UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

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| CELESTE PRETENDS EAGLE, Individually and As Special Administrator/Personal Representative of the ESTATE OF JAYLENE PRETENDS EAGLE AND W.R.E., JR., and ANNIE RED ELK, Individually and As Special Administrator/Personal Representative of the ESTATE OF WAYLON RED ELK, SR.,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Defendant. | ) | Civ. No.: 5:22-cv-05083-RAL<br><br>**PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' RESPONSE IN OBJECTION TO DEFENDANT'S MOTION TO DISMISS** |

Plaintiffs, Celeste Pretends Eagle, individually, and as Special Administrator and Personal "Representative" of the Estate of Jaylene Pretends Eagle and WRE.Jr., (deceased minor), and Annie Red Elk (since deceased) as Special Administrator and Personal Representative of the Estate of the Waylon Red Elk, Jr., by and through their attorney Robin L. Zephier, and hereby submit Plaintiffs' Response in Objection to Defendant's Motion to Dismiss, based upon the following authorities, argument, and exhibits presented herein within Plaintiffs' Memorandam in Support of Plaintiffs' Response in Objection to Defendant's Motion to Dismiss, and the Affidavit of Robin L. Zephier, attached. .

## HISTORY

Plaintiffs herein were the Estate "Representatives" of the Estates of Jaylene Pretends Eagle, W.R.E., Jr., and Waylon Red Elk, Sr., (the three Decedents). (See **Ex A**). The Federal Tort Claims Act (FTCA) administrative claim forms (SF95) were served and sent to the proper federal agency officials and agencies on January 24, 2019. (See **Ex B**),

After said FTCA administrative claim forms were delivered, the United States, by and through its agency officials, sent Plaintiffs' counsel written letters/notices on March 16, 2021 and April 1, 2022. (See **Ex I**), Plaintiffs/Claimants did clearly indicate that the "Claimant" described in the original July 24, 2019 FTCA administrative claim forms, Phyllis Wilcox and Annie Red Elk, were identified as being represented by legal counsel Robin L. Zephier, and both Wilcox and Red Elk were identified as both "Claimants" in Box # thirteen #13a, (signature authorization box) (**Ex B**) and as "Representative" in Box #2 (Claimant identity). (**Ex B**). The word "Representative" was certainly used specifically to denote "Representative of the Estate of Jaylene Pretends Eagle, Waylon Red Elk, Sr., and W.R.E., Jr".. As we all know in FTCA administrative claim practice, Form SF95 allows very limited space to include all detailed information in the Claim Form Boxes. Therefore, other documents are used to add as addendums or attachments in order to more fully indicate the necessary required "Notice" information required under the law and federal regulations. Also, cover letters sent by Robin L Zephier as the attorney for Phyllis Wilcox and Annie Red Elk, and the Estates, listed the identify authorization as

"Attorney for Phyllis Wilcox, individually, and as Special Administrator/Personal Representative for the Estate of Jaylene Pretends Eagle and W.R.E., Jr., and Annie Red Elk, individually, and as Special Administrator/Personal Representative for the Estate of Waylon Red Elk, Sr., in letters(s) dated (July 24, 2019). See **Ex. B.**

The federal agency for Defendant United States, ultimately sent a formal written denial letter to Plaintiffs'/Claimants' counsel, and stated that said FTCA administrative claims were being denied because of the stated conclusion that the tortfeasor Tyler Makes Him First, an Oglala Sioux Tribe Department of Public Safety, Department of Corrections employee, was not acting "within the scope of employment" at the time he negligently killed all three (3) Decedents. It was an especially horrible and gruesome collision, caused by a very drunk OST/DC employee Tyler Makes Him First, resulting in the Decedents and their baby son being decapitated. Jaylene was also 7 ½ months pregnant. The fetus died as well, with his/her mother that day, in mother Jaylene's arms.

Because of this formal written denial of all FTCA administrative claims by letters dated May 16, 2021, Defendant United States by and through its agency officials, said nothing more about the actual proof that Makes Him First was not acting within the scope of his employment at the time of the collision, or at the time Makes Him First attended an OST/DC work sponsored drinking party at or on a work site just minutes prior to Makes Him First driving and killing Decedents near Porcupine, SD. Nothing was ever indicated when said "party" started, which

supervisors organized and/or participated and/or encouraged (or required) the OST Department of Corrections employees to attend, and who was allowing obviously drunk workers/employees to drive away from the work party after drinking for hours on end. The only factual or legal conclusion within the FTCA claim denial which touched upon the issue of "scope of employment", was the mere conclusionary statement made by the federal agency officials, declaring that Tyler Makes Him First was not "acting within the scope of his employment". ( See **Ex. I**).

Makes Him First was charged with three (3) counts of vehicular homicide in federal criminal court in Rapid City, SD. Because of the nature of criminal proceedings, the United States and its U.S. Attorneys office, denied access to any of the investigation materials to the Plaintiffs, even including all details of the vehicles, the insurance presence/non-presence, the employees'/employers'/supervisors' employment status, and any details of the accident investigation. (See **Ex C**). Plaintiff even had to serve a Subpoena Duces Tecum upon the United States, in order to try to seek that information. (See **Ex. E**). Despite this fact and history, Plaintiffs were not allowed to view the criminal accident investigation materials, until just this week, when Assistant U.S. Attorney Mr. Hogden kindly sent a set of reports to counsel on April 18, 2023 (See **Ex F**), by email. It was in viewing this set of information for the first time, that Plaintiffs were finally able to at least see and begin to learn much detailed information that Plaintiffs had sought ever since 2017, but had never had access through any means, including civil discovery. (See **Ex D**). Makes Him First

was noted to have uttered to a bystander witness following the fatal collision, that he was coming from a "good time". (See **Ex F**, page 41.

Plaintiffs had a good faith belief and reasonable vision, that one day, by and through the filing and pursuit of this very Federal District Court action under the FTCA, that Plaintiffs may finally be able to participate in reasonable, fair and meaningful factual discovery with the United States and its under-agency (or 638 contractor(s), such as the B.I.A., the O.S.T. Tribe and its "law enforcement/law and order programs/entities, such as the OST Department of Public Safety-Department of Corrections (Makes Him First's employer)), since the federal civil litigation was begun. However, this Rule 12(b)(1) and 12(b)(6) Motion to Dismiss, has stopped, and threatened even that ordinary procedural process which is reasonably available to aggrieved parties in the Courts by following the appropriate civil and administrative process.

Plaintiffs did file and pursue an separate individual tort civil suit for wrongful death against Tyler Makes Him First in OST Tribal Court. That Tribal Court had jurisdiction over the individual parties' claims, absent the presence of any federal officials or actors' conduct. (See **Ex G**). Defendant Tyler Makes Him First was a very evasive and uncooperative civil defendant litigant, and Makes Him First even refused to admit his criminal and/or civil liability for having killed all three (3) Decedents, and Makes Him First refused to cooperate or comply with the civil discovery process. Defendant Tyler Makes Him First was in federal prison, of course,

but he had access to legal authorities and advice, and did his best to deny, delay and obstruct the civil process. Ultimately, Plaintiffs were able to secure an OST Tribal Court Default Civil Judgment against Tyler Makes Him First, individually, in the amount of $3,490,883.32, by Order dated July 16, 2021. (See **Ex H**). Essentially, that Judgment, through comity principles, can be construed as judicial estoppel on issues of identity of the civil Plaintiffs, negligence, legal liability, and even, to some extent, admissions as to the facts alleged that Tyler Makes Him First was in fact, a federal tribal employee. (See **Ex F**). However, it appears that Makes Him First was likely, totally uninsured for this horrific event and the permanent consequences.

**ARGUMENT**

A. CITATION TO OST DEPARTMENT OF PUBLIC SAFETY, DEPARTMENT OF CORRECTIONS, AS AN ENTITY COVERED UNDER THE FTCA

Defendant United States alleges that Plaintiffs cited no lexus or connection between the United States, and its OST Department of Public Safety Department of Corrections, as the Department of Corrections employees such as Tyler Makes Him First, as "federal officials" pursuant to a self determination contract(s) under ISDEAA or 25 USC 450 contract, by name. However, according to Plaintiffs' Complaint in this case, that conclusion and argument is not the complete story. Plaintiffs in ¶ 6 of said Complaint , did state that:

**JURISDICTION**

6. The amount in controversy exceeds the jurisdictional requirements of this Court, and venue is proper in this Court in that this action arose near Porcupine or Kyle, Oglala Lakota County, South Dakota, within the exterior boundaries of the Pine Ridge Sioux Indian Reservation. This action is brought, and the Court has both personal and subject matter jurisdiction in this matter pursuant to 28 U.S.C. Section 1346(b) and the Federal Tort Claims Act, 28 U.S.C. Section 2671, et seq., as amended and Pub. L. No. 103-138, Tit 111, § 308, Nov. 11, 1993, 107 Stat. 1416. (Emphasis Added).

Public Law, PL 103-138 is derived of "107 Stat. 1416". In *Buxton v. U.S.*, 2011 WL 4528337 (2011), p. 7-8, the District Court for South Dakota Western Division outlined the application and provision of Public Law No. 101-512 as an amendment to the ISDEAA as a means of jurisdictional foundation for a tribal or BIA law enforcement official under the FTCA. In *Buxton,* the Court stated that:

> Public Law No. 101-512 provides in pertinent part as follows:
> With respect to claim resulting from the performance of functions ... under a contract, grant agreement, or any other agreement or compact authorized by the Indian Self-Determination and Education Assistance Act ... an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs ... while carrying out any such contract or agreement and its employees are deemed employers of the Bureau ... while acting within the scope of their employment in carrying out the contract or agreement: *Provided*. That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act ...
> 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 (codified in the notes following 25 U.S.C. § 450F).

Further, in *Mound v. U.S.*, 2022 WL 1059471 (D.N.D. 2022), Pub. L. 103-138,

title III, § 308 is mentioned as a basis for ISDEAA jurisdiction, p. 4. See also, **Ex. K**, as addressed below herein.

PL 103–138, November 11, 1993, 107 Stat 1379

UNITED STATES PUBLIC LAWS

103rd Congress - First Session

Convening January 5, 1993

Additions and Deletions are not identified in this document.

PL 103–138 (HR 2520)

November 11, 1993

BUREAU OF INDIAN AFFAIRS

OPERATION OF INDIAN PROGRAMS

For operation of Indian programs by direct expenditure, contracts, cooperative agreements, and grants including expenses necessary to provide education and welfare services for Indians, either directly or in cooperation with States and other organizations, including payment of care, tuition, assistance, and other expenses of Indians in boarding homes, or institutions, or schools; grants and other assistance to needy Indians; maintenance of law and order; management, development, improvement, and protection of resources and appurtenant facilities under the jurisdiction of the Bureau of Indian Affairs,

Furthermore, in a recent prior case under the FTCA, that was recently handled and pursued by Plaintiffs' counsel against the United States and against the OST Department of Public Safety and Department of Corrections, a corrections employee named Sofia Janis, was the negligent actor driving within the scope of her employment, when she was negligent in driving a corrections van with prisoners, and negligently struck a private van head-on near Wounded Knee, SD, killing one lady, and severely injuring two (2) other elderly ladies. In that case, *Audrey Yellow Hair v. United States,* FTCA dated November 3, 2015, Civil File No: 16-5039-JLV, the United States paid multimillion dollar settlements to all claimants. There were no jurisdictional defects raised in that case despite involving the very same OST Governmental entity, the OST Department of Public Safety, Department of

Corrections, as in this case.

B. SUBSTANTIAL COMPLIANCE WITH THE NOTICE REQUIREMENTS OF THE FTCA SATISFIES THE JURISDICTIONAL REQUIREMENT

Plaintiffs, even if their administrative claim forms were less than perfect or not in as much factual detail as desired by the United States in this case (which Plaintiffs assert are not deficient), did substantially comply with the requirements of the federal regulations, 28 USCA §1346, 2671-75 and 28 CFR §14.3( c), by providing the Government with the identity of the claimants, and the basic nature of the claims and amounts, and causes of negligence giving rise to damages.

A foundational case utilized by the Eighth Circuit Court of Appeals on the issue of compliance with the FTCA to survive a motion to dismiss based upon Rule 12(b)(1) is found within *Farmers State Sav. Bank v. Farmers Home Admin.*, 866 F.2d 276-77 (8th Cir. 1989). In that case, the Eighth Circuit Court stated:

> Under section 2675(a), prior presentation of an administrative claim to the appropriate agency is a jurisdictional prerequisite to a suit based on the FTCA. *McMichael v. United States,* 856 F.2d 1026, 1035 (8th Cir.1988). The only question presented here is whether the several letters sent by Farmers State to FmHA and its representatives qualify as proper notice under section 2675(a).
>
> We have considered the notice requirement of section 2675 on several occasions. *See Gross v. United States,* 676 F.2d 295 (8th Cir.1982); *Lunsford v. United States,* 570 F.2d 221 (8th Cir.1977); *Melo v. United States,* 505 F.2d 1026 (8th Cir.1974). These cases stand for the proposition that a claimant satisfies the notice requirement of section 2675 if he provides in writing (1) sufficient information for the agency to investigate the claims, *see Gross,* 676 F.2d at 299, and (2) the amount of damages sought, *see Lunsford,* 570 F.2d at 226; *Melo,* 505 F.2d at 1029. This standard is in accordance with that adopted by other courts of appeals. *See GAF Corp. v. United States,* 818 F.2d 901, 919 (D.C.Cir.1987); *Charlton v. United States,* 743 F.2d 557, 561 (7th Cir.1984); *Warren v. United States Dep't of Interior Bureau of Land Management,* 724 F.2d 776, 780 (9th Cir.1984) (en banc); *Johnson by*

> *Johnson v. United States,* 788 F.2d 845, 848 (2d Cir.), *cert. denied,* 479 U.S. 914, 107 S.Ct. 315, 93 L.Ed.2d 288 (1986); *Lopez v. United States,* 758 F.2d 806, 809–10 (1st Cir.1985); *Bush v. United States,* 703 F.2d 491, 494 (11th Cir.1983); *Tucker v. United States Postal Serv.,* 676 F.2d 954, 959 (3d Cir.1982); Douglas v. United States, 658 F.2d 445 ,447, "(6th Cir.1981); *Adams v. United States,* 615 F.2d 284, 288–89 (5th Cir.1980).
>
> We conclude that Farmers State met the notice requirement of section 2675. We have held that two prerequisites for administrative investigation are the identity of the claimants, *see Lunsford,* 570 F.2d at 226, and the nature of the claims, *see Melo,* 505 F.2d at 1029. Farmers State identified itself and clearly detailed the bases for its claims. Farmers State also specified that $80,000 was the amount it sought to recover from FmHA. *Farmers States, Id*, at 277.

Also, in *Dykes v. U.S.*, 794 F.Supp. 334, 335-37, 338 (D.S.D. 1992), the District Court stated:

> The regulations promulgated pursuant to the Federal Tort Claims Act (FTCA) provide that "[a] claim based on death may be presented by the executor or administrator of the decendent's [sic] estate, or by any other person legally entitled to assert such a claim in accordance with applicable State law."28 C.F.R. § 14.3(c).
>
> The filing of an administrative claim prior to bringing an action in federal court is a jurisdictional requirement, *Lunsford v. United States,* 570 F.2d 221 (8th Cir. 1977) and a plaintiff may not bring an action in federal court without first having presented the claim to the appropriate agency. 28 U.S.C. §2675(a). This statutory jurisdictional requirement, that "the claimant shall have first presented the claim to the appropriate Federal agency," 28 U.S.C §2675, is essentially one of notice and is satisfied when a claimant "provides in writing (1) sufficient information for the agency to investigate the claims, and (2) the amount of damages sought."*Farmers State Sav. Bank v. Farmers Home Admin*, 886 F.2d 276, 277 (8th Cir. 1989).

The *Dykes* Court then went on to state further that:

> As stated, the Eighth Circuit has since determined that the notice requirement of § 2675 is met if a claimant "provides in writing (1) sufficient information for the agency to investigate the claims, and (2) the amount of damages sought." *Farmers State Sav. Bank v. Farmers Home Admin.,* 866 F.2d 276, 277 (8th Cir.1989) (citations omitted). Further defining the requirement, the court held "that two

> prerequisites for administrative investigation are the identity of the claimants, and the nature of the claims." *Id.* By recognizing only these minimal requirements, a court would presumably be acting in accordance with the FTCA's goal of expediting the equitable disposition of tort claims brought against the United States.
>
> Under the approach, adopted by several Courts of Appeals, that for the purposes of determining federal court jurisdiction the FTCA imposes a minimal, yet mandatory, notice requirement, Plaintiff has satisfied the jurisdictional requirements of 28 U.S.C. § 2675(a). *See Zywicki v. United States,* 1991 WL 128588 (D.Kan.1991) (Third, Fifth, Sixth, Seventh, Ninth, and District of Columbia Circuits "have reasoned that the only jurisdictional requirements of the FTCA administrative process are that the claimant give the agency adequate written notice of the claim and the underlying facts and that the claimant place a value on the claim.") Plaintiff gave the agency adequate notice of the nature of the claim such that the agency could proceed with investigation; and she provided a sum certain amount requested as relief. *See id.* Plaintiff simply would not have been able to reach final settlement with the agency until she supplied evidence of her authority to act in behalf of the estate. The Eighth Circuit's position as articulated in the contexts of the *Lunsford* and *Farmer's State Sav. Bank* decisions is not inconsistent with this general approach. *Dykes,* Id. *At 338.*
>
> Even if current Eighth Circuit law were to be interpreted to include the regulations as jurisdictional in nature, and thus a prerequisite to filing suit in **federal** court, the Court finds that Plaintiff **substantially** complied with both the statutory and regulatory requirements. The technicality, which Defendant contends should be fatal to the instant action, is Plaintiff's failure to amend the administrative claim to add the words "administratrix of the estate of Ian Knife" after claimant's name. The Court recognizes the regulations declare that a claim "shall be deemed to have been presented" when the agency receives written notification of the incident accompanied by evidence of the authority to present the claim."28 C.F.R. § 14.2. Nevertheless, the Court finds that when Attorney Pechota informed USMS of Dykes' appointment as administratrix, although not simultaneous with the initial filing, the Standard Form 95 was sufficiently "accompanied by" the necessary evidence. *See id.*

The employers negligence in this circumstance, leading up to, and during, and at the time of Makes Him First's consumption of work-provided alcohol, and his level of intoxication and continuance to become inebriated in the presence of his

supervisors/managers, and with the knowledge, acquiescence and foreseeability of said supervisors, at that work-site and/or work party. The employer's own negligence in providing alcohol to employees in a work sponsored event, with foreseeability that those employees may become drunk, do become drunk, then drive away after getting drunk, are all relevant and material to the employer's control, obligations and foreseeability of the dangers presented by the individual and collective negligence of employer and employee. The bare assertion or declaration that Makes Him First was not "acting within the scope of his employment" when he struck and killed Decedents, does not rise to the level of an acceptable verifiable source of facts or circumstances, for a Plaintiff to abandon claims of this nature without a fight.

Therefore, the need for all such factual information on these details and circumstances, supports a Rule 56(d) Motion to Defer ruling on said Motion to Dismiss.

## CONCLUSION

Plaintiffs pray that the Court deny the Defendant's Motion to Dismiss in its entirety. As an alternative, Plaintiffs pray that the Court grant Plaintiffs' Motion to Defer, and to allow for additional time for Plaintiffs to pursue fair, reasonable, meaningful discovery on the facts of Makes Him First's and his employers' activities on the job, at the party, organizing the party, supplying the alcohol, and the control, supervision, foreseeability and knowledge of all employment and employment related activities on the day that Makes Him First drank at the work party, then was allowed to drive away, and to kill the Decedents.

DATED this 14th day of April, 2023.

ZEPHIER & LAFLEUR, P.C.

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