit and how Trooper Kurtz actively worked to re-engage as primary pursuer. Accordingly, Neuenfeldt's conduct was reasonable as a matter of law. Additionally, the United States has not waived its sovereign immunity to suit under the discretionary function exception for any conduct involving Neuenfeldt's decision to join, begin, or continue a pursuit, as supported by two similar factual scenarios in the District of South Dakota involving the same Bureau of Indian Affairs Handbook. Docket 97 at 36-37.

Finally, Plaintiffs argue that Neuenfeldt breached a duty of care because he continued to pursue Bourassa even as Bourassa's identity was known. Again, this is not supported by the undisputed material facts of record. Docket 111 at 22. After Deputy Brakke relayed some name over the radio, Trooper Kurtz asked dispatch to run a name search or find an address for the name Deputy Brakke relayed, but no information was available during the pursuit. Docket 91-7 at 189-91. Troopers Spielmann and Kurtz, Deputy Baldini, and Chief Neuenfeldt all testified that they did not know Bourassa and were not aware of Bourassa's identity during the pursuit. *Id.*; *see also* Docket 91-2 at 277-79; Docket 91-5 at 113; Docket 91-10 at 18, 24-35. Thus, Plaintiffs' theory that Bourassa's identity was known is based on nothing more than speculation and should be rejected.

Plaintiffs argue that Bourassa could have been located the next day by other means and cite to his ankle monitor tracking sheet that was included in the Highway Patrol's accident report.

Docket 111 at 6-7. The officers did not know that Bourassa was on probation or parole until after Bourassa crashed. Docket 85-16 at 109. Trooper Kurtz testified: "we found an ankle bracelet at the scene after the crash. We contacted, I believe it was a parole officer, to see if he could do a download of that ankle bracelet after the fact – and he gave this [Veritracks sheet] to us after the pursuit. We did not have this during the pursuit." *Id.*; *see also* Docket 113-2. This argument is speculative and unsupported.

In assessing a motion for summary judgment, a court is to "consider only admissible evidence and disregard portions of various affidavits and depositions that were made without personal knowledge, consist of hearsay, or purport to state legal conclusions as fact." *Howard v. Columbia Pub. School Dist.*, 363 F.3d 797, 801 (8th Cir. 2004); *see* Fed. R. Civ. P. 56(e) (A party may not rely on his own pleadings in resisting a motion for summary judgment; any disputed facts must be supported by affidavit, deposition, or other sworn or certified evidence.). The nonmoving party's own conclusions, without supporting evidence, are insufficient to create a genuine issue of material fact. *Anderson*, 477 U.S. at 256; *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007). Based on the arguments stated above rather than undisputed record evidence, Plaintiffs cannot avoid summary judgment.

Plaintiffs attempt to advance expert[5] testimony for their argument that Neuenfeldt's pursuit conduct breached some standard of care. However, Plaintiffs offer no sworn expert testimony, which is required by Rule 56(c) of the Federal Rules of Civil Procedure and D.S.D. L.R. 56.1.B, to support their denial of the United States' Motion for Summary Judgment on Neuenfeldt's alleged pursuit negligence. Plaintiffs' police expert, Brad Booth, issued an unsworn report, Docket

[5] The United States reserves the right to further challenge whether this expert is qualified to opine as a law enforcement expert in the future, but specifically, whether he is qualified to opine on 638 contracts, the BIA Handbook, or jurisdiction in Indian country.

113-3, that generally asserts that Chief Neuenfeldt was outside of his jurisdiction or "did not follow policies" as set out in the BIA manual. These unsworn opinions are legal conclusions that purport to masquerade as facts or proper opinions. Booth otherwise makes incorrect factual assumptions given that his report was issued years before many of the depositions occurred and before the record facts were uncovered. For these reasons, all of his unsworn opinions are unsupportable and fail to create genuine issues of disputed material fact.

The Eighth Circuit holds that "[e]xpert testimony that is speculative is not competent proof and contributes 'nothing to a legally sufficient evidentiary basis.'" *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000) (citation omitted). *Id.* When there are deficiencies in the foundational facts or assumptions upon which the expert bases his opinion, then the resulting conclusions are "mere speculation" that should be excluded. *Id.*

Here, Booth's report is dated November 15, 2020. Docket 113-3. He had not reviewed the deposition testimony of Neuenfeldt, Roemen, Kurtz, Brakke, Baldini, or any other law enforcement officer who was involved in the pursuit. *Id.* at 1-2 (listing what evidence he considered in forming his opinions and excluding these depositions). He had not reviewed Sheriff Wellman's testimony. *Id.* He did not review the pursuit policy of Moody County, to whom Chief Neuenfeldt was offering active assistance. *Id.* He certainly did not review Deputy Brakke's testimony that he made a general call for assistance to any available units on June 18, 2017. *Id.* For these reasons, his unsupported opinions or those founded upon incomplete facts, must be rejected.

Next, Booth's opinions amount to an impermissible legal conclusion. "Any expert testimony on a legal conclusion will not assist the trier of fact and is thus inadmissible." *Berg v. Johnson & Johnson*, 940 F. Supp. 2d 983, 1000 (D.S.D. 2013) (citing *United States v. Wells*, 63

F.3d 745, 753 (8th Cir. 1995), *reversed on other grounds*). "Opinion testimony is not helpful to the factfinder if it is couched as a legal conclusion." *Hogan v. Am. Tel. & Tel. Co.*, 812 F.2d 409, 411 (8th Cir. 1987) (citation omitted). "[F]ederal courts typically preclude experts from interpreting the law for the court or from advising the court about how the law should be applied to the facts of a particular case." *McElgunn v. Cuna Mut. Group.*, Civ. 06-5061, 2008 WL 6898653, at *1 (D.S.D. Mar. 24, 2008).

The purpose of expert testimony is to assist the trier of fact and not to supplant it. Booth's opinion about whether or not Neuenfeldt was outside of his jurisdiction is a legal conclusion that must be made by the Court. Any opinion expressed by Plaintiffs' expert as to whether an officer's actions are objectively reasonable or a breach of applicable duty is not conclusive or appropriate. *Graham v. Connor*, 490 U.S. 386 (1989). Even though Plaintiffs argue that Booth "was asked by Plaintiffs' counsel to investigate whether Officer Neuenfeldt's actions on the night in question were both accurate and justified," those are just substitutes for "reasonable." Docket 111 at 7. Plaintiffs' unsworn expert testimony made no attempt to address the standard of care for law enforcement activities in South Dakota for areas adjacent to Tribal communities, nor did it address a national standard on policing policies; it merely offered bare and incorrect legal conclusions about negligence.

Since it is the purview of the Court, and not Mr. Booth, to resolve legal questions of negligence, Mr. Booth's personal opinions do not assist the trier of fact. His generic comments about law enforcement in South Dakota ignore the standard of care based on state law, ignore national law enforcement standards, rely on either unsupported facts or facts not in evidence, advance legal conclusions he is not capable of making, and ultimately, carry no weight. Accordingly, they cannot withstand a motion for summary judgment.

C. Proximate Cause and Comparative Fault Analyses Require Examination of Entirety of the Pursuit Facts, Including Conduct of Tahlen Bourassa and Any Intervening Events or Causes.

Plaintiffs routinely ask the Court to ignore material facts because they are not favorable to Plaintiffs' culpability. Even if Plaintiffs had shown that Neuenfeldt's conduct during the pursuit was below the standard of care, which they cannot, the Court can consider all facts leading up to and occurring during the pursuit to determine the proximate cause of the injuries to Plaintiffs. These facts include Bourassa's conduct[6] during the pursuit, which must be accounted for in considering Neuenfeldt's conduct and Plaintiffs' comparative fault and assumption of the risk. The United States is not asking the Court to apportion fault. Instead, it asks the Court to fully analyze the third element of a negligence claim: what is the proximate cause of Plaintiffs' injuries.

While Neuenfeldt and the other law enforcement officers were taking actions to continue the pursuit, most of the law enforcement conduct was dictated by Bourassa's on-going reckless behavior. Docket 99 at 22-24. Other courts in this district specifically found that although law enforcement officers initiated and continued pursuits, that the proximate cause of the injuries was the driver's negligent conduct. *Blacksmith v. United States*, Civ. 06-5022-AWB, 2008 WL 2001975 (D.S.D. May 6, 2008) ("[E]ven if it were to believe that OST DPS breached a duty to Nathan Dreamer during the police pursuit, Plaintiff has not met her burden of proving that any

[6] The United States reserves its ability to join or file a third-party action against Bourassa later in this lawsuit. The United States further preserves its right to later move to consolidate these two actions with Bourassa's action against the United States for negligence. *See* Civ. 20-4210-LLP. Plaintiffs have been aware that the Defendants may move to consolidate these actions since the Rule 26 meeting on July 15, 2020, in the two passengers' cases. *See* Docket 34, Parties' Discovery Report (stating under "Other matters" that "[i]t is likely that a third case involving the driver of this accident, Tahlen Bourassa, will be filed in district court . . . . The parties will likely disagree as to whether Mr. Bourassa's claims should be tried with either this [Roemen] matter or the *Ten Eyck* matter.").

such negligence was the proximate cause of [the] injuries[,]" but that the proximate cause was his own reckless driving behavior); *Good Low v. United States*, 428 F.3d 1126, 1128-29 (8th Cir. 2005) (dismissing case because plaintiff failed to establish the police officer's negligence was the proximate cause because driver's conduct was clearly a contributing cause of his injuries; and thus, his contributory negligence barred the action when it was greater than slight). Here too, it is appropriate for the Court to find in the United States' favor as a matter of law.

And even if Bourassa were not the proximate cause of the start of the pursuit and the bulk of the pursuit, he certainly was the proximate cause of the accident at the end of the pursuit and his decision to drive down a dusty road with a warning that it was a dead-end was an intervening cause that resulted in Plaintiffs' injuries. "Proximate cause is defined as 'a cause that produces a result in a natural and probable sequence and without which the result would not have occurred. Such cause need not be the only cause of a result. It may act in combination with other causes to produce a result.' " *Howard v. Bennett*, 894 N.W.2d 391, 395 (S.D. 2017) (citations omitted). However, "[w]hen the natural and continuous sequence of causal connection between the negligent conduct and the injury is interrupted by a new and independent cause, which itself produces the injury, that intervening cause operates to relieve the original wrongdoer of liability." *Id.* (quotation omitted) (emphasis omitted). An intervening cause that cuts off liability is a superseding cause if it "so entirely supersede[s] the operation of the defendant's negligence that it alone, without his negligence contributing thereto, produces the injury." *Id.*

In *Howard*, one motorist sued another motorist's estate when the first motorist had an accident soon after the initial motorist's accident in the same location, and the motorist believed his accident was caused by the first accident. 894 N.W.2d at 395. Although only the two motorists were parties to the action, the deceased motorist's estate argued that it was the Highway Patrol's

negligence in controlling his accident scene that caused the second accident, if any negligence existed at all. The South Dakota Supreme Court did not find it could not consider the Highway Patrol's conduct because it was not a named party, but instead focused on its conclusion that there could be no reasonable difference of opinion that the second accident was not a foreseeable consequence of the first driver's negligence, and could not be the proximate cause of the second motorist's injuries. *Id.* at 396. The first driver's negligence did not create a danger that injured the second, but merely "furnished the condition through which by subsequent independent events the injury resulted." *Id.* (citation omitted).

At the time Plaintiffs' injuries occurred, the pursuit had nearly concluded without injury, but instead of getting out of his truck, Bourassa ignored Deputy Baldini's commands and suddenly reversed and turned east down 229-A. Docket 91-5 at 186-187, 218-219. Chief Neuenfeldt and Deputy Baldini were well behind Bourassa's vehicle turning onto 229-A, as Baldini was still getting back in the cruiser. *Id.*; Docket 91-2 at 308. Chief Neuenfeldt was slowly following Bourassa east down 229-A, but he was not speeding because the road was dusty, and he knew it was a dead-end. Docket 91-2. at 308. Chief Neuenfeldt estimated he was a quarter of a mile behind Bourassa on 229-A because he recalls being near a specific grove of trees when Deputy Baldini got on the radio and said he thought Bourassa wrecked. *Id.* at 313. Deputy Baldini also estimated their cruiser was at least a quarter of a mile behind the truck on 229-A. Docket 91-5 at 190. Conversely, Roemen testified that once Bourassa turned onto 229-A, Roemen told Bourassa that it was a dead-end road. Docket 91-8 at 88. Bourassa ignored his passenger's advice, driving fast down 229-A. *Id.* at 112.

As in *Howard*, reasonable minds cannot differ that Neuenfeldt's conduct did not cause Plaintiffs' injuries. Bourassa's conduct in specifically ignoring that the road ahead was dangerous

was an intervening cause that independently caused Bourassa's truck to crash and its occupants to sustain injuries. The pursuit or the immediate conduct of Chief Neuenfeldt and Deputy Baldini merely "furnished the condition through which by subsequent independent events the injury resulted." *Howard*, 894 N.W.2d at 395 (citation omitted).

Recognizing this is so, Plaintiffs assert the United States cannot discuss the proximate cause of Plaintiffs' injuries when Bourassa is not a party to this action. Plaintiffs' sole support is a South Dakota state pattern jury instruction. But this is not a jury trial. The United States' liability, if any, will be decided by the Court, which is fully capable of understanding its role in what evidence it may consider and for what purpose it may consider it. Reasonable minds cannot differ that Bourassa's actions were an intervening cause that directly caused Plaintiffs' injuries.

D. Plaintiffs Were Contributorily Negligent or Assumed the Risk of Their Injuries.

Plaintiffs disputed that many of the facts leading up to the pursuit or occurring during the pursuit were material or relevant. However, these facts are critical to explain what happened on the evening in question. Further, since there are contributory negligence and assumption of the risk claims against Roemen and Ten Eyck, all facts that occurred mid-pursuit are relevant to their fault and assumption of the risk. For instance, Plaintiffs should have admitted the United States' SUMF ¶¶ 98-101 that discuss when the Bourassa truck stopped and hid for one minute, and neither Roemen nor Ten Eyck asked to get out or asked Bourassa to stop fleeing. Docket 112 at 25-26. Plaintiffs' argument that these facts are not material should be rejected. Plaintiffs' refusal to admit facts based on Roemen's own deposition testimony establishes they are trying to avoid Plaintiffs' own negligence or assumption of the risk of the pursuit, which is evidenced by their remaining in the truck throughout the full minute stoppage that occurred at 484th Avenue and 242nd Street, just a few minutes into the pursuit.

Plaintiffs further attempt to distract from or minimize their own knowledge by arguing that Roemen did not speak directly with Bourassa about his troubled history with law enforcement or that Morgan Ten Eyck had simply googled her boyfriend's name. Docket 111 at 4. Regardless of the source, as of June 17, 2017, Micah Roemen admitted he had actual knowledge that Bourassa was wearing an ankle monitor, had previously been involved in a stand-off with law enforcement, had previous trouble with drugs and a prior burglary charge, and was recently in jail. Docket 91-8 at 44-45, 58-59. Morgan Ten Eyck googled Tahlen Bourassa's name and pulled up stories related to him that a "McDonald's receipt led to arrest of burglary suspects" and "Standoff Suspect in Court Thursday, New Charges Expected." Docket 91-17 at 2. Plaintiffs cannot and do not dispute this actual knowledge.

Both Plaintiffs still chose to drive around with Bourassa after midnight on a Friday night knowing what they knew. No one is arguing that these decisions negate the tragedy of their injuries. But the law asks whether they contributed to their own injuries more than slightly or assumed the risk of injury when they had extensive knowledge of the risks they were undertaking, given Bourassa's history. Even if they did not assume the risk or contribute to their own injuries when they got in the truck, they contributed to their own injuries more than slightly or assumed the risk when they willingly and knowingly remained in the vehicle mid-pursuit and never spoke up or acted to protect themselves. Thus, Plaintiffs' unreasonable and knowing conduct and failure to act to protect themselves amounts to both contributory negligence more than slight and assumption of the risk.

While the duty of the passenger is not the same as the duty of a driver, the passenger still has a duty to act "as a reasonably prudent person would act under the circumstances and conditions then existing." *Miller v. Baken Park, Inc.*, 175 N.W.2d 605, 609 (S.D. 1970). The South Dakota

Supreme Court has opined:

> While the guest has no duty to direct or control the driver who has physical control of the car, but may trust him until it becomes clear that such trust is misplaced, there is a point where passive reliance upon the driver ends and the duty of a guest to exercise ordinary care for his own safety begins. *If the guest sees, or ought by due diligence to see, a danger not obvious to the driver, or sees that the driver is incompetent, careless, or not taking proper precautions, it is his duty to give some warning of danger, and a failure to do so constitutes contributory negligence . . . .* At precisely what point the duty arises . . . is largely a factual question to be properly decided by the jury upon the basis of the available facts and circumstances.

Beyer v. Cordell, 420 N.W.2d 767, 769-70 (S.D. 1988) (internal citations omitted).

At approximately 1:30 a.m. on June 18, 2017, Roemen and Ten Eyck were in the middle of a high-speed pursuit with Bourassa at the wheel. By that time, both Plaintiffs knew that Bourassa had been in a stand-off with law enforcement prior to this night. After speeding away from numerous police officers, striking Chief Neuenfeldt, and going around Trooper Spielmann's spike strips, Bourassa suddenly stopped the truck, turned off the lights off, and actively hid for more than one minute. Docket 91-8 at 95-97; 101-102. Plaintiffs had the knowledge, opportunity, and time to act to protect themselves and get out of the vehicle. The undisputed evidence establishes that neither of them tried to get out. *Id.* at 96-97, 89. Neither Plaintiff asked Bourassa to stop fleeing. Neither asked Bourassa to let them out. Neither attempted to get out. Roemen testified that Plaintiffs said and did nothing (other than noting that a road was a dead-end) during the remainder of the pursuit. Plaintiffs argue that they never "had a safe opportunity to exit [Bourassa]'s truck," which the record demonstrates is not true. On this record, a factfinder cannot conclude that Plaintiffs' comparative negligence is slight or must conclude as a matter of law that Plaintiffs assumed the risk of their injuries.

II. The United States Is Entitled to Summary Judgment on Count V.

A. Plaintiffs Failed to Articulate a Breach of an Actionable Duty Grounded in State Law for Negligent Supervision, Training, and Retention.[7]

Plaintiffs' main argument in favor of summary judgment on Count V is that the Government failed to perform a mandatory background check on Officer Neuenfeldt before hiring him as a tribal officer and promoting him to Acting Chief of Police. Docket 111 at 2. There is no dispute that this claim is a negligent hiring or a negligent retention claim. *See* Docket 97 at 42-44; 117 at IV. This is supported by the very case that Plaintiffs use as the source of their argument on Count V against the United States. *See Dakota Provisions, LLC v. Hillshire Brands Co.*, 226 F. Supp. 3d 945, 955 (D.S.D. 2016) ("Broadly stated, a negligent hiring claim suggests that *at the time an employee was hired*, it was negligent for an employer to engage the employee's services based on what the employer knew or should have known about the employee.") (quoting *Kirlin v. Halverson*, 758 N.W.2d 436, 444 (S.D. 2008)). As the United States previously noted in its Motion to Dismiss pursuant to 12(b)(1), Plaintiffs did not present a claim for negligent hiring in their administrative claim to the Department of Interior. Furthermore, Plaintiffs allege that the United States negligently retained Neuenfeldt after OJS employees knew that FSST police officers did not have background checks. Again, Plaintiffs did not present a negligent retention claim in their administrative tort claim. Thus, this Court does not have subject matter jurisdiction over any breach of this alleged duty pertaining to background checks broadly. Thus, the Court lacks

[7] The Court lacks jurisdiction over Plaintiffs' Negligent Hiring and Retention claims for those reasons expressed in the United States' Motion to Dismiss for Lack of Presentment, which is a jurisdictional bar to suit. Docket 97 at 42-44. Thus, all of Plaintiffs' arguments pertaining to negligent hiring or retention (Neuenfeldt's alleged pre-employment misconduct and/or lack of background check and/or failure to terminate employment for lack of training) must be ignored because those claims are not before the Court.

jurisdiction over a negligent hiring and/or retention claim and this alleged duty and breach.

Plaintiffs extensively cite to *Kirlin* to argue that their employment-like claims have merit. *Kirlin* only highlights the fatal flaws in Plaintiffs' argument. In *Kirlin*, there was a singular violent act that constituted an intentional tort that was untethered to the duties of the employee's job of providing HVAC maintenance. The only reason the negligent training, retention, and supervision arguments was discussed was whether this violent conduct was foreseeable based on the employer's knowledge. That is distinct from when Neuenfeldt was applying discretionary policies and using force as part of his police duties. But this case also is dissimilar from *Kirlin* because Plaintiffs have failed to connect the alleged negligent training or supervision to a specific action that occurred during the high-speed pursuit or otherwise establish causation between the employment claims and Neuenfeldt's specific conduct. Plaintiffs allege the United States' alleged employment failures resulted in Neuenfeldt being outside of his jurisdiction and negligently starting a pursuit. As stated above, these allegations are unsupported by the record. However, even if they were correct, Plaintiffs fail to point to any training or supervision issues that actually resulted in the pursuit itself being performed in a manner that fell below the standard of care and caused harm to Plaintiffs.

The United States does not dispute that there is a general duty to train police officers in South Dakota, but Plaintiffs cannot establish that there is heightened duty as found in a 638 contract, federal regulation, or federal handbook. To the extent Plaintiffs or the Court would argue that a breach of contract claim is a relevant state analogue, a breach of contract claim is not cognizable under the FTCA. *Larson v. United States*, Civ. 20-3019-RAL, 2021 WL 3634149, at *5 (D.S.D. Aug. 17, 2021) ("A breach of contract claim against the United States is not actionable under the FTCA."). In *Larson*, Judge Lange reiterated that the United States did not have a duty

to prevent a third-party's trespass when the alleged obligation stemmed from a contract and federal trespass regulations because "the Eighth Circuit has made clear that the United States's failure to fulfill a federally imposed obligation is not actionable under the FTCA." *Id.* (citing *Klett v. Pim*, 965 F.2d 587, 589 (8th Cir. 1992)).

Plaintiffs do not articulate, and have no expert testimony regarding, what the standard for training in South Dakota is for any police officer. Thus, Plaintiffs equally fail to establish a breach regarding Neuenfeldt's training. The undisputed facts establish that Neuenfeldt was trained pursuant to South Dakota law enforcement standards. He attended the South Dakota State Police Academy, which included pursuit training, and passed that course. Docket 102 ¶ 28. He received some training each year as noted on his training log. Docket 85-7; Docket 99 at 28. Neuenfeldt received field training when he was employed with Moody County, which included additional pursuit training. *Id.* Plaintiffs would not have a maintainable action in State Court against a private state actor on this record. Instead, here, they improperly are relying on concepts like an alleged breach of a contractual duty or on the United States' trust responsibility. *See* Docket 111 at 9 ("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 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 material to its duty under Kirlin v. Halverson.").

And even if Plaintiffs had presented evidence that the training identified in the 638 contract, federal regulation, or BIA Handbook was required to meet the standard of care for training of law enforcement in South Dakota, they do not appropriately allege and support that Neuenfeldt's training and experience was not comparable to this standard of care. Again, only an expert could

support such assertions. Plaintiffs do not have one. Instead, without support, Plaintiffs' current position is that regardless of whether Neuenfeldt's prior training and experience were comparable to the training identified in federal standards, his failure to get these exact trainings constitutes a breach. These unsupported allegations would be a "dramatic expansion of the Federal Tort Claims Act's waiver of sovereign immunity" if the Court were to find that the United States violated a federal duty or federal standard when that standard would not apply to a private party. *Smith*, 14 F.4th at 1234. Thus, Plaintiffs' arguments must be rejected.

B. The United States Is Entitled to Summary Judgment on Proximate Cause as to Count V Because Plaintiff Provides No Causation Evidence or Expert Testimony.

Plaintiffs do not rebut the cases asserted by the United States that police officer training is generally not within the purview of lay people. However, Plaintiffs argue that the breach is so obvious that even a lay person would understand it. However, "if bare allegations of a causal connection between a perceived deficiency in training and an accident were sufficient to support a negligent training claim, such a claim would exist against an employer every time an employee was driving and a passenger was injured." *Finkle v. Regency CSP Ventures Ltd. P'ship*, 27 F. Supp. 3d 996, 1001 (D.S.D. 2014) (citation omitted).

Plaintiffs failed to identify, via expert testimony or at all, the precise training or supervision that would have prevented specific allegedly tortious conduct by Neuenfeldt during the pursuit, and establish causation between that training and Neuenfeldt's conduct. Plaintiffs failed to obtain such an expert prior to summary judgement, and their claim fails. The United States is entitled to judgment as a matter of law.

III. Due to the Private Person Analogue to the FTCA, SDCL 3-21-9 Provides State Law Immunity for All Claims Against the United States.

Plaintiffs argue that SDCL 3-21-9 cannot apply because they were not escaping prisoners or persons resisting arrest, and the United States is attempting to apportion fault to Bourassa. First, as discussed above, the United States was discussing the factual series of events that caused Plaintiffs' injuries rather than attempting to apportion damages. Second, SDCL 3-21-9 is an absolute bar on liability that has no textual limitations related to "fault" or named parties. The statute does not require that the prisoner or person resisting arrest be the plaintiff in the action. Instead, the statute plainly provides that "[n]o person, political subdivision, or the state is liable for. . . any injury caused by or resulting from . . . [a]n escaping or escaped person [or] [a] person resisting arrest[.]" *Id.* (emphasis added).

Under the FTCA, the United States is able to assert any personal defense, including state law immunities, that its employee may raise under substantive state law. *Brownback*, 141 S. Ct. at 746-47 (noting the district court dismissed the action when analyzing the FTCA claim because the "Government was immune because it retains the benefit of state-law immunities available to its employees.").

Here, the conduct meets the plain terms of SDCL 3-21-9's immunity. Neuenfeldt was clearly a "person" to whom the immunity applies. Bourassa was resisting arrest under these facts. Bourassa knew that law enforcement intended to arrest him when they attempted to pull him over with commands to stop and police flashing lights clearly activated (Docket 91-2 at 257; Docket 91-7 at 123-26), when Neuenfeldt told Bourassa that he better unlock the doors or Neuenfeldt would arrest Bourassa (Docket 91-8 at 75), when spike strips were laid and Bourassa drove around the spike strips (Docket 91-10 at 21-22), when Bourassa intentionally hid from pursuers with his lights off during the pursuit (Docket 91-895-96; 98; 101-102), and when Deputy Baldini told

Bourassa to stop or get out of the vehicle just north of Flandreau (Docket 91-5 at 218), among other evidence of law enforcement's intent to arrest Bourassa. Finally, the statute does not merely confer immunity from injuries to the arrestee or to the "driver." Instead, immunity is conferred for "any injury caused by or resulting from" the resistance or flight. SDCL 3-21-9 (emphasis added). Roemen and Ten Eyck were clearly injured as a result of Bourassa escaping or resisting arrest from numerous law enforcement jurisdictions.

Plaintiffs' argument is that the United States inappropriately attempts to shift fault to Bourassa or that SDCL 3-21-9 cannot apply because "Plaintiffs were not on parole and never resisted any unlawful or alleged arrest." Docket 111 at 25. However, in *Hall v. City of Watertown ex. Rel. City of Watertown Police Dep't*, 636 N.W.2d 686 (S.D. 2001), the South Dakota Supreme Court viewed a fact pattern where the injured persons were third-parties who were struck when another driver fled police officers. There, the Supreme Court specifically considered the conduct of the fleeing driver (who was not a party to the action), to determine he could not intend to resist arrest because the police did not clearly express their intent to arrest. *Id.* at 688-89. Thus, there is no requirement that the conduct of the injured party be examined.

Plaintiffs also argue Bourassa is allowed to use all reasonable force to resist an unlawful arrest. Docket 111 at 25. Plaintiffs cite to a Georgia state court case, and even if this non precedential case was applicable, which it is not, SDCL 3-21-9 does not include a requirement that the arrest be "lawful" as Plaintiffs allege and contains no qualifications. Next, even if the Court were to read such a word into the statute, the record evidence establishes that numerous officers' attempts to arrest Bourassa were lawful.

Based on Bourassa's driving action near the house party scene, Trooper Kurtz believed he had reasonable suspicion that the person driving the vehicle was involved at the house party.

Docket 91-7 at 111. Trooper Kurtz saw Bourassa's truck fishtail in his rearview mirror, and then go north on 484th Avenue and activated his emergency lights to stop Bourassa's truck. Docket 101 (SUMF) ¶¶ 62-63. As Bourassa approached, Chief Neuenfeldt and Deputy Baldini began giving Bourassa hand signals and verbal commands to stop "because Kurtz was trying to pull [Bourassa] over." *Id.* ¶¶ 65-66. Bourassa briefly stopped at the driveway for Sergeant Kurtz's emergency lights. Docket 101 (SUMF) ¶ 68. Bourassa then accelerated toward Chief Neuenfeldt. *Id.* ¶ 71. Chief Neuenfeldt drew his gun as the Bourassa vehicle accelerated toward him. *Id.* ¶ 72. Chief Neuenfeldt was struck in the left thigh and shoulder and knocked to his knees by Bourassa's truck, specifically stating Bourassa "sideswiped me when he went past." *Id.* ¶ 73. This conduct establishes that Neuenfeldt's attempted arrest was lawful based on these facts.

Even if Plaintiffs argue that Neuenfeldt's attempted arrest is not lawful, the conduct that occurred after Bourassa struck Neuenfeldt, which included aggravated eluding, avoiding spike strips, running another police officer off the road, and other dangerous conduct would provide grounds for a second legitimate attempted arrest. *See United States v. Schmidt*, 403 F.3d 1009, 1016 (8th Cir. 2005) (discussing Eighth Circuit precedent finds that "resistance to an illegal arrest can furnish grounds for a second, legitimate arrest.") (citations omitted). Additionally, Bourassa's responding use of force could not be deemed reasonable based on these facts.

Plaintiffs have the burden of establishing that this Court has subject matter jurisdiction over this case. Plaintiffs did not even attempt to carry this burden in their reply. Thus, they cannot establish that this immunity is inapplicable to the facts of this case. Sovereign immunity is viewed narrowly in favor of the sovereign, and SDCL 3-21-9 provides an absolute bar from any liability.

CONCLUSION

For the reasons stated above, the Court should deny Plaintiffs' Partial Motion for Summary Judgment and grant summary judgment in the United States' favor.

Dated this 29th day of April, 2022.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of D.S.D. Civ. LR 7.1(B)(1) because it contains 8,745 words.

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