

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLEE ARCHAMBAULT individually
and as PERSONAL REPRESENTATIVE OF
ESTATE OF JACOB ARCHAMBAULT,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
JOSHUA ANTMAN and JAY ROMERO Sr.,
individually and in their official capacity as
police officers for the ROSEBUD SIOUX –
TRIBAL LAW ENFORCEMENT SERVICES,
and UNKNOWN SUPERVISORY
PERSONNEL OF THE UNITED STATES,
individually,

Defendants.

3:22 – CV-03002-RAL

**PLAINTIFFS' BRIEF IN
RESPONSE AND OPPOSITION
TO DEFENDANTS'
MOTIONS TO DISMISS**

Plaintiff, Charlee Archambault, individually and as personal representative of the Estate of Jacob Archambault and as personal representative of the Estate of Jacob Archambault, by and through the undersigned attorneys, and in response to Defendant's collective motions to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and Rule 12(b)(6) for failure to state a claim upon which relief may be granted, respectfully submits the following in opposition to Defendants' respective motions.

PRELIMINARY STATEMENT

Plaintiff brought a four-count action against Defendants. Count One is a *Bivens* claim against Defendants in their individual capacities alleging the officers, while under the color of law, used excessive force and deprived Jacob Archambault of his constitutional rights.

Count Two is a claim under 42 USC §1983 against Defendants in their individual capacities alleging a violation of Jacob Archambault's constitutional right through the Defendant's use of excessive, unreasonable, and unwarranted force. Count Three is a claim under 42 USC §1983 against Defendants in their individual capacities alleging a violation of Plaintiff's constitutional rights through the Defendant seizing Jacob Archambault and killing him through the use of unreasonable, unjustified, and deadly force. And Count Four is a claim under 42 USC §1983 alleging the Defendant officers violated Jacob Archambault's rights under the Constitution and the rights violations caused injury and damages prior to death.

In response to Plaintiffs' complaint the named defendants filed individual motions to dismiss the action. The United States' motion asserts 1) the United States is not a proper party to a *Bivens* action and should be dismissed for lack of subject matter jurisdiction, and 2) United States cannot be sued under §1983 and counts 2-4 should be dismissed for failure to state a claim upon which relief can be granted. Defendant Antman's motion asserts 1) there can be no *Bivens* claim against Tribal officers, and 2) that §1983 does allow for a cause of action by Tribal officers. Defendant Romero's motion asserts that 1) tribal sovereign immunity bars actions against the officers in both their official and individual capacities, 2) *Bivens* does not extend to tribal officers exercising inherent sovereign powers of the Tribe, 3) the officers cannot be sued under because they were not operating under color of state law, 4) Plaintiff failed to exhaust her tribal court remedies, and 5) the action is time barred by the Rosebud Tribal Code. It is from the combined motions that Plaintiff now responds.

BACKGROUND

At approximately 5 p.m. on January 27, 2019, Officer Antman of the Rosebud Sioux Tribal Law Enforcement heard a law enforcement dispatch for a call regarding a disturbance

and learned that Jacob Archambault may be a person of interest and that Archambault was driving a gold SUV. Officer Antman saw three gold SUVs in rapid succession. A gold Chevrolet Tahoe that was parked near the intersection of Hospital Road and Tiny Road so Officer Antman parked behind the Tahoe. A female passenger exited the rear driver side of the Tahoe and the Tahoe drove away. Officer Antman did not talk to the female that exited the Tahoe but activated flashing lights on his patrol car and attempted to stop the Tahoe.

The Tahoe did not stop for the patrol car lights and traveled on Tiny Road. At some point Officer Antman came to believe it was Jacob Archambault driving the Tahoe. The Tahoe driving to the end of North Spotted Tail Lane and then turned onto an off-road trail that connected North Spotted Tail Lane to Spotted Tail Lane. The shortcut trail is an incline that parallels the two roads but then has makes a sharp turn for the final portion which includes a significant slope. The presence of accumulated snow on the trail provided poor traction and caused the Tahoe to lose grip on the off-road incline between the two paved roads.

The Tahoe was making a failed attempt to get up the incline when Antman pulled onto the trail behind the Tahoe and blocked the trail to get back onto North Spotted Tail Lane. Officer Romero drove onto the trail and parked next to Antman's patrol car to make sure the exit on North Spotted Tail Lane was blocked. The location where Antman and Romero parked their vehicles and blocked the road was at the curve in the trail. The curve in the trail caused the police vehicles to be positioned perpendicular to the Archambault's Tahoe.

While Archambault was attempting the traverse the incline on the trail, Antman and Romero exited their vehicles and stood outside of their respective vehicles. Archambault

was unable to crest the incline on the shortcut and reversed down to make another attempt to get up the hill. While reversing, Archambault drove past Antman and his patrol vehicle, as well as Romero. Archambault then stopped near Romero's car and then drove forward to make the second attempt. On the second attempt Archambault again spun out and again reversed to make a third attempt to crest the incline.

When traveling in reverse for at least the second time, Archambault again passed Antman, Antman's vehicle, and Romero, but then the Tahoe slid on the snow into the front corner and bumper of Romero's car. When the Tahoe contacted the bumper of Romero's vehicle, Antman began firing his .40 caliber handgun at Archambault. After Antman began shooting at Archambault, then Romero also started shooting. The bullets fired by Antman and Romero entered the passenger side door of the Tahoe as it was reversing perpendicular to and past the officers. After Defendant's shot Archambault the Tahoe continued past Romero's vehicle and the officers continued to fire bullets at Archambault through the front windshield of the Tahoe as it was driving away from the officers. Archambault was struck with multiple bullets shot by Antman and Romero. Antman and Romero did not render any medical aid to Archambault, and he died waiting for help. An autopsy was performed on Archambault and the manner of death was determined to be homicide.

Following Jacob's death, Jacob's mother was appointed the personal representative of Jacob's estate. The action pending before the Court was brought by the personal representative against the officers.

ARGUMENT¹

¹ Due to the similarity of the individual Defendants' motions the common arguments will be pooled to avoid redundancy.

A. Sovereign Immunity

The officers seek to have the Complaint against them dismissed based on the fact that at all times relevant in the Complaint the officers were working in their capacity as the police officers for the Rosebud Sioux Tribe (hereinafter “Tribe”). Both officers argue that because they were acting within their official capacity the claims are barred by tribal sovereign immunity.

Plaintiff recognizes that Indian tribes recognized by the United States government are immune from suit in federal court. *Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.*, 50 F.3d 560, 562 (8th Cir. 1995) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, (1978)). In this case there was no action or claim sought against the Tribe; the suit is against the officers in their individual capacity under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 288, 397 (1971). Plaintiff too understands the inquiry for the Court on a sovereign immunity question is whether the action is plead against an officer of the Tribe as a crafty way of attempting to get to the Tribe of which the officer is an agent. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Such is not the case here as the Tribe is not a real party in interest.

“The general criterial for determining when a suit is in fact against the sovereign is the effect of the relief sought. *Pennhurst State Sch. & Hosp. V. Halderman*, 465 U.S. 89, 107 (1984). The relief sought in this action is money damages against officers Antman and Romero. The action will not “expend itself on the public treasury or domain, or interfere with public administration” *Id.* at 102. When a civil action simply seeks to recover damages from an officer in their individual capacity and will not disturb any property of the Tribe then the “question is easily answered” and there is no “jurisdictional difficulty.” *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88 (1949). “[T]ribal defendants sued in their

individual capacity for money damages are not entitled to sovereign immunity, even though they are sued for actions taken in the course of their official duties.” *Pistor v. Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015).

The action against the officers in their individual capacities only seeks money damages and allowing the claim to proceed would neither interfere with the Tribe’s powers of self-government nor their sovereign powers. It is undisputed that all times relevant hereto the officers were performing functions for the Tribe under a contract entered into between the Tribe and the Federal Government pursuant to 25 U.S.C. §5321. The contract was for Antman and Romero to act as police officers and enforce tribal laws on the reservation land controlled by the Tribe. However, the contract also provides the offers authority to investigate crimes and detain non-Indians for delivery to State of Federal authorities of prosecution. The officers power originates from federal law and the performance of the federal functions during occurs concurrent to the Tribal functions. The officers were not simply exercising inherent sovereign powers of the Tribe as they argued. The officers were performing a federal function under the color of law derived from federal law. The officers are not immune from suit. Defendants’ motion to dismiss on the basis of tribal sovereign immunity should be denied.

B. *Bivens* Claims

In most cases the FTCA is the exclusive remedy for a Plaintiff and shields federal employees by providing “absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties.” *United States v. Smith*, 499 U.S. 160, 162 (1991) (citing 28 U.S.C. § 2679(b)(1)). However, the FTCA does include various exceptions to the exclusive-remedy language allowing certain types of suits to proceed against individual employees. One such exception relates to a claim “brought for a violation of the Constitution of

the United States.” 28 U.S.C. § 2679(b)(2)(A). Such is the case here. The exception allows suits for an alleged violation of an individual constitutional rights and provides a Plaintiff with an opportunity to bring a *Bivens* claim irrespective of the FTCA administrative filing requirement. One of the purposes of the exception to allow the *Bivens* action is the deterrent effect “because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States.” *Carlson v. Green*, 446 U.S. 14, 21 (1980).

“A *Bivens* claim is a cause of action brought directly under the United States Constitution against a federal official acting in his or her individual capacity for violations of constitutionally protected rights.” *Buford v. Runyon*, 160 F.3d 1199, 1203 n.6 (8th Cir. 1998) (citing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)). In this case Both Antman and Romero were federal officials acting under the color of law when the constitutional rights of Jacob Archambault are claimed to have been violated. Both officers were operating under authority of a 638 contract between the United States Department of the Interior (hereinafter “Department” or “Agency”), Bureau of Indian Affairs (hereinafter “BIA”) and Tribe². Plaintiff understands that simply because the officers were operating under the 638 contract, they were not necessarily considered a federal actor for *Bivens* purposes. The question of whether the officers were federal actors hinges on the specific duty they were performing at the time of the alleged constitutional violation and whether the duty was tribal or federal.

Plaintiff argues the officers were performing a federal duty at the time alleged in the Complaint and was therefore a federal employee acting under the color of law and therefore subject a §1983/*Bivens* action. Plaintiff understands Tribes have the inherent power to enforce

² A specific contract entered into between a federally-recognized Tribe and the Federal Government as provided in the 1975 Indian Self-Determination and Education Assistance Act. Pub. L. 93-638.

tribal laws against Indians for crimes occurring within the boundaries of the reservation. *United States v. Wheeler*, 435 U.S. 313, 323-26 (1978). The Tribal authority comes from and remains subject to the plenary authority of Congress. See, e.g., *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014). Some states have adopted Public Law 83-280 which allows Tribes and States to enforce laws without the jurisdictional lines. South Dakota is not a state that has adopted P.L. 280. In the individual states where P.L. 280 does not apply, the federal government retains criminal jurisdiction for major crimes committed under the Indian Country Crimes Act (18 U.S.C. § 1152), the Indian Country Major Crimes Act (18 U.S.C. § 1153), and the Assimilative Crimes Act (18 U.S.C. § 13). The Tribal officers in those jurisdictions, as is the case on the Rosebud Sioux reservation, not only enforce the Tribal laws but also perform and conduct investigations for federal prosecution.

The 638 contract between the Tribe and BIA allowed for the officers to assist with state and federal law matters that occur on tribal land. 25 U.S.C. §2804(a)(8). During the performance of their duties the officers will investigate and pursue all offenders and coordinate and assist with both State and Federal agencies as the circumstances dictate. Pursuant to the Indian Law Enforcement Reform Act (hereinafter “ILERA”), the Secretary of the Department of the Interior (hereinafter “Secretary”), under 25 U.S.C. §2303(8), has the authority to enforce state law based on a request from state or local law enforcement. Specifically, the “Secretary may charge employees of the Bureau [of Indian Affairs] with responsibilities and may authorize those employees to – (8) when requested, assist (with or without reimbursement) and Federal, Tribal, state, or local law enforcement agency in the enforcement or carrying out of the laws or regulations the Agency enforces or administers” *United States v. Ziegler*, 2001 DSD 10, ¶12 (Fn. 2, quoting 25 U.S.C. §2303(8)). In this case the officers were investigating alleged crimes that

could have both Tribal and Federal jurisdiction. The performance of duties that would assist Federal law enforcement, the officers were performing a federal function. Because the actions derived from the power of Federal law, the offers were federal actors and subject to suit under *Bivens*.

C. Statute of Limitations and Exhaustion of Remedies

Defendant Romero raised the issue and suggested that the statute of limitations in the Rosebud Tribal Code prevents Plaintiff from moving forward on his §1983/*Bivens* claims. Such is not the case. The incident occurred on January 27, 2019, and this action was commenced on January 24, 2022. “Since neither 42 U.S.C. §1983 or 42 U.S.C. §1985 define the time within which suits thereunder must be brought, the court must look to the most applicable South Dakota Statute of limitations to determine whether [an] action is barred.” *Reints v. City of Rapid City, S. Dakota*, No. CV. 13-5043-JLV, 2020 WL 773468, at *2 (D.S.D. Feb. 18, 2020) (citing *Johnson v. Daily*, 479 F.2d 86, 88 (8th Cir. 1973)). In South Dakota, a specific statute exists actions based on federal civil rights statutes. SDCL § 15-2-15.2 provides that “[a]ny action brought under the federal civil rights statutes may be commenced only withing three years after the alleged constitutional deprivation has occurred.” Here it is clear the action was brought within the requisite period and Defendant’s motion should be denied.

Defendant Romero concedes that there is no legal authority supporting his argument that the court should “borrow” the tribal statute of limitations in this matter when he writes “there seems to be no case law directly on point to what statute of limitation should apply when civil jurisdiction would have appropriately been had by a Tribe.” *Doc. 26* at p. 14. In addition to the lack of authority binding Plaintiff and this court to the Tribe’s statute of limitations, Romero’s

argument also fails because Romero fails to establish that the Tribe would have civil jurisdiction over Plaintiff's claims.

Plaintiff is not required to prosecute her Bivens claim in Tribal court under an exhaustion of remedies requirement, because Congress has not designated Tribal court has an "alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and equally effective." *Carlson v. Green*, 446 U.S. 14, 18-19, 100 S.Ct. 1468, 1471 (1980).

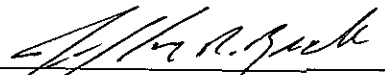
Defendant Romero's reliance upon *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694 (2019) is misplaced. *Stanko* is distinguishable in that Plaintiff does not assert that Defendants Antman and Romero were "tribal officers acting in their individual capacities under color of tribal law" when violating Jacob Archambault's rights. *Stanko*, 916 F.3d at 699; *Doc. 1* at ¶ 6; *supra* at § B. As a result, the Tribal court cannot assert jurisdiction over Plaintiff's claims. Unlike the plaintiff in *Stanko*, there is no question that Plaintiff in the present case has asserted a federal cause of action. *Stanko*, 916 F.3d at 700.

CONCLUSION

For the forgoing, this Court should deny Defendant's collective motions to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, find that the officers do not possess sovereign immunity, and determine that action has been timely commenced. In sum, all the respective motions filed collectively by Defendants should be denied.

Respectfully submitted and electronically filed this 13th day of June, 2021.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on the 13th day of June, 2022 the foregoing Plaintiff's Brief in Response and Opposition to Defendants' Motions to Dismiss was filed and served electronically via the CM/ECF filing system and service and the same was delivered electronically to the following:

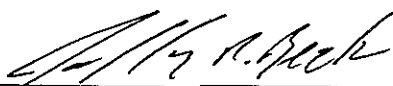
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