UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 22-1683

LONNIE TWO EAGLE, SR.

Plaintiff – Appellant,

v.

UNITED STATES OF AMERICA,

Defendant – Appellee.

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

The Honorable Jeffery L. Viken
United States District Judge

BRIEF OF APPELLEE UNITED STATES OF AMERICA

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Lonnie Two Eagle, Sr. ("Two Eagle") appeals the district court's order dismissing his Federal Tort Claims Act ("FTCA") lawsuit for lack of subject matter jurisdiction.

Two Eagle was mowing grass on property owned by the Rosebud Sioux Tribe (the "Tribe") when he was struck by a car driven by Chad Sully ("Sully"). Sully was on his lunch break and returning to work at the Rosebud Indian Health Service (IHS) hospital (the "hospital") at the time of the accident. It is believed that Sully suffered a seizure at the time of the accident. Sully was previously diagnosed with a seizure disorder but cleared to drive by Dr. Matthew C. Smith. Dr. Smith was an independent contractor and provided services at the hospital under a telemedicine agreement with Avera eCare, LLC (n/k/a Avel eCare, LLC) ("Avera").

The district court properly dismissed Two Eagle's complaint because Sully was acting outside the scope of his employment at the time of the accident, the hospital's supervision and retention of Sully fell within the discretionary function exception to the FTCA, and Dr. Smith was an independent contractor.

The government submits that the facts and arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

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JURISDICTIONAL STATEMENT

The district court dismissed Two Eagle's complaint on March 2, 2022, finding that it lacked subject matter jurisdiction over his FTCA claims. APP. 337-348, R. Doc. 51. Two Eagle filed a timely notice of appeal on March 31, 2022. Appellee's Addendum 1-2, R. Doc. 53. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER A FULL TRIAL ON THE MERITS IS NEEDED TO RESOLVE THE SCOPE OF EMPLOYMENT QUESTION.

Johnson v. United States, 534 F.3d 958 (8th Cir. 2008)
Magee v. United States, 9 F.4th 675 (8th Cir. 2021)
Osborn v. United States, 918 F.2d 724 (8th Cir. 1990)
Fed. R. Civ. P. 12(b)(1)

II. WHETHER CHAD SULLY ACTED WITHIN THE SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT.

Deuchar v. Foland Ranch, Inc., 410 N.W.2d 177 (S.D. 1987)
Hass v. Wentzlaff, 816 N.W.2d 96 (S.D. 2012)
Leafgreen Am. Fam. Mut. Ins. Co., 393 N.W.2d 275 (S.D. 1986)
Tammen v. Tronvold, 965 N.W.2d 161 (S.D. 2021)

III. WHETHER ISSUES OF EMPLOYEE SUPERVISION FELL WITHIN THE DISCRETIONARY FUNCTION EXCEPTION OF THE FTCA.

Dykstra v. United States, 140 F.3d 791 (8th Cir. 1998)
Herden v. United States, 726 F.3d 1042 (8th Cir. 2013)
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28 U.S.C. § 2680(a)

IV. WHETHER DR. MATTHEW C. SMITH WAS AN INDEPENDENT CONTRACTOR.

Charlima, Inc. v. United States, 873 F.2d 1078 (8th Cir. 1989)
Knudsen v. United States, 254 F.3d 747 (8th Cir. 2001)
United States v. Orleans, 425 U.S. 807 (1976)
28 U.S.C. § 2671

STATEMENT OF THE CASE

The United States leases property from the Tribe for purposes of operating the Rosebud Comprehensive Health Care Facility. APP. 94-101, R. Doc. 32-2. The Rosebud Water Resources Office was built on approximately five acres excluded from the lease. APP. 101, R. Doc. 32-2, at p. 8. On August 5, 2019, Two Eagle, an employee of the Rosebud Water Resources Department, was mowing grass on the Water Resources Department grounds. APP. 101, R. Doc. 32-2, at p. 8; APP. 290 ¶¶ 4-5, R. Doc. 42, at ¶¶ 4-5; APP. 292, R. Doc. 42-1; APP. 293, R. Doc. 42-2; APP. 294-295 ¶¶ 5, 7-8, R. Doc. 43, at ¶¶ 5, 7-8; APP. 296, R. Doc. 43-1 (Appellee's Addendum 3).[1] Two Eagle was injured when he was struck by a car driven by Sully, an employee of the hospital. The point of impact, and the location where Two Eagle came to rest, was on the Water Resources Department grounds owned and controlled by the Tribe. APP. 101, R. Doc. 32-2, at p. 8; APP. 290 ¶¶ 4-5, R. Doc. 42, at ¶¶ 4-5; APP. 292, R. Doc. 42-1; APP. 293, R. Doc. 42-2; APP. 294-295 ¶¶ 7-8, R. Doc. 43, at ¶¶ 7-8; APP. 296, R. Doc. 43-1 (Appellee's Addendum 3).

Sully was (and currently is) employed as a cook in the Dietary Department at the hospital. APP. 83 ¶¶ 1-2, R. Doc. 22, at ¶¶ 1-2. At the time of the accident, Sully was on a lunch break and returning to work. APP. 40 ¶ 15, R. Doc. 20, at ¶

[1] The arial photo (APP. 296) marking point of impact and location where Two Eagle came to rest is difficult to read. A more legible copy is provided as Appellee's Addendum 3.

15; APP. 83 ¶ 4, R. Doc. 22, at ¶ 4. Sully was working a double shift that day. APP. 39 ¶ 6, R. Doc. 20, at ¶ 6; APP. 83 ¶ 3, R. Doc. 22, at ¶ 3. Employees working a double shift are allowed a 45-minute lunch break. APP. 39 ¶ 9, R. Doc. 20, at ¶ 9. Under Office of Personnel Management Policy, "[a] lunch or other meal period is an *approved period of time* in a *nonpay and nonwork status* that interrupts a basic workday or a period of overtime work for the purpose of permitting employees to eat or engage in permitted personal activities." APP. 39 ¶¶ 10-11, R. Doc. 20, at ¶¶ 10-11; APP. 45, R. Doc. 20-3, at p. 1 (emphasis added).

Sully took his lunch break at approximately 1:00 p.m.[2] APP. 83 ¶ 4, R. Doc. 22, at ¶ 4; APP. 105, R. Doc. 32-3, at p. 3. During his lunch break, Sully drove home, took a nap, and prior to returning to the hospital, stopped at the post office to check his personal mail. APP. 40 ¶ 15, R. Doc. 20, at ¶ 15; APP. 83 ¶ 4, R. Doc. 22, at ¶ 4. Sully was driving his personal car at the time of the accident. APP. 83 ¶ 5, R. Doc. 22, at ¶ 5. The accident occurred between approximately 1:30 p.m. and 1:41

[2] Two Eagle asserts that Sully took his lunch break at 12:45 p.m. This is not supported by the record. At approximately 12:40 p.m. or 12:45 p.m., Sully's supervisor *instructed* him to take his lunch break when the "lunch crowd settled down." APP. 39 ¶ 8, R. Doc. 20, at ¶ 8; APP. 334, R. Doc. 47-2. Per Sully's sworn declaration, he took his lunch break at approximately 1:00 p.m. APP. 83 ¶ 4, R. Doc. 22, at ¶ 4.

p.m.[3] APP. 105, R. Doc. 32-3, at p. 3; APP. 108, R. Doc. 32-4, at p. 1; APP. 149, R. Doc. 32-8, at p. 1.

Regarding the accident, Sully stated he "blacked out" on the road. APP. 40 ¶ 15, R. Doc. 20, at ¶ 15. Sully further stated he recalled "waking up" in the ambulance but did not recall the accident. *Id.*; APP. 83 ¶ 4, R. Doc. 22, at ¶ 4. It is believed that Sully suffered a seizure at the time of the accident. Sully was previously diagnosed with a seizure disorder but cleared to drive by Dr. Smith. APP. 384, R. Doc. 19-1, at p. 36. Dr. Smith provided telemedicine services through the Distant Site Provider Credentialing and Privileging Agreement executed between Avera and the hospital. APP. 48-49 ¶¶ 3-10, R. Doc. 21, at ¶¶ 3-10; APP. 53-61, R. Doc. 21-1; APP. 62, R. Doc. 21-2; APP. 63-65, R. Doc. 21-3.

Following the accident, Sully was transported to the hospital Emergency Department for treatment. While being treated in the Emergency Department, Sully stated he had a history of seizures and was prescribed Keppra 750mg twice a day. APP. 388, 397, R. Doc. 19-1, at pp. 40, 48. Sully, however, admitted to taking Keppra only once a day, although no physician advised that he reduce his prescribed dosage. *Id.* Sully also admittedly failed to report the date of his last known seizure

[3] Sully reported that the accident occurred at approximately 1:30 p.m. APP. 105, R. Doc. 32-3, at p. 3. Rosebud Sioux Tribe Law Enforcement Services and Emergency Medical Services were notified at 1:41 p.m. APP. 108, R. Doc. 32-4, at p. 1; APP. 149, R. Doc. 32-8, at p. 1.

to his neurologist. *Id.* On the date of the accident, Sully tested positive for cannabinoids. APP. 394, R. Doc. 19-1, at p. 46.

Two Eagle subsequently brought this action against the United States under the FTCA. In count one of the complaint, Two Eagle alleges that Sully negligently operated a motor vehicle while within the scope of his employment. APP. 2-5, R. Doc. 4, at ¶¶ 5-15. Count two alleges a cause of action for the negligent hiring, training, supervision, screening, and retention of Sully. APP. 5-6, R. Doc. 4, at ¶¶ 16-18. Count three alleges that Dr. Smith was negligent in medically clearing Sully to drive. APP. 7-8, R. Doc. 4, at ¶¶ 19-23. The United States moved to dismiss the complaint for lack of subject matter jurisdiction because Sully was acting outside the scope of his employment at the time of the accident, the hospital's supervision and retention of Sully fell within the discretionary function exception to the FTCA, and Dr. Smith was an independent contractor.

In accordance with 28 U.S.C. § 636, the motion to dismiss was referred to a United States Magistrate Judge. The magistrate judge carefully considered the jurisdictional facts and evaluated the merits of the jurisdictional claims, resolving factual disputes based on affidavits and supporting documents. The magistrate judge issued a report recommending that the United States' motion to dismiss be granted. APP. 297-333, R. Doc. 46.

Based on the record, the magistrate judge concluded that Sully was acting outside the scope of his employment at the time of the accident under the going and coming rule "which precludes an employer's liability, as a matter of law, when an employee is 'going to and coming from work….'" *Tammen v. Tronvold*, 965 N.W.2d 161, 169 (S.D. 2021) (quoting *S. Dakota Pub. Entity Pool for Liab. v. Winger*, 566 N.W.2d 125, 131 (S.D. 1997)). The court stated Sully's commute to the hospital fell squarely within the going and coming rule because the hospital neither had sufficient control over nor received a sufficient benefit from his commute. APP. 307, R. Doc. 46, at p. 11. The court further found that exceptions to the going and coming rule were inapplicable in this case. APP. 310-315, R. Doc. 46, at pp. 14-19.

The magistrate judge also concluded that the hospital's supervision and retention of Sully fell within the discretionary function exception. Here, the court noted that Two Eagle failed to cite any federal statute, regulation, or agency directive mandating any specific course of action by the hospital regarding Sully's seizure disorder and failed to rebut the presumption that the hospital's decisions were based on public policy considerations. APP. 317-319, R. Doc. 46, at pp. 21-23.

Finally, the magistrate judge concluded that Dr. Smith was an independent contractor because he was not subject to any day-to day control by the hospital. APP. 326, R. Doc. 46, at p. 30. The court also noted that the telemedicine agreement states

Avera was an independent contractor and found that Dr. Smith was either an employee or independent contractor of Avera. *Id.*

Two Eagle objected to the magistrate judge's report and recommendation. The district court conducted a de novo review of the record and those portions of the report or proposed findings and recommendations to which objection was made. The district court overruled Two Eagle's objections and adopted the magistrate judge's report and recommendations. APP. 337-348, R. Doc. 51. Addressing Two Eagle's specific objections, the district court held that Sully was not acting within the scope of his employment at the time of the accident and Dr. Smith was an independent contractor. APP. 341-347, R. Doc. 51, at pp. 5-11.

SUMMARY OF THE ARGUMENT

The FTCA is a limited waiver of sovereign immunity for certain torts of federal employees acting within the scope of their employment. 28 U.S.C. § 1346(b)(1). Sully was acting outside the scope of his employment at the time of the accident. Sully was engaged in a personal errand. While on his lunch break, he drove home, took a nap, and stopped at the post office to check his personal mail. Sully's actions served solely his own interests with no underlying purpose to further the hospital's business. *See Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177, 181 (S.D. 1987) (stating "an employer should not be held liable for the acts of a servant who has embarked upon a 'frolic' of his own with no underlying purpose of

furthering his master's business."). Furthermore, Sully's actions were not a foreseeable consequence of his employment as a cook at the hospital. *See Hass v. Wentzlaff*, 816 N.W.2d 96, 103 (S.D. 2012) (stating "[i]f the act was for a dual purpose, the fact finder must then consider the case presented and the factors relevant to the act's foreseeability in order to determine whether a nexus of foreseeability existed between the agent's employment and the activity which caused the injury."). Therefore, Sully was acting outside the scope of his employment at the time of the accident, and this Court lacks subject matter jurisdiction over count one of the complaint.

The discretionary function exception to the FTCA also shields the government from liability for claims based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government. 28 U.S.C. § 2680(a). Decisions involving the supervision and retention of federal employees are generally discretionary and subject to public policy considerations. *See Tonelli v. United States*, 60 F.3d 492, 496 (8th Cir. 1995) (stating "[i]ssues of employee supervision and retention generally involve the permissible exercise of policy judgment and fall within the discretionary function exception."). In this case, there is no federal statute, regulation, or agency directive prescribing a required course of action by the hospital regarding Sully's seizure disorder and the supervision and retention of hospital

employees is subject to policy considerations. Therefore, the hospital's supervision and retention of Sully falls within the discretionary function exception to the FTCA, and this Court lacks subject matter jurisdiction over count two of the complaint.

Finally, independent contractors are excluded from the definition of employees under the FTCA. Dr. Smith was an independent contractor. The government did not retain any control over Dr. Smith's day-to-day performance or over the telemedicine services rendered under the telemedicine agreement with Avera. *See Knudsen v. United States*, 254 F.3d 747, 750 (8th Cir. 2001) (stating "[t]o determine whether an individual is an employee or contractor, the court must evaluate the extent to which the government has the power to supervise the individual's day-to-day operations."). Dr. Smith's independent contractor status is further supported by the contract documents and the circumstances of the telemedicine services provided. Therefore, Dr. Smith was an independent contractor, and this Court lacks subject matter jurisdiction over count three of the complaint.

STANDARD OF REVIEW

The United States moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(h)(3). Rule 12(b)(1) governs dismissal for lack of subject matter jurisdiction. Two Eagle bears the burden of establishing jurisdiction. *Osborn*, 918 F.2d at 730.

The standard of review depends on the nature of the jurisdictional challenge. *Osborn v. United States*, 918 F.2d 724, 729 n. 6 (8th Cir. 1990). In this case, the United States factually attacked the jurisdictional allegations of the complaint. In reviewing a motion to dismiss for lack of subject matter jurisdiction based on a factual attack, the Court of Appeals reviews the district court's factual findings for clear error and legal conclusions de novo. *Yeransian v. B. Riley FBR, Inc.*, 984 F.3d 633, 637 (8th Cir. 2021); *St. Louis Heart Center, Inc. v. Nomax, Inc.*, 899 F.3d 500, 503 (8th Cir. 2018).

ARGUMENT

I. A FULL TRIAL ON THE MERITS IS NOT NEEDED TO RESOLVE THE SCOPE OF EMPLOYMENT QUESTION.

"Jurisdictional questions, 'whether they involve questions of law or fact, are for the court to decide' at the outset, unless the jurisdictional issue is so bound up with the merits that a full trial on the merits is needed to resolve the question." *Magee v. United States*, 9 F.4th 675, 682 (8th Cir. 2021) (quoting *Osborn*, 918 F.2d at 729-730). In this case, the jurisdictional issue, i.e., whether Sully was acting within the scope of his employment, is unrelated to whether his conduct was negligent, i.e., duty, breach, proximate cause, and damages. Thus, the magistrate judge correctly concluded that the court could resolve any factual disputes and determine whether Sully was acting within the scope of his employment at the time of the accident. APP. 304-305, R. Doc. 46, at pp. 8-9. As the magistrate judge noted

"[t]he issue whether Mr. Sully was acting within the scope of his employment is unrelated to whether his conduct was negligent, which is the most important issue on the merits." APP. 305, R. Doc. 46, at p. 9. "Moreover, because jurisdiction is a threshold question, judicial economy demands that the issue be decided at the outset rather than deferring it until trial, as would occur with denial of a summary judgment motion." *Osborn*, 918 F.2d at 729.

Citing *Godwin ex rel. Godwin v. United States*, a district court decision from the Fifth Circuit, Two Eagle argues that the factual issue of scope of employment is so intertwined with the merits of the case that dismissal under Federal Rule of Civil Procedure 12(b)(1) would be improper. In *Godwin* the district court held, in the context of the FTCA, that "dismissal for lack of subject-matter jurisdiction based on a finding that the tortfeasor was not acting within the scope of her employment at the time of the incident would be improper." Case No. 14-CV-391-DPJ/FKB, 2015 WL 4644711, *2 (S.D. Miss. Aug. 4, 2015). The court reasoned that where 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 is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case. *Id.* The court then considered the motion to dismiss under a summary judgment standard and refrained from making credibility determinations or weighing the evidence. *Id.* at *3. The court denied the motion to dismiss finding

a question of fact existed as to whether the plaintiff was acting within the scope of employment at the time of the accident. *Id.* at *3.

This Court, however, rejected this approach in the case of *Johnson v. United States*, 534 F.3d 958 (8th Cir. 2008). In *Johnson* this Court stated, while generally, "whether an employee's actions are within the scope of employment is a question of fact, we fail to see how the factual nature of this inquiry somehow renders the jurisdictional issue 'so bound up with the merits that a full trial on the merits' is necessary to resolve the issue."[4] *Id.* at 963-64 (quoting *Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986)). This Court further noted that whether an employee's conduct is within the scope of employment is unrelated to whether the conduct was negligent, which is the most important issue on the merits. *Id.* at 964; *see also Osborn*, 918 F.2d at 730 (stating "the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims."); *Moss v. United States*, 895 F.3d 1091, 1097 (8th Cir. 2018) (stating "the Rule 12(b)(1) procedure enables the court to resolve a threshold jurisdictional issue without the need for trial, unless the issue is 'so bound up with the merits that a full

[4] Two Eagle attempts to distinguish *Johnson* arguing that making an arrest was "clearly not a duty of [the employee's] job as a correctional officer." Certainly, taking a nap and stopping at the post office on a personal errand were not part of Sully's duties as a cook.

trial on the merits may be necessary to resolve the issue.'") (quoting *Disability Support All v. Heartwood Enter., LLC*, 885 F.3d 543, 547 (8th Cir. 2018)).

On appeal, Two Eagle also argues that the determination of whether Dr. Smith was an independent contractor is a question of fact that should be determined after a full trial on the merits. The issue of whether Dr. Smith was acting as an independent contractor is unrelated to whether his conduct was negligent and, as stated above, judicial economy demands that the issue be decided at the outset rather than deferring it until trial.

The jurisdictional issues in this case are unrelated to whether the alleged conduct was negligent. Therefore, the United States' motion to dismiss was properly decided under Federal Rule of Civil Procedure 12(b)(1).

II. CHAD SULLY WAS ACTING OUTSIDE THE SCOPE OF HIS EMPLOYMENT AT THE TIME OF THE ACCIDENT.

Sovereign immunity shields the federal government and its agencies from suit absent a waiver. *Fed. Deposit Ins. Corp. 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. Dep't of Hous. & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000) (citing *Presidential Gardens Assoc. v. United States*, 175 F.3d 132, 139 (2d Cir. 1999)). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Navajo Nation*, 537 U.S. 488, 502

(2003). The FTCA waived the federal government's sovereign immunity for certain torts of federal employees within the scope of their employment. *See Audio Odyssey, Ltd. v. United States*, 255 F.3d 512, 516 (8th Cir. 2001). Under the FTCA, the United States has waived its sovereign immunity:

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances 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).

Count one of the complaint alleges that Sully operated his car while acting within the scope of his employment with the hospital. APP. 2-5, R. Doc. 4, at ¶¶ 5-15. Sully, however, was engaged in a personal errand and was not acting within the scope of his employment at the time of the accident. Therefore, there is no waiver of sovereign immunity, and the district court properly dismissed count one for lack of subject matter jurisdiction.

A. Chad Sully's Actions Served Solely His Own Interests and Were in No Way Connected to His Services as a Cook.

Under South Dakota law,[5] an employer becomes liable for injuries caused by the negligence of his employee when such negligence occurs within the scope of the

[5] The parties agree that the question of whether Sully was acting within the scope of his employment is determined under South Dakota law because the accident occurred in South Dakota. *See LaFromboise v. Leavitt*, 439 F.3d 792, 796 (8th Cir.

employee's employment. *Deuchar*, 410 N.W.2d at 180-181 (S.D. 1987). The phrase "within the scope of employment" is

> vague but flexible, referring to "those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment."

Id. at 180 (quoting *Prosser and Keeton on the Law of Torts* §70, 1t 502 (5th ed. W. Keeton 1984)). An employer, however, "should not be held liable for the acts of a servant who has embarked upon a 'frolic' of his own with no underlying purpose of furthering his master's business." *Id.* at 181.

"The rule of respondeat superior applies only in cases in which it is established by affirmative evidence that at the time when the given tort was committed the relationship of master and servant or employer and employee existed between the party charged with liability and the actual tort feasor." *United States v. Lushbough*, 200 F.2d 717, 720 (8th Cir. 1952). The South Dakota Supreme Court utilizes a two-part test for analyzing vicarious liability claims. *See Hass*, 816 N.W.2d at 103 (S.D. 2012). "[T]he fact finder 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.* If the servant acted

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2006) (holding that "where an act or omission occurs within the territorial boundaries of both a tribal reservation and a State, 'the law of the place' for purposes of the FTCA is the law of the State").

with an intention to serve solely his own interests, the act is not within the scope of employment and his master is not liable for it. *Id.* "If the act was for a dual purpose, the fact finder must then consider the case presented and the factors relevant to the act's foreseeability in order to determine whether a nexus of foreseeability existed between the agent's employment and the activity which caused the injury." *Id.* For an act to be foreseeable, 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." *Leafgreen v. Am. Fam. Mut. Ins. Co.*, 393 N.W.2d 275, 280-281 (S.D. 1986).

In this case, Sully was hired to cook at the hospital and his work was performed in the kitchen. APP. 38 ¶ 3, R. Doc. 20, at ¶ 3. Sully's duties included the planning, preparing, and coordinating of meals. APP. 39 ¶¶ 4-5, R. Doc. 20, at ¶¶ 4-5; APP. 41-43, R. Doc. 20-1. Sully's job responsibilities did not include operating a motor vehicle. *Id.* On the day of the accident, Sully was working a double shift. APP. 39 ¶¶ 6-7, R. Doc. 20, at ¶¶ 6-7; APP. 44, R. Doc. 20-2; APP. 83 ¶ 3, R. Doc. 22, at ¶ 3. At approximately 12:45 p.m., Sully's supervisor told him to take his lunch break when the "lunch crowd settled down." APP. 39 ¶ 8, R. Doc. 20, at ¶ 8; APP. 334, R. Doc. 47-2. At approximately 1:00 p.m., Sully took his lunch break and drove home, took a nap, and prior to returning to the hospital for his second shift, stopped at the post office to check his personal mail. APP. 40 ¶ 15, R.

Doc. 20, at ¶ 15; APP. 83 ¶ 4, R. Doc. 22, at ¶ 4. Sully stated to medical personnel, his supervisor, and via declaration that the accident occurred while returning to the hospital on his lunch break. APP. 40 ¶ 15, R. Doc. 20, at ¶ 15; APP. 83 ¶ 4, R. Doc. 22, at ¶ 4; APP. 388, 395, R. Doc. 19-1, at pp. 40, 47. Sully's actions served *solely* his own interests and were in no way connected to his duties as a cook.

Further, Sully's actions were unforeseeable. Sully was cleared to drive on the date of the accident. Sully, however, failed to take his seizure medication as prescribed. Sully was prescribed Keppra 750mg twice a day for his seizure disorder. APP. 388, 397, R. Doc. 19-1, at pp. 40, 48. Sully admitted to taking Keppra only once a day, although no physician advised that he reduce his prescribed dosage. *Id.* Sully also admittedly failed to report the date of his last known seizure to Dr. Smith. *Id.* Finally, on the date of the accident, Sully tested positive for cannabinoids.[6] APP. 394, R. Doc. 19-1, at p. 46.

To be within the scope of employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized. *Deuchar*, 410 N.W.2d at 180. In determining whether the conduct is of the same general nature as or incidental to the conduct authorized by an employer, a court may consider whether

[6] Sully was charged with Simple Assault (negligently causing bodily injury to another) in violation of RSTLOC 5-5-1(B), Reckless Driving (driving under the influence and not taking full dose of medication to prevent seizure) in violation of RSTLOC 6-2-1, and Driving Under the Influence (marijuana) in violation of RSTLOC 6-1-1. Appellee's Addendum 4.

the act is one commonly done in the course of business; the time, place and purpose of the act; whether the act is within the enterprise of the master; and whether the means of doing harm has been furnished by the master. *See Deuchar*, 410 N.W. 2d at 180 n. 2 (holding that South Dakota is guided by the principles articulated in the Restatement (Second) of Agency).

Two Eagle argues that Sully's return to the hospital to begin his second shift was "incidental" to Sully's employment as a cook. But driving to and from work is not incidentally related to Sully's duties as a cook. Sully's duties included the planning, preparing, and coordinating of meals. APP. 39 ¶¶ 4-5, R. Doc. 20, at ¶¶ 4-5; APP. 41-43, R. Doc. 20-1. Sully's job responsibilities did not include operating a motor vehicle. *Id.* Sully was engaged in a personal errand. APP. 40 ¶ 15, R. Doc. 20, at ¶ 15; APP. 83 ¶ 4, R. Doc. 22, at ¶ 4. Finally, Sully was driving his personal car and not a vehicle furnished by the hospital. APP. 83 ¶ 5, R. Doc. 22, at ¶ 5.

Additionally, Two Eagle cites to *St. Johns v. United States*, 240 F.3d 671 (8th Cir. 2001) in support of a broader interpretation of scope of employment under the FTCA. *St. Johns* is inapposite to this case. *St. Johns* involved public policy considerations and the imposition of FTCA liability for police officer misconduct made possible *only* by virtue of employment authority. *Id.* at 677.

At the time of the accident, Sully was on his lunch break. While on his lunch break, he drove home, took a nap, and stopped at the post office to check his personal

mail. Sully's actions served solely his own interests with no underlying purpose to further the hospital's business. Thus, Sully was acting outside the scope of his employment at the time of the accident. Furthermore, Sully's actions were not a foreseeable consequence of his employment as a cook. Therefore, Sully was acting outside the scope of his employment at the time of the accident, and the district court properly dismissed count one for lack of subject matter jurisdiction.

B. The "Going and Coming" Rule Precludes the United States' Liability as a Matter of Law.

The United States moved to dismiss count one because Sully was acting outside the scope of his employment at the time of the accident under the traditional scope of employment analysis of *Deuchar*. As stated above, Sully's actions served solely his own interests with no underlying purpose to further the hospital's business. Two Eagle argued that the government was liable under the premises exception to the going and coming rule, but that is misplaced here.

The going and coming rule originated in worker's compensation law and precludes an employer's vicarious liability when an employee is going to and coming from work. *See Tammen*, 965 N.W.2d at 169. Under the rule, when an employee travels to or from work he is deemed to be acting in his own interests without constraints by the employer regarding method or means of commute. *Id.* at 170. As a matter of public policy:

> it is inherently unfair to penalize an employer by "imposing unlimited liability … for the conduct of its employees over which it has no control and from which it derives no benefit." This is because, "when employees travel to or from work they are deemed to be acting in their own interests without constraints by the employer regarding the method or means of the commute."

Id. at 169-70 (citations omitted).

Recently, in the case of *Tammen v. Tronvold*, the South Dakota Supreme Court considered the going and coming rule in a tort action. In *Tammen*, plaintiffs brought an action against the Pierre volunteer fire department and a member of the department for injuries sustained when they collided with the member's vehicle. *Id.* at 164-65. The Department required members to use their own vehicles to respond to fire calls. *Id.* at 166. At the time of the accident, the member was driving his personal vehicle to a monthly training meeting. *Id.* at 165. The court determined that the defendant's actions fell within the going and coming rule, which precluded the employer's liability as a matter of law. *Id.* at 171.

In its analysis of the facts, the South Dakota Supreme Court found that the member's act of driving to attend the training meeting fell squarely within the going and coming rule. The court noted that at the time of the accident, even if the member "was required to attend the meeting, his act of driving to the meeting was indistinguishable from that of an ordinary commuter whose employer requires him or her to have personal transportation to arrive at work." *Id.* at 170. The court also noted that the member was not responding to an emergency and there was no

evidence that use of the member's vehicle served a special purpose. *Id.* at 171. Finally, the court in *Tammen* found that the benefits the department received from the member's commute were insufficient to place the act within the scope of his employment. *Id.* The court stated:

> for a court to impose liability upon an employer for an employee's commute, "[s]omething more is required, some distinguishing fact establishing that under the peculiar facts of employment the business interest is directly benefitted."

Id. (quoting *Beard v. Seamon*, 175 So. 2d 671, 675 (La. Ct. App. 1965)). The court further stated that to conclude that the training meeting was within the scope of employment, under these specific facts, would give no effect to the going and coming rule. *Id.*

In this case, upon review of the evidence, the district court concurred with the magistrate judge's conclusion that Sully's actions were outside the scope of his employment. Specifically, the district court agreed that Sully's act of driving to the hospital to work his second shift was "indistinguishable from that of an ordinary commute" and "fit squarely within the framework of the going-and-coming rule articulated in *Tammen*." APP. 342, R. Doc. 51, at p. 6. The district court also found that the accident occurred at approximately 1:40 p.m. during Sully's 45-minute

lunch break.[7] APP. 342, R. Doc. 51, at p. 6. These findings of fact are supported by the record. Sully took his lunch break at approximately 1:00 p.m. APP. 83 ¶ 4, R. Doc. 22, at ¶ 4; APP. 105, R. Doc. 32-3, at p. 3. Kitchen employees are allowed a 30-minute lunch break. APP. 39 ¶ 9, R. Doc. 20, at ¶ 9. When a kitchen employee works a double shift, he or she is allowed approximately 15 additional minutes for lunch. *Id.* Sully was working a double shift on the day of the accident and was allowed a 45-minute lunch break. *Id.*; APP. 39 ¶ 6, R. Doc. 20, at ¶ 6; APP. 83 ¶ 3, R. Doc. 22, at ¶ 3.

In response to the United States' motion to dismiss, Two Eagle argued that the accident occurred within the scope of Sully's employment because he was paid during his lunch break. The record does not support this argument. First, under Office of Personnel Management Policy, "[a] lunch or other meal period is an *approved period of time* in a *nonpay and nonwork status* that interrupts a basic workday or a period of overtime work for the purpose of permitting employees to eat or engage in permitted personal activities." APP. 39 ¶¶ 10-11, R. Doc. 20, at ¶¶ 10-11; APP. 45, R. Doc. 20-3, at p. 1. (emphasis added). Second, Sully was not

[7] The record shows the accident occurred between approximately 1:30 p.m. and 1:41 p.m. APP. 105, R. Doc. 32-3, at p. 3; APP. 108, R. Doc. 32-4, at p. 1; APP. 149, R. Doc. 32-8, at p. 1.

paid wages for time spent traveling to and from work.[8] As noted by the district court, whether the accident occurred within the time allowed Sully for his lunch break, or whether he was late returning to work, is irrelevant to the scope of employment analysis. APP. 343, R. Doc. 51, at p. 7.

In this case, like in *Tammen*, the accident was " 'a consequence of risks and hazards to which all members of the traveling public are subject rather than risks and hazards having to do with and originating in the work or business of the employer.'" *Id.* (quoting *Texas Gen. Indem. Co. v. Bottom*, 365 S.W.2d 350, 353 (Tex. 1963)). The hospital neither derived a benefit from nor controlled Sully's commute and, thus, Sully's act of driving was within the going and coming rule. Therefore, Sully was acting outside the scope of his employment at the time of the accident, and the district court properly dismissed count one for lack of subject matter jurisdiction.

[8] Although the magistrate judge cited to Louisiana caselaw recognizing an exception to the going and coming rule when transportation is furnished as an incident of an employment agreement, either through a vehicle or payment of wages or expenses, South Dakota has not recognized such an exception outside the worker's compensation context. Notably, under Louisiana law, payment of wages is only *one* factor in a scope of employment analysis. *See Champagne v. United States*, Civ. No. 13-299, 13-348, 2014 WL 222069, at *2-3, 6 (E.D. La. Jan. 21, 2014) (stating the fact that the employee was paid during his lunch break was not enough to overcome the weight of the other factors that the court was required to consider); *see also Hawkins v. Fowler*, Civ. No. 09-639 (JJB-CN), 2010 WL 1851072, at *4 (M.D. La. May 7, 2010) (finding that even if the federal employee had permission to use the government owned vehicle, his trip was not within the course and scope of employment).

C. Exceptions to the Going and Coming Rule Must Relate to Situations Where the Hazards of the Journey Are Fairly Regarded as Hazards of the Service.

Exceptions to the going and coming rule spring from the employer's exertion of "'some *control* over the employee's actions and a palpable *benefit* to be reaped …, thus squarely placing such conduct back into the vicarious liability construct….'" *Tammen*, 965 N.W.2d at 172 (emphasis in original) (quoting *Carter v. Reynolds*, 815 A.2d 460, 467 (N.J. 2003)). In this regard, the South Dakota Supreme Court in *Tammen* noted significant distinctions between the principles underlying workers' compensation coverage and the doctrine of respondeat superior and stated, "a determination of vicarious liability within the context of respondeat superior requires a *narrower construction* of an employee's scope of employment." *Id.* (emphasis in original) (citing *S. Dakota Pub. Entity Pool for Liab.*, 566 N.W.2d at 128 (S.D. 1997)).[9] Thus, the same factual circumstance could result in a court imposing liability on an employer in a workers' compensation case but not in a

[9] Under workers' compensation law, an employee seeking workers' compensation benefits forfeits his right to bring a tort action against the employer for workplace injuries in exchange for a quick and certain remedy. *Tammen*, 965 N.W.2d at 172 (citing *Harn v. Cont'l Lumber Co.,* 506 N.W.2d 91, 95 (S.D. 1993)). "To effectuate the expeditious and determinate nature of workers' compensation claims, courts construe the phrase 'arising out of and in the course of employment *liberally*.'" *Id.* (quoting *Mudlin v. Hills Materials Co.*, 698 N.W.2d 67, 71 (S.D. 2005)). Whereas the doctrine of respondeat superior "'is grounded upon a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.'" *Id.* (quoting *Leafgreen*, 393 N.W.2d at 280.

respondeat superior case. *Id.* at 173. This can occur because respondeat superior requires a narrower view of an employee's scope of employment by focusing on whether the employer had control over the employee or received a benefit (aside from delivering the employee to the work site) from the employee's act. *Id.*

In *Tammen*, the South Dakota Supreme Court rejected the application of exceptions to the going and coming rule. *Id.* at 172-74. The Court counseled for "careful construction of the nature and circumstances surrounding the scope of a worker's employment before expanding liability beyond the going and coming rule." *Id.* at 173 (stating "injuries occurring during an employee's commute 'are said not to arise out of and in the course of employment; rather they arise out of the ordinary hazards of the journey, hazards which are faced by all travelers and which are unrelated to the employer's business.'") (quoting *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 479 (1947)). The Court concluded that "exceptions to the going and coming rule should 'relate to situations where the hazards of the journey may fairly be regarded as the hazards of the service.'" *Id.*

In this case, Two Eagle seeks application of the premises exception to the going and coming rule. Two Eagle relies on the case of *Shuford v. United States*, No. 13-CV-6303 (SJF/AKT), 2014 WL 4199408 (E.D.N.Y. Aug. 21, 2014). In *Shuford*, the plaintiff allegedly suffered injuries during a lunch break while on the premises of her employer. *Id.* at *1. The issue in that case was whether the plaintiff's

claims were covered under the Federal Employees' Compensation Act ("FECA"), which would bar pursuit of plaintiff's claims under the FTCA. FECA provides compensation for personal injuries sustained by a federal employee "while in the performance of his duty." 5 U.S.C. § 8102. Under FECA, "employees are guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation, but in return they lose the right to sue the Government." *Id.* at *2 (quoting *Mathirampuzha v. Potter*, 548 F.3d 70, 80-81 (2d Cir. 2008)).

Shuford is inapposite to this case. First, the present case does not involve a question of FECA coverage. Second, as discussed above, a determination of vicarious liability within the context of respondeat superior requires a narrower construction of an employee's scope of employment.[10] Finally, the accident in this case did not occur on the premises of the hospital. The United States leases property from the Tribe for the purposes of operating the Rosebud Comprehensive Health Care Facility. APP. 94-101, R. Doc. 32-2. The Water Resources Office was built on approximately five acres excluded from the lease. APP. 101, R. Doc. 32-2, at p. 8. Rosebud Sioux Tribe Officer Chad Roe reported that "[t]here was a trail of fluids and gasoline from the point of impact along with items of debris from the grassy

[10] Because determination of vicarious liability within the context of respondeat superior requires a narrower construction of an employee's scope of employment, worker's compensation cases are not controlling.

area to the resting point of the vehicle." APP. 109, R. Doc. 32-4, at p. 2. The aerial photo marked by Officer Roe establishes that the point of impact and the location where Two Eagle physically came to rest was on the Rosebud Water Resources' property. APP. 294-295 ¶¶ 7-8, R. Doc. 43, at ¶¶ 7-8; APP. 296, R. Doc. 43-1 (Appellee's Addendum 3). *See also* Plat of the Rosebud IHS Hospital Subdivision and Aerial and Plat of the Rosebud IHS Hospital Subdivision. APP. 290 ¶¶ 4-5, R. Doc. 42, at ¶¶ 4-5; APP. 292, R. 42-1; APP. 293, R. Doc. 42-2.[11]

Two Eagle further seeks application of the "access" doctrine. The access doctrine is also a construct of workers' compensation law and an extension of the premises exception to the going and coming rule. Under this doctrine, an accident is deemed to be in the course and scope of employment if the accident occurs at a point so closely related to the employer's premises as to be considered a part of the premises. In support of application of the access doctrine, Two Eagle cites the case of *U.S. Fire Ins. Co. v. Deering Mgmt. Grp., Inc.*, 946 F. Supp. 1271 (N.D. Texas 1996), applying Texas workers' compensation law. Two Eagle, however,

[11] Two Eagle further cites *Diaz v. United States*, 789 F. Supp.2d 722 (S.D. Miss. 2011) in support of application of the premises exception. *Diaz* is inapposite to this case. First, *Diaz* did not concern application of the premises exception. The issue in that case was whether the federal employee was traveling to or from his "regular" or "fixed" place of employment. Second, *Diaz* applied Missouri law and the going and coming rule quoted by Two Eagle is from a Mississippi worker's compensation case. Two Eagle also cites *Pitt v. Matola*, 890 F. Supp. 89 (N.D. NY 1995). *Pitt* too is inapposite to this case. *Pitt* did not concern application of the premises exception, applied New York law, and involved military personnel on active duty.

misunderstands the ruling in that case. *Deering* does not support application of the access doctrine and expansion of the rules of vicarious liability. To the contrary, the district court determined that the access doctrine did not apply under the facts that were proven during the trial. *Id.* at 1283 (recognizing that if the district court determined at trial that the access doctrine did not apply, the insurance carrier "would be bound to provide coverage"). Moreover, the Texas Supreme Court has held that "the access doctrine does not apply to extend the rules that determine when employers can be held vicariously liable for the alleged negligence of their employees." *OCI Beaumont LLC v. Barajas,* 520 S.W.3d 83, 88 (Tex. App. 2017) (noting that the court's decision could be different if case involved a workers' compensation claim); *see also Harris v. Munday Cont. Maint. Inc.*, 1997 WL 126791, at *2 (Tex. App. Mar. 20, 1997) (unpublished) (declining to extend the access doctrine outside of the workers compensation context).

In this case, upon review of the evidence, the district court concurred with the magistrate judge's conclusion that exceptions to the going and coming rule were inapplicable. Specifically, the district court agreed that the accident did not occur on hospital grounds. APP. 344-345, R. Doc. 51, at pp. 8-9. This finding of fact is supported by the record. As discussed above, at the time of the accident, Two Eagle was mowing grass on property owned and controlled by the Tribe. APP. 101, R. Doc. 32-2, at p. 8; APP. 290 ¶¶ 4-5, R. Doc. 42, at ¶¶ 4-5; APP. 292, R. Doc. 42-1;

APP. 293, R. Doc. 42-2; APP. 294-295 ¶¶ 5, 7-8, R. Doc. 43, at ¶¶ 5, 7-8; APP. 296, R. Doc. 43-1 (Appellee's Addendum 3). The point of impact and the location where Two Eagle came to rest was on the Rosebud Water Resources property. APP. 294-295 ¶¶ 7-8, R. Doc. 43, at ¶¶ 7-8; APP. 296, R. Doc. 43-1 (Appellee's Addendum 3). *See also* Plat of the Rosebud IHS Hospital Subdivision and Aerial and Plat of the Rosebud IHS Hospital Subdivision. APP. 290 ¶¶ 4-5, R. Doc. 42, at ¶¶ 4-5; APP. 292, R. 42-1; APP. 293, R. Doc. 42-2. Moreover, Two Eagle cites no legal authority supporting the application of the premises exception and the access doctrine under South Dakota law.

In the present case, although the circumstances are unfortunate, the accident was a consequence of risks and hazards to which all members of the traveling public are subject rather than risks and hazards having to do with and originating in the work or business of the hospital. Because Sully was simply commuting to work at the hospital, his act of driving falls within the going and coming rule. Furthermore, under South Dakota law, because the hazards of the journey cannot be fairly regarded as the hazards of Sully's service as a cook at the hospital, exceptions to the going and coming rule do not apply. *Tammen*, 965 N.W.2d at 173 (holding that exceptions to the going and coming rule should relate to situations where the hazards of the journey may fairly be regarded as hazards of the service). Therefore, Sully

was acting outside the scope of his employment at the time of the accident, and the district court properly dismissed count one for lack of subject matter jurisdiction.

III. ISSUES OF EMPLOYEE SUPERVISION AND RETENTION FALL WITHIN THE DISCRETIONARY FUNCTION EXCEPTION OF THE FTCA.

Count two of the complaint alleges that the hospital was negligent in the hiring, training, supervision, screening, and retention of Sully. APP. 5-6, R. Doc. 4, at ¶¶ 16-18. Specifically, the complaint alleges that the hospital was negligent in allowing Sully to drive to work while suffering a seizure disorder. APP. 6 ¶ 17, R. Doc. 4, at ¶ 17. "Issues of employee supervision and retention generally involve the permissible exercise of policy judgment and fall within the discretionary function exception." *Tonelli*, 60 F.3d at 496 (8th Cir. 1995). Therefore, there is no waiver of sovereign immunity, and the Court lacks subject matter jurisdiction.

The FTCA does not waive the immunity of the United States for "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). The discretionary function exception protects government policy making. *Dykstra v. United States*, 140 F.3d 791, 795 (8th Cir. 1998). "To the extent an alleged act falls within the discretionary function exception, a court lacks subject matter jurisdiction." *Id.* Importantly, the discretionary function exception shields the United States from liability even if the

government employee's actions were negligent. *See United States v. Gaubert*, 499 U.S. 315, 323 (1991). "[N]egligence is simply irrelevant to the discretionary function inquiry." *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1029 (9th Cir. 1989).

The Supreme Court has established a two-part test in determining whether the acts of a government employee are protected from liability under the discretionary function exception. "The first inquiry is whether the challenged conduct or omission is truly discretionary, that is, whether it involves an element of judgment or choice instead of being 'controlled by mandatory statutes or regulations.'" *Herden v. United States*, 726 F.3d 1042, 1046 (8th Cir. 2013) (quoting *Gaubert*, 499 U.S. at 328). Thus, this Court must determine whether there is "a federal statute, regulation, or policy [that] specifically prescribes a course of action for an employee to follow." *Gaubert*, 499 U.S. at 322. When no such mandate exists, the governmental action is considered the product of judgment or choice (i.e., discretionary). *Dykstra*, 140 F.3d at 795.

If the challenged action is discretionary, "the next inquiry is whether the government employee's judgment or choice was 'based on considerations of social, economic, and political policy.'" *Herden*, 726 F.3d at 1047, (quoting *Layton v. United States*, 984 F.2d 1496, 1499 (8th Cir. 1993)). If a discretionary decision is "susceptible to policy analysis," the discretionary function exception applies

regardless of whether a defendant actually engaged in "conscious policy balancing." *C.R.S. ex rel. D.B.S.*, 11 F.3d at 801 (8th Cir. 1993). When the first step is satisfied, courts presume that the government action involved considerations of public policy. *Herden*, 726 F.3d at 1048. It is the plaintiff's burden to rebut that presumption. *Id.*

Absent a federal statute, regulation, or agency directive specifically prescribing a course of action, decisions involving IHS employees and the operation of the Rosebud IHS hospital are matters of judgment or choice. Two Eagle cites no federal statute, regulation, or agency directive that mandates any specific conduct by William Wonnenberg ("Wonnenberg"), Sully's supervisor. Thus, Wonnenberg's actions were discretionary.

Two Eagle, however, argues that Dr. Smith's instruction to Sully not to drive until six months seizure free mandated that Wonnenberg take action to prevent Sully from driving to and from work. Dr. Smith's medical advice is not a federal statute, regulation, or agency directive. Thus, Wonnenberg's supervision of Sully was a matter of judgment or choice and falls within the discretionary function exception.

Furthermore, the supervision and retention of IHS employees involves the kind of policy judgment that the discretionary function was meant to protect. *Tonelli*, 60 F.3d at 496 (holding "[i]ssues of employee supervision and retention generally involve the permissible exercise of policy judgment and fall within the discretionary function exception."); *Red Elk on Behalf of Red Elk v. United States*,

62 F.3d 1102, 1107 n. 4 (8th Cir. 1995) (stating "[t]he hiring and selection of an employee is a discretionary function of the government-employer."); *see also Vickers v. United States*, 228 F.3d 944, 950 (9th Cir. 2000) (noting that "hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield."); *Richman v. Straley*, 48 F.3d 1139, 1146 (10th Cir. 1995) (holding that "[d]ecisions regarding employment and termination are inherently discretionary, especially where … the relevant statutes provide no guidance or restrictions."); *Archambault v. United States*, 12-CV-01022-CBK, 82 F. Supp.3d 961, 965 (D.S.D. 2015) (noting that there are finite resources available to IHS and "[d]ecisions as to staffing and operating procedures need to be made in an effort to maximize the effectiveness of the agency.").

Two Eagle also argues that Wonnenberg was negligent in failing to inquire regarding Sully's driving restrictions. As stated above, negligence is irrelevant to the discretionary function inquiry.

This argument also *incorrectly* assumes that Wonnenberg had detailed knowledge of Sully's seizure history and medical treatment. On April 8, 2019, Sully sought information from Wonnenberg regarding a ketogenic diet. Wonnenberg is the Director of Food and Nutrition Services and is not a medical doctor. APP. 185 ¶ 1, R. Doc. 40, at ¶ 1. Wonnenberg reviewed with Sully the risks, benefits, and

evidenced-based literature regarding a ketogenic diet and epileptic seizures. Wonnenberg encouraged a healthy diet and encouraged Sully to seek further testing before starting a ketogenic diet. APP. 185, R. Doc. 40, at ¶ 2. At that time, Wonnenberg had no detailed knowledge of Sully's seizure history or medical treatment. APP. 185 ¶ 3, R. Doc. 40, at ¶ 3.

Additionally, contrary to Two Eagle's claim, Wonnenberg was unaware of any driving restrictions. APP. 185 ¶ 4, R. Doc. 40, at ¶ 4. Sully was first evaluated by Dr. Smith on April 16, 2019. APP. 372-375, R. Doc. 19-1, at pp. 24-27. It was on that date, and over a week after Wonnenberg's meeting with Sully, that Dr. Smith instructed Sully not to drive until "6 months seizure free." APP. 374, R. Doc. 19-1, at p. 26. There is also no evidence in the record establishing whether Sully complied with Dr. Smith's instruction not to drive.

Two Eagle further argues that Wonnenberg should have second-guessed Dr. Smith's decision clearing Sully to drive. On July 23, 2019, Dr. Smith cleared Sully to resume driving in August. As stated above, Wonnenberg is not a medical doctor. It was not his responsibility to medically assess whether it was safe for Sully to operate a car, nor would it have been within his duties and responsibilities as Sully's supervisor.

Finally, accepting Two Eagle's argument would result in the unreasonable invasion of Sully's privacy and violation of federal law. Health care providers may

not give health information to employers without patient authorization. 45 C.F.R. § 164.502. Additionally, epilepsy would likely be considered a disability under the Americans with Disabilities Act (ADA). The ADA prohibits discrimination based on disability. 42 U.S.C. § 12112. Under the ADA, an employer may not inquire about an employee's condition unless it has a reasonable belief that the employee is unable to safely perform the essential functions of his job or to support the employee's request for a reasonable accommodation. *Id.*[12] As previously stated, Sully's job responsibilities did not include operating a motor vehicle. APP. 39 ¶ 4, R. Doc. 20, at ¶ 4; APP. 41-43, R. Doc. 20-1. Wonnenberg, therefore, had no reason to inquire into whether Sully's potential disability impacted his ability to operate a motor vehicle.

Two Eagle fails to cite to any federal statute, regulation, or agency directive prescribing a required course of action. Thus, Wonnenberg's actions were discretionary. Further, issues of employee supervision and retention generally involve the permissible exercise of policy judgment and fall within the discretionary

[12] Federal regulations implementing employment provisions of the ADA allow an employer to inquire "into the ability of an employee to perform job-related functions" but requires information regarding the medical condition or history of any employee be "maintained on separate forms and in separate medical files and be treated as a confidential medical record." 29 C.F.R. § 1630.14(c). Supervisors and managers may be informed only for purposes of "necessary restrictions on the work or duties of the employee and necessary accommodations." *Id.*

function exception. Therefore, the district court properly dismissed count two of the complaint for lack of subject matter jurisdiction.

IV. DR. MATTHEW C. SMITH WAS AN INDEPENDENT CONTRACTOR.

Count three of the complaint alleges that Dr. Smith was negligent in clearing Sully to drive. Dr. Smith was an independent contractor providing telemedicine services under Avera's Distant Site Provider Credentialing and Privileging Agreement with the hospital. Therefore, there is no waiver of sovereign immunity.

The FTCA "is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *United States v. Orleans*, 425 U.S. 807, 813 (1976). Independent contractors of the federal government are exempted from coverage. *Id.* at 814; *Audio*, 255 F.3d at 519-520 (stating independent contractors are excluded from the definition of employees of the government). The FTCA states:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, *but does not include any contractor with the United States.*
>
> "Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty . . . and persons acting on behalf of a federal agency in

> an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation . . .

28 U.S.C. § 2671 (emphasis supplied).

Whether Dr. Smith was an independent contractor within the meaning of the FTCA turns on whether IHS and the hospital had the power to control his physical performance in a detailed manner. *Orleans*, 425 U.S. at 814. Federal funding or policing of federal standards and regulations does not create employee status. *Id.* at 815. "The crucial element in determining whether an individual may be considered a federal employee is the amount of control the federal government has over the physical performance of the individual." *Charlima, Inc. v. United States*, 873 F.2d 1078, 1080-81 (8th Cir. 1989) (citing *Orleans*, 425 U.S. at 814-15 (1976)). Thus, the Court must assess "the extent to which the government has the power to supervise the individual's day-to-day operations." *Knudsen*, 254 F.3d at 750 (8th Cir. 2001). Whether an individual is a federal employee or independent contractor under the FTCA is a question of federal law. *Knudsen*, 254 F.3d at 750.

A. The Government Did Not Retain Control Over Dr. Smith's Day-to-Day Performance or Over the Telemedicine Services Rendered Under the Distant Site Credentialing and Privileging Agreement.

Two Eagle cannot establish that IHS or the hospital exercised the requisite amount of control over Dr. Smith's performance to consider him a federal employee under the FTCA. Dr. Smith's independent contractor status is further supported by the contract documents and the circumstances of the telemedicine services provided.

First, and most importantly, the government did not retain any control over Dr. Smith's day-to-day performance or over the telemedicine services rendered under the contract. While providing telemedicine services under the Distant Site Credentialing and Privileging Agreement, Dr. Smith used his independent medical judgment in the evaluation, consultation, examination, diagnosis, and treatment of IHS patients. APP. 51 ¶ 21, R. Doc. 21, at ¶ 21. Upon a telemedicine consult request by a hospital healthcare provider, an appointment is scheduled with a telemedicine specialist. APP. 51-52 ¶ 22, R. Doc. 21, at ¶ 22. The hospital provides an exam room and the audio-visual equipment for remote access but does not supervise the service provider's day-to-day operations and exercises no control over his or her independent medical judgment. *Id.*; APP. 52 ¶ 23, R. Doc. 21, at ¶ 23. That Dr. Smith provided telemedicine services for IHS patients under the telehealth contract did not transform him into a federal employee for purpose of the FTCA. *See Rutten v. United States*, 299 F.3d 993, 995 (8th Cir. 2002) (stating "[u]nder plaintiff's approach, any contractor could be found to act on behalf of a federal agency when he performs a service that the agency is contractually obligated to perform…. Such an interpretation would unacceptably narrow the contractor exception and we decline to adopt it here."); *Bernie v. United States*, 712 F.2d 1271, 1273 (8th Cir. 1983) (holding that physicians treating an IHS patient under contracts were not federal employees where IHS did not supervise their day to day operations or

exercise control over medical judgment"); *Robb v. United States*, 80 F.3d 884, 893-94 (4th Cir. 1996) (reasoning that physician was an independent contractor under the FTCA where contract evinced a clear intent to create an independent contractor relationship and government exercised no control over the physician's professional judgment); *Carrillo v. United States*, 5 F.3d 1302, 1304, (9th Cir. 1993) (noting that "[t]he circuit courts are unanimous in holding that a contract physician is not an employee of the government under the FTCA."); *see also Mantiply v. United States*, 634 Fed. Appx. 431, 434 (5th Cir. 2015) (holding that orthopedic surgeon at VA was an independent contractor because contracts referred to him as an independent contractor and "[t]he control exercised by the VAMC was on an administrative level only and did not include [the physician's] medical judgment") (unpublished).

Second, Dr. Smith provided telemedicine services through the Distant Site Provider Credentialing and Privileging Agreement executed between Avera and the hospital. APP. 48-49 ¶¶ 3-10, R. Doc. 21, at ¶¶ 3-10; APP. 53-61, R. Doc. 21-1; APP. 62, R. Doc. 21-2; APP. 63-65, R. Doc. 21-3. Dr. Smith was granted "courtesy" privileges at the hospital pursuant to the Agreement. APP. 49 ¶ 10, R. Doc. 21, at ¶ 10. Contractors granted courtesy privileges do not have the same rights as Active members of the medical staff. APP. 49-50 ¶¶ 11-14, R. Doc. 21, at ¶¶ 11-14; APP. 66-75, R. Doc. 21-4. Additionally, Dr. Smith was not compensated by IHS or the

hospital. Avera invoiced the hospital for telemedicine services rendered under the Agreement. APP. 51 ¶¶ 16-17, R. Doc. 21, at ¶¶ 16-17; APP. 76-81, R. Doc. 21-5.

Third, the Distant Site Provider Credentialing and Privileging Agreement specifically stated that Avera was acting as an independent contractor. APP. 53 ¶ 2, R. Doc. 21-1, at ¶ 2. Under the Agreement, Avera was to provide credentialing decisions for purpose of providing "certain clinical services from a distant-site location via electronic communications to patients physically located at ROSEBUD HOSPITAL." APP. 53 ¶ 1, R. Doc. 21-1, at ¶ 1. This is a clear expression of the parties' intent to establish an independent contractor relationship. Avera further contracted with Moonlighting Solutions, LLC, a physician moonlighting firm, to provide telemedicine physicians and services at the hospital. APP. 25-26 ¶¶ 5-7, R. Doc. 19-2, ¶¶ 5-7; APP. 34 ¶¶ 6-7, R. Doc. 19-3, at ¶¶ 6-7; Appellee's Addendum 5-7. Moonlighting Solutions, LLC, maintained professional liability insurance for personal injury resulting from Dr. Smith's performance of services as an independent contractor and named Avera McKennan Hospital & University Health Center as the certificate holder. APP. 51 ¶¶ 18-20, R. Doc. 21, at ¶¶ 18-20; APP. 82, R. Doc. 21-6.

Finally, Two Eagle has filed a separate medical malpractice action against Avel eCare, LLC (f/n/a Avera eCare, LLC), Moonlighting Solutions, and Dr.

Matthew C. Smith in state court.[13] *See* APP. 24-32, R. Doc. 19-2. In response to Two Eagle's complaint, Dr. Smith and Moonlighting Solutions admitted that Avel eCare, LLC, contracted with Moonlighting Solutions to provide telemedicine physicians for purpose of providing telemedicine services at the Rosebud hospital. APP. 25-26 ¶¶ 5-7, R. Doc. 19-2, at ¶¶ 5-7; APP. 34 ¶ 7, R. Doc. 19-3, at ¶ 7. Avel eCare, LLC, also admitted that it contracted with IHS to provide telemedicine services and that it contracted with Moonlighting Solutions to provide telemedicine physicians, including Dr. Smith. APP. 25-26 ¶¶ 5-7, R. Doc. 19-2, at ¶¶ 5-7; Appellee's Addendum 5-7.

The hospital did not control Dr. Smith's day-to-day professional performance under the telehealth contract or control his independent medical judgment. APP. 52 ¶ 23, R. Doc. 21, at ¶ 23. Dr. Smith was an independent contractor providing telemedicine services under the Distant Site Provider Credentialing and Privileging Agreement between Avera and the hospital. Therefore, the district court properly dismissed count three of the complaint for lack of subject matter jurisdiction.

[13] Two Eagle's accident, though tragic, is not actionable under the FTCA. In this regard, it is noted that Two Eagle is not left without remedy. Two Eagle's medical expenses are currently paid by the Rosebud Sioux Tribe's worker's compensation carrier, and he has filed a separate medical malpractice action against Avel eCare, LLC (f/n/a Avera eCare, LLC), Moonlighting Solutions, and Dr. Matthew C. Smith in state court. *See Lonnie Two Eagle, Sr. v. Avel eCare, LLC, Moonlighting Solutions, and Matthew C. Smith*, South Dakota Sixth Judicial Circuit, Case No. 60CIV21-000003; *see also* APP. 24-32, R. Doc. 19-2.

B. Dr. Smith Was Not a Personal Services Contractor.

Congress has extended the FTCA's waiver of sovereign immunity to "certain claims arising out of the performance of [Indian] self-determination contracts." *Hinsley v. Standing Rock Child Protective Servs.*, 516 F.3d 668, 672 (8th Cir. 2008) (quoting *FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8th Cir. 1995)). Under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C § 5301 *et seq*., personal injury claims arising out of medical malpractice and the performance of ISDEAA contracts are covered by the FTCA. Section 5321(d) states in relevant part:

> For purposes of section 233 of Title 42, with respect to claims by any person… for personal injury, including death, resulting from the performance … of medical … functions …, *an Indian tribe, a tribal organization or Indian contractor carrying out a contract* … under sections 5321 or 5322 of this title is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract … and its employees (including those acting on behalf of the organization or contractor as provided in Section 2671 of Title 28, and including an *individual who provides health care services pursuant to a personal services contract with a tribal organization* for the provision of services in any facility owned, operated, or constructed under the jurisdiction of the Indian Health Service) are deemed employees of the Service while acting within the scope of their employment in carrying out the contract….

(Emphasis added.)

FTCA coverage extends to *individual* personal services contractors providing health services in an IHS facility and carrying out the functions of a self-determination contract. 25 C.F.R. § 900.193. A "personal services contract" refers

to a contract between an Indian contractor and the *person* providing the services and not a corporation such as Avera (or contract between Avera and its agents or employees). *Sisto v. United States*, 8 F.4th 820, 827 (9th Cir. 2021). Thus, the extension of FTCA coverage to an "individual who provides health care services pursuant to a personal services contract" does not apply to an agent or employee of a subcontractor. *Sisto*, 8 F.4th at 828; *see also Tsosie v. United States*, 452 F.3d 1161, 1163 (10th Cir. 2006) (stating "the FTCA does not authorize suits based on the acts of independent contractors or their employees").

Dr. Smith was not a personal services contractor. Dr. Smith had no contractual relationship with the Tribe. Dr. Smith was an agent of Avera and provided services pursuant to the Distant Site Provider Credentialing and Privileging Agreement between Avera and the hospital. APP. 49 ¶¶ 6-8, R. Doc. 21, at ¶¶ 6-8; APP. 53-61, R. Doc. 21-1; APP. 62, R. Doc. 21-2; APP. 63-65, R. Doc. 21-3. Under the agreement, Avera agreed to provide clinical services from a distant-site location via electronic communications to patients physically located at the hospital. APP. 53 ¶ 1, R. Doc. 21-1, at ¶ 1. Avera was acting as an independent contractor under the agreement. APP. 53 ¶ 2, R. Doc. 21-1, at ¶ 2. Additionally, as discussed below, Dr. Smith was not carrying out the functions of a self-determination contract. Therefore, there is no FTCA coverage, and the district court properly dismissed count three of the complaint for lack of subject matter jurisdiction.

C. Clinical Services Provided by Dr. Smith Under the Telemedicine Agreement Were Outside the Functions Authorized in or Under the ISDEAA Contracts with the Tribe.

At the time of the accident, the Tribe contracted with the Department of Health and Human Services ("HHS") to provide the following services:

> Contract No. HHS-I-241-2019-00004 – Solid Waste
>
> Scope of work included the collection, transportation, and disposal of solid waste from the IHS Rosebud Hospital and Staff Quarters.
>
> Contract No. HHS-I-241-2017-00005 – Health Services
>
> Scope of work included Health Administration and Ambulance Service, Substance Abuse Drug Treatment Program, Purchased/Referred Care for Ambulance and Mini-Bus, Community Health Representatives, and Long-term care services through the White River Health Care Center.

APP. 187-188 ¶¶ 6-8, R. Doc. 41, at ¶¶ 6-8; APP. 189-252, R. Doc. 41-1; APP. 253-289, R. Doc. 41-2. Thus, the clinical services provided by Dr. Smith under the telemedicine agreement with Avera were outside the functions authorized in or under the ISDEAA contracts with the Tribe. APP. 188 ¶ 9, R. Doc. 41, at ¶ 9.

Two Eagle, however, argues that because Dr. Smith was granted privileges at the hospital, Dr. Smith is considered an employee.[14] In support of his argument, Two Eagle cites to the annual funding agreement for Contract No. HHS-I-241-2019-

[14] A physician may not treat patients within a hospital setting unless privileges are granted by the hospital. Accepting Two Eagle's argument would render the independent contractor exemption to the FTCA meaningless.

00004 for the disposal of solid waste at the hospital. APP. 188 ¶¶ 7-8, R. Doc. 41, at ¶¶ 7-8; APP. 253-289, R. Doc. 41-2. As stated above, services rendered by Dr. Smith under the telemedicine agreement were outside the functions authorized in or under the ISDEAA contracts and, thus, the provisions of the contracts are inapplicable. *Colbert v. United States*, 785 F.3d 1384, 1393 (11th Cir. 2015) (concluding that for purposes of "FTCA coverage, the relevant limiting principle is the alleged tortfeasor's performance of identifiable 638 contract functions—"carrying out" the self-determination contract.").

Nonetheless, it is noted that the funding agreement references a provision under the Indian Health Care Improvement Act ("IHCIA"), 25 U.S.C. § 1601, *et seq.*, extending FTCA coverage to individuals who are designated as employees for purposes of the FTCA as part of the privileging process and are issued privileges on the condition that they provide services to individuals eligible to receive IHS services. *See* APP. 274-275 Section Eleven - Federal Tort Claims Act, R. Doc. 41-2, at pp. 22-23. Section 1680c(e)(1) of the IHCIA provides that hospital privileges in facilities like the Rosebud hospital may be extended to non-Indian Health Services practitioners who provide certain services. It states:

> Such non-Service health care practitioners may, as part of the privileging process, be designated as employees of the Federal Government for purposes of section 1346(b) and chapter 171 of Title 28 (relating to Federal tort claims) only with respect to acts or omissions which occur in the course of providing services to eligible individuals *as part of the conditions under which such hospital*

privileges are extended.

25 U.S.C. § 1680c(e)(1) (emphasis added); *see also* 25 C.F.R. § 900.199 (stating FTCA coverage extends to health care practitioners to whom staff privileges have been extended in contractor health care facilities operated under a self-determination contract on the condition that such practitioner provide health services to IHS beneficiaries covered by the FTCA). Section 1680c(e)(1) of the IHCIA does not confer FTCA coverage to all health care providers who have been granted hospital privileges. *Sisto*, 8 F.4th at 828-829.

In this case, Avera was responsible for the credentialing and privileging process and Dr. Smith was granted privileges because he was an agent or employee of Avera rendering services under the telemedicine agreement. APP. 53-54 ¶ 3, R. Doc. 21-1, at ¶ 3. Indeed, there is no evidence that the hospital designated Dr. Smith an employee for purposes of the FTCA as part of the hospital's credentialing and privileging process and as a condition under which such staff privileges were extended. To the contrary, the Distant Site Provider Credentialing and Privileging Agreement stated that Avera would provide telemedicine services as an independent contractor, acknowledged that it would be responsible for claims or damages arising from personal injury caused by the negligence of its employees, and required that providers performing contracted services under the telemedicine agreement maintain professional liability malpractice coverage. APP. 53 ¶¶ 1-2, R. Doc. 21-1,

at ¶¶ 1-2; APP. 59-60 ¶ 20, R. Doc. 21-1, at ¶ 20. Thus, it is no surprise that the hospital did not designate Avera's employees or agents as employees of the hospital for purposes of the FTCA, thereby protecting itself from liability, because the hospital was already protected from liability by the provisions of its contract with Avera. *Sisto*, 8 F.4th at 829.

The clinical services provided by Dr. Smith under the telemedicine agreement with Avera were outside the functions authorized in or under the ISDEAA contracts with the Tribe. Furthermore, because hospital privileges were not issued to Dr. Smith on the condition that he provide services to IHS beneficiaries covered by the FTCA, 25 U.S.C. § 1680c(e)(1) does not confer FTCA coverage. Therefore, the district court properly dismissed count three of the complaint for lack of subject matter jurisdiction.

D. Contractual Provisions Designed to Secure Program Objectives and Ensure General Performance of the Contract Do Not Abrogate the Contractor Exception Under the FTCA.

The Distant Site Provider Credentialing and Privileging Agreement between Avera and the hospital requires that providers performing contracted services abide by any applicable hospital policies and procedures. APP. 57 ¶ 12, R. Doc. 21-1, at ¶ 12. Two Eagle argues that this requirement establishes control by the hospital over Dr. Smith's performance under the telemedicine agreement. This argument is without merit.

Contractual provisions designed to secure the program objectives and ensure general performance of the contract do not abrogate the contractor exception under the FTCA. The United States may "fix specific and precise conditions to implement federal objectives" without becoming liable for an independent contractor's negligence. *Orleans*, 425 U.S. at 816; *see also Pauley v. Ball Metal Beverage Container Corp.*, 460 F.3d 1069, 1074 (8th Cir. 2006) (discussing relationship between landowner and independent contractor and stating retention of control must go beyond securing compliance with the contracts, such as controlling the details of the manner in which the work is done); *Autery v. United States*, 424 F.3d 944, 957 (9th Cir. 2005) (stating contractual provisions "directing detailed performance generally do not abrogate the contractor exception" under the FTCA); *Berkman v. United States*, 957 F.2d 108, 113-14 (4th Cir. 1992) (finding no liability under the independent contractor exception of the FTCA even though the United States demanded compliance with its standards and had the right to inspect the independent contractor's work).

In this case, Two Eagle sought leave to supplement the record submitting Article 7 of the hospital by-laws for the district court's review. The district court granted Two Eagle's motion to supplement the record. APP. 348, R. Doc. 51, at p.12. Article 7 governs the telemedicine credentialing and privileging process. APP. 335-336, R. Doc. 47-3. Article 7.3 states that the hospital will rely on the

credentialing and privileging decision by the telemedicine entity so long as certain requirements are met. APP. 335 Art. 7.3, R. Doc. 47-3, at Art. 7.3. Those requirements include that

> [t]he IHS hospital has an internal review of the distant-site telemedicine entity's providers performance and provides this information to the distant-site telemedicine entity. Information sent from the IHS hospital to the distant-site telemedicine entity must include, at a minimum, all adverse events and complaints regarding telemedicine services provided by the distant-site telemedicine entity provider to the IHS hospital.

APP. 335-336 Art. 7.3(e), R. Doc. 47-3, at Art. 7.3(e). This provision merely requires the hospital to engage in an internal review of the telemedicine providers performance to include, at a minimum, all adverse events and complaints and provide this information to Avera for purpose of credentialing and privileging decision. This provision did not give the hospital control over Dr. Smith's day-to-day operations or control over his independent medical judgement.[15]

[15] Two Eagle also cites to Article 5 of the hospital by-laws stating that the Governing Board is the final and only authority that may grant full Medical Staff membership and clinical privileges. Two Eagle argues that the Governing Board is the final authority regarding the granting, suspension, or revocation of clinical privileges and that this establishes control over Dr. Smith's day-to-day performance under the telemedicine agreement. Article 5 governs the credentialing process and appointment to the Rosebud IHS Medical Staff by the hospital. As previously stated, Dr. Smith provided telemedicine services through the Distant Site Provider Credentialing and Privileging Agreement with Avera. APP. 48-49 ¶¶ 3-10, R. Doc. 21, at ¶¶ 3-10; APP. 53-61, R. Doc. 21-1; APP. 62, R. Doc. 21-2; APP. 63-65, R. Doc. 21-3. Avera was responsible for the credentialing and privileging process. APP. 53-54 ¶ 3, R. Doc. 21-1, at ¶ 3. Moreover, that the hospital could terminate

The hospital did not control Dr. Smith's day-to-day operations or control his independent medical judgment. Dr. Smith was acting in the capacity of an independent contractor and the district court properly dismissed count three for lack of subject matter jurisdiction.

CONCLUSION

For the reasons set forth above, the district court's order and judgment dismissing the complaint and action against the United States should be affirmed.

Dated this 26th day of July, 2022.

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the telemedicine agreement with Avera did not give the hospital control over Dr. Smith's day-to-day performance or his independent medical judgment.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Eighth Circuit Rule 10.6.3, I certify that this brief was prepared using Microsoft Word 2016.

I further certify that I have provided the foregoing brief to the Court via electronic filing of a PDF version of the brief. The PDF file has been scanned for viruses using virus-scanning software approved by the United States Attorney's Office and is virus free.

I further certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Appellee's brief is proportionately spaced, has a typeface of 14 points or more, and contains 12,965 words.

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2022, I electronically filed the foregoing Appellee's Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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