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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

* * * * *

Gayleen Boney,

Plaintiff,

v.

Walter Valline,

Defendant.

CV-N-05-683-RJJ (VPC)

**WALTER VALLINE'S POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56, FRCP**

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**EXHIBITS**:

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|---|---|
| Exhibit 1 | *Gayleen Boney, as Administrator and Personal Representative of the Estate of Norman Boney, Jr., Deceased v. United States of America*, 3:07:0373-ECR-RAM |
| Exhibit 2 | Norman Boney's Medical Record, BCCH 225 |
| Exhibit 3 | *Davis v. Keplin*, 18 ILR 6148 (Turtle Mtn. Tr. Ct., 9/6/91) |
| Exhibit 4 | *United States of America v. Lantry*, 03:06-CR-00186-LRH-RAM, Order dated 11/6/07 |
| Exhibit 5 | 638 Contract, Section 5, p. 31, , Exhibit B, to the defendant's reply, Court document No. 16 |

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Dean Pennock
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**DEPOSITIONS:**

Gayleen Boney 9-17-2007
Gayleen Boney 12-1-2007
Gayleen Boney 12-6-2007
Gayleen Boney 12-8-2007
Melissa Boney 3-8-2008
Norman Boney, Sr., 3-8-2008
Charrisa Dunnett 2-21-2008
Dean Pennock 11-14-2007
Walter Valline 10-25-2007
Walter Valline 12-11-2007

## I. INTRODUCTION

Plaintiff's *Bivens*[1] complaint requires her to prove that Walter Valline, a former police officer of the Walker River Paiute Tribe, while a Federal actor, retaliated against her in derogation of her First and Fourth Amendment rights under the United States Constitution due to her letter writing activities. The undisputed facts belie the allegations.

For his part, Officer Valline regrets that deadly force was necessary on July 15, 2004. He used deadly force because he believed his life was in jeopardy and that he had no other alternative when the two belligerents confronting him disobeyed his commands and closed to within 15 inches and at the most, 48 inches, respectively, from him. By reason of the narrow manner in which the plaintiff pled her case, the material fact in this case is Officer Valline's subjective intent, therefore, at the time in question. If the proof were that Officer Valline misunderstood what was happening and acted out of an unreasonable fear or because he panicked, the plaintiff would fail in her burden. Due to the gravaman of the plaintiff's complaint, she must show that "but for" the intent to retaliate because the plaintiff complained in writing about Officer Valline to the Tribe's Chief of Police, deadly force would not have been used and she would not have been handcuffed, assuming *arguendo,* Officer Valline restrained the plaintiff. *See*, *Hartman v. Moore*, 547 U.S. 250, 257, 260, 126 S.Ct. 1695, 64 L.Ed.2d. 441 (2006). To establish jurisdiction, she must also prove Officer Valline was a federal actor, acting outside the course and scope of his employment.

Plaintiff cannot sustain this burden because, *inter-alia*, she admits Officer Valline acted within the course and scope of his position as a Walker River Paiute Tribal Police Officer when deadly force was used.[2] As such, summary judgment pursuant to Rule 56, FRCP, is appropriate on the grounds the Court lacks jurisdiction since Tribal officials, acting within the course and scope of their official duties, are immune from suit, there is no proof of the Federal action *Bivens* requires and because the application of *Bivens* on these facts would wreak havoc upon Tribal sovereignty.

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[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388, 91 S.Ct. 1999.

[2] *See, Gayleen Boney, as Administrator and Personal Representative of the Estate of Norman Boney, Jr., Deceased v. United States of America*, 3:07:0373-ECR-RAM, attached hereto as Exhibit 1, a complaint brought under the Federal Tort Claims Act (FTCA), which requires, for prosecution, the statement in the plaintiff's complaint that Officer Valline was acting at all times within the course and scope of his tribal employment, ¶ 15, p.5;18-21.

## II. STANDARD FOR DECIDING RULE 56, FRCP, MOTIONS FOR SUMMARY JUDGMENT

Motions for summary judgment shall be granted where there is no genuine dispute over any material fact and the moving party is entitled to judgment as a matter of law. *See*, *Celotex v. Catrett*, 477 U.S. 317, 322-323 (1986). As a corollary, where the plaintiff fails to establish an essential element of her case when opposing the motion for summary judgment, all facts, disputed or not, are rendered "immaterial" and the moving party is entitled to judgment as a matter of law. *Ibid*. In addition, Rule 56, FRCP, focuses only upon those facts which are material and as to them, the dispute must be genuine to defeat the motion. When the moving party has carried its burden under Rule 56(c), its opponent must "... do more than simply show that there is some metaphysical doubt as to the material facts...[parallel citations omitted]." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586, 687 (1986). Materiality, in turn, is determined by the substantive law of the case. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986). Finally, when deciding whether the dispute is genuine, while it is not the function of the Court to weigh the evidence and determine who is telling the truth, it is also true that:

> ...there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party....[internal citations omitted]. If the evidence is merely colorable, ... [internal citation omitted] or is not significantly probative, summary judgment may be granted. *Id.* at 247- 250.

*See also, Dubois v. Ass'n. of Apt. Owners*, 453 F.3d 1175, 1180 (9th Cir., 2006); *Villiarimo v. Aloha Island Air, Inc*., 281 F.3d 175, 1161 (9th Cir., 2002) (no "genuine issue" where the only evidence presented is 'uncorroborated and self-serving' testimony).

Consequently, even where, as here, the Court is confronted with two conflicting stories, summary judgment may lie. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris,* __ U.S. __, 127 S.Ct. 1769, 1776 (2007).

For material and substantial portions of her complaint, plaintiff has no information, whatsoever, to support essential elements of her causes of action. In addition, while there are two

stories presented to the Court, in the remaining critical respects of the plaintiff's causes of action, plaintiff's story is blatantly in conflict with the physical evidence and corroborated testimony and evidence of Officer Valline. This case is, therefore, ripe for disposition by summary judgment in Officer Valline's favor.

## III. BECAUSE TRIBAL SOVEREIGN IMMUNITY FROM SUIT IS RAISED BY OFFICER VALLINE'S MOTION, THE COURT'S JURISDICTION TO HEAR THIS LAWSUIT IS IMPLICATED

The sovereign immunity from suit enjoyed by the Walker River Paiute Tribe, s*ee, Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 59, 98 S.Ct. 1670 (1978), is co-extensive to the immunity from suit enjoyed by the Federal government and extends with equal vigor to tribal officials such as Officer Valline, when acting within the course and scope of their employment. *See*, *Chemehuevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1051, citing *Santa Clara Pueblo,* at 58; *U.S. v. Oregon*, 657 F.2d. 1009, 1013 fn. 8 (9th Cir., 1981). *See also*, *Snow v. Quinault Indian Nation*, 709 F.2d 1319, 1321 (9th Cir., 1983), cited by the Court. Order, dated 1/18/2007, p. 9;11-12. Equally significant, it is the law of the case that tribal sovereign immunity from suit protects persons like Officer Valline when acting in the capacity of a Tribal Police Officer. *Id.* at 9;18-19.

Officer Valline adds, here, tribal sovereign immunity implicates the jurisdiction of the Court. It must be resolved first before consideration is given to the substantive claims of the complaining party. *Chemehuevi v. California, supra* at 1051. It is also clear that qualified good faith immunity, invoked here,

> ...is '*an immunity from suit,* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.' [Internal cite omitted]. Thus, we have held that an order denying qualified immunity is immediately appealable even though it is interlocutory.... (Italics in original). *Scott v. Harris*, *supra* at 1773 n.2.

## IV. STATEMENT OF UNDISPUTED FACTS

1. On April 20, 2004, Officer Walter Valline began employment as a Walker River Tribal Police Officer. Valline Aff. ¶ 2.

2. On April 21, 2005, his second day on the job and while still a trainee, a drunken Norman Boney, Sr. (Boney, Sr.) smashed him in the nose, bloodying it and his own knuckle, when

Officer Valline and Officer Bakaris, with the assistance of Dean Pennock, Chief of the Walker River Paiute Tribe, apprehended Boney, Sr. Boney Sr., was only subdued after bolting and running, after Chief Pennock threatened Boney, Sr., with a taser. The situation was so chaotic, Chief Pennock also had to threaten the plaintiff with a taser, also. Pennock depo., pp 153;16-25, 154, 155;1-12; Valline Aff. ¶ 3, Pennock Aff. ¶ 7; 2 Valline[3] depo. pp. 98;20-25, 99;1-2.

3. This incident was one of two that plaintiff included in her letter, dated May 30, 2004, to Chief Pennock, complaining about Officer Valline, as examples of Officer Valline's alleged mistreatment of her family. Exhibit E., to the amended complaint.

4. On May 29, 2004, Officer Valline was dispatched because Boney, Sr., was reportedly drunk and possibly driving one of the Boney family vehicles. He was apprehended, and once again, obviously drunk, was belligerent, bolted from the scene and taunted the officers, including Officer Valline, to come and fight him. Because Boney, Sr., could not keep his pants from falling down, Officer Valline was able to avoid a fight and arrest Boney, Sr. 1 Valline depo., pp. 186-188; Valline Aff. ¶ 4.

5. The truck Boney, Sr., was driving was impounded because drug paraphernalia was found in the vehicle. Two teenage girls were also with Boney, Sr. They were released to their parents. 1 Valline depo., pp. 194-197; Valline Aff. ¶ 5.

6. Melissa Boney, the plaintiff's daughter, and Norman "Manny" Boney, Jr., also telephoned and insisted that the Officers not impound the truck but turn it over to them. Due to the presence of drug paraphernalia in the vehicle, the request was declined. 1 Valline depo., pp. 198-204; Valline Aff. ¶ 5.

7. Subsequently, the plaintiff telephoned Officer Valline, complaining about the way he treated her two children when they arrived at the scene to retrieve the truck. The plaintiff made the complaint, though she was not present to know exactly what had transpired. Boney depo., p. 112;13-17.

8. Officer Valline tried to respond to the plaintiff's complaints. Officer Valline did not

[3]1 Valline depo., refers to the Valline deposition of 10/25/07, 2 Valline depo., refers to the Valline deposition of 12/11/07.

know that Boney, Jr., was also on the line and that it was a three way conversation. According to Melissa Boney, she, too, was on the line though she did not disclose her participation on the phone call to Officer Valline, MBoney depo., p. 104;1-7. When Officer Valline explained the story different, apparently, than what Boney, Jr., wanted to hear, he jumped into the conversation and called Officer Valline a liar. Officer Valline then asked, if it was "Manny" that was on the phone. According to the plaintiff, Officer Valline then said, "I'll come and drug test you right now." Boney depo., p 116;2-6.

9. After being berated by the plaintiff, Officer Valline hung up the phone. 2 Valline depo., p. 94; Boney depo., p. 116. This phone conversation was the second example of supposed abuse by Officer Valline of the plaintiff's family which included her letter dated May 30, 2004, to Chief Pennock. Exhibit E. The letter is devoid of any statement that Officer Valline used swear words during the phone conversation.

10. When she was "cross examined" by her lawyer, the plaintiff "remembered" that Officer Valline called Manny a "mother fucker." Boney depo., p 161; 9-11.

11. On June 10, 2004, Officer Valline was again dispatched in response to another Boney family matter. Valline Aff. ¶ 6. For the third time, at least, since Officer Valline began his employment with the Tribe, Boney, Sr., was drunk. This time, authorities were called to the residence of Boney, Sr., on 22 Lake Pasture Road, on the Walker River Paiute Tribal Reservation. Boney, Sr., was unconscious and was taken away by medical personnel. Boney depo., p. 142;12-17. Subsequent medical records reveal that Boney, Sr., had a blood/alcohol reading at the extraordinary level of .229 MG/DL. Boney, Sr., medical records, BCCH 255. Exhibit 2.

12. Boney, Sr., and the plaintiff had mutual restraining orders against each other, requiring them to stay away from each other. Boney depo., pp. 146;17-22, 147;1-5. By this time, Boney, Sr., and the plaintiff were also divorced. Boney depo. pp., 94;8-13, 192;16-17.

13. Nonetheless, the plaintiff appeared at the residence of Boney, Sr., while he was still there. Officer Valline reminded the plaintiff of the restraining order and that she was not supposed to be there. Boney depo., pp 146;3-25, 147;1-17. The plaintiff challenged Officer Valline to do something about it, telling him to "then fucking do it." Boney depo., p., 150; 6-8. He did. He

handcuffed her and put her in the back of his squad car for 20 minutes. He then released her. The plaintiff made no complaint about the incident to Tribal officials or Chief Pennock. Boney depo., pp., 154;23-25, 155;1-16.

14. On July 15, 2004, late in the afternoon or early evening, Officer Valline fielded a phone call from the plaintiff. 2 Valline depo., pp. 115, 116;1-2. She told him that she thought Boney, Sr., was driving around the Reservation while drunk. She did not want the vehicle impounded if Boney, Sr., was arrested for drunk driving. She gave no more of an explanation than this. Boney depo., p., 141; 4-14. She did not inform Officer Valline that her son, Boney, Jr., was also along. Boney depo., p 141; 21-23. As far as Officer Valline knew, Boney, Sr., was alone in the vehicle. 2 Valline depo., pp. 115, 116;1-2, 118;22-25, 119;10.

15. Chief Pennock overheard the conversation. Pennock Aff. ¶¶ 17, 18; Pennock depo. pp. 182;20-25, 183, 184. He dispatched Officer Valline to respond since it was against Tribal law to be driving on the Reservation while drunk. 2 Valline depo., p. 122;1-4; Boney depo., pp. 358;1-2, 360;1-7. Officer Valline then contacted Officer Yocum for assistance in the apprehension of Boney, Sr., 2 Valline depo., p., 122;3-20, and they went in separate squad cars to find them. They were the only two officers on duty that evening. Yocum Aff. ¶ 3; 2 Valline depo., p., 111;16-20; Pennock Aff. ¶¶ 12, 16, 17; Pennock depo., p., 183, 184.

16. Officer Valline saw Boney, Sr., first, notified Officer Yocum and told him he was heading towards Lake Pasture where Boney, Sr., resided. 2 Valline depo., p. 123;1-6; Yocum Aff. ¶ 3. When Officer Valline pulled into the driveway at Lake Pasture, he discovered Boney, Sr., and to his surprise, Boney, Jr., was present. Valline Aff. ¶¶ 7, 8; Yocum Aff. ¶ 4.

17. Boney, Jr., got out of the truck and immediately confronted Officer Valline, who rolled down the window and backed him off with his taser which he deployed. Valline Aff. ¶ 9; 2 Valline depo., pp., 124;1-14.

18. Within minutes or less, Dunnett depo., pp., 55;24-25, 64;23-25, 65;4-6, 112;14-16, MBoney depo., pp. 64;1-2, 65;1-18, deadly force was used after Officer Valline was confronted with a 100 pound pit bull named Tank, warned he would shoot the dog, gave commands to get back, Dunnett depo., pp. 96;20-25, 97;1-3, 22, 25, 98;1-2, and get down on the ground, MBoney

depo., p. 40;7-15, Boney, Jr., wrapped his fists with his red "rags," was screaming epithets including "CK for Life" and meaning "Cop Killer for Life," and "I'm going to fucking kill you," 2 Valline depo., p. 133;6-8, and had moved towards Officer Valline instead of getting back as he had been told. 2 Valline depo., pp., 96, 124-134.

19. Both Boneys disobeyed Officer Valline's commands and moved towards him. He tasered Boney, Sr., and seeing out of the corner of his eye what Officer Valline perceived as a quick movement in his direction from Boney, Jr., Officer Valline turned and without getting into the sighting position, discharged his weapon twice at Boney, Jr. 2 Valline depo., pp. 133, 134.

20. Officer Valline waited so long before using the taser or his gun, the physical evidence is undisputed that Boney, Jr., had closed from the porch to within less than 48 inches of Officer Valline before he used deadly force on Boney, Jr., and Boney, Sr., had closed from the truck to within 15 inches of the end of Officer Valline's taser before he shot Boney, Sr. They had triangulated and were within arms reach of Officer Valline before he defended himself. Ginnochio Aff. ¶ 6, Exhibit C; Rick Guilbault Aff. ¶¶ 9-11; 2 Valline depo., pp. 133-134.

21. Officer Valline used his weapons in self-defense, only after the Boneys refused to obey his orders to stay back and get on the ground. 2 Valline depo., pp., 124-134. He acted because he feared for his life. He had retreated, 2 Valline depo., p. 132;12-14, and believed he had no other recourse. He was concerned that Boney, Jr., had a weapon and he was concerned that the Boneys might get him on the ground, since there were two of them, stomp him, or get his weapons from him, in which case, he feared it would be all over for him. Valline Aff. ¶¶ 10-12, 14-15; 2 Valline depo., p. 140;13-16 .

22. Officer Valline neither restrained nor handcuffed the plaintiff at any time that evening. 2 Valline depo., pp. 141;19-25, 142; 1. After she arrived on the scene and had gone directly to her son, who was lying on the ground, she left him of her own accord, Boney depo., p. 433;12-22, and walked towards officers Valline and Yocum and confronted them. Yocum Aff. ¶ 12; 2 Valline depo., pp. 135, 139;23-25, 140;1-16.

23. Thereafter, Chief Pennock arrived, Boney depo., pp., 433;23-25, 434;6-18, escorted the plaintiff away from the two officers, and after she became unconsolable, and out of control,

Pennock depo., p. 212;9-15, 2 Valline depo., pp. 135, 139, 140. Chief Pennock handcuffed the plaintiff and he and Officer Yocum placed her in the rear of Officer Valline's squad car. 2 Valline depo., pp. 140;3-7, 141, 142;1-8. Chief Pennock also told Officer Valline to keep away from the plaintiff because his presence was upsetting to her. Pennock depo., 201;1-12. He complied. When she tried to escape from the squad car, Chief Pennock and other officers prevented her from getting all the way out of the vehicle. Officer Valline never touched the plaintiff. 2 Valline depo., p. 142; Pennock depo., pp. 199-201; Pennock Aff. ¶¶ 19-21; Yocum Aff. ¶¶ 13, 14, 16 .

24. The total elapsed time from the moment that Boney, Jr., came out of the house with his rags wrapped around his fists and came towards Officer Valline until Officer Valline tasered Boney, Sr., and used deadly force to subdue Boney, Jr., was measured in a few minutes, if not just in seconds. Valline Aff. ¶ 16; Pennock depo., p. 212;20-25; M Boney depo., pp., 64;1-2, 65;1-18.

25. Charissa Dunnett stated that after she arrived at the scene, which was when the pit bull was still on the porch with Boney, Jr., every thing happened "so fast." Dunnett depo., pp., 55, 64, 65, 112.

26. The six letters, Exhibit A through F, attached to plaintiff's complaint, constitute the total of plaintiff's First Amendment activities for purposes of her amended complaint. Letters A through C, have nothing to do with Officer Valline, Boney depo., pp., 57-59, 60; 21-24. Plaintiff has no knowledge that Officer Valline ever knew of their existence, Boney depo., pp., 336;1-2, 337;1-3, 337;4-10 . Plaintiff concedes paragraphs 9 through 11of her complaint have nothing to do with Officer Valline. Boney depo., p., 62;1-10, 12-15.

27. Exhibits D through F, admittedly relate to Officer Valline. Exhibit E and its contents are the basis of the plaintiff's claim Officer Valline retaliated against the plaintiff when he used deadly force against Boney, Jr., because he was getting back at the plaintiff in derogation of her First and Fourth Amendment rights for complaining to Chief Pennock in the letter, Exhibit E. Amended Complaint, ¶ 34; Boney depo., p. 404; 4-10 .

28. The plaintiff admits she has no knowledge that Officer Valline was even aware the letters, Exhibit D, E, and F, Boney depo., pp 396;1-8, 401; 14-23, discussing the complaints about Officer Valline, even existed and admits none of the letters had any adverse impact on Officer

Valline's job. Boney depo., pp., 119;17-21, 120;7, 338;1-17, 339;9-19, 345;7-10.

29. The plaintiff believes that Chief Pennock, to whom Exhibit E, a letter dated May 30, 2004, was written, only talked to Officer Valline about portions of the letter. Pennock depo., p. 175; 1-4; Pennock Aff. ¶¶ 5, 9, 10. Boney depo., p. 397;1-6.

30. The plaintiff admits she has no information about Officer Valline's intentions on the evening of July 15, 2004, including why Officer Valline used deadly force then. Boney depo., pp. 78;9-20, 80;1-4, 393;17-18, 424;9-14, 425;1-5, 15-25, 426;1, 10-13, or whether he acted with premeditation. Boney depo., p. 426;14-23.

31. The plaintiff admits she has no information to support any of the allegations set out in her complaint upon which to base a claim that Officer Valline was a federal actor on July 15, 2004. Boney depo., pp. 38-43, 46, 47, 346-350, 364-379.

32. The Tribe has not ceded criminal jurisdiction to the Federal government over its membership, including at the time of the incident of July 15, 2004. Reymus Aff. ¶¶ 9, 10. Pennock Aff. ¶¶ 11-13.

33. The Tribe exercises operational control over its police department and its officers to the exclusion of the Federal government. Pennock Aff. ¶¶ 11-15; Pennock depo., p. 122;23 "(they [the Federal Government] don't run us or anything."); Remus Aff. ¶¶ 10, 11, 12, 14, 21.

34. The Tribe trains and authorizes according to its own procedures, its tribal police officers to make arrests, to use deadly force if in the opinion of the officer it is warranted, and to possess and use tasers. Pennock depo., pp. 61, 62, 64;20-24, 65;1-5; Pennock Aff. ¶ 15.

35. All of the incidents constituting the plaintiff's complaint took place on the Reservation of the Walker River Paiute Tribe. Pennock Aff., ¶ 22.

36. The plaintiff, Boney, Sr., Boney, Jr., and Melissa Boney were residing on the Reservation at the time. Boney depo., pp. 129;9-12, 192;1-2.

37. The plaintiff, Boney, Sr., and Boney, Jr., were members of the Walker River Paiute Tribe, at least at one point in their lives. Boney depo., pp. 197;4-9, 290;1-3, 11-17.

38. Officer Valline was dispatched by the Tribe's Chief of Police in furtherance of Tribal Law to pursue a possible drunken driver, Boney, Sr., whom his ex-wife, the plaintiff, had

reported was reported driving on the Reservation roads. Pennock depo., pp. 182;20-25, 183, 184, 185; Pennock Aff. ¶¶ 16, 17. The Tribe had not ceded to criminal jurisdiction to anyone at the time. Pennock Aff. ¶ 13.

39. The Tribe has its own Law and Order Code, which Officer Valline and Officer Yocum were directed to enforce, its own duly adopted Constitution, and its own Tribal Court system, as distinguished from a Code of Federal Regulations Court of Indian Offenses. Pennock depo., pp. 32, 33, 35;1-11, 38;8-24; Reymus Aff. ¶¶ 3-6; Pennock Aff. ¶¶ 12, 13.

40. Officer Valline regrets that deadly force had to be used on July 15, 2004, and wishes he could have seen an alternative. Valline Aff. ¶ 17. He was confronted, however, with individuals with a history of violence, Valline Aff. ¶ 14, one of whom had, when drunk, already punched Officer Valline in the face and tried to bate him into a fight, also while drunk, during the brief period of time Officer Valline was on the Tribe's force. 1Valline depo., pp. 174-177, 183-188.

41. Boney, Sr., admits that he was shit faced drunk on the evening of July 15, 2004, that he had contributed to the delinquency of a minor by supplying his own son, a minor at the time, with alcoholic beverages the evening of July 15, 2004, and that he tends to get upset around the police when drunk. N Boney depo., pp. 29, 34;1-16, 36;16-25, 42;1-22.

42. The autopsy of Boney, Jr., revealed that his blood alcoholic content was .116 G/100 ML, Anderson Affidavit and attachment, which would put him over the legal limit of .10 for driving. Anderson Affidavit with Exhibit attached. Pennock Aff.,¶ 12.

43. Officer Valline's concerns about weapons were well founded because Boney, Jr., had a knife concealed on his person at the time of the incident. Ginnochio Aff. ¶ 7, Exhibit D. Also, Boney, Jr., had previously threatened a Tribal Police Officer, Pennock depo., pp. 204, 205; Pennock Aff. ¶ 17, and a warrant was also outstanding on July 15, 2004, for the arrest of Boney, Jr., for a failure to appear. *Ibid.* The officers had been looking for Boney, Jr., to serve the warrant for several days and it was thought that he may have left the Reservation. Valline Aff. ¶ 7; Yocum Aff. ¶ 4. Indeed, nearly the entire family was known to the police, then. Valline Aff. ¶ 7.

44. Boney, Sr., was dishonorably discharged from the United States Marines for drinking and had been convicted of the felony of mayhem when he punched out the eye of the

victim of the crime. N Boney depo., pp. 17;13-25, 18;1-13.

## V. ARGUMENT

### A. The Lawsuit Must Be Dismissed Because the Court Lacks Jurisdiction To Hear This Dispute By Reason of the Tribe's Sovereign Immunity From Suit Made Applicable To Officer Valline Valline Because He Was Acting Within the Course And Scope Of His Employment As A Tribal Official At All Pertinent Times

#### 1. Officer Valline Was Acting At All Times Within the Parameters of "Colorable Authority" As A Tribal Police Officer and Consequently, As A Tribal Official, He Was Immune From Suit

If Officer Valline was acting within the course and scope of his duties as a Tribal Police Officer, he is, like the Tribe, immune from suit. *See, Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1272 (9th Cir., 1991). Whether a tribal official is acting within the course and scope of his employment is decided in Federal Court by the law of the state in which the alleged wrongful conduct occurred. *Grantham v. Durant*, 471 F.Supp.2d 1069, 1074 (D. Nev., 2006). *See also, Red Elk v. U.S.*, 62 F.3d 1102 (8th Cir., 1995).

Plaintiff, herself, resolves this issue in the affirmative. She admits in the companion case she and her lawyer, here, filed on behalf of the Estate of Norman Boney, Jr., cited, *supra*, footnote, two, that Officer Valline was acting at all times within the course and scope of his employment. This related case, based upon the FTCA, arises out of the exact same incident, here. Since the gravamen of the FTCA complaint is that Officer Valline was acting at all relevant times within the course and scope of his employment as a Tribal Police Officer, the plaintiff and her attorney must know that is also true, here, if they are sincere in the pursuit of the other action.

Regardless, the same conclusion is reached under Nevada law. Whether one is acting within the course and scope of his employment is generally a question of fact. *Grantham v. Durant, supra* at 1074. However, plaintiff's admission eliminates this as an issue and since it is also true that when the evidence is undisputed concerning the status of the employee at the time of the unlawful conduct, the issue may be resolved as a matter of law, making it ripe for summary judgment. *Ibid*.

Nevada defines course and scope of employment by statute. An employee is acting outside the course and scope when the conduct is truly an independent venture, was not committed in the

course of the very task assigned to the employee, **and** the conduct was not reasonably foreseeable under the facts and circumstances, given the nature and scope of his employment. The criterion are not in the alternative. All three must be present to find a party was acting outside the course and scope of employment. *Ibid*., *see also*, NRS 41.745 (1).

Thus, in Nevada, neither the commission of a murder by a security officer while on duty within the context of a lover's spat nor an assault by a black jack dealer upon a customer for making a disparaging remark forecloses a finding an employee was acting within the course and scope of his employment. *Rockwell v. Sun Harper Budget Suites,* 112 Nev. 1217, 925 P.2d 1175 (1996)*; Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 469 P.2d 399, 400 (1970). Neither does lying during the course of a sexual harassment investigation, defaming the plaintiff, and using the sexual harassment investigation process to the promote personal ends preclude a finding a person was acting within the course and scope of his employment. On these facts, the Court in *Grantham* reasoned that reporting sexual harassment, even when it is a lie, is a part of an employee's job in the workplace. It is not inconceivable that this might happen. It is even foreseeable that a person might use the anti-discrimination policies for personal gain to retaliate against another employee that was disliked and as a result, a person of ordinary intelligence and prudence could "...reasonably anticipate that employees ...[would make] slanderous remarks about another employee during a workplace dispute investigation." *Id.* at 1075.

In *Red Elk*, cited *supra*, an Eighth Circuit case, two tribal police officers of the Pine Ridge Indian Reservation in South Dakota were patrolling the reservation late at night when they encountered an underage teenage girl walking along the roadway after the Tribal curfew. They took her in custody but did not take her directly home. Instead, they drove off the road. One of the officers jumped out of the car, waited outside and looked the other way while the other officer raped the girl. He then returned and asked if it was his turn. The girl refused and the officer did not push it any further. *Red Elk, supra* at 1107. This incident was followed by other sexual encounters, both with and without consent. A pregnancy resulted. The tribal officer who committed the offense was convicted of sexual abuse of a minor and sentenced to five years in prison and three years of supervised release. *Id.* at 1103. Plaintiff's suit was brought under the

FTCA alleging the officers were acting in the course and scope of their duties when the rape was committed. The Federal government argued, this could not be.

The Eighth Circuit disagreed, explaining there was a strong nexus between the act and the authority of the officers. The job created the opportunity for this to happen. They had the authority to pick her up and require her to get in the squad car. Once there, they had the opportunity to lock the doors and keep her captive. Foreseeability was also a touchstone. Given that the Tribe had adopted a curfew for under age members of the Tribe, it was certainly not unforeseeable that a Tribal Officer might find a young, under age female member of the Tribe out after curfew, alone, and require her to get in the squad car for a ride home. When opportunity and authority were present, it was foreseeable that the situation might go awry. From the combination of these factors, the Court concluded that personal nature of the activity, individual sexual gratification, did not hold the day. The officers were acting within the course and scope of their authority. *See also*, cited in *Red Elk*, *Mary M. v. City of Los Angeles*, 54 Cal.3d 202, 814 P.2d 1341, 285 Cal.Rptr. 99 (1991)(Los Angeles liable for rape of plaintiff by one of its officers).

Applying these principles, without question, Nevada law requires a finding that Officer Valline acted within the course and scope of his employment when he arrived at 22 Lake Pasture Road on July 15, 2004, and the events unfolded. It is undisputed Officer Valline was present because he was dispatched to be there by the Chief of Police in response to a phone call from a Tribal member, the plaintiff, who reported her ex-husband was intoxicated while driving on the Reservation. Officer Valline was dispatched to enforce Tribal law because the Tribe has laws prohibiting this conduct. SOF 38, 39. Furthermore, the Walker River Tribe has not ceded to anyone, the right of the Tribe as a sovereign Nation, to preserve the peace and promote the health and welfare of Tribal members on the Reservation. *Ibid.*

In addition, the Tribe required its law enforcement personnel to carry weapons, authorized the use of deadly force according to the officer's discretion, Pennock depo., pp. 64; 20-25, 65; 1-5, 76; 8-25, 80; 18-20, 81; 10-16, 83; 1-2; 94; 21-24, 95, trained officers in the use of weapons based upon the Tribe's own standards and procedures, and authorized its personnel to keep the peace by making arrests. Pennock Aff. ¶¶ 15, 16; Pennock depo., pp 59; 22-25, 60; 1-15, Law enforcement

personnel are employed, paid and recruited by the Tribe, and subject to the Tribe's personnel policies and procedures. Pennock Aff. ¶¶ 14, 15; Reymus Aff. ¶¶ 5, 15-18, 21.

Moreover, the fact that the Tribe has standards and practices for the use of weapons including the use of deadly force, indicates to a reasonable person that it is not inconceivable that the weapons might be used and that deadly force may be necessary. *See, Red Elk, supra* 1107, 1108. Thus, the expectation is that if law enforcement personnel were required to carry weapons, officers would use them. Pennock Aff. ¶ 15.

Also, here, the prospect of an altercation was real. This call for police assistance marked the third time in Officer Valline's short career with the Tribe he was called upon to apprehend a drunken Boney, Sr. Statement of Facts (SOF) 2, 4, 11. Since Boney, Sr., punched Officer Valline in the nose on the first occasion, and wanted to duke it out with him on the second, Officer Valline was dispatched into a situation where violence was more likely than not. SOF 2.

None of these facts are in dispute. The Court is free, see *Grantham*, to conclude, as it must, that Officer Valline was acting within the course and scope of his employment. He was clearly performing the job for which he was hired and authorized to perform when Chief Pennock dispatched him to address the plaintiff's call for police assistance the evening of July 15, 2004.

The outcome of July 15, 2004, does not, itself, detract from the conclusion that Officer Valline was acting within the course and scope of his official duties as a Tribal police officer and was, therefore, immune from suit. As explained in *Bassett v. Mashantucket Pequot*, 204 F.3d. 343, 359 (2nd Cir. 2000): "[A] tribal official-even if sued in his 'individual capacity'-is only 'stripped ' of tribal immunity when he acts 'manifestly or palpably beyond his authority...' *Bassett*, 204 F.3d at 359 (Quoting *Doe* at 1210)." In other words, Tribal officials are not stripped of their sovereignty, in their official capacity, merely because they are performing their jobs poorly or because it is alleged, unlawfully. "Beyond the scope" of authority upon which sovereign immunity turns is not defined by the legality of the conduct but upon the jurisdiction to act in the first place. *Id.* at 281, fn. 15. In accord is *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695, 69 S.Ct. 1457, 1464 (1949)(if the actions of an officer do not conflict with the terms of his valid authority, then, they are actions of the sovereign, whether or not tortuous under general law).

*Bassett* also holds:

> [I]t would be insufficient in the complaint to merely allege that the Tribal official '...violated state and federal law in order to state a claim that...[the Tribal officials] acted beyond the scope of their authority....Rather, the Court finds that to state a claim for damages against...[ the defending Tribal officials] the plaintiffs would have to allege and prove that ...[the Tribal officials] acted 'without any colorable claim of authority,' apart from whether they acted in violation of federal or state law. [footnote and internal citations omitted.] *Bassett, supra* at 281.

Applying the *Bassett* and *Larson* "colorable claim of authority" reasoning, Officer Valline was clearly vested with this authority, since Officer Valline was dispatched to apprehend a drunk driver, was authorized to make arrests, was authorized to use deadly force, and was present to enforce Tribal law. Pennock Aff. ¶¶ 16, 17. Colorable authority bracketed every aspect of his presence at Lake Pasture Road. Absent proof of something more than just his conduct which would eviscerate his colorable claim of authority, Officer Valline is immune from suit. *See*, *Linneen v. Gila River Indian Community*, 276 F.3d 489 (9th Cir., 2002) (taunting, threatening suspects by holding a gun to their heads, berating suspects and other forms of boorish, if not outrageous, conduct did not take a police officer outside the course and scope, since conduct arose out of official duties and sovereign immunity applied).

**2. The Record Is Devoid Of Proof to Support The *But For* Test Plaintiff Relies Upon To Remove From Officer Valline The Mantel of *Colorable Authority* Which Makes Him Immune From Suit**

The plaintiff must establish that there is some aspect of Officer Valline's conduct, outside of the incident, itself, which would take him beyond the mantel of colorable authority and remove him from his capacity as a Tribal official in order for the plaintiff to avoid dismissal on the grounds that Tribal officials are immune from suit. Plaintiff offers, here, her First Amendment contention that when Officer Valline used deadly force, he was intent on revenge to get back at the plaintiff for complaining in a letter, Exhibit E to her complaint, to the Chief about him. The plaintiff asserts Officer Valline was not hired to violate constitutional rights and if he did, he would be acting outside his official duties and stripped of his immunity from suit. *See, Ninigrett Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 29 (1st Cir., 2000). The gravamen of plaintiff's amended complaint requires her to prove that **but for** the fact that Officer Valline's mind was full of revenge to get back at the plaintiff for being a letter writer, deadly force

would not have been used against her son. *See, Hartman v. Moore, supra*, at 260, *see also, Maness v. Star-Kist Foods, Inc.,* 7 F.3d 704, 708 (1993).

The plaintiff's First Amendment claim immediately runs headlong into her related FTCA action, where she admits that Officer Valline was acting at all times within the course and scope of his employment. This statement negates any assertion, here, that Officer Valline used deadly force in retaliation for exercising her First Amendment rights since such conduct would take Officer Valline's actions outside the course and scope of his conduct, contrary to the basis of the FTCA lawsuit. *See, Hardin v. White Mountain Apache Tribe,* 779 F.2d 476, 479 (9th Cir., 1985). By suing the Federal government under the FTCA because of Officer Valline's conduct, she disclaims that Officer Valline acted in derogation of her First Amendment rights.

The plaintiff also fails the burden of proving the "but for" test for the want of proof of intent, itself. When deposed, the plaintiff admitted that she did not know what went on in Officer Valline's mind because you cannot know what is going on in someone's mind. Boney depo., pp. 78; 9-20; 80; 1-3.

> Also, in paragraph 35 of the complaint, she alleges:
> At all relevant times Defendant Walter Valline acted outside the course and scope of his authority in using unauthorized force. His acts were motivated by a desire to further his interest and protecting his career in law enforcement, and protect his individual reputation in the law enforcement community. And he was not, as such, acting in furtherance of the business of the tribal police. Boney, depo., p. 423;20-25, p. 424;1-2.

When asked to explain this paragraph, she admitted that she had no information about any of the assertions it contains. Boney depo., pp. 423;19 - 426;23. When asked specifically about what information she had about Officer Valline's motivation to use deadly force, she said she had none. Boney depo, pp. 425;7-25, 426;1-13. Then, she was asked what information she had to prove that Officer Valline acted in a premeditated way when he used deadly force. Her answer was that she had none, but that she wished she did. Boney depo., p. 426; 14-23. Thus, the plaintiff has no evidence of Officer Valline's intent to support the plaintiff's "but for" burden.

The six letters the plaintiff attaches to her complaint are of no help to prove Officer Valline's intent the evening of July 15, 2004. They are the manifestation of her First Amendment rights and, therefore, constitute the activity which would have been the object of Officer Valline's

retaliation, if this were his subjective intent on July 15, 2004.

The first three letters, however, Exhibits A through C, the plaintiff admits had nothing to do with Officer Valline. She also admits that paragraphs 9 through 11 of her complaint, have nothing to do with Officer Valline, though offered as examples of her First Amendment activity. These three letters and these paragraphs from her amended complaint are immaterial. SOF 26.

Exhibits D, E and F admittedly discuss Officer Valline. As proof Officer Valline acted out of revenge because the plaintiff wrote these letters, exercising her First Amendment rights, they are of no use since the plaintiff admits Officer Valline never even knew they existed. Pennock Aff. ¶ 5; SOF 28. Officer Valline states, he understood only, that the plaintiff had made a complaint about him, did not know the details of the complaint, and was never shown the letters, Exhibit D, E or F, written about him. 1 Valline depo., pp., 85; 8-12, 86; 14-18, 88; 6-22, 89; 16-19, 91; 1-3, 14-19. She believes, however, that Chief Pennock at least talked to Officer Valline about the contents of a portion of Exhibit E, the letter addressed to him. SOF 29. The plaintiff is only left, then, with some of the contents of Exhibit E, Boney depo., p 404; 4-10, to sustain a claim of retaliation because, without knowledge of the protected activity, there can be no retaliation as a matter of law. If Officer Valline did not know about it, he could not retaliate. *See, Raad v. Fairbanks North Star Borough School Dist.,* 323 F.3d 1185, 1197 (9th Cir., 2003).

The contents of Exhibit E are also problematic because the plaintiff admits that the complaints she registered in the letter resulted in no adverse personnel action taken against Officer Valline. Nothing was done to him as a result of the letter or its contents. SOF 28; Pennock Aff. ¶¶ 9, 10; 1 Valline depo., p., 85; 8-11. Also, she has no information anyone from the Tribal Council talked to Officer Valline about the letter or that Officer Valline even knew that the plaintiff had complained about him to the Tribal Council. Officer Valline was unaware the plaintiff had brought Exhibit E to the attention of the Tribal Council. Boney depo., pp. 247; 5-7, 9-12, 249, 250, 251, 252, 267, 308; 2-6, 309, 340, 345. In fact, the plaintiff had no information that Officer Valline was aware either she, her friends, or any member of her family were complaining about him. Boney depo., pp. 242-245.

To overcome this gap in her retaliation claim, since Officer Valline was oblivious to the

plaintiff's complaints about him, she tries to prove retaliation circumstantially through the allegation Officer Valline repeatedly abused her family during the short period of time Officer Valline was employed at the Tribe. Boney depo., p. 389; 15-25. Plaintiff's theory here is that since Officer Valline was abusive, the plaintiff claims, to her family before July 15, 2004, his subjective intent on July 15, 2004, must have been retaliation against the plaintiff for exercising her First Amendment rights. The incidents, themselves, belie the claim.

The plaintiff identifies only five incidents to support this spurious theory. Boney depo., pp. 215, 216, 389; 15-25. The first was the April 21, 2004, incident, when Officer Valline got punched in the nose by Boney, Sr. SOF 2. The second was the incident of May 29, 2004, when Boney, Sr., wanted to fight but could not because his pants kept falling down. SOF 4. The third was the four way phone call, which the plaintiff labeled harassment, though it only took place by telephone. SOF 6, 7, 8, 9. The fourth was the day, June 10, 2004, that Boney, Sr., was so drunk, he was unconscious. SOF 11. The plaintiff admits she never complained to anyone in authority about this incident. SOF 13. The fifth incident followed a conversation with the plaintiff. Officer Valline came by her house to pick up an affidavit she wrote because she was a witness to an incident on the Reservation. Boney depo., pp. 73, 74. Officer Valline told the plaintiff that he believed that Boney, Jr., had been driving on the Reservation while under age. Plaintiff told Officer Valline to go do his job. Boney depo., p. 74. Officer Valline then saw her son and Charissa Dunnett drive by and so, he went after them and stopped them. Plaintiff was not present and does not know what was said. Dunnett and Boney, Jr., were not arrested[4]. They were allowed to go on their way. The plaintiff never registered a complaint to anyone about this incident. Boney depo., p. 75.

Plaintiff also relies upon Tasha Plummer, Boney depo., p. 389; 1-14, who worked at the Tribe's Smoke Shop, where the Tribal Police refuel their squad cars. Pennock depo., p. 107; 1-3. Plaintiff apparently found out about Ms. Plummer's claims when the plaintiff read an FBI witness interview statement produced during discovery in this case. Boney depo. p. 234; 1-6. According to the statement Plummer gave, Officer Valline said that he would hate to see what happened to the

[4]Eventually, Boney, Jr., was arrested for driving while underage without a license, failed to appear for the court hearing, and a warrant for his arrest was issued for failure to appear (FTA), a warrant that was still outstanding on July 15, 2004. Valline Aff. ¶ 7.

Boneys if they got him on a bad day. Plaintiff was unaware of the alleged Plummer conversation because Plummer never reported this statement or claim to anyone in authority or the plaintiff, it was apparently so insignificant in Plummer's mind at the time. Boney depo., p. 235; 24-25. Pennock depo., pp. 171; 12-21, 172; 1-8, 173; 11-25, 174, 1-7.

When deposed, however the plaintiff was asked if she had any information that Officer Valline was having a bad day on July 15, 2004. She admitted she did not know and had not seen Officer Valline prior to the incident of July 15, 2004. Boney depo., pp. 422; 9-17, 423; 3-5.

As circumstantial proof of revenge on the part of Officer Valline on the evening of July 15, 2004, these incidents reflect nothing upon Officer Valline's subjective intent. First, plaintiff never made known to the authorities, she was upset about three of the five incidents. Second, there is no nexus to the events of July 15, 2004. If anything, the incidents show that Officer Valline could reasonably believe that Boney, Sr., was something akin to the town drunk, who would resist arrest, become violent, and run from authorities when caught drunk driving. Boney, Sr., admits, as much, including the conviction for committing mayhem. N. Boney depo., p. 15;20-25, 16;1-5, 41;24-25, 42;1-16. They also show Officer Valline had the misfortune to be on duty when Boney, Sr., was drinking and would decide to go off half cocked and fight. From any fair review of these incidents, there is nothing in them to suggest they were staged by Officer Valline to get at the Boneys.

As for the letter, Exhibit E, and its contents, in order to conclude that Officer Valline acted out of revenge, one would have to believe that Officer Valline used deadly force over a letter he had never seen and that he used deadly force over a letter that the plaintiff admits had absolutely no adverse consequences for him. Pennock Aff. ¶¶ 10, 11. He could not have retaliated since there was nothing adverse which happened to him against which to retaliate.

One would also have to believe that Officer Valline would be willing to use deadly force for reasons unrelated to the events that were unfolding before him, knowing that two people, the plaintiff's daughter and cousin, were present to possibly witness what transpired or that his partner, that evening, Officer Yocum, would also show up at any second to witness what was happening. Since everything was happening at warp speed, Dunnett depo., pp., 55, 64, 65, 112, M Boney depo., pp. 64;24-25, 65;1-18, one would have to believe that Officer Valline even had time to

formulate such thoughts. Furthermore, he would have had to have developed this intent on the spot, because he did not know, and did not even suspect that Boney, Jr., would be there when he set out to locate a drunken Boney, Sr. Valline Aff. ¶¶ 7, 9.

None of this is in dispute. It is also, undisputed that when Officer Valline arrived at Lake Pasture Road, he was facing Boney, Sr., who was reportedly drunk, was admittedly prone to violence when drunk, N Boney depo., pp. 15;20-25, 16;1-5, 41;24-25, 42;1-16, and had previously hit Officer Valline in the face when he was drunk. Valline Aff. ¶¶ 3, 4. The autopsy revealed that Boney, Jr, though under age, had been drinking and was legally drunk. *See,* Anderson Affidavit and Exhibit. Furthermore, though a teenager, Boney, Jr., previously had a run in with a tribal police officer. Pennock Aff. ¶18.

Also, before the two girls, Dunnett and Melissa Boney arrived on the scene, Boney, Jr., approached Officer Valline before he could even get out of his car and verbally accosted him. SOF 17. Then Boney, Jr., left the truck, went into the house, and came out with a snarling 100 pound pit bull called Tank. 2 Valline depo., pp., 96, 124-134. Thereafter, it is also uncontroverted that both Boneys defied oral commands from Officer Valline. Dunnett admits that Boney, Jr., was told to get back. Dunnett depo., pp., 96; 20-25, 97; 1-3, 22-25, 98; 1-2. Melissa Boney admits that Officer Valline gave the command to get down on the ground. MBoney depo. p. 40;7-15.

Boney, Jr., it is also not disputed, started out on the porch. With the exception of putting the pit bull back into the house after Officer Valline threatened to shoot it, 2 Valline depo. pp. 124-134, neither Boney obeyed any of Officer Valline's commands. Boney, Sr., started out by his vehicle, the truck. It is undisputed that Boney, Jr., wrapped his fists with red "rags." He was also yelling "CK for life" or "Cop Killer for life." SOF 18, 19. Officer Valline thought that Boney, Jr., might have had a weapon in his hand. Valline Aff. ¶ 12. Boney, Jr., then closed on Officer Valline, as did Boney, Sr. As the two approached Officer Valline, he retreated, at which point he tasered Boney, Sr., and then, seeing what he perceived out of the corner of his eye as a quick movement towards him, Officer Valline used deadly force on Boney, Jr., shooting towards him twice as he was trained. 2 Valline depo., pp., 124-134; Pennock depo., p. 224; 5-13. Officer Valline waited so long to take this defensive action, Boney, Jr., had closed from the porch of the

house to within no more than 48 inches of Officer Valline, the physical evidence establishes. Ginnochio Aff. ¶ 5, Exhibit B. Boney, Sr., had closed from his truck to within 15 inches of the front of the taser, the physical evidence reveals. Rick Guilbault Aff. ¶¶ 9-11.

Officer Valline vehemently denies that his mind set was to use deadly force, Valline Aff. ¶¶ 10-12, 14, 15, against Norman Boney, Jr., to get back at his mother because of the letter of May 30, 2004, Exhibit E, or its contents. Valline Aff. ¶¶ 10-12, 14, 15. Aside from the fact he did not know the letter even existed, he was dealing with a situation that sadly and very quickly spiraled out of control. He feared for his life. He waited until the last second before deploying defensive measures. The physical evidence is indisputable that Officer Valline waited so long, the Boneys were breathing down his neck, though told to stay back and get down on the ground. As it turned out, also, it is undisputed also that Boney, Jr., had concealed on himself a knife. Ginnochio Aff. ¶ 7, Exhibit D. From the photo, it is evident the knife is a weapon, not one used by wood carvers.

Paraphrasing Dickens, this is a case of two versions. One, the plaintiff's, is implausible and uncorroborated. When she admits she cannot read Officer Valline's mind and has no information about his motive, SOF 30, or that Officer Valline acted with premeditation, Boney depo, p. 426; 14-23, her claim that Officer Valline's mind set was one of retaliation against her in derogation of her First Amendment rights rings hollow, given also that her exercise of the First Amendment was totally inconsequential to Officer Valline. Nothing the plaintiff did gave Officer Valline a reason to retaliate. On the other hand, the physical evidence is indisputable that Officer Valline almost waited too long to defend himself because the Boneys had closed to within 48 inches and 15 inches respectively, before Officer Valline took his defensive measures. These facts corroborate Officer Valline's claim he was in fear for his life.

The case then, tracks *Harris*. The plaintiff's version is blatantly contradicted by the physical evidence that the Boneys were virtually on top of Officer Valline, after disregarding commands that the Boneys ignored to stay back and get down on the ground. No reasonable jury could believe the plaintiff's version based upon a series of improbable beliefs she cobbles together to justify a claim that Officer Valline would retaliate against her due to a letter that had no meaning to Officer Valline. It is beyond credence to claim that the contents of Exhibit E were paramount in

Officer Valline's mind while he was staring down a 100 pound pit bull, contending with a drunken Boney, Sr., who was a possible powder keg once again, addressing Boney, Jr., who disregarded Officer Valline's commands, and fending off both Boneys, who had closed to within 48 inches and 15 inches, respectively, instead of staying back and on the ground. Any reasonable jury would have to conclude, Officer Valline used deadly force because the indisputable physical evidence placed the Boneys right in his face, within arms reach of Officer Valline. Having been punched, once, by Boney, Sr., and taunted, a second time, to come and fight, he feared for his life.

Couched in the terms of Rule 56, FRCP, the material fact of this case is Officer Valline's subjective intent at the time. There could be no genuine dispute over the material fact in this case that Officer Valline's mind was focused entirely upon the events unfolding before him and upon a grave concern for his safety to the exclusion of a letter he never saw and was of no consequence to him whatsoever. He may have been correct in his perception of the events or incorrect about them as they unfolded. The accuracy of his perception is of no moment. Due to the nature of the plaintiff's amended complaint ¶ 34, the only material issue is what was consuming Officer Valline's thought process at the time. *Hartman v. Moore, supra* at 260; *Maress v. Star-Kist, supra* at 708. It is evident, no reasonable jury could conclude anything but that Officer Valline was consumed by the events unfolding before his eyes, as he saw them, to the total exclusion of a letter he never saw and was, itself, inconsequential to him.

This portion of the case is ripe for disposition by summary judgment. Officer Valline was acting at all times within the course and scope of his employment, as the plaintiff admits, and the application of Nevada law would dictate. Plaintiff is incapable of stripping from Officer Valline his mantel of colorable authority because Exhibit E and its contents, which were of no moment to Officer Valline, could not have been more remote from his mind the evening of July 15, 2004. The sole material fact of this cause of action, Officer Valline's subjective intent, is not in dispute. Since he was consumed by the events unfolding before him, plaintiff cannot show that "but for" her letter, Exhibit E, and its contents, Officer Valline would not have used deadly force on July 15, 2004. Her complaint then falls because revenge was the narrow path she chose to prove that Officer Valline was acting outside the course and scope of his employment. The truth is, survival,

not revenge, motivated Officer Valline. Since Officer Valline was acting within the course and scope of his employment as a Tribal Police officer, he is immune from suit by reason of the umbrella of the Tribe's sovereign immunity. The First Amendment retaliation claim must be dismissed for the want of jurisdiction. *See, Snow, supra* at 1319, *Chemehuevi, supra* at 1051. *See also, Linneen, supra* at 492. Congress has still not abrogated tribal sovereign immunity for the acts of tribal officials who, like Officer Valline, act within the course and scope of their official duties. *U.S. v. Oregon, supra* at 1013.

**B. For The Same Reasons Explained Above, Plus, Plaintiff's Fourth Amendment Claim Must Also Be Dismissed for the Want Of Jurisdiction**

Plaintiff's Fourth Amendment claim is in part, that she was handcuffed in retaliation for the exercise of her letter writing, First Amendment activities. The claim is identical to her First Amendment claim. But for her letter, Exhibit E, and its contents, plaintiff would not have been handcuffed. Amended Complaint ¶ 34. Since the claim is the same, so is the response. As explained above, a claim that Officer Valline had in mind at any time the evening of July 15. 2004, any thoughts about a letter written May 30, 2004, is pure fiction.

Plaintiff's Fourth Amendment, excessive force claim, is that Officer Valline aided in the handcuffing of her and helped on two occasions, put her in his police car for no good reason. Amended Complaint ¶ 23. She also includes here in the unlawful Fourth Amendment restraint, that Officer Valline kept her from her son while he was lying on the ground after she arrived at the scene, and then later while she was in the police car.

The evidence is, however, that the plaintiff was handcuffed by Chief Pennock. SOF 23. The evidence is also that Officer Valline did not keep the plaintiff from assisting her son after the shooting. She got up from him of her own accord and others restrained her and kept her away thereafter. SOFs 22, 23.

The Court has two divergent stories to sort. Since the plaintiff's version is not corroborated, it may be rejected. Applying the law to the corroborated facts, the Fourth Amendment claim must be dismissed as there is no proof of revenge and Officer Valline exerted no force upon the plaintiff. No excessive force claim, therefore, may lie. *See, Sariciar v. Katz,*

533 U.S. 194, 211, 121 S.Ct. 2151, 150 L.Ed.2d. 272 (2001) (Ginsberg, J., concurring).

**C. Qualified Good Faith Immunity Also Requires Dismissal**

Tribal officials are also entitled to qualified good faith immunity from suit. *See, Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 509 (1991); *Davis v. Keplin*, 18 ILR 6148 (Turtle Mtn. Tr. Ct., 9/6/91). Officer Valline's qualified good faith immunity is also inseparable from the discussion of the previous two sections. The question must be decided at the earliest possible part of a case, *Scott v. Harris, supra* at 1773, n.2, *Harris* also enables courts to address, first, the underlying constitutional question if that is the most expeditious and direct route for resolving the qualified immunity defense. *Id.* at 1774.

The approach works, here, based upon the discussion contained in the preceding two sections. As clearly demonstrated, there was no retaliation, whether with respect to the First or Fourth Amendment. The plaintiff was also not handcuffed or restrained by Officer Valline. No inquiry, therefore, need be made into the question of whether the constitutional right relied upon was so well known any police officer should have known he was acting outside the course and scope of his official duties, because no constitutional rights of the plaintiff were violated in the first place. Furthermore, as explained *supra,* pages 12 and 16, since the plaintiff insists Officer Valline was acting within the course and scope of his duties, any claim he violated her constitutional rights is negated. Officer Valline is immune from suit, whether the immunity, derivative from the Tribe, is absolute or qualified. *See, Imperial Granite Co., supra* at 1272.

**D. *Bivens* Fails For, *Inter-Alia*, The Want of Federal Action**

*Bivens* requires a showing of Federal action and proof the United States Constitution has been violated. *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1337,1338 (9th Cir., 1987). For the reasons stated in each of the preceding sections, the plaintiff's *Bivens* cause of action falls because the Constitution was not violated.

The other element of *Bivens* requires proof Officer Valline was a federal actor on July 15, 2004. Since he was not an employee, *per se*, of the Federal government, *see,* amended complaint, p. 2; 1, 2, the question is whether the Federal government had so insinuated itself into the operation of the Tribe's police department to transform Officer Valline's police work on the Reservation into

federal action for purpose of assigning *Bivens* liability. If not, the *Bivens* claim, the entire basis of the amended complaint, must be dismissed for the want of Federal action. *See, Dry v. U.S.*, 235 F.3d 1249 (10th Cir., 2000).

While the plaintiff relies, in her amended complaint, upon the proposition that Officer Valline was a Federal actor, she has virtually no information at her disposal to support the allegations in her pleadings of Federal action on the part of Officer Valline, SOF 31; Boney depo., pp., 368; 4-25, 369; 1-6, 373; 11-15, including the allegations in her amended complaint, that Officer Valline was acting jointly with the Federal government. Boney depo., pp. 369; 8-20, 373; 11-15. Thus, the plaintiff is left with only the fact of a so-called "638 Contract" to support her claim the Federal government had insinuated itself into the operation of the Tribe's Police Department to make Officer Valline a Federal actor.

Conversely, the Tribe was in control of its own police department, its Constitution, its Law and Order Code and retained its inherent criminal jurisdiction over its members. It had not ceded criminal jurisdiction to the Federal government at the time of the incident. Pennock Aff. ¶¶ 11-14; Reymus Aff. ¶¶ 3-5, 21. The Tribe hires, trains and pays its law enforcement officials, and they are subject to the Tribe's personnel policies and procedures. Pennock Aff. ¶ 14; Pennock depo., pp. 32, 33, 40, 59, 61-65, 76, 80, 83, 103, 104, 105, 108-110.

Correspondingly, Officer Valline was present on Tribal business having been dispatched to address the plaintiff's report that Boney, Sr., was again driving while drunk. Pennock Aff. ¶¶ 16, 17; 2 Valline depo., pp., 115, 116, 118; 18-25, 119. Officer Valline was present to enforce the Tribe's Law and Order Code, which prohibits drunk driving, was authorized to carry weapons, and was authorized to use them if, in the officer's opinion, there use was necessary. Pennock depo pp. 61, 62, 64; 20-24, 65; 1-5; Pennock Aff. ¶¶ 14, 15. Officer Valline was present at Lake Pasture at the direction and authorization of the Tribe to take care of Tribal business. Pennock depo. pp 182, 183; Reymus Aff. ¶¶ 5, 21; 2 Valline depo., pp., 115, 116, 118; 18-25, 119. At the end of the day, Boney, Sr., was cited by Chief Pennock under the Tribe's Law and Order Code. Pennock Aff. ¶ 22.

There was also nothing remarkable about Officer Valline's arrival at Lake Pasture Road on the Reservation to respond to the plaintiff's report of drunk driving to convert Officer Valline from

a tribal law enforcement officer into a Federal actor on July 15, 2004, *e.g.*, he was not a SWAT team member, not cross-deputized by the Federal government, he was not there to enforce Federal law. While the situation deteriorated once Boney, Sr., was found, this started out as a dispatch to handle, yet another, Boney family feud. Pennock Aff. ¶¶ 16, 17; Pennock depo. pp. 151-157, 158; 21-25, 159; 1-15, 168; 12-25, 169; 1-12, 179; 20-25, 180; 1-4. Boney Sr., was drunk again.

Not one of these undisputed facts framing Officer Valline's presence at Lake Pasture Road constitutes Federal action. He was present on Tribal business to enforce Tribal law and as a result, he was present as a Tribal Official. *Dry v. U.S., supra* at 1254, 1255.

The Federal government agrees that Officer Valline is not automatically a Federal actor. 25 CFR §§ 12.21 and 12.22 recognize that Tribal Police Departments are separate and distinct from the BIA. Tribal law enforcement officials operating under BIA contracts are not automatically commissioned as Federal officers and BIA officers may enforce tribal laws only with the permission of the Tribe. On the Walker River Paiute Tribal Reservation, the Tribe has not given the BIA authority to enforce the Tribe's Law and Order Code, or Constitution, except on a case by case basis. Reymus Aff. ¶ 3-5, 9. At the time of the incident, the Tribe had not given anyone else authority to enforce the Tribe's Law and Order Code. SOF 23.

Judge Hicks acknowledged this distinction in an Order he issued in *United States of America v. Lantry*, 03:06-CR-00186-LRH-RAM, Order dated 11/6/07, attached hereto. In this criminal case, a dispute arose over access to the personnel files the Walker River Paiute Tribe maintained on its police officers. The defendant wanted the Federal government to produce the personnel files of the Walker River Paiute Tribal police officers who were listed to testify at trial. Judge Hicks denied the request unless it could be shown that these police officers had been specifically commissioned as Federal officers by the BIA, because the Tribe's Police Department is separate and apart from the Federal government.

Thus, the BIA does not provide an automatic nexus from which the Federal government might insinuate itself into the law enforcement activities of the Tribe's police department. Absent specific commissions as Federal officers, the personnel files the Tribe keeps on its police officers belong to the Tribe and the Tribe's dominion is exclusive. Plaintiff's reliance upon the BIA to

supply her nexus from which an insinuation of Federal presence can be shown is unavailing.

*Dry v. U.S., supra*, also requires a finding that Officer Valline was not a *Bivens* Federal actor. There, several tribal police officers allegedly deprived the plaintiffs of their liberty without due process of law in derogation of their Fourth and Fifth Amendment rights of the United States Constitution. The plaintiffs also alleged that certain tribal officials "'deliberately, intentionally, and maliciously'" committed multiple intentional torts against them. *Id.* at 1252. The Court understood the plaintiffs were asserting a *Bivens* claim.

Specifically, the plaintiffs were arrested for distributing literature during a Labor Day festival on tribal grounds in 1995. They were detained for several hours and then released after being charged with a number of crimes in the nature of disturbing the peace and interfering with a police officer or resisting arrest. *Id.* at 1251. Analyzing the *Bivens* claim, the Tenth Circuit recalled *Wheeler* where it states: "It is undisputed that Indian tribes have power to enforce their criminal laws against tribal members." *Wheeler v. U.S.,* 433 U.S. 313, 322, 985 S.Ct. 1079 (1978); *Dry v. U.S., supra* at 1254. The Court in *Dry* also noted 25 U.S.C. § 1301(2) of the Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq*., where the powers of self-government possessed by the Tribes include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians...." 25 U.S.C. § 1301(2) quoted, *Dry v. U.S., supra* at 1254.

After confirming that the Choctaw Tribe had not waived this inherent right of sovereignty, the Tenth Circuit affirmed the dismissal of the case, holding that because the Tribal police officers were present to enforce Tribal criminal law, they were acting pursuant to Tribal authority rather than Federal authority. As a matter of law , Tribal law enforcement personnel were not Federal actors, there was no Federal action to support a *Bivens* cause of action and, therefore, the case had to be dismissed. *Id.* at 1255. Applying *Dry*, here, this case must also be dismissed because the plaintiff has no proof that the Tribe had in any way waived is inherent right to enforce its criminal laws over its members and Officer Valline was dispatched to enforce Tribal criminal law.

This Court noted, the Ninth Circuit will look at the four factors enumerated in its Order to determine whether there has been an insinuation of the Federal government with the picture. Order dated 1/18/07, p. 4. Their application yields the same result as in *Dry.*

In its Order, the Court already concluded that the element of a symbiotic relationship does not appear, here. *Id.* at p. 12. No information has been uncovered since then to require departure from that determination. Turning to whether police work is traditionally reserved for the government, this Court, here, said it was. It would be hard to assert otherwise. This is not the end of the inquiry. Not just any government will do. Where the claim is *Bivens*, the governmental function must be one which is typically reserved to the Federal government. *See, e.g., Vincent v. Trend Western Technical Corp.*, 828 F.2d 563, 568, 569 (9th Cir. 1982) (whether the activity lies in the exclusive prerogative of the State or Federal government). On the Tribe's Reservation lands, however, as a matter of law, this finding cannot be made. As *Dry, Wheeler* and their progeny reveal, tribal criminal law enforcement is an aboriginal prerogative of the Tribe when, as here, sovereignty has not been waived. Officer Valline was not present at Lake Pasture Road, as a surrogate of the Federal government. Dispatched to enforce Tribal criminal law, the Federal government was ousted because the Tribe occupied the field. His presence was in furtherance of a function inherently Tribal. Reymus Aff. ¶¶ 20, 21; Pennock Aff. ¶¶ 12, 16, 17.

Were it the case that Tribal police officers are Federal actors because they perform a function on the Reservation typically performed by the Federal government, the holding would in effect amount to a back door defeasance of Tribal sovereignty by inserting the United States Constitution on to the Reservation. *Dry* and *Talton v. Mayes,* 163 U.S. 363, 382-285, 165 S.Ct. 1986, 41 L.Ed. 196 (1896) make clear, the United States Constitution does not apply to Tribes on their land. Tribal police officers are Federal actors merely because the Tribes accept Federal dollars to run their police departments, every time a tribal law enforcement officer takes action such as handcuffing a suspect who then claims excessive force, the United States Constitution could be evoked and correspondingly imported by implication upon Tribal lands. Since most tribes operate their police departments with 638 Contract funds, Reymus Aff. ¶ 13, the net effect would be a wholesale invasion of Tribal lands by the United States Constitution and a corresponding diminution of sovereignty that would inevitably occur through the back door of *Bivens*. Tribes would be astonished if this were the case. Reymus Aff., ¶¶ 12, 13.

There are several more problems, however, with a finding of Federal action under *Bivens*

based upon the acceptance of 638 Contract dollars and the corresponding conditions they bring. First, the 638 Contract provides that it has no effect upon tribal sovereignty, which is being preserved. 638 Contract, Section 5, p. 31, , Exhibit B, to the defendant's reply, Court document No. 16, attached hereto as Exhibit 5. Also, it is well settled that tribal sovereignty cannot be defeated by implication. *Santa Clara Pueblo v. Martinez, supra* at 59. Moreover, given the widespread acceptance of 638 Contract monies to run police departments and, therefore, the corresponding wholesale intrusion of the United States Constitution through tribal police activity, if the acceptance of 638 Contract funds is sufficient to convert Tribal police departments into Federal actors, there would have been no reason to adopt the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1301, *et seq*., in the first place. It was in significant part because the United States Constitution is inapplicable to Tribal lands that ICRA was adopted. *Id.* at 56-58. Absent, therefore, some extraordinary circumstances not present here such as perhaps a joint Federal/Tribal Federal sting operation, *Bivens* has no place on the Reservation when a Tribal officer is trying investigate yet another Boney, Sr., drunken incident.

As for the impact of government regulations upon Officer Valline's actions, as explained in great detail, above, they had none. The Federal government exercised no operational control over Tribal police departments. Except for the fact of funding, the Federal government was non-existent on an operational basis, the level at which Tribal Police Officers like Officer Valline operated. This element, therefore, must not augur for a finding of Federal action.

Finally, the mere fact of Federal funding with conditions attached, itself does not create a Federal actor out of a Tribal official. *Vincent v. Western Trend, supra* at 567. Despite the attachment of conditions to the Federal funds, the Federal government exerts no operational control, *per se*, on the Tribe's police department, as explained, *supra.*

In the final analysis, if the mere presence of Federal dollars through the execution of a 638 Contract were to convert Tribal Police Officers into Federal actors, why stop with just police officers? The Tribes receive Federal dollars for other activities on the Reservation. They, too, have conditions attached. Reymus Aff. ¶¶ 10-12. Why, then, wouldn't these employees of the Tribe also be Federal actors, thereby subject to the constraints of the United States Constitution?

Whether or not *Bivens* were extended that far, if the mere presence of Federal dollars through the execution of a 638 Contract were to convert police officials into Federal actors, the effect would be to turn Tribal sovereignty on its head and inject the United States Constitution into the aboriginal affairs of the Tribe, the Tribe's right to exercise criminal jurisdiction over its membership. This was not and expressly could not be the effect of the execution of a 638 Contract and the acceptance of Federal dollars under the contract. Reymus Aff. ¶¶ 10-13.

There is, therefore, no Federal action, here, to support *Bivens.* Officer Valline was not acting on behalf of the Federal government at any time of July 15, 2004. Since the entire complaint is based upon *Bivens*, it must be dismissed.

**CONCLUSION**

Officer Valline regrets that deadly force had to be used. It is sad that a young person has died. Officer Valline wishes it were not so. That being said, summary judgment is in order because the material fact of this case, Officer Valline's subject intent, is not in dispute. He feared for his life and took action when it is undisputed the two Boneys had gotten to with 48 inches and 15 inches of him. There is no credible proof Officer Valline handcuffed or even touched the plaintiff. The plaintiff admits Officer Valline acted within the course and scope of his employment. He, therefore, falls under the protection of the Tribe's sovereign immunity from suit, thereby ousting the Court of jurisdiction to hear this case. Even if the plaintiff's uncorroborated version of the events were true, the case must fail for the want of Federal action. It is uncontroverted that Officer Valline was a tribal official, and tribal officials are not Federal actors, here. *Bivens* does not lie as a matter of law.

The motion for summary judgment may providently be granted in favor of Officer Valline.

Dated this 11th day of March, 2008.

Zeh & Winograd

By : /s/Charles R. Zeh

*Attorney of Record for Walter Valline*

**CERTIFICATE OF SERVICE**

It is hereby certified that service of the foregoing WALTER VALLINE'S POINTS & AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56, FRCP was made through the Court's electronic filing and notification or, as appropriate, by sending a copy thereof by first-class mail from Reno, Nevada, addressed to the following addressee(s) on March 11, 2008.

Mitchell C. Wright
325 West Liberty Street
Reno, NV 89501

/s/Charles R. Zeh

Charles R. Zeh