No. 22-1683

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LONNIE TWO EAGLE, SR.
Plaintiff-Appellant
v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District
Court for the District of South Dakota
Western Division

Reply Brief of Lonnie Two Eagle, Sr., Appellant

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ARGUMENT

1. Sully was acting within the scope of his employment at the time of the accident.

At footnote 2 of page 4 of the government's brief, the government contends that Plaintiff's allegation that Sully took his lunch break at 12:45 is not supported by the record. However, Sully's supervisor William Wonnenberg wrote an email on August 6, 2019, the day after the accident, that read in part, "I do not know what time Chad came back from his lunch break. I want to say I let him go around 12:40 or 12:45 for lunch." APP. 334 R. Doc. 52. (Appellant's Addendum 1).

Therefore, there is evidence in the record supporting the Plaintiff's allegation as to Sully leaving for lunch at 12:45. The significance of the time when Sully went to lunch is that Sully was being paid at the time he drove over Mr. Two Eagle. Hospital employees receive a half hour unpaid lunch. APP. 334 R. Doc. 52. (Appellant's Addendum 1). The accident took place at 1:41p.m. so Sully's lunch break was over and he was being paid earnings. The hospital employees do not have a time clock or a sign-in or sign-out sheet. Fact questions should not be determined in favor of the moving party at the early stages of the litigation process.

The government raises other disputed facts in their brief including that Sully was allowed a 45-minute lunch break since he was on a double shift (APP. 334 R. Doc. 52), Sully was cutting his Keppra dosages (APP. 89 R. Doc. 30-3) against doctor's orders and that Sully didn't tell the doctor the correct date for when his

last seizure occurred. APP. 350, 361, 369 R. Doc. 19-1. The doctor had access to Sully's medical records which is the most reliable source to determine the date of Sully's last seizure before the subject accident, which was on April 11, 2019.

2. Supervisor Wonnenberg's negligent failure to monitor Sully's driving was not a discretionary function.

The government has cited *Tonelli v. United States,* 60 F.3d 492, 496 (8th Cir, 1995) for the proposition that employee supervision and retention decisions generally fall within the discretionary function exception. In *Tonelli* the court denied the government's motion for summary judgment as to the post office's failure to act after being notified of a post office employee's illegal activity involving Tonneli's mail. In the instant case the hospital's failure to assure that Sully wasn't driving after being notified of Sully's seizure condition would not represent a choice based on plausible policy considerations either. Wonnenberg oversaw a relatively small staff of cooks and would have been well aware of whether Sully was on a no drive directive after suffering the series of seizures from January to April 2019. It can be reasonably inferred that Wonnenberg was notified that Sully was to wait six months from the last seizure date to commence driving.

III. Smith was a federal employee for purposes of the FTCA not an independent contractor.

The government relies on *Sisto v. United States,* 8 F.4h 820, 827 (9th Cir. 2021) in part for the argument that Dr. Smith was an independent contractor not

covered by the FTCA. The Court in *Sisto* held that the doctors were independent contractors because they weren't personal services contractors and had not been designated as federal employees by the tribe in its self-determination contract. In the instant case, an attachment to the self-determination contract specifically does designate all health care practitioners who had been granted clinical privileges serving tribal members as federal employees. There is no indication in *Sisto* that there was similar language in the tribe's self-determination contract even though there was independent contractor language in the contract between the tribe and the independent contractor who hired and paid the doctors. For each self-determination contract, year after year, the same contract language identifying all health care practitioners as federal employees appeared in the self-determination contract with the Rosebud Tribe in the instant case. These are clearly conflicting contract provisions requiring a fact determination as to which provision controls. APP. 274, 275 R. Doc. 41-2.

CONCLUSION

For all reasons herein submitted and for the reasons as submitted in Appellant's original brief, Appellant Lonnie Two Eagle respectfully requests the Court to reverse the trial court's order granting the Government's Motion to Dismiss.

Dated this 29th day of August, 2022.

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CERTIFICATE OF COMPLIANCE

This brief complies with FRAP 32(a)(5), 32(a)(6) and 32(a)(7).

The Brief was prepared using Office 365 and printed in a proportionally spaced typeface in 14-point type.

According to the word processor, this brief contains 717 words, excluding the table of contents, table of authorities, statement with respect to oral argument, and certificates of counsel.

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August 29, 2022.

By: /s/ *Jon J. LaFleur*