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

Brief of Lonnie Two Eagle, Sr., Appellant

JON J. LAFLEUR
Zephier & LaFleur PC
2020 West Omaha St.
PO Box 9460
Rapid City, SD 57709
(605) 342-0097
Counsel for Lonnie Two Eagle, Sr.

SUMMARY OF THE CASE – REQUEST FOR ORAL ARGUMENT

On August 5, 2019, Chad Sully, a Rosebud Indian Health Services Hospital employee, drove over Plaintiff Lonnie Two Eagle, Sr. while Two Eagle was operating a riding lawn mower for the Rosebud Sioux Tribe Water Resources Department. Two Eagle suffered catastrophic injuries. Immediately before the accident Sully had suffered a seizure that caused him to lose control of his vehicle.

Two Eagle filed a federal tort claim lawsuit claiming that Sully was negligent, that Sully's supervisor was negligent for failing to monitor Sully's driving, and that Dr. Smith, negligently authorized Sully to drive under his mistaken belief that 6 months had elapsed from Sully's last seizure.

The government filed a motion to dismiss contending that Sully was not within the scope of his employment at the time of the accident, that Sully's supervisor's conduct fell within the discretionary function exception to the FTCA and finally, that Dr. Smith was an independent contractor, and therefore, was not a federal employee when he negligently authorized Sully to start driving again. The district court agreed with the government and granted the motion to dismiss.

Two Eagle respectfully believes the district court ruling is based on mistaken assumptions, and oral argument will assist this Court in analyzing the factual determinations and legal conclusions of the district court.

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JURISDICTIONAL STATEMENT

Mr. Two Eagle's claims stem from the negligence of federal employees and are brought in the South Dakota District Court, Western Division, pursuant to the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2401(b), 2671-80 & 2672.

On March 2, 2022, the district court granted the government's FRCP 12(b)(1) and/or 12(h)(3) motion to dismiss adopting Judge Duffy's report and recommendation dated January 5, 2022. The district court entered judgment in favor of the defendant on March 3, 2022.

On March 31, 2022, Plaintiff filed his Notice of Appeal. This Court's appellate jurisdiction is based on 28 U.S.C. § 1291, providing jurisdiction over final judgments from a U.S. District Court.

STATEMENT OF ISSUES

1. Did the district court err in dismissing the negligence claim against federal employee Chad Sully on the basis that Sully was not acting within the scope of his employment at the time of the motor vehicle accident on August 5, 2019?

Godwin ex rel. Godwin v. United States, No. 3:14CV391-DPJ-FKB, 2015 WL 4644711, at *2 (S.D. Miss. Aug. 4, 2015)(dismissal not appropriate when scope of employment facts intertwined with merits of the case).

Deuchar v. Foland Ranch, 410 N.W.2d 177, 180-181 (SD 1987)(conduct that is incidental to conduct authorized by employer is within scope of employment).

Leafgreen v. American Family Mut. Ins. Co., 393 N.W.2d 275, 280-281 (SD 1986)(principal is liable for harm caused by an agent where there is a sufficient nexus making the harm foreseeable).

Shuford v. United States, No. 13-CV-6303 SJF AKT, 2014 WL 4199408, at *5 (E.D.N.Y. Aug. 21, 2014)(premises exception to the going and coming rule).

2. Did the district court err in dismissing the negligence claim against federal employee William Wonnenberg on the basis that Wonnenberg's failure to monitor Sully's driving was a discretionary function for which the federal government did not waive sovereign immunity?

Herden v. United States, 726 F.3d 1042, 1046 (8th Cir. 2013)(test for discretionary function exception).

3. Did the district court err in ruling that Dr. Matthew C. Smith was an independent contractor and not a federal employee?

Sisto v. United States, 8 F.4th 820, 829 (9th Cir. 2021)(self determination contracts and degree of control affecting federal employee vs. independent contractor analysis).

STATEMENT OF THE CASE

This horrendous accident occurred on August 5, 2019, close to the Rosebud Indian Health Services Hospital (Hospital) building around 1:41 that afternoon. The Hospital is isolated from the Rosebud community and is on an elevated 155-acre tract of land. APP. 85, R. Doc. 30, APP. 93, R. Doc. 32-1.

Mr. Two Eagle was operating a riding lawn mower for Rosebud Sioux Tribe Water Resources adjacent to Hospital Drive, the road that circles the hospital. Chad Sully, a cook at the Hospital, was working a double shift on August 5, 2019 and had started his workday at 6:00 a.m. Sully took his thirty-minute lunch break at approximately 12:45 p.m. and was just getting back to the hospital when the accident happened. APP. 85, R. Doc. at ¶ 7, 8, 9, APP. 88, R. Doc. 30-2, APP. 3,

R. Doc. 30-3. Sully was scheduled to finish work that day at 6:30 p.m. APP. 89, R. Doc. 30-3. There is no timeclock and time records are not kept for lunch breaks or arrival and end of the day times. APP.38, R. Doc 20 at ¶12.

Sully suffered a seizure, lost control of his vehicle and ran over Mr. Two Eagle while Two Eagle was operating the riding lawnmower. APP. 85, R. Doc. 30 at ¶ 3.

The Water Resources building, where Mr. Two Eagle worked, was constructed near the Hospital on a five-acre tract when the United States Indian Health Services agreed to allow some of their leased land to be used as the location for the Water Resources building. (APP. 94, R. Doc. 32-2).

According to the motor vehicle accident report Mr. Two Eagle was transported by ambulance to the Hospital less than one quarter mile away. APP. 102, R. Doc. 32-3 and APP. 107, R. Doc. 32-4. Hospital Drive is the sole access road to get to the Hospital. APP.144, R. Doc. 32-7. The accident report indicates that Sully's vehicle came to rest on the hospital grounds partially on the street and partially on the Hospital's lawn near the helipad at the Hospital. (See photos and video of the accident scene marked APP. 112, R. Doc. 32-5 and APP. 143, R. Doc 32-6 [on CD]). The riding lawnmower was still connected to the front of Sully's car where it came to rest on the hospital grounds. APP. 112, R. Doc. 32-5. Mr. Two Eagle fell off the mower after impact and his location was approximately 25

feet from Hospital Drive when he was loaded onto a gurney and hauled by ambulance to the Hospital. APP. 107, R. Doc. 32-4.

Sully had suffered seizures in January 2019, March 2019 and April 2019 and was treated at the Hospital. APP. 350 , R. Doc. 9-1, at APP. 350- 372, APP. 399-401 and APP. 85, R. Doc. 30 at ¶ 2. Sully quit driving after neurologist Dr. Smith on April 16, 2019, during a telemedicine appointment, issued a directive to not drive until seizure free for six months. Six months from Sully's last seizure would have run October 11, 2019. APP. 372-375 R. Doc. 19-1. On July 23, 2019, during a subsequent telemedicine appointment Dr. Smith mistakenly reported that Sully's last seizure was in February 2019 and authorized Sully to commence driving again beginning in August. APP. 383, 386, R. Doc. 19-1, APP. 89, R. Doc 30-3. As noted above, the accident occurred on August 5, 2019.

Mr. Two Eagle had just turned seventy-one years old at the time of the accident. He and his wife of 49 years, Carol, live in Parmelee, SD, a small community about twelve miles from Rosebud. He had been employed as a maintenance worker for Rosebud Sioux Tribe Water Resources since 1999. He served in the military and was honorably discharged in 1970. After his military service Two Eagle worked for schools and the Indian Health Services as a maintenance worker until he took on the job at Water Resources in 1999. Two

Eagle was healthy and liked to stay active before this accident, and rode his bicycle regularly.

As a result of the accident Mr. Two Eagle suffered head, spinal and leg injuries and was hospitalized for over 350 days. He was taken to the Rosebud Hospital and then flown to Rapid City. He stayed at the Rapid City hospital until September 18, 2019, and then was transferred to the Madonna medical facility in Lincoln, Nebraska. He remained at Madonna but was also back and forth between St. Elizabeth medical facility in Lincoln until the end of July 2020. Mr. Two Eagle's right lower leg had to be amputated. He now gets around by wheelchair or walker. He incurs dialysis sessions three times per week. His head injury required substantial rehabilitation and he is still left with permanent loss of cognitive abilities. (APP. 4-6, 8, R. Doc. 4). The past and future medical expense and home health care exceeds seven million dollars. Mr. Two Eagle could not return to work and the present value of the loss of earnings is at least $112,000 had he continued working to age 75. After release from the hospital in Lincoln, Nebraska Mr. Two Eagle and his wife lived with their son, Lowney and his family. The family has sacrificed to provide for Mr. Two Eagle.

SUMMARY OF THE ARGUMENT

1. **Whether Chad Sully was acting in his capacity as an employee of the hospital at the time of the accident.**

The district court ruled that Sully was not acting within the scope of his employment at the time of the accident primarily relying on the going and coming rule as outlined in *Tammen v. Tronvold,* 2021 S.D. 56, ¶ 23-26.

Plaintiff Two Eagle contends that since Sully had entered the sole access to the hospital, was being paid at the time of the accident and the accident occurred so close to the hospital with Sully's car coming to rest on the Hospital grounds, the government should be held vicariously liable under South Dakota law for Sully's negligence. *Deuchar v. Foland Ranch,* 410 N.W.2d 177, 180-181 (SD 1987); *Leafgreen v. American Family Mut. Ins. Co.,* 393 N.W.2d 275, 280-281 (SD 1986).

2. Whether Sully's supervisor William Wonnenberg had a duty to monitor if Sully was driving to and from work in violation of his doctor's directive to not drive until October 11, 2019, and whether the act of monitoring falls within the discretionary function exception to the FTCA.

The district court ruled that since there was no federal statute, regulation or agency directive mandating any specific course of action that Sully's supervisor should have undertaken, then the government action is considered the product of judgment or choice and the action is discretionary.

Plaintiff Two Eagle contends that since Wonnenberg knew that Sully had a seizure condition and had not been driving since April 16, 2019, that Wonnenberg, knowing of the danger of driving with a seizure condition, had a duty to verify if Sully's Neurologist had purposely released Sully to start driving again in the

beginning of August 2019. Sully's neurologist had given a directive to not drive until October 11, 2019, so there was no choice or judgment involved. Sully should not have been driving on August 5, 2019 and Wonnenberg should have checked and confirmed that Sully's Neurologist purposely authorized Sully to start driving again.

3. Whether Dr. Smith should be considered a federal employee under the FTCA or rather an independent contractor falling outside the confines of the FTCA.

The district court ruled that in accordance with Melody Price-Yonts Declaration and the "Distant Site Credentialing and Privileging Agreement" between the hospital and Avera eCare, LLC, Dr. Smith was an independent contractor and the FTCA did not permit a claim against the United States because of his alleged negligence.

Plaintiff Two Eagle contends that the Annual Funding Agreement Between the Secretary of the United States Department of Health and Human Services and the Rosebud Sioux Tribe at Section Eleven specifically provides that a health care practitioner who has been granted clinical privileges in a health facility operated by the Contractor shall be considered a federal employee for FTCA purposes for any acts or omissions that occur in the course of providing services to eligible Indian beneficiaries even if the practitioner is not an employee of the IHS or an employee or personal services contractor of the Contractor. JJL Declaration docket APP. 274, R. Doc. 41-2.

In addition, Article 7 of the January 2020 Bylaws and Regulations of the hospital staff entitled "Telemedicine" provides that the hospital oversees the performance of the telemedicine providers and ultimately controls the performance of the providers. APP. 335, R. Doc. 47-3. Therefore, Dr. Smith should be considered a federal employee for FTCA purposes.

ARGUMENT

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

STANDARD OF REVIEW

The district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) is reviewed de novo. The Court must rule upon the jurisdictional issue unless a full trial on the merits is necessary to resolve the jurisdictional issues because the jurisdictional facts are so bound up with the merits of the case. If the district court determines disputed jurisdictional facts, those findings are reviewed under the clearly erroneous standard. *Buckler v. United States,* 919 F.3d 1038, 1044 (8th Cir. 2019).

A threshold requirement to establish jurisdiction under the FTCA is that the federal employee was acting within the scope of his employment when the tort was committed. *Johnson v. United States,* 534 F.3rd 958, 963 (8th Cir. 2008). The law of the state where the tortious acts occurred is controlling in determining the scope of employment issue. *Id* at 963. The district court can dismiss an action for lack of

subject matter jurisdiction based on: "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Id.* at 962. In the instant case the government brings an attack on the jurisdictional allegations of the complaint.

But a court should not dismiss for lack of subject matter jurisdiction when the facts essential to such a determination are intertwined with or identical to the facts that determine the merits of the case. *Osborn v. United States,* 918 F.2d 724, 730 (8th Cir. 2008) (citing *Crawford v. United States,* 796 F.2d 924, 929 (7th Cir. 1986); *Godwin ex rel. Godwin v. United States*, No. 3:14CV391-DPJ-FKB, 2015 WL 4644711, at *2 (S.D. Miss. Aug. 4, 2015).

Jurisdictional scope of employment facts intertwined with merits of the case.

The *Johnson* and *Crawford* cases can be distinguished from the instant case. In *Johnson* the federal employee was clearly not performing a job function for federal government at the time that the alleged tortious wrongful arrest occurred. The federal employee's job was a correctional officer at a facility in Fort Yates, North Dakota. At the time of the subject incident, the federal employee was on his way to Mobridge, South Dakota when he decided to make an arrest which was clearly not a duty of his job as a correctional officer in Fort Yates. In *Crawford* the

jurisdictional issue was the statute of limitation and did not in any way involve the scope of employment issue as in the instant case.

In *Godwin,* the government raised the going and coming rule in defending an FTCA case related to a motor vehicle collision, just as in the instant case. There, the court determined that it must consider matters of fact that are in dispute, specifically whether the tortfeasor was "on duty" at the time of the accident. The court, citing the Fifth Circuit, wrote that dismissal for lack of subject-matter jurisdiction based on the finding that the tortfeasor was not acting within the scope of her employment at the time of the incident would be improper and held that the jurisdictional attack intertwined with the merits of the FTCA claim and should be treated like any other intertwined attack and considered under Rule 12(b)(6) or Rule 56. *Id*. at *3-4. Because the government had alternatively moved under Rule 56 the court treated the motion as a Rule 56 motion since it would have been improper to rule on the 12(b)(1) motion. *Id.* (*citing Montez v. Dep't of the Navy*, 392 F.3d 147, 150 (5th Cir. 2004).). The court explained:

> [w]here the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court (assuming that the plaintiff's federal claim is not immaterial and made solely for the purpose of obtaining federal jurisdiction and is not insubstantial and frivolous) is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case.

Id. at *2 (quoting *Montez v. Dep't of the Navy*, 392 F.3d 147, 150 (5th Cir. 2004).). "[W]here factual issues determinative of jurisdiction are intertwined with or identical to factual issues determinative of the merits[,]…the rule of *Bell v. Hood* 327 U.S. 678, 682 (1946) requires the district court to assume jurisdiction and decide the case on the merits." (citations omitted).

Since the jurisdictional facts in the case at hand are intertwined with the facts on the merits, exactly as they were in *Godwin,* this court should deny the United States' Motion to Dismiss and allow discovery to proceed and let the scope of employment issue be determined at trial or by way of summary judgment.

Scope of employment analysis

Plaintiff alleges that Sully was acting within the scope of his employment at the time of the subject accident. The United States disagrees contending that Sully was on his lunch break and, under the going and coming rule, was not within the scope of his employment at the time he injured Mr. Two Eagle. The district court agreed with the government and granted a dismissal of the count of the complaint that was based on Sully's negligent conduct.

In South Dakota, an act is within the scope of employment if it is directly or indirectly connected with the business of the employer. *Deuchar v. Foland Ranch,*

Inc., 410 N.W.2d 177, 180 (S.D. 1987). And conduct that is incidental to conduct authorized by the employer is within the scope of employment. *Id.* at 180, n.2.

South Dakota courts consider a number of factors in analyzing scope of employment, including: (1) whether the act is commonly done in the course of business; (2) the time, place, and purpose of the act; (3) whether the act is within the enterprise of the master; (4) whether the means of doing harm has been furnished by the master; and (5) the extent of departure from the normal method of accomplishing an authorized result. *See Deuchar v. Foland Ranch, Inc.,* 410 N.W.2d 177,180, n. 2 (S.D. 1987). Whether an act of an employee is within the scope of employment, in most cases, is a question of fact for the jury. *Hass v. Wentzlaff,* 2012 S.D. 50, ¶20. Vicarious liability claims are analyzed under a two-part test in South Dakota. *Id.* ¶ 21. "[T]he factfinder must first determine whether the [act] was *wholly* motivated by the agent's personal interests or whether the act had a dual purpose, that is, to serve the master and to further personal interests." *Id.* (quoting *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 24). "When a servant acts with an intention to serve *solely* his own intentions, this act is not within the scope of employment and his master may not be held liable for it." *Id.* ¶ 21.

South Dakota adopted the foreseeability test for determining when a servant's acts are within the scope of employment in *Leafgreen v. American*

Family Mut. Ins. Co., 393 N.W.2d 275, 280-81 (SD 1986). The South Dakota Supreme Court wrote:

> We think it fairly stated that a principal is liable for tortious harm caused by an agent where a nexus sufficient to make the harm foreseeable exists between the agent's employment and the activity which actually caused the injury; foreseeable is used in the sense that the employee's conduct must not be so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business.

In the instant case it is abundantly clear that Sully was only acting for the benefit of his employer at the time of the injury since the only reason he was in this isolated area where the hospital complex is located was incidental to his job. APP. 86 at ¶7 and 8 R. Doc. 30 and APP. 89, R. Doc. 30-3. There was not any personal reason or benefit for Sully to be at the site where this accident occurred. The only reason that Sully was on the road circling the hospital at 1:40 in the afternoon on August 5, 2019, was to finish his double shift that arose due to staffing shortages.

Generally, an act of an employee that has an independent purpose, solely of a personal nature, is not within the scope of employment. *St. John v. United States,* 240 F.3d 671, 677 (8th Cir. 2001) (citing *United States v. Lushbough,* 200 F.2d 717, 720 (8th Cir. 1952). Judge McMillan, writing on behalf of the Eighth Circuit in *St. John,* rejected the government's limited interpretation of the FTCA that only conduct condoned by the employer falls within the scope of employment. *Id.* Such a narrow interpretation was contrary to the reasons for passing the FTCA, to

"reflect strong public policy to protect citizenry from torts committed by public servants" and "to adopt respondeat superior as it is understood in law of the states." *Id.*

The United States' reliance on *Tammen v. Tronvold,* 2021 S.D. 56, ¶ 23-26 and the going and coming rule is misplaced because the rule doesn't apply to incidents occurring on the employer's premises or the sole access route to the work site. *Tammen* can further be distinguished on the basis that the alleged agent was a Pierre volunteer firefighter not receiving regular wages and was not yet a certified firefighter. The volunteer was on his was to attend a monthly training meeting that was required in order for him to become a certified firefighter. In the instant case Sully was a long time federal employee working as a cook for the hospital and the accident occurred on the hospital grounds and/or on the access to the hospital.

Under the premises exception to the going and coming rule, employee conduct that occurs on an employer's premises is incidental to conduct authorized by the employer and is therefore within the scope of employment. *See Shuford v. United States,* No. 13-CV-6303 SJF AKT, 2014 WL 4199408, at *5 (E.D.N.Y. Aug. 21, 2014).

An "exception almost universally recognized is the premises rule: an employee going to or coming from work before or after work hours *or at lunch*

while on the premises of the employer, is compensable." *Shuford,* 2014 WL 4199408 at *5.

In *Diaz v. United States,* 789 F.Supp.2d 722, 726 (S.D. Miss. 2011), the government removed a state court action into federal court arguing that under the FTCA the defendant federal employee was within the scope of employment, and therefore, the proper defendant was the United States. The plaintiff objected contending that the going and coming rule controlled establishing that the federal employee was not within the scope of his employment. *Id.* The *Diaz* court explained that the going and coming rule for FTCA purposes, "holds as a general rule, that 'the hazards encountered by employees while going to or returning from their regular place of work and off of employer's premises are not incident to employment and accidents arising therefrom are not compensable.'" *Id.* (*quoting Stepney v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 416 So. 2d 963, 964 (Miss. 1982). The rule itself as expressed by the *Diaz* court makes it clear that the going and coming rule is inapplicable to occurrences on the employer's premises.

The court in *Pitt v. Matola,* 890 F.Supp. 89, 92–94 (N.D. NY 1995) held that the Defendant was within the scope of employment while driving to work because the Defendant was on the employer's premises, and therefore, employer had the right to control him at that time. *Id.* The court rejected the government's argument that the going and coming rule applied taking the conduct out of the scope of

employment. *Id.* The court found significant that Matola had been on duty since 7:00 am and was on the way to his next work assignment. *Id.* Similarly, in the case at hand, Sully had been on duty since 6:00 am and was on the employer's premises on the way to his next assignment to complete his double shift.

Although Plaintiff has been unable to find FTCA or *respondeat superior* cases in South Dakota that apply the premises exception to the going and coming general rule, South Dakota has regularly recognized the premises exception in the workers' compensation setting. *Howell v. Cardinal Industries,* 497 N.W.2d 709, 711–12, n.7; *Fair v. Nash Finch Company,* 2007 S.D. 16, ¶ 13; *Steinberg v. South Dakota Dept. of Military and Veterans Affairs,* 2000 S.D. 36, ¶ 20.

As noted above in *Shuford* the federal courts have also recognized the premises exception under the Federal Employees' Compensation Act. 2014 WL 4199408 at *5 (Secretary of Labor determined employee was within the scope of employment at time she suffered bee stings at lunch on employer's premises).

Another exception to the going and coming rule is the "access doctrine" under which an employee is considered to be within the course of employment if the injury occurred within an area that the employer has indicated should be used as an access route and is within a reasonable margin of time and space necessary for passing to and from work. *U.S. Fire Ins. Co. v. Deering Management Group*, 946 F.Supp. 1271, 1282 (N.D. Tex., 1996). In the instant case, Hospital Drive, the

location of the subject injury, as you can see from the map and photos, (APP. 112 , R. Doc. 32-5 and APP. 144, R. Doc. 32-7) is the sole access route to the hospital where Sully worked. Each employee of the hospital must use this road to get to their job site which clearly benefits and is of tremendous value to their employer.

The government has cited *Primeaux v. United States,* 181 F.3d 876 (8th Cir. 1999) and *St. John v. United States,* 240 F.3d 671, 677 (8th Cir. 2001), for the proposition that FTCA liability is limited to conduct within the scope of employment and does not include claims outside the scope of employment based on the reliance of apparent authority. Clearly, there is no contention in the instant case that Mr. Two Eagle was relying on apparent authority of a federal employee, Sully and therefore, those cases are distinguishable from the instant case.

The inconsistency of the government's position on the issue of scope of employment is apparent when considering *White v. United States,* 143 F.3d 232 (Fifth Cir. 1998), *Shuford,* supra., *Wollman v. Gross,* 484 F. Supp. 598 (Dist. SD, Southern 1980), *Healy v. United States,* 435 F. Supp. 2d 157 (D.D.C. 2006), *Diaz, supra.* and other similar cases wherein the government urged that the subject conduct was within the scope of employment. Had Sully been a civilian federal employee and the one injured due to the negligence of an IHS employee, at the same location under similar work circumstances, the government would be here arguing that Sully was within the scope of his employment and that F.E.C.A.

applies as the exclusive remedy for Sully. The government should not be allowed to proffer such conflicting and irreconcilable legal arguments under like fact patterns depending on what suits their interests.

Sully was acting within the scope of his employment under South Dakota respondeat superior law at 1:41 p.m. on August 5, 2019 when Sully drove his motor vehicle over Mr. Two Eagle. The location of the accident was on hospital grounds and on grounds that are directly adjacent to the sole access road to the hospital where Sully works. APP. 85 at ¶ 3 R. Doc.30 and APP. 87, R. Doc. 30-1. The going and coming rule is inapplicable since Sully was on his employer's premises and on the only access road to the hospital. The accident site was a short distance (less than 100 yards) from the hospital structure as can be seen in the photographs and video of the accident scene on the day of the accident. (APP. 112, R. Doc. 32-5 and APP. 143, R. Doc. 32-6). The only reason Sully was at the location of the accident was to serve his employer to complete his second shift required because of staffing shortages. APP. 85 at ¶ 5 and 6, R. Doc. 30. There wasn't any personal benefit or reason for Sully to be at the location of the accident. APP. 88, R. Doc. 30-2 and APP. 85 at ¶ 6, R. Doc. 30. Hospital Drive that leads to and circles the hospital is the lone access to the hospital and all employees must use it to get to their jobs. The hospital does not have a system to clock in or out so Sully did not clock out when he took a break after working approximately seven

hours on August 5, 2019. APP. 85 at ¶ 6, R. Doc. 30. The only written policy for lunch breaks allows an unpaid half hour. APP. 44, R. Doc. 20-2, APP. 45, R. Doc. 20-3. As such, Sully was being compensated at the time of the collision. (According to Sully's supervisor, Sully took his half hour break at 12:40 or 12:45 p.m; APP. 39 at ¶ 8, R. Doc. 20 and APP. 334, R. Doc. 47-2.) The accident occurred at 1:41 pm.

Plaintiff has met his burden of proof establishing that Sully was within the scope of his employment at the time of this accident, and therefore, this court does have subject matter jurisdiction for this FTCA lawsuit and the United States' motion to dismiss should be denied.

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

STANDARD OF REVIEW

The district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) is reviewed de novo. The Court must rule upon the jurisdictional issue unless a full trial on the merits is necessary to resolve the jurisdictional issues because the jurisdictional facts are so bound up with the merits of the case. If the district court determines disputed jurisdictional facts, those findings are reviewed under the clearly erroneous standard. *Buckler v. United States,* 919 F.3d 1038, 1044 (8th Cir. 2019).

Discretionary function analysis

The federal government waives sovereign immunity for FTCA claims. But the waiver does not apply to the performance of a discretionary function which is an exception to the FTCA. To determine whether the discretionary function exception bars a lawsuit the first inquiry is whether the challenged conduct is truly discretionary, involving an element of judgment or choice rather than controlled by mandatory statutes or regulations. *Herden v. United States,* 726 F.3d 1042, 1046 (8th Cir. 2013).

If the challenged conduct is discretionary, then the next inquiry is whether the employee's judgment was based on social, economic, and political policy. *Id.* at 1047.

Plaintiff acknowledges that on July 23, 2019, Dr. Smith authorized Sully to start driving again commencing in August and that Sully had not been driving since April 16, 2019, based on his medical care providers' directive to cease driving due to his seizure condition. APP. 374, R. Doc. 19-1, APP. 89, R. Doc. 30-3.

However, Sully's work supervisor, dietician William Wonnenberg, saw Sully on April 8, 2019, related to Sully's nutritional health and noted Sully's seizure condition. APP. 185, R. Doc. 40. Wonnenberg being abundantly familiar

with long-time cook Sully and the rest of the cooking crew, would have been aware that Sully was not driving due to his seizure condition and the difficulties for Sully's family caused by Sully not being able to drive. It can be reasonably inferred that Wonnenberg would have discussed with Sully how long driving was disallowed. For each seizure that Sully had in January, March and April 2019, he was treated at the Rosebud IHS where Sully worked and Wonnenberg would have been aware of the seizures.

Since the six-month no driving directive had been set by Dr. Smith in April 2019, (APP. 374, R. Doc. 19-1) there was no discretion or decision-making left to be made by Wonnenberg. Sully was not to drive until after October 11, 2019. Wonnenberg realized or should have realized that Sully was not allowed to drive until the middle of October. It was negligent for Wonnenberg to fail to verify that Sully's medical care providers had purposely chosen to shorten the no driving directive from the mid-October time frame to the beginning of August. It would not have been a HIPPA violation for Wonnenberg to ask Sully's medical providers to verify that Sully was authorized to drive even though six months had not elapsed from Sully's last seizure.

The government claims an intervening unforeseeable act because at some point in time after the accident Sully allegedly admitted that he was not taking the correct dosage of his seizure medicine. First, Sully's January 31, 2020, statement

disputes those allegations and creates a fact question as to the dosage of medicine being taken at the time of the accident. (APP. 89, R. Doc. 30-3). Second, regardless of the dosage, Sully was not to drive for six months, period, and Wonnenberg, who knew about the seizures and knew Sully wasn't driving for a period of time, should have reasonably questioned the shortening of the do-not-drive time frame.

The government also contends an intervening act alleging Sully misinformed Dr. Smith on July 23, 2019, about the last seizure date. However, it is not known how or why Dr. Smith's July 23, 2019, telemedicine visit note under Chief Complaint reads, "no seizures since February". Medical professionals do not let patients' memories dictate medical decision making on important matters such as when to allow a seizure patient to commence driving, but instead use reliable past medical records for verification. It is not unusual for patients to inaccurately convey past medical history and treatment information.

Wonnenberg's failure as Sully's supervisor, to follow up with Sully or Sully's health care providers to confirm that the shortening of the six month no drive direction was intended, is a clear failure to exercise reasonable care. Wonnenberg's duty of care required Wonnenberg to inquire why the time frame was shortened and whether the shortening was intended. Wonnenberg would not have been deciding whether Sully should drive, only checking to see that the

decision has been properly entered and was intended. Had Wonnenberg done so, this horrible accident could have been avoided.

Wonnenberg's negligent failure to monitor Sully's driving was not a discretionary function since a no-drive directive had been entered on April 16, 2019 by Sully's doctor. Wonnenberg oversaw a relatively small kitchen staff and would have been familiar with any difficulties involving their means of transportation. Wonnenberg knew that Sully was suffering from a seizure condition and was not driving due to the condition after April 16, 2019 and it can be reasonably inferred that Sully would have been notified Wonnenberg of the six month timeframe. Two Eagle requests this Court to find that the discretionary function exception to the FTCA does not apply and to reverse the district court's dismissal of his action based on the lack of subject matter jurisdiction.

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

STANDARD OF REVIEW

The district court's grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) is reviewed de novo. The Court must rule upon the jurisdictional issue unless a full trial on the merits is necessary to resolve the jurisdictional issues because the jurisdictional facts are so bound up with the merits of the case. If the district court determines disputed jurisdictional facts, those

findings are reviewed under the clearly erroneous standard. *Buckler v. United States,* 919 F.3d 1038, 1044 (8th Cir. 2019).

Federal employee v. independent contractor analysis

The district court ruled that Dr. Smith was an independent contractor and therefore his conduct was not subject to the FTCA.

Whether an individual is a federal employee or independent contractor under the FTCA is a question of federal law. *Logue v. United States,* 412 U.S. 521, 527 (1973). Whether the federal government has the power to control the detailed physical performance of the contractor is critical in making this determination. *Unites States v. Orleans,* 425 U.S. 807, 814. (1976). The question is whether day-to-day operations are supervised by the Federal Government. *Bernie v. United States,* 712 F.2d 1271, 1273 (8th Cir. 1983).

On July 23, 2019, Dr. Smith failed to check Sully's past medical records to verify the date of last seizure and inaccurately noted in the July 23, 2019 medical notations, "no seizures since February" (APP. 383 R. Doc. 19-1), and based on that error Dr. Smith released Sully to start driving again in August (APP. 386, R. Doc. 19-1). The last seizure actually occurred on April 11, 2019, not in February 2019. Dr. Smith's error is significant and relevant since Sully had a six month no-drive directive from the date of last seizure and Dr. Smith's error allowed Sully to drive commencing August instead of properly waiting until after October 11, 2019. After

Dr. Smith allowed Sully to drive commencing in August, Sully had a seizure while driving on August 5, 2019, resulting in the catastrophic injuries to Mr. Two Eagle.

Rosebud Sioux Tribe (RST) entered into a self-determination contract with the United States of America Secretary of the Department of Health and Human Services (DHHS) in part related to the Rosebud Indian Health Care facility. (APP. 255-289, R. Doc. 41-2). Avera eCare LLC (Avera) and the RST entered into an agreement whereby RST agreed to allow Avera to provide telemedicine physicians for RST patients. (APP. 53-61, R. Doc. 21-1). There is no dispute that employees of the Rosebud IHS are covered under the FTCA. But, independent contractors (as well as its employees) are not covered under the FTCA. 28 U.S.C. § 2671. Neurologist Dr. Smith is one of the telemedicine physicians supplied by Avera and provided medical care for Sully's seizure condition. If Dr. Smith is a federal employee pursuant to the contract provisions between the RST, DHHS and Avera, then the only claim that Mr. Two Eagle could raise against Dr. Smith would be under the Federal Tort Claims Act.

The relevant documentation includes:

1. Contract between the Secretary of the Department of Health and Human Services and Rosebud Sioux Tribe – Solid Waste October 1, 2018, with attachments including the Annual Funding Agreement between the Secretary of Health and Human Services and the Rosebud Sioux Tribe,

HHS-I-241-2019-00004, Fiscal Year 2019 – Solid Waste Contract, (APP. 255-289, R. Doc. 41-2);

2. Distant Site Provider Credentialing and Privileging Agreement Between Rosebud Hospital and Avera eCare, LLC, (APP. 53-61, R. Doc. 21-1);

3. Bylaws & Rules and Regulations of the Rosebud Comprehensive Healthcare Facility Medical Staff, (APP. 335-336, R. Doc. 47-3).

The Self Determination Contract between the Rosebud Sioux Tribe and the Secretary of the Department of Health and Human Services in SECTION 1(a)(2) provides (APP. 258, R. Doc. 41-2):

> Purpose – Each provision of the Indian Self-Determination and Education Assistance Act (25 U.S.C: 5301 et seq.) and each provision of this Contract shall be liberally construed for the benefit of the Contractor [Rosebud Sioux Tribe] to transfer the funding and the following related functions, services, activities, and programs (or portion thereof), that are otherwise contractible under section 102(a) of such Act, including all related administrative functions, from the Federal Government to the Contractor.

And at attachment 2 SECTION ELEVEN FEDERAL TORT CLAIMS ACT provides (APP. 274, R. Doc. 41-2):

> A health care practitioner who has been granted clinical privileges in a health facility operated by the Contractor shall be considered an employee of the Federal Government for purposes of the Federal Tort Claims Act (FTCA), 28 U.S.C. §1346(b) and Chapter 171 of Title 28 of the U.S. Code, for any acts or omissions that occur in the course of providing services to eligible Indian beneficiaries as well as those

> persons deemed to be eligible for IHS services pursuant to IHCIA sections 813(a) and (b), 256 U.S.C. §1680c(a) and (b), even if the practitioner is not an employee of the IHS or an employee or personal services contractor of the Contractor. (emphasis added). Whether FTCA applies in any particular case is initially decided on an individual case-by-case basis by the United States Department of Justice and ultimately decided on a case-by-case basis of the Federal Courts. Pursuant to 25 U.S.C. §1680u, the Contractor may employ traditional health care practices and practitioners.

This provision indicates that health care practitioners who have been granted clinical privileges are to be considered employees of the federal government for purposes of the Federal Tort Claims Act even if the practitioner is not an employee of the IHS or an employee or personal services contractor with the Rosebud Hospital. There is a proviso that the employment status shall first be determined by the United States Department of Justice and ultimately by the Federal Courts.

The Rosebud Hospital/Avera eCare LLC contract at sections 12 and 20 has relevant provisions (APP. 57, 59, R. Doc. 21-1). Section 12 Compliance with Indian Health Service Policies and Procedures provides:

> Providers shall, when providing Contracted Services, abide by any applicable ROSEBUD HOSPITAL policies and procedures.

Section 20 Liability and Insurance provides:

> As among the parties, each party acknowledges that it will be responsible for claims or damages arising from personal injury or damage to persons or property to the extent they result from negligence of that party's

employees. AVERA eCARE agrees not to seek indemnification from either the United States or ROSEBUD HOSPITAL for any settlement, verdict or judgment resulting from any claim or lawsuit against it or its Providers arising out of the performance of contracted services. AVERA eCARE acknowledges that Providers performing contracted services will have liability coverage throughout the duration of this Agreement consistent with the following: Professional liability (malpractice) coverage, in amounts that are reasonable and customary in the community for the appropriate specialty, covering liability for personal injury or property damage including legal representation and expense of defense of any such liability claims, actions or litigation, resulting from performance contracted services by AVERA eCARE under the Telehealth Contract and this Agreement. This coverage may come from any source, but shall clearly cover AVERA eCARE for the duration of the Telehealth Contract and this Agreement. AVERA eCARE must provide documentary proof of the insurance coverage to the ROSEBUD HOSPITAL facility prior to performance of contracted services. The professional liability insurance coverage may be on either an occurrences basis or on a claims-made basis. If the policy is on a claims-made basis, an extended reporting endorsement for a period of not less than 3 years after the end of the Telehealth Contract terms must also be provided. AVERA eCARE shall notify the ROSEBUD HOSPITAL Immediately if an adverse change in coverage occurs for any reason. ROSEBUD HOSPITAL agrees not to seek indemnification from AVERA eCARE for any settlement, verdict or judgment resulting from any claim or lawsuit against it or its Providers arising out of the performance of contracted services. ROSEBUD HOSPITAL and its employees are covered by the liability protection afforded by the Federal Tort Claims Act (FTCA). The FTCA is codified in the Title 28 of the United States Code at sections 1346(b) and 2671-2680 and operates as a limited waiver of sovereign immunity under which the United States assumes liability for certain negligent or wrongful acts or omissions committed by Government employees while acting within the scope of their official Federal employment. See 28 U.S.C. 1346(b).

Earlier in this Avera/RST agreement at Section 2 it is represented that Avera is acting as an independent contractor. (APP. 53, R. Doc. 21-1).

Bylaws & Rules and Regulations of the Rosebud Comprehensive Healthcare Facility Medical Staff (APP. 66-75, R. Doc. 21-4) provide:

> Governing Body/Governing Board (GB) is the final authority on granting, restricting, suspending, or revoking delineated clinical privileges.
>
> 5.1.7 The GB is the only authority that can grant full MS membership and/or clinical privileges. Clinical privileges are granted through procedures outlined in these Bylaws.
>
> 5.3.9 The GB makes the final decision for appointment, privileging, credentialing, reappointment, reprivileging, and re-credentialing.

Clearly, Rosebud Hospital relies on Avera to do the credentialing for the telemedicine doctors, but what's not so clear is whether the telemedicine practitioners should be considered federal employees or employees of Avera, the independent contractor. The self-determination (APP. 255, R. Doc. 41-2) and the Avera/RST contract (APP. 53-61, R. Doc. 21-1) provisions seem contradictory.

The Avera/RST contract (APP. 53-61, R. Doc. 21-1) provides that Avera is an independent contractor for credentialing purposes and is required to secure liability insurance for injuries caused by Avera's employees.

The RST/DHHS self-determination contract (APP. 274, R. Doc. 41-2) provides that health care practitioners granted clinical privileges are to be considered federal employees for purposes of the FTCA even if the practitioner is

not an employee of the IHS or an employee or a personal services contractor of the Rosebud Sioux Tribe. This self determination contact also specifies as indicated above that the contract should be liberally construed in favor of the Rosebud Sioux Tribe. This seems to strongly support that Dr. Smith be considered a federal employee.

The Bylaws and Rules and Regulation for the medical staff at ARTICLE 7 (APP. 335, R. Doc. 47-3) includes a section on telemedicine with recommendations on the scope of services to be provided and specifies conditions for the allowance of certain providers including the IHS internal review of the provider's performance and adverse events and complaints. In addition under ARTICLE 5 (APP. 69, R. Doc. 21-4) the governing board is the only authority that can grant full medical staff membership and/or clinical privileges and is the final authority on granting, restricting, suspending, or revoking delineated clinical privileges. Definitions and Abbreviations.

Paragraph 12 of the Avera RST agreement (APP. 57, R. Doc. 21-1) provides that the providers supplied by Avera must abide by the Rosebud Hospital's policies and procedures while providing Contracted Services, and therefore subject to the control of the Rosebud Hospital.

In some cases, despite contract language to the contrary, the court may determine that a worker is a federal employee rather than an employee of an

independent contractor based on the degree of control exercised over the worker. *Sisto v. United States,* 8 F.4th 820, 829 (9th Cir. 2021).

The United States cites numerous cases indicating that the critical determination is whether the IHS had power to control the physical day to day performance of Dr. Smith. As far as who has control over Dr. Smith, it is not helpful to examine control of the diagnosis or treatment of the patient, since the doctor alone controls that without any input from Avera or RST. What is significant is that section 12 of the Avera/Rosebud Hospital agreement (APP. 57, R. Doc. 21-1) expressly indicates that the Avera providers are subject to the rules and regulations of the Rosebud Hospital. In addition, the governing board of the hospital has the ultimate say on who are to be the providers for the hospital. For control considerations, the Rosebud Hospital and its governing board has ultimate control over both full medical staff members and over providers with clinical or courtesy privileges. Under the legal authority specifying that control is the critical factor, the above contractual provisions support the conclusion that the Rosebud Hospital controlled the conduct of the health care providers for their Native American patients, making the health care providers, including telemedicine providers, employees of the hospital and ultimately the federal government. There is at least a fact question as to whether the Rosebud Hospital had control and on

whether Dr. Smith should be considered an employee of Avera or the federal government for FTCA purposes.

In *Sisto* the court concluded that the medical provider was the employee of the independent contractor, but the language in the self-determination contract in the case at hand appears to have stronger language on providers being considered federal employees than did the self-determination contract in *Sisto.* In addition, the contract between the tribe and the independent contractor in *Sisto* was more explicit about the providers being employees of the independent contractor. No where within the Avera contract does it specifically state that the telemedicine medical providers are to be considered employees of Avera.

Thus, the determination of whether Dr. Smith is an employee of Avera or the federal government requires a fact determination that should be determined after a full presentation of the case and cannot be determined at this stage of the proceeding as requested in the government's 12(b)(1) and 12(h)(3) motion. Two Eagle requests this Court to find that Dr. Smith was a federal employee for purposes of the FTCA and to reverse the district court's dismissal based on a lack of subject matter jurisdiction related to the negligence claim involving Dr. Smith.

CONCLUSION

On August 5, 2019, Lonnie Two Eagle's world was turned upside down. In a flash, Mr. Two Eagle was transformed from a productive worker and family man to an invalid. No longer independent he relies on family for his most basic needs.

Plaintiff has met his burden to show that the court has subject matter jurisdiction for this FTCA lawsuit based on Sully's, Wonnenberg's and Dr. Smith's misconduct. Two Eagle is entitled to his day in court and requests this Court to reverse the district court's judgment granting the government's 12(b)(1) or 12(h)(3) motion to dismiss.

Dated this 9th day of June, 2022.

/s/ *Jon J. LaFleur*
Jon J. LaFleur
Zephier & LaFleur PC
2020 West Omaha St.
PO Box 9460
Rapid City, SD 57709
(605) 342-0097
Counsel for Appellant

CERTIFICATE OF COMPLIANCE

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

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June 9, 2022.

By: /s/ *Jon J. LaFleur*