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' BRIEF IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT AND IN RESISTANCE TO PLAINTIFFS' PARTIAL MOTION FOR SUMMARY JUDGMENT**

The United States of America, by and through its counsel of record, resists Plaintiffs' Motion for Partial Summary Judgment on Count V, which alleges negligent training, supervision, and retention against the United States. Docket 83. The United States also cross moves for summary judgment on all claims against it because Plaintiffs can neither establish the breach of a known duty grounded in South Dakota law nor causation for any of their claims (Counts I, III, and V) as a matter of law. The United States also has immunity under South Dakota law to this suit. Dismissal is appropriate.

INTRODUCTION

On June 18, 2017, Tahlen Bourassa made repeated, harmful choices that led to a high-speed pursuit that ultimately resulted in the injuries sustained by his passengers, Morgan Ten Eyck and Micah Roemen. Plaintiffs now move for partial summary judgment, alleging that the United States' failure to train the then-Chief of Police for the Flandreau Santee Sioux Tribe, Robert

Neuenfeldt, caused Plaintiffs' injuries.

As sovereign immunity issues must be resolved at the outset, the Court should grant the United States' Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(h), which would moot Plaintiffs' Partial Motion for Summary Judgment. Dockets 90, 97. Even if the Court reaches Plaintiffs' motion, it must be denied because Plaintiffs cannot establish that the United States breached a known duty established by South Dakota law when they solely allege the United States violated alleged federal mandates. Plaintiffs also failed to provide any causation evidence other than conclusory speculation. Plaintiffs further failed to provide any expert testimony establishing that the absence of a specific training caused Neuenfeldt to engage in the pursuit activities or that Neuenfeldt's conduct on June 18, 2017 fell below the standard of care expected of a similarly situated law enforcement officer. Plaintiffs' failure to show that Neuenfeldt's conduct was below the standard of care defeats their negligent training and supervision claims, because in order to prevail on such claims, they must show that his conduct was unlawful. Thus, their claim fails for each of these reasons.

The undisputed material facts prove as a matter of law that Bourassa's conduct was the proximate cause of Plaintiffs' injuries. The undisputed evidence further 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. Conversely, Neuenfeldt acted as a reasonable police officer and had discretion to make the choices he made on June 18, 2017. Finally, the United States, through Neuenfeldt, as a private person when considering the Federal Tort Claims Act's ("FTCA") jurisdictional parameters, further had immunity from liability for all claims under SDCL

3-21-9. For these reasons, summary judgment must be granted in favor of the United States.

FACTUAL BACKGROUND

I. Flandreau Santee Sioux Tribe's 638 Contract for Law Enforcement Services

The Flandreau Santee Sioux Tribe (hereafter "FSST" or "the Tribe") and the United States, acting through the Bureau of Indian Affairs, Office of Justice Services (hereafter "BIA" or "OJS") entered into a contract wherein the Flandreau Santee Sioux Tribal Police Department was operated by the Tribe pursuant to an Indian Self-Determination and Education Assistance Act ("ISDEAA") Contract (hereafter referred to as the "638 Contract" or "ISDEAA Contract"). Statement of Undisputed Material Fact ¶ 1 ("SUMF"). In this ISDEAA Contract, the provision of law enforcement services for the Flandreau Santee Sioux Indian Reservation was transferred from OJS to the Tribe from October 1, 2015 through September 30, 2018. *Id.* ¶ 2.[1] The only supervisory obligation that the BIA retained with respect to the Contract was noted in the Annual Funding Agreement, which provided that "[t]he Government, through the Bureau of Indian Affairs, shall . . . [p]rovide technical assistance and guidance, as needed, to the Contractor[,]" and "monitor Contractor performance under this contract[,]" which included "[p]eriodic on-site technical assistance visits, as needed and/or requested by the Contractor[.]" *Id.* ¶ 3.

II. Mutual Aid Agreements and Dispatch Agreement

During this same time, the Moody County Sheriff's Office ("Moody County") and the Tribe entered into a Law Enforcement Assist Agreement in September of 2015. SUMF ¶ 5. The City of Flandreau and Moody County had a similar agreement because "there's usually one [police

[1] Furthermore, the 638 Contract provided that "[w]hen operating within the scope of this contract, the contractor may be required to leave or operate outside of Indian country." SUMF ¶ 4. The 638 Contract provides for five specific instances of acceptable work outside of Indian country, but the Contract provides that this "may include, but are not limited to" those five instances. *Id.*

officer] out for each department" and "[s]ometimes one person can't control the situation." *Id.* ¶ 6. Pursuant to their Mutual Aid Agreement, Moody County or the Tribe could request assistance from the other entity "[i]n the event of or the threat of an emergency, disaster, or widespread conflagration which cannot be met with the facilities of one of the parties to this agreement, the other party agrees, upon proper request, to furnish law enforcement assistance to the party requesting the assistance upon either an actual or standby basis." *Id.* ¶ 7. A "proper request" from Moody County to the Tribe "shall only be communicated directly, either formally or informally, by the Sheriff's Office or the Sheriff's designee(s), to the Tribal Chief of Police or the Chief's designee." *Id.* ¶ 8. While the furnishing party is rendering aid to the other, the responding officer "shall temporarily have the same powers and authority conferred by law on the members of the law enforcement of the party to which the assistance is rendered." *Id.* ¶ 9. The Mutual Aid Agreement was an attachment to the 638 Contract. Docket 93-1 at 79-82.

As of June 17, 2017, Moody County provided dispatch services to the Tribe and the City of Flandreau. SUMF ¶ 10. Thus, Moody County's dispatch received and accepted "all calls for service within, or near, the jurisdiction of the Tribe, including emergency calls for fire, medical, and emergency situations." *Id.* It also provided radio and support communications with the Tribe from the initial call until the conclusion of the emergency. *Id.* During this timeframe, Moody County, the City of Flandreau, and the Tribe all utilized the same radio channel. *Id.* ¶ 11. In addition, other nearby agencies or jurisdictions also had access to this radio channel; like Lake County and certain South Dakota Highway Patrol officers who worked in that geographical area. *Id.* ¶ 12.

III. Events Leading Up to Tahlen Bourassa Fleeing Law Enforcement on June 18, 2017

During the 638 Contract performance period, in about January of 2016, Robert Neuenfeldt was hired as a police officer by the Tribe's then-Police Chief, Nicholas Cottier. SUMF ¶ 13. Neuenfeldt had been certified as a law enforcement officer by the State of South Dakota after attending the State Academy in 2013. *Id.* ¶ 14. Neuenfeldt previously worked as a deputy sheriff for Moody County from 2013 through late 2015. *Id.* ¶ 15. Neuenfeldt eventually became Acting Chief of Police for the Tribe and occupied that role on June 17, 2017. *Id.* ¶ 16.

On the evening of June 17, 2017, Moody County Sheriff's Deputies Carl Brakke and Logan Baldini[2] were on duty together in Brakke's police cruiser. SUMF ¶ 17. They were doing a drive-by security check of a residence located in rural Moody County at 24364 484th Avenue, Dell Rapids, South Dakota. *Id.* ¶ 21. The owners of this unoccupied property requested extra drive-bys from the Moody County Sheriff's Office to help the owners with security because there had been a party there the evening before. *Id.* ¶ 22. The owners had ongoing concerns with trespassing. *Id.*

At 11:50 p.m. on June 17, 2017, Deputy Brakke radioed[3] to Moody County dispatch that he could see six to eight vehicles at the location and "looks like another house party going on." SUMF ¶ 23. Deputy Brakke relayed to dispatch that as they pulled up to the residence, 15 individuals ran from the house toward the trees. *Id.* ¶ 24. Deputy Brakke said he believed there

[2] At the time of this incident, Deputy Baldini was new to his position and was riding along with Deputy Brakke for experience. SUMF ¶ 18. Deputy Baldini had been sworn in as a law enforcement officer by a state court judge, but had not yet been to the South Dakota State Police Academy to become a certified law enforcement officer. *Id.* ¶ 19. Deputy Brakke was Deputy Baldini's field training officer, which is why the two deputies were riding together. *Id.* ¶ 20.

[3] For the Court's benefit if it listens to the radio transmissions, the following is an identification of each individual responder's call sign: 1F: Carl Brakke; 1W: Logan Baldini; HP 28: Isaac Kurtz; HP 198: Chris Spielmann; 7C: Robert Neuenfeldt; 5-2-1: Moody County Dispatch; 2-3: Brent Goehring. SUMF ¶ 149.

were more people in the house, and there were a number of people who did not run, but instead stayed in the driveway near Deputy Brakke's cruiser. *Id.* ¶ 25. Deputy Brakke estimated there were 25 people in the house having a party. *Id.* ¶ 26.

Deputy Brakke testified that he was involved with radio traffic from at least two different dispatchers and two different radio channels that night. SUMF ¶ 27. He testified that after he contacted Moody County's dispatch, he went to the "Brookings inter-agency" channel,[4] which is a channel that Troopers from the South Dakota Highway Patrol monitor and where deputies go to ask for their help, and asked for assistance at a house party and "gave the address the same type of way" that he gave it to his own dispatcher. *Id.* ¶ 28. On his inter-agency request for assistance, he asked for "any available units" or "can you start all units to my location" and "went on to explain about the kids running and the number of vehicles." *Id.* ¶ 29. Deputy Brakke testified that he asked for "additional units" because it could have been deemed "an emergency." *Id.* ¶ 30. Deputy Baldini also testified Deputy Brakke made a call for "a general assist" on the radio. *Id.* ¶ 31.

At 11:52 p.m., Deputy Brakke contacted Flandreau City Police Officer Brent Goehring via radio and told him about the party at the residence. SUMF ¶ 32. Officer Goehring responded and said: "10-4. We can start heading that way." *Id.* At about 12:02 a.m. on June 18, 2017, one of the partygoers standing in the driveway with Deputies Brakke and Baldini started to have a seizure. *Id.* ¶ 33. Deputy Brakke requested an ambulance to assist with the seizure. *Id.* ¶ 34. By the time the ambulance arrived, the seizure had passed, and the individual did not need to be transported to the hospital for medical care. *Id.* ¶ 35. At about 12:05 a.m., South Dakota Highway Patrol Trooper Isaac Kurtz[5] was working in the area and asked Moody County dispatch if Deputy Brakke needed

[4] The parties have been unable to locate recordings from the Brookings Inter-agency channel.

[5] Isaac Kurtz was a Sergeant with the South Dakota Highway Patrol at the time of this incident.

assistance with the house party. SUMF ¶ 36. Dispatch responded and said, "Yes, please." *Id.*

Deputy Brakke did not call Chief Neuenfeldt to ask him to assist. SUMF ¶ 38. However, Sheriff Wellman testified that his Moody County employees "obviously were outnumbered and tried to call in other resources to try to contain the situation." *Id.* ¶ 39. Sheriff Wellman testified that under the Mutual Assist Agreement, his deputies could call the tribal police officers and ask for help. *Id.* ¶ 40. Sheriff Wellman concluded that Deputy Brakke made "a request for assistan[ce]," but it was not to Neuenfeldt specifically. *Id.* ¶ 41. But he also said that there was, in general, a radio call for backup to all available units, and "the tribe falls into that." *Id.* ¶ 42. Finally, Sheriff Wellman admitted that if Chief Neuenfeldt heard a request for assistance from Deputy Brakke that Chief Neuenfeldt would have authority under the Mutual Assist Agreement to assist in Moody County. *Id.* ¶ 43.

Chief Neuenfeldt also was on duty on June 18, 2017, and testified that he responded to the house party scene because he heard Deputy Brakke call out over the radio and request assistance "when one of the people he was with started having a seizure." SUMF ¶ 44. Chief Neuenfeldt believed he arrived before the ambulance. *Id.* ¶ 45. The FSST Command Log confirms one ambulance arrived at 12:28 a.m. Docket 91-4 at 5. Chief Neuenfeldt arrived at 12:13 a.m. *Id.* ¶ 46. Officer Goehring arrived at 12:17 a.m. *Id.* ¶ 47. Trooper Kurtz arrived at 12:35 a.m. *Id.* ¶ 48.

IV. Bourassa Strikes Chief Neuenfeldt and Flees from Trooper Kurtz

After the party had been broken up around 1:20 a.m., Deputy Brakke was in or near his police cruiser in the driveway to the residence giving tickets or processing some of the partygoers who had not fled. SUMF ¶ 49. Chief Neuenfeldt, Deputy Baldini, and Trooper Kurtz had helped

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SUMF ¶ 37. However, to better clarify the jurisdictions involved, the United States refers to him as Trooper in this brief to orient him with the Highway Patrol.

search the area for the partygoers who had fled and cleared other structures on the rural property,[6] and were having a discussion at the end of the driveway. *Id.* ¶ 50. At that time, Deputy Brakke had already seen at least three cars drive north past the driveway to the residence that would stop about a half of a mile past the driveway and then speed off, as though they were picking up those partygoers who had fled. *Id.* ¶ 51. Deputy Brakke relayed via radio to the other police units that these cars may be picking up people that ran from the house. *Id.* ¶ 52. While talking with Deputy Baldini and Chief Neuenfeldt, Trooper Kurtz noticed a vehicle traveling eastbound on 244th Street that appeared to be traveling slow and stopped to the west of 484th Avenue. *Id.* ¶ 53. Trooper Kurtz was in his cruiser and drove south toward the vehicle that he saw. *Id.* ¶ 58. Based on the vehicle's actions, Trooper Kurtz believed he had reasonable suspicion that the person driving the vehicle was involved at the house party. Roche Decl., Ex. 7 at 111.

The vehicle that was approaching the residence turned out to be a gray Dodge pickup that was driven by Tahlen Bourassa. SUMF ¶ 59. Micah Roemen and Morgan Ten Eyck were passengers in Bourassa's pickup. *Id.* ¶ 60.

Bourassa turned north onto 484th Avenue and started heading towards the residence. SUMF ¶ 61. Trooper Kurtz met Bourassa's vehicle, and after Bourassa's vehicle passed Trooper Kurtz, officers heard Bourassa's vehicle accelerate, and Trooper Kurtz saw the truck fishtail in his rearview mirror. *Id.* ¶ 62. Trooper Kurtz turned around to go north on 484th Avenue and activated his emergency lights to stop Bourassa's truck. *Id.* ¶ 63.

[6] Trooper Kurtz's police cruiser was equipped with a dash camera that recorded his cruiser's vantage point from the time he arrived at the house party until the accident scene. SUMF ¶ 55. Thus, his camera would have captured the start of the pursuit, the portion of the pursuit where Kurtz was the primary pursuer, and after Kurtz arrived at the accident site. Chief Neuenfeldt's cruiser was not equipped with a dash cam. *Id.* ¶ 56. Chief Neuenfeldt had a body-worn camera, but forgot to turn it on. *Id.* ¶ 57.

Bourassa approached the driveway to the residence in his vehicle. SUMF ¶ 64. As he approached, Chief Neuenfeldt and Deputy Baldini stepped from the driveway into the road and began giving Bourassa hand signals and verbal commands to stop. *Id.* ¶ 65. Chief Neuenfeldt testified he "was yelling stop because Kurtz was trying to pull [Bourassa] over." *Id.* ¶ 66. As Bourassa's vehicle slowed and approached the driveway to the residence, Chief Neuenfeldt crossed to the driver's side of the truck and Deputy Baldini stayed near the passenger side where Roemen sat. *Id.* ¶ 67. Bourassa briefly stopped at the driveway for Sergeant Kurtz's emergency lights. *Id.* ¶ 68.

During this brief stop, Bourassa locked his doors as Chief Neuenfeldt approached his side of the truck. SUMF ¶ 69. Passenger Roemen said Chief Neuenfeldt told Bourassa he would arrest him if Bourassa did not unlock his doors. *Id.*¶ 70. Thereafter, Bourassa ignored the officers' commands to get out or unlock his doors, and Bourassa 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.

There is no known witness to the strike. Roemen did not see the strike and admitted he could not see Chief Neuenfeldt's lower body at all through the driver-side window. SUMF ¶ 74. Deputies Baldini and Brakke did not witness the truck striking Chief Neuenfeldt, but they testified they saw Chief Neuenfeldt getting up from his knees as the Bourassa truck sped away. *Id.* ¶ 75. Later that evening after this incident concluded, Chief Neuenfeldt sought medical care at the emergency room, where the provider noted objective[7] findings of "a little bit of bruising" on his

[7] Plaintiffs argue that Neuenfeldt was not struck. They do not, however, have any proof beyond speculation. They disclosed a video enhancement expert whose review of the video concluded that "nothing can be seen in the video that supports the allegation that the pickup struck the officer."

left lower thigh that looked like it would turn into a "more significant bruise as time goes." *Id.* ¶ 76. The provider also observed that his left shoulder did not appear bruised, but it was "a little bit red." *Id.* ¶ 77.

After striking Chief Neuenfeldt, Bourassa fled from the scene. Trooper Kurtz was behind Bourassa's truck as it sped away, and Trooper Kurtz immediately initiated a high-speed pursuit going north on 484th Avenue at 1:21 a.m. SUMF ¶ 78. Trooper Kurtz listed the reason for initiating the pursuit as exhibition driving and failure to stop[8] when directed by law enforcement. *Id.* ¶ 79. He said Bourassa failed to stop for Chief Neuenfeldt, Deputy Baldini, and himself because he had activated his emergency lights. *Id.* ¶ 80. Once Trooper Kurtz initiated the pursuit, he asked dispatch to contact a supervisor. *Id.* ¶ 82. Trooper Kurtz did not yet know that Chief Neuenfeldt had been struck when initiating the pursuit.

After getting up off of the ground, Chief Neuenfeldt got in the driver's side of his cruiser. SUMF ¶ 83. Deputy Baldini also ran to Chief Neuenfeldt's cruiser and got in the passenger's side because he had concerns for Chief Neuenfeldt's safety, saying "I saw Rob getting up off the ground, and I didn't know if he was injured in any way." *Id.* ¶ 84. Their cruiser was secondary

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Docket 85-12 at 4. However, this expert report, which is not evidence, essentially admits the video is inconclusive. There is no indication Mr. Maher reviewed other testimony or that he is a reconstructionist. He merely enhanced the video, but still cannot conclusively state what the video showed. Thus, his opinion is not relevant, does not assist the trier of fact, and is not grounded in the record evidence. The United States also has a reconstructionist expert who will testify that both the accident scene and on-scene officer testimony support Neuenfeldt's claim that the pickup sideswiped him. The United States will provide this report upon request. However, the Court need not even resolve this issue when there is no dispute the pursuit was lawfully initiated for other reasons. Finally, whether Bourassa struck Neuenfeldt or not is not dispositive. The acceleration by Bourassa toward Neuenfeldt when ignoring his commands to stop would by itself be assault or attempted assault on law enforcement (SDCL 22-18-1; SDCL 22-18-1.05; 22-18-1.1).

[8] After Trooper Kurtz initiated the pursuit, Bourassa also violated the law by eluding or engaging in aggravated eluding. SUMF ¶ 81.

behind Trooper Kurtz in the pursuit. *Id.* ¶ 85. Chief Neuenfeldt testified that he joined the pursuit as secondary because he was concerned about officer safety. *Id.* ¶ 86. At approximately 1:22 a.m., Chief Neuenfeldt relayed over the radio: "HP28: He hit me with his truck. That's assault on law enforcement." *Id.* ¶ 87.

From 484th Avenue, Bourassa turned west onto 242nd Street, and Trooper Kurtz followed Bourassa. SUMF ¶ 88. At this time, Highway Patrol Trooper Chris Spielmann entered the area after hearing the pursuit radio traffic. Trooper Spielmann set up across 481st Avenue just north of 241st Street,[9] ahead of Bourassa to prepare spike strips. *Id.* ¶ 89. Trooper Kurtz gave Trooper Spielmann permission to deploy spikes. *Id.* ¶ 94. Bourassa then turned northbound on 481st Avenue and approached the position of Trooper Spielmann. *Id.* ¶ 95. Bourassa avoided the spikes by turning east on 241st Street. *Id.* ¶ 96. Trooper Kurtz also turned east on 241st Street. *Id.* ¶ 97.

After traveling east on 241st Street for approximately 3 miles, Bourassa turned south onto 484th Avenue and then quickly turned east on 242nd Street. SUMF ¶ 98. Passenger Roemen testified that after turning east on 242nd Street, Bourassa stopped in the middle of the road and turned off his headlights. *Id.* ¶ 99. The Bourassa truck was stopped for about a minute. *Id.* ¶ 100. While the Bourassa truck was stopped, neither of the passengers asked to get out of the truck or attempted to get out. *Id.* ¶ 101.

Meanwhile, Trooper Kurtz shadowed Bourassa by turning southbound on 484th Avenue.

[9] Plaintiff Roemen disputes that Trooper Spielmann set up the spike strips at the intersection of 241st Street and 481st Avenue even though he does not dispute that the Highway Patrol's video of the pursuit shows a police officer at that intersection. SUMF ¶ 90. Roemen claims that the Highway Patrol video has been altered. *Id.* ¶ 91. Roemen testified that Trooper Spielmann was set up farther south on 481st Avenue between 242nd and 241st Streets, but not at the intersection. *Id.* ¶ 92. Roemen also testified Bourassa went in the ditch to get around Spielmann's spike strip and told others that the truck "almost killed" or "almost ran over Chris Spielmann[.]" *Id.* ¶ 93. The Court need not resolve this factual dispute to rule upon any pending motion.

SUMF ¶ 102. However, because Bourassa abruptly turned onto 242nd Street and turned off his headlights, Trooper Kurtz temporarily lost sight of the Bourassa vehicle near the intersection of 484th Avenue and 242nd Street. *Id.* ¶ 103. Shortly after he lost sight of the Bourassa vehicle, Trooper Kurtz saw Bourassa's taillights headed eastbound, and he relayed that location to the other pursuing police units. *Id.* ¶ 104.

For his part, Roemen testified that while the Bourassa truck was hiding, he watched other cop cars "fly by" continuing south on 484th Avenue, but one police car turned east on 242nd Street and started driving toward Bourassa's truck. SUMF ¶ 105. Chief Neuenfeldt and Deputy Baldini were the closest law enforcement vehicle to Bourassa's last known whereabouts, as they were traveling southbound on 484th Avenue between 241st Street and 242nd Street when they heard Trooper Kurtz relay that he believed he saw Bourassa's taillights eastbound on 242nd Street, so they turned east on 242nd Street, saw Bourassa's taillights, and Bourassa took off again. *Id.* ¶ 106.

Chief Neuenfeldt and Deputy Baldini saw Bourassa's vehicle within minutes after Trooper Kurtz lost sight, and they continued the pursuit as the primary pursuer. SUMF ¶ 107. After Trooper Kurtz lost sight[10] of the Bourassa vehicle, he continued to search for the truck and tried to get ahead of the Bourassa truck so he could find a place to lay spike strips. *Id.* ¶ 108. In fact, although Trooper Kurtz lost sight of Bourassa around 1:28 a.m., he had already stated over the radio by 1:30 a.m. that was going to try and "get ahead of him[.]" *Id.* ¶ 109.

From eastbound on 242nd Street, Bourassa turned north on 485th Avenue, with Chief Neuenfeldt and Deputy Baldini following directly behind. SUMF ¶ 112. When Chief Neuenfeldt's

[10] Trooper Kurtz testified that he did not terminate the pursuit, but he "stopped being the primary pursuer" or "primary unit in pursuit of that vehicle." SUMF ¶ 110. Trooper Kurtz never requested a "10-22," terminated, or stopped the pursuit. *Id.* at 192-193. Trooper Kurtz testified that a "10-22" means "to stop, disregard . . . go about your normal, job, normal work." *Id.*

vehicle became the primary pursuer, he focused on driving and Deputy Baldini covered the radio to relay the turns and route of the pursuit to dispatch and the other responding officers and agencies. *Id.* ¶ 113. Eventually, Bourassa turned west on 237th Street and traveled that road for about a mile before turning north onto 484th Avenue. *Id.* ¶ 114. Chief Neuenfeldt and Deputy Baldini followed. *Id.* Next, after traveling north on 484th Avenue for about a mile, Bourassa turned west onto 236th Street and sped on that road for two miles. *Id.* ¶ 115. Bourassa then turned north on 482nd Avenue and drove north on that road for approximately 5 miles[11] until 482nd Avenue turned into 231st Street, going west until reaching Highway 13. *Id.* ¶ 116.

As the pursuit reached just southeast of the town of Flandreau, FSST Tribal Police Officer Brian Arnold was driving toward Bourassa's vehicle. SUMF ¶ 118. Right before Bourassa turned north onto Highway 13, Bourassa met Officer Arnold and forced Officer Arnold off the road and into the ditch. *Id.* ¶ 119.

Bourassa sped north on Highway 13 through the town of Flandreau. SUMF ¶ 120. Chief Neuenfeldt and Deputy Baldini continued to pursue. *Id.* Once Bourassa crossed the bridge on Highway 13 just north of Flandreau, Bourassa went by a car[12] and then came to a very rapid stop on Highway 13 just north of 229-A. *Id.* ¶ 121. Chief Neuenfeldt stopped his cruiser in the southbound lane behind Bourassa, and Deputy Baldini got out of the cruiser and told Bourassa to stop or get out of the vehicle. *Id.* ¶ 123.

After nearly a 20-minute pursuit, the chase nearly concluded without injury, but instead of

[11] During about a mile of this portion of the pursuit, 482nd Avenue turned into a minimum maintenance road called a two track, but Chief Neuenfeldt knew this road turned back into gravel after that section, so he continued to pursue. SUMF ¶ 117.

[12] The pursuit only crossed paths with this one non-law enforcement vehicle during the pursuit. SUMF ¶ 122.

getting out of his truck, Bourassa ignored Deputy Baldini's commands and suddenly reversed and turned east down 229-A. SUMF ¶ 124. Chief Neuenfeldt and Deputy Baldini were some distance behind Bourassa when they finally turned east down 229-A because Chief Neuenfeldt had to wait for Deputy Baldini to get back inside the cruiser. *Id.* ¶ 125. Chief Neuenfeldt did not force Bourassa to take 229-A when, in fact, Bourassa could have continued north or south on Highway 13 or turned east or west. *Id.* ¶ 126.

As he slowly followed Bourassa east down 229-A, Chief Neuenfeldt was not speeding because the road was dusty, and he knew it was a dead-end. SUMF ¶ 127. 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.* ¶ 128. Deputy Baldini also estimated their cruiser was at least a quarter of a mile behind the truck on 229-A. *Id.* ¶ 129. As Chief Neuenfeldt and Deputy Baldini drove toward the end of 229-A, they believed that Bourassa had wrecked up ahead because they could see what appeared to be lights flashing. *Id.* ¶ 130. As they approached the dead-end, they noticed that Bourassa had crashed his truck into a field to the north of the road. *Id.* ¶ 131. Neither Chief Neuenfeldt nor Deputy Baldini witnessed the crash because there is a large hill in the middle of 229-A. *Id.* ¶ 132. Chief Neuenfeldt's cruiser struggled to stop, likely because his brakes were hot from the pursuit, and slid over a fence post at the entrance to the field where Bourassa crashed farther into the field. *Id.* ¶ 133.

Roemen testified that once Bourassa turned onto 229-A, he told Bourassa that it was a dead-end road. SUMF ¶ 134. Bourassa ignored his passenger's advice, driving fast down 229-A. *Id.* ¶ 135. Roemen remembers there was a corn field to their right, a pasture to their left and a tree straight-ahead at the dead-end. *Id.* ¶ 136. The very last thing he remembers is seeing a tree and a

dead-end sign and crashing. *Id.* All three occupants of the pick-up were ejected in the crash and sustained serious injuries. *Id.* ¶ 137. Chief Neuenfeldt and Deputy Baldini were the first responders on the accident scene, but Highway Patrolman Denver Kvistad, City Officer Brent Goehring, and FSST Officer Arnold all arrived within one to two minutes of the crash. SUMF ¶ 138.

While Deputy Brakke was processing party goers from the residence, he testified that someone in his cruiser told him that the truck driver was "possibly" a "Tay-len Bros-na from Dell Rapids who was involved in a possible stand off . . . a year ago." SUMF ¶ 139. 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. *Id.* ¶ 140. 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.*¶ 141.

At the time of this pursuit, Bourassa was on parole and wearing an ankle monitor because he had recently been released from prison. SUMF ¶ 142. As of June 17, 2017, Roemen was aware 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. *Id.* ¶ 143. Bourassa's girlfriend, Morgan Ten Eyck, was equally aware of Bourassa's previous law enforcement encounters[13] on June 17, 2017. *Id.* ¶ 144. Bourassa did not have any alcohol in his system that evening, but tested positive for a prescription drug for which he did not have a prescription. *Id.* ¶ 147. The Highway Patrol sent criminal charges forward against Bourassa, but nothing has happened with that referral. *Id.* ¶ 148.

[13] There were two cell phones recovered from the accident scene. SUMF ¶ 145. Law enforcement downloaded data from those two cell phones, which turned out to belong to Bourassa and Morgan Ten Eyck. *Id.* ¶ 146.

STANDARD OF REVIEW

Summary judgment on all or part of a claim is appropriate if the movant establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of establishing the absence of a genuine issue of material fact. *Musolf v. J.C. Penney Co., Inc.*, 773 F.3d 916, 918 (8th Cir. 2014); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Once the moving party has met its burden of demonstrating there is no genuine issue of material fact, the non-moving party may not rest on the allegations in its pleadings, but instead must set forth specific facts showing the existence of a genuine issue of material fact for trial. *Matsushita*, 475 U.S. at 586-87.

The court views facts and inferences drawn from those facts "in the light most favorable to the party opposing the motion." *Matsushita*, 475 U.S. at 588. The "issue of proximate cause is normally left to the [factfinder] rather than decided on summary judgment, [but] there are times where . . . the lack of proximate cause between a defendant and an injury can lead to only one conclusion." *Beatty v. United States*, 983 F.2d 908, 909 (8th Cir. 1993) (citations omitted).

ARGUMENT

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 and Breach.

Plaintiffs solely allege in their Amended Complaint that "Defendants owed a duty of care to [Plaintiffs] as an innocent bystander and passenger of the fleeing vehicle, and breached this duty by failing to follow mandatory pursuit policies, causing severe and permanent damages to [Plaintiffs]." Docket 76 ¶¶ 35-36. Plaintiffs never state what the duty is, and this paragraph is the only time Plaintiffs allege the breach of a duty under Counts I or III. Plaintiffs have not brought

forth any known duty or breach of a duty that is grounded in South Dakota law, and summary judgment is appropriate.

Sovereign immunity shields the Federal Government and its agencies from suit in the absence of a waiver. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). To sue the United States, a plaintiff must show both a waiver of sovereign immunity and a grant of subject matter jurisdiction. *V.S. Ltd. P'ship v. HUD*, 235 F.3d 1109, 1112 (8th Cir. 2000) (citation omitted). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite to jurisdiction." *United States v. Navajo Nation*, 537 U.S. 488, 502 (2003) (citation and quotation omitted). The Federal Tort Claims Act ("FTCA") waives the Federal Government's sovereign immunity for certain torts of federal employees acting within the scope of their employment. *See Audio Odyssey, Ltd. v. United States,* 255 F.3d 512, 516 (8th Cir. 2001).

The FTCA contains numerous exceptions to this waiver of sovereign immunity, however. *See, e.g.,* 28 U.S.C. § 2680. If an exception applies, "the bar of sovereign immunity remains." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 485 (2006). "Sovereign immunity is a jurisdictional doctrine, and the terms of the United States' 'consent to be sued in any court define that court's jurisdiction to entertain the suit.' " *Brown v. United States,* 151 F.3d 800, 803-04 (8th Cir. 1998) (quoting *Meyer*, 510 U.S. at 475). Thus, "[w]here the United States has not waived sovereign immunity under the FTCA, the district court lacks subject matter jurisdiction to hear the case." *Hart v. United States*, 630 F.3d 1085, 1088 (8th Cir. 2011) (citations omitted). The plaintiff carries the burden of showing that jurisdiction exists. *VS Ltd. P'ship v. HUD,* 235 F.3d 1109, 1112 (8th Cir. 2000) (citation omitted).

The FTCA provides federal courts with exclusive jurisdiction against the United States for money damages when personal injury or death was caused by the negligence of federal employees

and "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); 28 U.S.C. § 2674. Thus, liability against the United States only attaches under the FTCA when state law would impose the same liability on a private individual in like circumstances. *See First Nat'l Bank in Brookings v. United States*, 829 F.2d 697, 700 (8th Cir. 1987); *Miller v. United States*, 932 F.2d 301, 303 (4th Cir. 1991) ("A plaintiff has an FTCA cause of action against the government only if she would also have a cause of action under state law against a private person in like circumstances."). Furthermore, under the FTCA, state procedural laws are preempted, but the FTCA borrows the substantive law of the state to determine liability. *See Sorace v. United States*, 788 F.3d 758, 763 (8th Cir. 2015).

Thus, under South Dakota law, in order to prevail on a suit based on negligence (Count I or Count V), Plaintiffs must prove Neuenfeldt owed a legal duty to them, that he breached that duty, that such breach was the proximate and factual cause of the injury, and an actual injury. *Janis v. Nash Finch Co.*, 780 N.W.2d 497, 500 (S.D. 2010). The existence of a duty is a question of law to be determined by the Court. *Tipton v. Town of Tabor*, 538 N.W.2d 783, 785 (S.D. 1995). "The existence of a duty owed by the defendant to the plaintiff, which requires the defendant to conform to a certain standard of conduct in order to protect the plaintiff against unreasonable risks, is elemental to a negligence action." *Larmon v. United States*, 200 F. Supp.3d 896, 904 (D.S.D. 2016)(citation omitted).

First, Plaintiffs have failed to state a claim for negligence against Neuenfeldt that is grounded in South Dakota law. Plaintiffs have not stated an actionable duty or breach. Because Plaintiffs' negligence claims are solely based upon the violation of an alleged federal directive, they are insufficient to establish liability under state law, as the FTCA requires. *See* 28 U.S.C.

§ 1346(b)(1); *see also Klett v. Pim*, 965 F.2d 587, 589 (8th Cir. 1992) ("The violation of a federal statute or administrative regulation by an agency of the United States does not, standing alone, create a cause of action under the FTCA. '[F]ederally imposed obligations, whether general or specific, are irrelevant to our inquiry under the FTCA, unless state law imposes a similar obligation upon private persons.'") (internal citations omitted); *Howell v. United States*, 932 F.2d 915, 917 (11th Cir. 1991) ("The FTCA was not intended to create a new cause of action; nor was it intended as a means to enforce federal statutory duties.") (citation omitted); *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 536 (1st Cir. 1997) ("It is virtually axiomatic that the FTCA does not apply 'where the claimed negligence arises out of the failure of the United States to carry out a [federal] statutory duty in the conduct of its own affairs[.]") (citation and internal quotation marks omitted); *Johnson v. Sawyer*, 47 F.3d 716, 727 (5th Cir. 1995) (quoting *Chen v. United States*, 854 F.2d 622, 626 (2d Cir. 1988)) ("[T]he FTCA's 'law of the place' requirement is not satisfied by direct violations . . . of federal statutes or regulations standing alone . . . . The alleged federal violations also must constitute violations of duties 'analogous to those imposed under local law.'").

The Court should find Plaintiff cannot establish that Defendant owed Plaintiffs an actionable duty that it breached when their sole theory is Neuenfeldt violated a federal directive.

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.

In South Dakota, police officers owe a duty of ordinary care to criminal suspects. *Blacksmith v. United States*, Civ. 06-5022-AWB, 2008 WL 2001975, at *3 (D.S.D. 2008). But a police officer is not an ensurer of the safety of persons he suspects have committed a crime. *Good Low v. United States*, 428 F.3d 1126, 1128 (8th Cir. 2005).

In *Schreiner v. United States*, Judge Schreier determined that the plaintiff failed to allege in his complaint "the violation of any statutorily imposed dut[y]" when he only claimed the tribal

police officers "failed to follow OST police department policy with regard to motor vehicle pursuits." Civ. 03-5069-KES, 2005 WL 1668429 (D.S.D. July 18, 2005). Judge Schreier instead found that the appropriate duty was the common law rule "requiring the exercise of ordinary care or skill not to injure another" because there was no statutory duty. *Id.* at *3. The duty of ordinary care was that which a reasonable person would exercise "under the same or similar circumstances." *Id.* at *4 (citation and quotation omitted). The Court ultimately concluded that "[a] reasonable police officer exercising ordinary care under the same or similar circumstances, would have initially engaged in such a pursuit to prevent loss of life given the reckless manner in which [the suspect] was driving." *Id.* Although the Court did not reach contributory negligence, it ultimately found it to be "significant" that the victims who were struck by the police officers engaged in a pursuit "were playing in or very near the street." *Id.* at *4.

Considering the facts and circumstances here, there is no dispute that Chief Neuenfeldt's conduct in this case was reasonable. On the evening of June 17, 2017, the weather was dry and clear. Docket 97 at 37. The South Dakota Highway Patrol began the pursuit after Bourassa failed to yield to law enforcement and sped away. *Id.* ¶¶ 78-79. Chief Neuenfeldt was on scene pursuant to a lawful mutual assist agreement. SUMF ¶¶ 4-9; 23-44. He joined the pursuit as the secondary pursuer out of concern for Trooper Kurtz's safety. *Id.* ¶ 86. Once on the scene pursuant to the mutual assist agreement, Chief Neuenfeldt had "the same powers and authority conferred by law on the members of the law enforcement of the party to which the assistance is rendered." *Id.* ¶ 9. Thus, Chief Neuenfeldt had the same jurisdiction as a Moody County Deputy would have had to begin, continue, join, or terminate a pursuit.

There is further no dispute that while Trooper Kurtz temporarily lost sight of Bourassa's vehicle, he radioed the last known whereabouts to the other law enforcement vehicles in the area,

in the hopes that another vehicle would pick up the pursuit. SUMF ¶ 104. Trooper Kurtz testified at his deposition that he never terminated the pursuit, but temporarily lost sight and then actively tried to get back in front of Bourassa. *Id.* ¶¶ 108-109. Trooper Kurtz was working to get back in front of Bourassa within two minutes of losing sight of his vehicle. SUMF ¶¶ 108-09. Sheriff Wellman, who was the decisionmaker for County, also never terminated the pursuit.

And as the factual section demonstrates, while the pursuit itself lasted nearly 24 minutes, it took an incredible amount of attention and focus for Chief Neuenfeldt to follow the fleeing vehicle. Docket 97 at 38. Deputy Baldini was charged with working the radio and providing dispatch with detailed instructions about the pursuit path. *Id.* Deputy Baldini testified that he did not feel that the pursuit speeds were becoming unsafe. *Id.* Chief Neuenfeldt testified that he believed he was exercising sound judgment even when traveling at high speeds. *Id.* Furthermore, from the beginning of the pursuit until its end, Bourassa only passed one non-law enforcement vehicle. *Id.* The pursuit occurred almost exclusively on unoccupied county roads. While the pursuit went through a portion of the city of Flandreau, it was on the far east side of town and it was past 1:30 a.m. There is only one reference in the depositions or documents that the gravel roads were dusty, and that was right before the pursuit concluded after Bourassa turned onto 229-A, and Neuenfeldt was more than a quarter mile back and slowly approaching Bourassa's vehicle due to the dust. *Id.* at 39.

Comparatively, Bourassa showed clear signs that he was a danger to the public and other law enforcement officers. It was dark. It was 1:30 in the morning. Officers presumed Bourassa was involved with the house party and his intoxication levels were unknown. SUMF ¶ 58. He was traveling more than 100 miles per hour and disregarding stop signs. Bourassa struck one police officer, disregarded orders from many law enforcement officers, drove around spike strips, hid

from law enforcement in the middle of the pursuit, drove one law enforcement officer off the road, and generally displayed erratic and aggressive behavior with two passengers inside. *Id.* ¶¶ 71, 73, 96, 119.

Plaintiffs attempt to paint a picture of a rogue law enforcement officer with no experience and no training. However, they provide no undisputed evidence that Neuenfeldt breached a specific duty or his conduct fell below the standard of care. They also ignore that Neuenfeldt had received South Dakota State Law Enforcement Academy training, had been a law enforcement officer with Moody County, and was engaged in this specific pursuit with other experienced law enforcement officers who initiated the pursuit and also continued to pursue Bourassa until he crashed. Not one of these law enforcement officers or supervisors terminated the pursuit. Under these circumstances, Plaintiffs cannot show that a reasonable officer would have terminated the pursuit.

C. Tahlen Bourassa Was the Proximate Cause of Plaintiffs' Injuries.

The term proximate cause is defined by the South Dakota Supreme Court as: "[A]n immediate cause which, in natural or probable sequence, produces the injury complained of. This excludes the idea of legal liability based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury." *Mulder v. Tague*, 186 N.W.2d 884, 887 (S.D. 1971); *Leslie v. City of Bonesteel*, 303 N.W.2d 117, 119 (S.D. 1981) (the harm suffered must be found to be a foreseeable consequence of the act complained of). "Normally, proximate cause is an issue for the jury, but when legal minds cannot differ, summary judgment may be entered on proximate case." *Walther v. KPKA Meadowlands Ltd. Partnership*, 581 N.W.2d 527, 537 (S.D. 1998).

Bourassa's actions detailed at length above and resulting in him losing control of his vehicle and throwing his passengers from the vehicle, was the sole direct and "immediate cause

which, in natural or probable sequence, produced the injury complained of." *Musch v. H-D Co-op, Inc.,* 487 N.W.2d 623 (S.D. 1992). His conduct was not justified under the circumstances. Reasonable minds could reach no other conclusion. Chief Neuenfeldt and Trooper Kurtz's pursuit conduct (attempting to keep pace with the vehicle driving in excess of 100 mph) was inconsequential. This is particularly true when the pursuit had essentially ended before Bourassa turned down 229-A. Although Neuenfeldt was still slowly pursuing Bourassa, he had lost sight of the truck, and was no longer within eyesight. SUMF ¶¶ 127, 132. Yet, Bourassa continued to drive "fast" down 229-A. *Id.* ¶ 134. He continued to drive fast when his passenger advised him that the road was a dead-end. *Id.* ¶ 135. Those are the circumstances that harmed Roemen and Ten Eyck.

Even if Plaintiffs had shown that Neuenfeldt's conduct during the pursuit was below the standard of care, such conduct was not the proximate cause of the injuries to Plaintiffs. In the past, a court in this district dismissed an FTCA claim brought by the executor of a fleeing driver in a high-speed pursuit because the proximate cause of the injury was the driver's own conduct. *Blacksmith v. United States*, Civ. 06-5022-AWB, 2008 WL 2001975 (D.S.D. May 6, 2008). In that case, the Court concluded:

> [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 such negligence was the proximate cause of Dreamer's injuries. Instead, the much greater weight of evidence presented in this case indicates that the car accident which fatally injured Nathan Dreamer was the result of Dreamer's own decisions and conduct. Dreamer's injuries are attributable to his own recklessness and wrongful acts in driving while intoxicated, refusing to stop for emergency vehicles, taking actions which foreseeably led to a police pursuit, driving recklessly given the road conditions on BIA 41, driving on the wrong side of the road, and failing to maintain control of the vehicle. The Court finds that these actions by Dreamer were the proximate cause of his injuries, not any actions (negligent or otherwise) by the OST DPS.

Blacksmith, 2008 WL 2001975, at *4.

Another pursuit case was dismissed by the district court based on proximate cause. In that

case, the fleeing driver led officers on a high-speed pursuit and ultimately crashed his car into an alfalfa field, but continued to hide in the field, and was eventually run over by the pursuing officer. *Good Low v. United States*, 428 F.3d 1126 (8th Cir. 2005). The Eighth Circuit affirmed the district court's dismissal because it found that the plaintiff's conduct was clearly a contributing cause of his injuries; and thus, his contributory negligence barred the action when it was greater than slight. *Id.* at 1128-29. Thus, when facts show beyond any dispute, as they do here, that Bourassa's actions were the legal and proximate cause of injury it is appropriate for the Court to hold, as a matter of law, for the United States.

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

Plaintiffs also failed to exercise ordinary care to protect themselves from known harms or they assumed the risk of their injuries given their knowledge about Bourassa and their failure to act to attempt to exit his truck mid-pursuit. Plaintiffs originally put themselves in the position of danger based on their prior knowledge of Bourassa's criminal record and prior stand-off with law enforcement. Plaintiffs knowingly continued that danger after being involved in a high-speed pursuit for numerous miles and, when Bourassa stopped, neither attempted to get out or asked to be let out. Thus, they assumed the risk of injury or were contributorily negligent more than slight. Under these facts, summary judgment should be awarded to the United States.

1. Comparative Negligence

South Dakota law provides that "the fact that the plaintiff may have been guilty of contributory negligence does not bar a recovery when the contributory negligence of the plaintiff was slight in comparison with the negligence of the defendant[.]" SDCL 20-9-2. Pursuant to this statute, "the plaintiff's negligence is compared with the negligence of the defendant, not with the ordinarily prudent person." *Renville v. United States*, Civ. 1024-CBK, 2017 WL 1483311, at *5

(D.S.D. April 24, 2017) (quoting *Schmidt v. Royer*, 574 N.W.2d 618, 627 (S.D. 1998)). The issue of contributory negligence may be decided as a matter of law in some cases. *Id.* "Slight is defined as small of its kind or in amount; scanty; meager." *Id.* (quotations and citations omitted).

Plaintiffs' conduct cannot be considered scant or meager compared to Neuenfeldt's. On June 17, 2017, both passengers had knowledge of Bourassa's prior law enforcement stand-off and his stint in prison. SUMF ¶¶ 143, 144. They got in the truck and drove around well after midnight on a Saturday night – knowing Bourassa was on parole. Docket 91-18 (Bourassa texting Roemen that he was "here" to pick him up at 12:28 a.m.). There is no dispute that both passengers, after experiencing Bourassa's erratic and dangerous driving, had multiple opportunities to get out of the Bourassa truck. The first time was when Bourassa stopped by the law enforcement officers at the house party. SUMF ¶¶ 68-69. The second time was when Bourassa was actively hiding from law enforcement officers and his vehicle was stopped for at least a minute after traveling one hundred miles an hour and going around spike strips. *Id.* ¶¶ 98-101. The third time was when Bourassa stopped just north of the bridge on Highway 13 before reversing and turning east on 229-A. *Id.* ¶¶ 121-124.

And yet, Ten Eyck and Roemen took no steps to get out of the truck. Upon this record, neither asked Bourassa to stop fleeing at any point. Neither asked Bourassa to let them out of the truck. *Id.* Given all of this information, Plaintiffs' negligence was more than slight, and they are barred from recovery.

2. Assumption of the Risk

Under South Dakota law, the three elements for assumption of the risk are: "1) that the plaintiff had actual or constructive knowledge of the existence of the specific risk involved; 2) that the plaintiff appreciated the risk's character; and 3) that the plaintiff voluntarily accepted the risk,

having had the time, knowledge, and experience to make an intelligent choice." *Carpenter v. City of Belle Fourche*, 609 N.W.2d 751, (S.D. 2000) (citation and quotation omitted). "A person has constructive knowledge of a risk if it is plainly observable so that anyone of competent faculties is charged with knowledge of it." *Id.* Furthermore, a person cannot "close their eyes to obvious dangers, and cannot recover where they were in 'possession of facts from which [they] would be legally charged with appreciate of the danger[.]'" *Id.* (citation omitted).

Even if the Court will not find that Ten Eyck and Roemen were contributorily negligent, the same facts discussed above equally lead to a conclusion that both passengers assumed the risk of injury when deciding to enter Bourassa's pickup truck and drive around on June 17-18, 2017. They furthermore assumed the risk when they knowingly chose to stay in his pickup truck after engaging in a high-speed pursuit for numerous miles. As such, they assumed the risk of their injuries and cannot recover from the United States.

II. Plaintiffs' Partial Motion for Summary Judgment Should Be Denied, and 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. [14]

First, because summary judgment or dismissal is appropriate on the underlying negligence claim against Neuenfeldt, Plaintiffs do not allege an actionable tort, and their claim for negligent supervision and training also must be dismissed. *See* Docket 97 at 41-42; *supra* Section I.B.; *see also Total Auctions & Real Estate, LLC v. S.D. Dep't of Rev & Reg.*, 888 N.W.2d 577, 581 (S.D.

[14] 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.

2016) (concluding that "a negligent supervision claim requires that an employee commit an underlying tort.") (citing *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 53 (Iowa 1999)).

As to Count V, Plaintiffs again fail to establish the breach of an actionable duty that the United States allegedly violated that is grounded in South Dakota law. For instance, each allegation is tied to this allegation: "United States empowered Officer Neuenfeldt . . . by allowing him to carry a gun and operate a motor vehicle without sufficient training and supervision contrary to the [BIA Handbook]," "as well as contrary to other regulations requiring training and supervision set forth in the United States Code." Docket 76 ¶¶ 81. In their brief, Plaintiffs cite to federal law, the Bureau of Indian Affairs Office of Justice Services Law Enforcement Handbook, Third Edition, and the 638 contract itself to establish the United States had a duty to provide "safe and effective law enforcement for [the Tribal] community." Docket 83 at 3. Plaintiffs also claim the United States and the Tribe were bound to each other through a trust relationship. *Id.* These are not state duties. And, even if those were state law duties, Plaintiffs are not even within the class of persons covered by the duty alleged by Plaintiffs, the tribal community.

Plaintiffs spend the majority of their brief[15] in support of partial summary judgment discussing the "mandatory directives" regarding training for a federal law enforcement officer or in this instance, a tribal officer working pursuant to a 638 contract. Plaintiffs have flipped the burden of proof by affirmatively arguing against the United States' discretionary function

[15] Plaintiffs violated numerous local rules of this Court in their brief. First, Plaintiffs filed an overlength brief that was nearly 70 pages, but never requested leave of court to file an overlength brief. D.S.D. Civ. LR 7.1B1. Furthermore, Plaintiffs neglected to include a word count to establish that their brief conforms with the 12,000 word limit. *Id.* There is no question that this brief grossly exceeds 12,000 words. Additionally, Plaintiffs allege numerous "facts" in their brief, but fail to include any citation to their Statement of Undisputed Material Facts or any record cite. Thus, these facts are unsupported and cannot be considered for purposes of summary judgment. The Court should either strike these facts or ignore them when considering the facts of the case.

exception defense (that was not raised as to Count V) by discussing allegedly mandatory federal directives when it is their burden to establish that the United States had an actionable duty under South Dakota law that it breached, which breach proximately caused Plaintiffs' damages.

Plaintiffs argue that "[a]llowing rogue untrained tribal officers to be retained and operate in the capacity of a federal officer, carrying a gun and facilitating high-speed chases, is similar to a hospital allowing a heart surgeon without a medical degree to perform heart surgeries." Docket 84 at 60. First, even if a hospital allowed a surgeon with inadequate training to perform a heart surgery, the plaintiffs would still have to show the surgery was below the standard of care and caused their alleged injuries. It would not be sufficient to argue solely that the surgeon was not adequately trained. That is exactly what Plaintiffs are attempting to do here, argue the United States is liable because Neuenfeldt was inadequately trained, regardless of whether his actions were reasonable or regardless of whether his actions were the proximate cause of harm to Plaintiffs. Such an argument cannot establish liability as a matter of law.

Furthermore, this comparison wildly misses the mark. Neuenfeldt was trained at the South Dakota State Police Academy in 2013, with specific high-speed pursuit training (EVOC training) conducted by the very agency that initiated this pursuit – the South Dakota Highway Patrol. *See* United States' Response to Plaintiffs Statement of Undisputed Material Facts ¶ 28 (citing to Docket 85-4 at 22-25, 33-34, 40); SUMF ¶¶ 13-15. He worked for two to three years as a Moody County Sheriff's Deputy. SUMF ¶¶ 15. Neuenfeldt had extensive field training when he was first hired by Moody County, which included training on Moody County's pursuit guidelines. United States Response to Plaintiffs' SUMF ¶ 28. Neuenfeldt was trained on various topics from 2013 through 2017. Docket 85-7; Roche Decl., Ex. 1 (FSST April 2017 Site Visit). He is now a field training officer himself. Docket 85-7. Plaintiffs also ignore the fact that many experienced law

enforcement officers were involved in the pursuit directly or through supervisory decision-making.

This is not the case of an untrained, lone, rogue officer engaging in an unreasonable pursuit. Plaintiffs have failed to carry their burden on summary judgment of establishing an actionable duty under South Dakota law and how the United States specifically breached that duty.

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 fail to articulate which specific training Neuenfeldt lacked and how that specific lack of training caused[16] their injuries. Plaintiffs simply argue that Neuenfeldt was not trained at all or that he should not have been patrolling on June 18, 2017. This is pure speculation and is insufficient to establish that Neuenfeldt's lack of training proximately caused Plaintiffs' injuries as a matter of law. Because Plaintiffs' negligent supervision claims are woven into, or derive from, their negligent training claims – all fail.

First, regardless of Neuenfeldt's presence on June 18, 2017, Bourassa still would have driven by this house party. He would have still been on parole. He would have encountered law enforcement officers like Deputy Baldini, Trooper Kurtz, and Deputy Brakke. It is just as likely that Bourassa would have failed to stop or follow commands for any law enforcement officer that he encountered, as there is no evidence that Bourassa disliked Chief Neuenfeldt or vice versa. The two did not know each other. SUMF ¶ 141. Thus, regardless of Neuenfeldt's presence, it is just as likely that Bourassa would have fled. And Trooper Kurtz testified the pursuit was started because Bourassa failed to stop for himself, Chief Neuenfeldt, and Deputy Baldini. Trooper Kurtz initiated the pursuit. There is substantial evidence to suggest that numerous agencies and officers were

[16] Negligent training that leads to a reasonable or lawful pursuit could not be considered proximate cause under the law, as the negligent training would not be within the chain of events that actually caused the injury to Plaintiffs.

following the pursuit or attempting to join it, and any one of those officers could have continued the pursuit or later encountered Bourassa's truck.

There is no evidence that the Highway Patrol or Moody County terminated the pursuit. And as Bourassa's erratic behavior intensified (e.g., striking Neuenfeldt and fleeing, going around Spielmann's spike strips, running FSST Officer Arnold off of the road, and ignoring his passenger's advice to avoid a dead-end), it seemed that there nothing that was going to stop him. There is no dispute that one person who could have always stopped the pursuit was Tahlen Bourassa. Absent specific facts to establish Plaintiffs' speculation, their claim fails, and as established above, Bourassa's conduct proximately caused Plaintiffs' injuries.

Plaintiffs also make a conclusory supposition that had Neuenfeldt been trained on jurisdiction or pursuits, this accident would not have occurred. Docket 84 at 64. But plaintiffs have not articulated what specific training within Bridge Training would have prevented the injuries alleged. Comparatively, the United States has established in its Motion to Dismiss, that Neuenfeldt responded to the scene of the house party lawfully pursuant to a mutual assist agreement and possessed the same powers that a Moody County Deputy would have held at that time. In response to these facts, Plaintiff must provide specific and detailed information about which training that Neuenfeldt lacked, what the training would have consisted of, and how the lack of this specific training caused this accident. *See Kirlin v. Halverson*, 758 N.W.2d 436, 454 (S.D. 2008) ("A suggestion that an employer should train employees not to attack others is inexact."); *Beatty*, 989 F.2d at 909 (dismissing plaintiff's FTCA action against the military for its alleged failure from stopping an officer from driving drunk and causing harm because even "even if there had been such a failure on the Air Force's part, plaintiff . . . could offer no evidence to indicate that such a failure to abide by regulations was a proximate cause of [plaintiff's] injuries.").

Critically, Plaintiffs never disclosed any expert opinion regarding the failure to train or supervise claims. Plaintiffs' expert disclosure deadline has passed; thus, Plaintiffs' failure to disclose expert testimony is fatal to their motion and claim. The South Dakota Supreme Court has agreed that, "[g]enerally, expert testimony is required in negligence cases when the defendant is held to a standard of care that is outside the common knowledge and experience of [the/an] ordinary persons." *Hanson v. Big Stone Therapies, Inc.*, 916 N.W.2d 151, 159 (S.D. 2018) (citations omitted).

In *Sheard v. Hattum*, the South Dakota Supreme Court determined that the "adequacy of [the alleged employee]'s training, welding techniques, and specifically if and how a fuel tank can be welded safely, is not within the common knowledge or experience of a lay person[,]" and summary judgment was appropriate because the plaintiff "did not offer any testimony or evidence on accepted welding techniques and safety standards." 965 N.W.2d 134, 142-43 (S.D. 2021). The Court again reiterated its long-held black letter law that "expert testimony is required when the subject matter at issue does not fall within the common experience and capability of a lay person to judge." *Id.* (citation and quotation omitted). The Court specifically concluded that without expert testimony, the plaintiff "has not generated a fact question on whether [defendants] breached their duty to train, or whether this breach caused the accident." *Id.*

A law enforcement expert must be presented on causation pertaining to an alleged lack of training; i.e., whether a certain type of pursuit or jurisdictional training was necessary and would have impacted the actual conduct of Robert Neuenfeldt on June 17-18, 2017. Law enforcement training[17] and supervision is not within the knowledge of a lay person. *See Moore v. District of*

[17] "The myriad of subjects to be covered in training (e.g., ranging from firearms training and use of force to completing paperwork), the specific content of training on these subjects, the frequency of training (e.g., annually or more or less frequently), and manner of training (e.g., in person,

Columbia, 79 F. Supp.3d 121, 143-44 (D.D.C. 2015) ("[E]xpert testimony has been required for claims of negligent training of police personnel.") (citations omitted). Only an expert with the relevant training, knowledge, and expertise could opine on the specific training curriculum Neuenfeldt allegedly did not have (which is not in the record or alleged in this motion) and how that lack of training connects to his actual conduct.

For instance, in a supervisory liability claim against police supervisors for an asserted failure to train claim in *Gaines v. City of Moore*, 2021 WL 3284269, at *6 (W.D. Okla. July 30, 2021), the plaintiffs alleged that "in failing to ensure proper training, [the supervisors] 'caused [the officer] to effectuate an improper use of his police powers by disobeying traffic laws in the absence of a legitimate law enforcement situation in violation of the U.S. Constitution, proximately and directly causing [decedent]'s death." The court specifically found that such allegations "requires a conclusory leap, asking the Court to speculate that a general failure to train is the direct and proximate cause of the accident. This statement includes no facts to support how [these supervisory officers] specifically set in motion a series of events that they knew or should have known would have caused the accident." *Id.* Expert testimony equally would be required to provide the conclusory leap from the lack of a general training to a fleeing motorist causing an accident. *See e.g., Burley v. Kytec Inno. Sports Equip., Inc.*, 737 N.W.2d 397, 407 (S.D. 2007) (finding "expert testimony is needed to explain to the jury how the [allegedly negligent product design] . . . proximately caused [plaintiff]'s injuries.").

Plaintiffs' expert disclosure deadline passed on November 15, 2020. Docket 74 at 2.

online, as a group of individually) for police officers in order to meet effectively a national standard of care and assess whether the training provided fell short of that standard, is simply beyond the ken of the average lay juror." *See Moore v. District of Columbia*, 79 F. Supp.3d 121, 143-44 (D.D.C. 2015)

Plaintiffs allege they learned of the failure to train and negligent supervision/retention claims at Neuenfeldt's deposition that occurred on February 24, 2021. Docket 74 at 10. They moved to amend the complaint on March 31, 2021. *Id.* The Court granted Plaintiffs' motion on June 9, 2021. *Id.* In its order, the Court noted it would "permit the parties to designate a new deadline by which to disclose any experts that may be needed to address Plaintiffs' new claims." *Id.* at 11. Plaintiffs never disclosed a new expert or any amended opinions of its retained experts or advanced any intention to do so. By their motion, they acknowledge that they do not have any expert testimony on this issue and never intend to get any. Plaintiffs never attempted discovery on Count V. They took no depositions, they sent no interrogatories, and they sent no requests for production of documents. Docket 91 ¶¶ 2-4. So any future requests for additional discovery should be rejected.

Now, Plaintiffs argue that the absence of training and related supervision caused the harm, but they never identified what specific provisions of training were not provided and how those provisions were causally connected to Neuenfeldt's conduct on June 17-18, 2017. Even if this Court finds that the United States had a duty to train or supervise that it breached, Plaintiffs have brought forth no evidence the "breach caused Plaintiffs' injuries." *Sheard*, 965 N.W.2d 134, *6. Absent expert testimony identifying the specific training or precise lack of supervision and connecting it to Plaintiffs' injuries, their claim must be dismissed. *See Moore*, 79 F. Supp.2d at 145. For these reasons, the United States is entitled to summary judgment on Count V.

III. Due to the Private Person Analog to the FTCA, SDCL 3-21-9 Bars Liability for All Claims Against the United States.

Because the FTCA applies, the United States is entitled to any state law immunity that applies to a private person in South Dakota. 28 U.S.C. § 1346(b)(1). In a section entitled "No liability for parole or release of prisoner or revocation thereof or for certain other matters," the South Dakota code provides:

> No person, political subdivision, or the state is liable for any injury resulting from the parole or release of a prisoner or from the terms and conditions of his parole or release or from the revocation of his parole or release, or for any injury caused by or resulting from:
>
> (1) An escaping or escaped prisoner;
> (2) An escaping or escaped person;
> (3) A person resisting arrest;
> (4) A prisoner to any other prisoner; or
> (5) Services or programs administered by or on behalf of the prison, jail, or correctional facility.

SDCL 3-21-9.

The South Dakota Supreme Court has found for this section to apply and for a person to resist arrest, "one must be informed that police intend to arrest, for without that knowledge a person cannot, in turn, intentionally resist arrest." *Hall v. City of Watertown ex rel. City of Watertown Police Dep't*, 636 N.W.2d 686, 688-89 (S.D. 2001).

Here, there is no dispute that Bourassa was on parole at the time of the initial stop. SUMF ¶ 142. Presumably, he knew he was not supposed to violate any laws while on parole, which included traffic offenses. Trooper Kurtz activated his emergency lights to get Bourassa to stop. SUMF ¶¶ 63, 68. Chief Neuenfeldt and Deputy Baldini were giving Bourassa hand signals and verbal commands to stop. *Id.* ¶ 65. Instead of following commands, Bourassa locked his doors. *Id.* ¶ 69. Roemen testified that Chief Neuenfeldt then told Bourassa he would arrest him if he did not unlock his doors *Id.* at 70. At that point, Bourassa understood that police intended to arrest, but resisted through flight. Bourassa sped away, struck Neuenfeldt and proceeded to flee from numerous police officers who were following him with lights and sirens activated. This flight included a path around spike strips, which is a clear and further indication that police intended to arrest and apprehend him. *Id.* ¶¶ 94-96. And Bourassa specifically would have understood that officers intended to arrest him, as he had been in a previous stand-off with law enforcement and

was taken into custody. *Id.* ¶ 143. Deputy Baldini further attempted to arrest Bourassa when Bourassa abruptly stopped on Highway 13 just north of Flandreau. SUMF ¶ 123.

This undisputed evidence establishes that Bourassa was either an escaping or escaped person or knowingly and intentionally was resisting arrest. SDCL 3-21-9; *Hall*, 636 N.W.2d at 688-89. Accordingly, the United State cannot be liable for any injury resulting from his attempts to escape and/or resist arrest. All counts against the United States must be dismissed.

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.

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DENNIS R. HOLMES
Acting United States Attorney

/s/ Meghan K. Roche
MEGHAN K. ROCHE
Assistant U.S. Attorney
P.O. Box 2638
Sioux Falls, SD 57101-2638
(605) 330-4400
(605) 330-4402
Meghan.Roche@usdoj.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of D.S.D. Civ. LR 7.1(B)(1) because it contains 11,909 words.

/s/ Meghan K. Roche
MEGHAN K. ROCHE
Assistant U.S. Attorney