UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CELESTE PRETENDS EAGLE, Individually and as Special Administrator/Personal Representative of the ESTATE OF JAYLENE PRETENDS EAGLE and W.R.E.J., and ANNIE RED ELK, Individually and as Special Administrator/Personal Representative of the ESTATE OF WAYLON RED ELK, SR., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	5:22-cv-05083-RAL **UNITED STATES' BRIEF IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Defendant moves to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The United States has not waived sovereign immunity over the claim alleged in the Complaint. The Court does not have subject matter jurisdiction over this matter and Plaintiffs fail to state a claim.

Plaintiff Celeste Pretends Eagle is pursuing individual tort claims and tort claims as a special administrator against the United States on behalf of the estate of Jaylene Pretends Eagle-Red Elk (deceased) and W.R.E.J. (deceased), a minor child.

Plaintiff Annie Red Elk is pursuing individual tort claims and tort claims as a special administrator against the United States for the estate of Waylon D. Red Elk, Sr. (deceased).

Plaintiffs assert federal jurisdiction based on the Federal Tort Claims Act ("FTCA"), 28 U.S.C 2671, et seq., and negligence by a United States' employee acting within the scope of his employment, 28 U.S.C. 1346(b). Compl. ¶6.

STATUTORY BACKGROUND

The FTCA waives the sovereign immunity of the United States for certain torts committed by federal employees. F.D.I.C. v. Meyer, 510 U.S. 471, 475 (1994). Section 314 of Pub. L. 101-512 extends waiver of immunity to include negligence claims arising from tribal employees "while acting within the scope of their employment in carrying out the contract or agreement ISDEA contracted programs[.]" Pub. L. 101-512, Title III, § 314, Nov. 5, 1990, 104 Stat. 1959, as amended Pub. L. 103-138, Title III, § 308, Nov. 11, 1993, 107 Stat. 1416 ("Section 314").

FACTUAL BACKGROUND

On Saturday November 4, 2017, while driving northbound on BIA 27, Tyler Makes Him First, while intoxicated, crossed the centerline into southbound traffic leading to an accident and the tragic death of Waylon D. Red Elk, Sr, Jaylene Pretends Eagle-Red Elk, W.R.E.J., and a seven- and one-half month-old-unborn child. Compl. ¶ 7. Plaintiffs allege the following:

- Makes Him First was drinking at an employee or employer sponsored event prior to the tragic accident. Id. (employee sponsored); Compl. ¶8 (employer sponsored).

- Makes Him First's workplace supervisors provided him with alcohol at the employee or employer sponsored event and allowed him to leave. Id.

- During times relevant to this lawsuit, Makes Him First was an employee of the Oglala Sioux Tribe Department of Public Safety Corrections Department. Compl. ¶ 5.

- The Oglala Sioux Tribe Department of Public Safety Corrections is an agency of the United States, Makes Him First's supervisors are supervisors for the United States, and that Makes Him First is a federal official. Compl. ¶ 7.

- Those supervisors were negligent by providing intoxicating beverages to Makes Him First prior to the employee/employer event and allowing Makes Him First to leave in a drunken condition. Compl. ¶8.

- Plaintiffs suffered damages as a result. Compl. ¶¶ 9,10, and 11.

PROCEDURAL BACKGROUND

According to the Complaint, Phyllis Wilcox was initially appointed by the Oglala Tribal Court as personal representative of the estate of Jaylene Pretends Eagle and her minor child. Compl. ¶ 4. Phyllis passed away in 2021, and Celeste Pretends Eagle was thereafter appointed on April 19, 2021. Id. Annie Red Elk was appointed by the Oglala Tribal Court as personal representative of the estate of Waylon Red Elk, Sr. on October 30, 2018. Id.

On July 24, 2019, Claimants submitted FTCA Administrative claims on behalf of the Estates of all Decedents. The claims were denied on March 16, 2021, due to a finding that Makes Him First was not acting within the scope of employment. Compl. ¶ 6; Compl. Ex. A. Claimants filed for reconsideration on September15, 2021, and that request was denied. Id.

On September 21, 2022, Plaintiffs filed a complaint against Defendant, United States (herein referred to as "U.S." or "Government"). The U.S. admitted service on October 5, 2022, and the Court subsequently granted an unopposed motion to extend time to answer or otherwise respond to the complaint. The Government's response is due on or before January 30, 2023.

STANDARD OF REVIEW

Defendant moves to dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). To survive a facial attack on jurisdiction under Rule 12(b)(1), Plaintiffs have the burden of proving that subject matter jurisdiction exists. V S Ltd. P'ship v. Dep't of Hous. & Urban Dev., 235 F.3d 1109, 1112 (8th Cir. 2000). A challenge to subject matter jurisdiction can be facial or factual. Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir. 1990). Under a facial challenge, the Court reviews the allegations in the Complaint in a light favorable to Plaintiffs to ascertain whether subject matter jurisdiction exists. Jones v. United States, 727 F.3d 844, 846 (8th Cir. 2013); Stalley v. Catholic Health Initiatives, 509 F.3d 517, 521 (8th Cir. 2007).

To survive a factual attack on the Court's jurisdiction, however, the "[C]ourt is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case[.]" Osborn, 918 F.2d at 730 (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). The Court is free to "consider matters outside the pleadings," and the Court "need not

view the evidence in the light most favorable to the non-moving party." See Osborn, 918 F.2d at 729 n.6, 730 (quoting Mortensen, 549 F.2d at 891).

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim for relief that is plausible on its face," Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007), and must plead those facts with enough specificity "to raise a right to relief above the speculative level." Id. at 555; see also Glick v. W. Power Sports, Inc., 944 F.3d 714, 717 (8th Cir. 2019) (courts should disregard conclusory allegations or legal conclusions). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In evaluating such a motion, courts consider the well-pleaded factual allegations in the complaint, which must be taken as true, and may also consider documents attached to the complaint and matters of public and administrative record referenced in the complaint. See Great Plains Trust Co. v. Union Pacific R. Co., 492 F.3d 986, 990 (8th Cir. 2007); Fed. R. Evid. 902(5) (court can take judicial notice of facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned"). Courts, however, are not required to accept as true legal conclusions "couched as … factual allegations[s]." Ashcroft, 556 U.S. at 678.

ARGUMENT

This Court should grant Defendant's motion and dismiss Plaintiffs' Complaint. Plaintiffs' Complaint is facially and factually defective thereby depriving this Court of jurisdiction. Additionally, the Complaint fails to state a claim upon which this Court can grant relief.

I. Plaintiffs fail to show this Court has jurisdiction

Plaintiffs allege The Oglala Sioux Tribe Department of Public Safety Corrections is an agency of the United States, Makes Him First's supervisors are supervisors for the United States, and that Makes Him First is a federal official. Compl. ¶ 7. But this is a conclusion without any supporting facts to establish such. Thus, this Court should disregard Plaintiff's conclusory assertion. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (vague and conclusory allegations not entitled to a presumption of trust); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)

(plaintiff must plead facts with enough specificity "to raise a right to relief above the speculative level.").

The Oglala Sioux Tribe Department of Public Safety Corrections is, in fact, **not** an agency of the United States. And it is proper for this Court to take notice of facts that are universally known. See Brown v. Piper, 91 U.S. 37, 42 (1875) ("Facts of universal notoriety need not be proved."). And although through the Indian Self Determination and Education Assistance Act ("ISDEA"), 25 U.S.C § 5301 *et.sq.*, a waiver may be extended in limited circumstances to include negligence claims arising from tribal employees "while acting within the scope of their employment in carrying out the contract," no such allegations exist in the Complaint to arguably establish such a connection. See Demontiney v. United States ex rel. Dept. of Interior, Bureau of Indian Affairs, 255 F.3d 801, 805 (9th Cir. 2001) (ISDEA's waiver of sovereign immunity is limited to self-determination contracts.) Plaintiffs fail entirely to allege that an ISDEA agreement exists and similarly fail to identify any function or activity of such ISDEA agreement that Makes Him First was engaged in when the accident occurred.

The Complaint alleges no facts that the Oglala Sioux Tribe operates corrections under an ISDEA contract, and no facts that, if proven, would show Makes Him First was acting within the scope of an ISDEA contract when the accident occurred. Consequently, Plaintiffs fail to meet their burden to facially establish jurisdiction and, thus, Plaintiffs' Complaint should be dismissed. See V S Ltd. P'ship, 235 F.3d at 1112 (8th Cir. 2000) (plaintiffs' burden to establish jurisdiction exists); see also Val-U Construction Co. of S.D., Inc., v. United States, 905 F. Supp. 728 (D.S.D. 1995) (waiver must be strictly construed).

Finally, even if Plaintiffs had pleaded that the Oglala Sioux Department of Public Safety had been operating corrections under an ISDEA contract, they could not show, nor could it be reasonably inferred that Makes Him First was acting within the scope of employment under an ISDEA contract when the accident occurred based on the facts alleged in the Complaint. See Compl. ¶¶ 7-8.

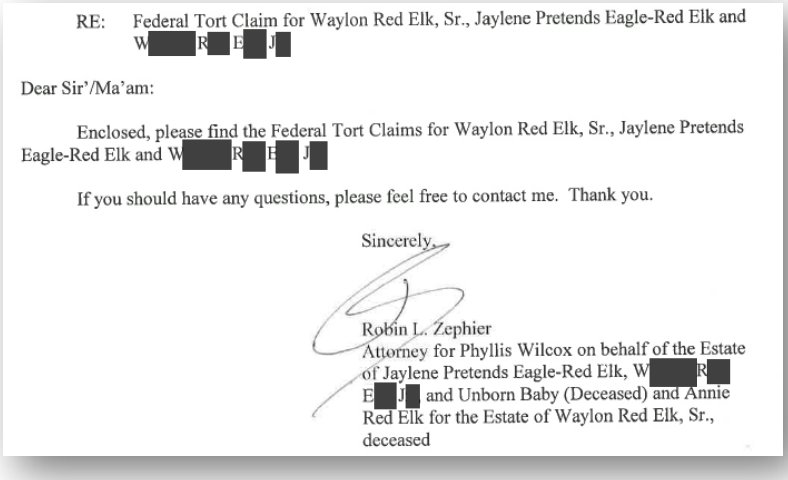
II. Plaintiffs cannot show the claim was properly presented

Factually, Plaintiffs failed to properly present their claims and therefore have not exhausted their administrative remedies. Thus, Plaintiffs' complaint should be dismissed. See

McNeil v. United States, 508 U.S. 106, 107 (1993) (exhaustion is a precondition to filing an FTCA claim). Specifically, Plaintiffs failed to properly present evidence of representational authority to make their claims and failed to plead that representational authority was properly presented.

"An [FTCA] action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal agency[.]" 28 U.S.C. § 2675(a). Evidence of the signatory claimants' authority to present the claim "on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative" must be affirmatively provided. 28 C.F.R. § 14.2(a). Here, no such evidence was ever provided and is therefore fatal to Plaintiffs' claim. Runs After v. United States, No. 10-cv-3019, 2012 WL 2951556, at *3 (D.S.D. July 19, 2012), aff'd sub nom. After v. United States, 511 F. App'x 596 (8th Cir. 2013) (quoting Bellecourt v. United States, 994 F.2d 427, 430 (8th Cir. 1993))("The presentment requirement of § 2675(a) 'is jurisdictional and must be pleaded and proven by the FTCA claimant.'"); see also Mader v. U.S., 654 F.3d 794, 805 (8th Cir. 2011) ("We have long held that compliance with § 2675(a)'s presentment requirement is a jurisdictional precondition to filing an FTCA claim in federal district court.").

On July 30, 2019, the Department of Interior ("DOI"), Solicitor's Office, Tort Practice Branch ("TPB") email intake received three SF95s. Rebeca Polk Decl. The cover letter for those three SF95s, from Plaintiffs' attorney, stated that the FTCA administrative claims were for "Waylon Red Elk, Sr., Jaylene Pretends Eagle-Red Elk and [W.R.E.J.]" Id.; Id., Ex. A.



RE: Federal Tort Claim for Waylon Red Elk, Sr., Jaylene Pretends Eagle-Red Elk and W[redacted]R[redacted]E[redacted]J[redacted]

Dear Sir'/Ma'am:

Enclosed, please find the Federal Tort Claims for Waylon Red Elk, Sr., Jaylene Pretends Eagle-Red Elk and W[redacted]R[redacted]E[redacted]J[redacted]

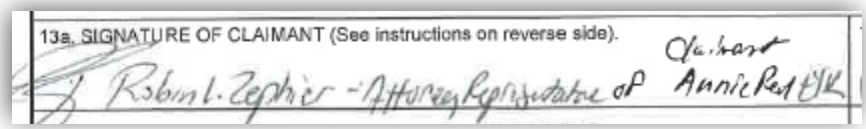
If you should have any questions, please feel free to contact me. Thank you.

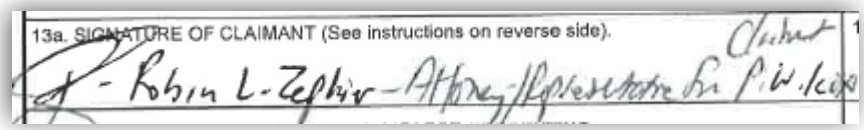
Sincerely,

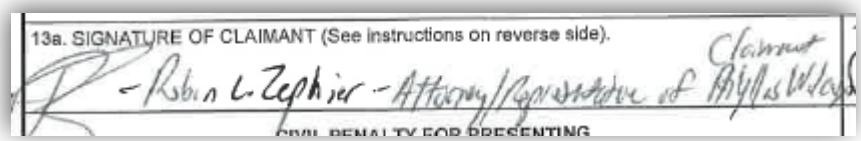
Robin L. Zephier
Attorney for Phyllis Wilcox on behalf of the Estate of Jaylene Pretends Eagle-Red Elk, W[redacted]R[redacted]E[redacted]J[redacted] and Unborn Baby (Deceased) and Annie Red Elk for the Estate of Waylon Red Elk, Sr., deceased

Id.

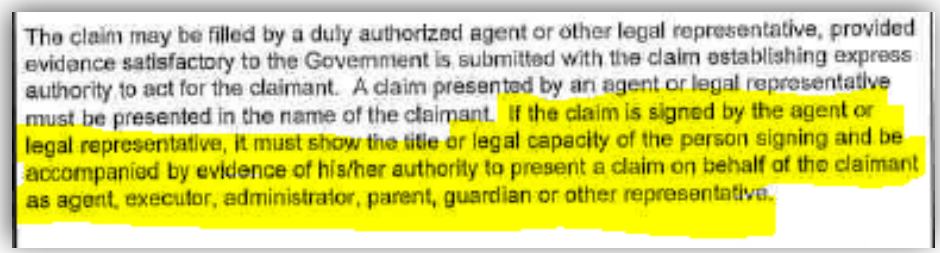
The first SF95 identified Annie Red Elk as the Claimant, "Representative". Id. The second and third SF95s identified Phyllis Wilcox as the Claimant, "Representative". Id. The TPB also received a copy of the above-identified cover letter and three SF95s on August 6, 2019, and August 9, 2019. Similarly, the SF95s were signed in the following way, respectively:







Id. However, as the instructions make clear, in addition to being signed by a legal representative, and in addition to showing title, it must "be accompanied by evidence of his/her authority[.]"


The claim may be filled by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian or other representative.

Id. (Emphasis added).

As can be observed from the submissions, no evidence of representational authority was ever provided to DOI. Id., Ex. A; see Trottier v. United States, No. 3:21-CV-93, 2021 WL

5237287, at *3–4 (D.N.D. Nov. 10, 2021) ("The focus . . . is not whether a plaintiff has actual authority to bring a claim, but whether the plaintiff has first presented to the appropriate federal agency evidence of his or her authority to act on behalf of the claim's beneficiaries under state law.") The attorney submitted administrative claims purportedly on behalf of Annie Red Elk individually and for the Estate of Waylon Red Elk, Sr. as well as on behalf of Phyllis Wilcox individually and for the Estates of Jaylene Pretends Eagle and W.R.E.J.. However, no evidence was ever presented to the DOI of such representational authority. See Rebeca Polk Decl., Ex. A. In addition, no evidence was presented to the DOI that Annie Red Elk had authority to represent the Estate of Waylon Red Elk, Sr., or that Phyllis Wilcox had authority to represent the Estate of Jaylene Pretends Eagle or the Estate of W.R.E.J. Id. And under South Dakota law, only a personal representative may bring a wrongful death action. SDCL § 21-5-5. Plaintiffs' failure to provide evidence of representational authority deprives this Court of jurisdiction. See Runs After, No. 10-cv-3019, 2012 WL 2951556, at *3; Mader v. U.S., 654 F.3d at 805. Finally, the fact that DOI denied the claims based on the meritorious finding that Makes Him First was not acting within the scope of his employment is of no import to the jurisdictional inquiry. See Mader, 654 F.3d at 799 (agency denial on merits does not forgive the failure to properly present claim).

III. Plaintiffs fail to plead sufficient facts to state a claim for relief

A claim under 1346(b), must allege six elements: The claim must be (1) against the United States, (2) for money damages, (3) for injury or loss of property or personal injury or death, (4) caused by the negligent or wrongful act or omission of any employee of the Government, (5) while acting within the scope of his office or employment, (6) 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. F.D.I.C. v. Meyer, 510 U.S. 471, 476-77 (1994); Loeffler v Frank, 486 U.S.549, 562 (1988). Furthermore, within the context of the ISDEA, liability attaches only to injuries arising out of the ISDEA contract. Goodthunder v. Na'Nizhoozhi Center, Inc., 1995 WL 865870, *3 (D.N.M.) (Dec. 1, 1995) ("It is clear from the plain language of the ISDEAA that Congress waived sovereign immunity by allowing FTCA liability to attach to injuries arising only out of self-determination contracts.")

Here, Plaintiffs fail to plead facts that establish their claim is against the U.S. Their conclusory allegation that the Oglala Sioux Tribe Department of Public Safety Corrections is an agency of the U.S., Compl. ¶ 7, is insufficient for this Court to infer the U.S. waived sovereign immunity as to a tribal department. Tribes are separate sovereigns. See e.g. United States v. Wheeler, 435 U.S. 313, 318, 322-323 (1978). And Plaintiffs fail to plead facts that establish Makes Him First was an employee of the U.S. Indeed, Plaintiffs Complaint is void of any facts tethering the U.S. to the Oglala Sioux Tribe Department of Public Safety Corrections. There is no reference to an ISDEA contract, and no assertion that the injuries alleged arose out of actions in furtherance of an ISDEA contract. In short, Plaintiffs fail to plead "enough facts to state a claim for relief that is plausible on its face," Bell Atl. Corp., 550 U.S. at 570, and Plaintiffs fail to plead those facts with enough specificity "to raise a right to relief above the speculative level." Id. at 555.

CONCLUSION

This Court should grant Defendant's motion to dismiss.

Dated this 30th day of January, 2023.

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