UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

RONALD COLBERT and JERRI COLBERT,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, KANDIS MARTINE, and P.V. HOLDING CORP., d/b/a BUDGET RENT-A-CAR SYSTEM, INC., a foreign corporation,

Defendants.
_____/

CASE NO. 3:09-cv-998-J-20JRK

DEFENDANT UNITED STATES OF AMERICA'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

Defendant, the UNITED STATES OF AMERICA, through its counsel the United States Attorney, Middle District of Florida, moves for dismissal pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Further, pursuant to Rule 56(c), Defendant moves for summary judgment for on the grounds that Plaintiffs cannot rebut the presumption of negligence that Plaintiff Ronald Colbert was the sole and proximate cause of the accident and resulting injuries, if any, stemming from the accident.

INTRODUCTION

Plaintiffs filed this action against the United States of America, pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, alleging that the United States is responsible for the alleged negligent acts of Defendant Kandis Martine in causing a motor vehicle accident on April 2, 2007, which resulted in

injury to the Plaintiffs. Doc. 1. Plaintiffs contend that, at the time of the accident, Defendant Martine, an employee of the Navajo Nation, was acting within the course and scope of her employment pursuant to a contract authorized by the Indian Self-Determination and Education Assistance Act (ISDEAA). Doc. 1 at ¶ 1. As a result, Plaintiffs contend that Ms. Martine is deemed to be an employee of the United States for purposes of the FTCA under these circumstances. Doc. 1 at ¶ 4. However, Plaintiffs cannot demonstrate that this Court has subject matter jurisdiction pursuant to the FTCA because, at the time of the accident, Defendant Martine was not performing work pursuant to an ISDEAA contract. Hence, Defendant Martine cannot be deemed to be an employee of the United States for purposes of the FTCA. Thus, this action must be dismissed for lack of subject matter jurisdiction. Further, Defendant is entitled to judgment as a matter of law because Plaintiff Ronald Colbert was the sole and proximate cause of the accident at issue.

FACTUAL BACKGROUND

1. **The Accident**.

On April 2, 2007,[1] Plaintiffs were involved in a motor vehicle accident at the intersection of Main and Forsyth Streets in downtown Jacksonville, Florida. Doc. 1 at ¶¶ 21-24. Just before the motor vehicle accident occurred, Defendant

[1]Plaintiffs contend that they incorrectly alleged in the Complaint that the accident occurred on April 2, 2008, the date listed on the traffic crash report, rather than April 2, 2007.

Martine was traveling the wrong way on Main Street, which is a one-way street. Exhibit 1 (Deposition of Kandis Martine) at p 17, ln 15-18. Lucy Laughter Begay, an employee of the Navajo Nation's Children and Family Services Program, was a passenger in the vehicle driven by Defendant Martine. Martine Depo at p 37, ln 3-7. At the time of the accident, the driver in the vehicle in front of the Plaintiffs' vehicle, made a right turn from Forsyth Street onto Main Street. Id. at p. 26, ln 12-25. After the driver turned right onto Main Street and stopped without colliding head-on with Defendant Martine's vehicle, Mr. Colbert, who was also turning right onto Main Street closely behind the vehicle in front of him, contends that he was unable to stop before colliding with Mr. Murphy's vehicle. Id. Plaintiffs contend that they were injured in the collision. See generally Doc. 1 (Complaint).

2. **The Contracts Between the Navajo Nation and DOI**.

There are over 560 federally recognized Indian tribes. The Navajo Nation is one such federally recognized Indian tribe. The capitol of the Navajo Nation is located in Window Rock, Arizona, although the reservation covers the corners of three states: Arizona, New Mexico, and Utah. Further, the Navajo Nation is the largest reservation in the United States, covering more than 27,500 square miles.

Effective January 1, 2006 through December 31, 2010, the United States Department of Interior (DOI), Bureau of Indian Affairs (BIA) and the Navajo Nation entered into a three-year contract pursuant to the ISDEAA, which is commonly referred to as a 638 Contract. Exhibit 2 (Excepts of Contract No.

CTN00T780A7 hereinafter Social Services Program Contract) at p 005, ¶ (b)(2). The BIA entered into this 638 Contract with the Navajo Nation for the purpose of administering a Social Services Program. Id. at p 2, ¶ (a)(2). Section O of the Fiscal Year 2007 Annual Funding Agreement (AFA) provides in pertinent as follows:

> For purposes of Federal Tort Claims Act [FTCA] coverage, the Navajo Nation and its employees are deemed to be employees of the Federal government while performing work under the contract. This status is not changed by the source of the funds used by the Navajo Nation to pay employees salary and benefits unless the employee receives additional compensation from performing covered services from anyone other than the Navajo Nation.

In addition, the Scope of Work (SOW) provides, in pertinent part, that the "[s]ervices under this contract shall be performed per the 'Navajo Division of Social Services Manual for '638 Contracted Social Services Programs. Id. p 093. Further, the SOW sets forth the various social services to be provided to the members of the Navajo Nation. Id. p 093-094.

In addition, for the calendar year 2007 the BIA and the Navajo Nation entered into a 638 Contract for the purpose of administering the Division of Social Services, Navajo Children and Family Services Program, pursuant to Indian Child Welfare Act (ICWA), 25 U.S.C. § 13 (2009). Martine Depo at Exhibit 6 (Excerpts of Contract No.CTN00T780A8 hereinafter the ICWA Program Contract) at p 1, ¶ a(2). Section O of the Fiscal Year 2007 AFA ICWA Program Contract regarding FTCA coverage is the same as that contained in the Social Services Program Contract. Martine Depo at Exhibit 5 at § O. The SOW for the

ICWA Program Contract includes 11 enumerated activities to be performed, including "[r]equest coordination of legal services from the Navajo Nation Department of Justice on behalf of Navajo children and families, when applicable." Id. at Scope of Work.

3. **The Trip To Jacksonville**.

During the relevant time, Defendant Martine was employed by the Navajo Nation DOJ in Window Rock, Arizona, as staff attorney. Exhibit 3 (Answers to Defendant United States of America's First Set of Interrogatories to Defendant Kandis Martine) at No. 3. As a staff attorney, Defendant Martine provided legal services to several Navajo Nation Divisions. Martine Depo at p 67, ln 25, p 68, ln 1–3, 7-14. Defendant Martine testified that the reason she was in Jacksonville was because her "client", the Navajo Children and Family Services Program, objected to an adoption of a Navajo child by a non-Navajo family pending in the Fourth Judicial Circuit in and For Duval County. Martine Depo at p 14, ln 18-25, p 15, ln 1-3. Ms. Martine contends that she was in Jacksonville to guide and assist a local Jacksonville contract attorney retained to represent the interests of the ICWA Program at Defendant Martine contends that. Exhibit 3 at Interrogatory Nos. 6 and 7.

Ms. Martine testified that her travel to Jacksonville was approved by the Assistant Attorney General of the Navajo Nation Department of Justice. Id. at Interrogatory No. 5. Notably, Ms. Martine was not approved for or authorized for a rental car while in Jacksonville. Martine Depo at p. 65, ln 10-11.

MEMORANDUM

I. Standard of Review on Motion to Dismiss for Lack of Subject Matter Jurisdiction.

A district court must dismiss an action where the court lacks jurisdiction over the subject matter. Fed.R.Civ.P. 12(b)(1) and 12(h)(3). The district court's subject matter jurisdiction can be challenged at any time in civil proceedings. As a result, a party may attack the court's subject matter jurisdiction at any time in the proceedings. Kontrick v. Ryan, 540 U.S. 443, 455, 124 S.Ct. 906, 915 (2004); In re: CP Ships Ltd. Securities Litigation, 578 F3d 1306, 1311 (11th Cir. 2009); Scarfo v. Ginsberg, 175 F3d 957, 960 (11th Cir. 1999).

Challenges to the court's subject matter jurisdiction can be facial or factual. In re: CP Ships Ltd. Securities Litigation, 578 F3d at 1311; Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990). Facial attacks on the complaint require the court merely to determine if the plaintiff has sufficiently alleged a basis of the subject matter jurisdiction, and the allegations in the complaint are taken as true. Id. at 1311; Dunbar, 919 F.2d at 1529. Factual attacks challenge the existence of subject matter jurisdiction irrespective of the pleadings, and matters outside the pleadings are considered. Id. at 1311; Dunbar, 919 F.2d at 1529. No presumptive truthfulness attaches to the plaintiff's allegations in a factual attack, and the existence of disputed material facts will not preclude the trial court from evaluating the merits of the jurisdictional claims. Dunbar, 919 F.2d at 1529.

Because matters outside the pleadings are being considered here, this constitutes a factual attack on the Court's subject matter jurisdiction. Although a defendant may submit matters outside of the pleadings to show that an individual is not a federal employee acting within the course and scope of employment, the court's order should be a dismissal pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction if the claim. See Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002) (concluding that attachment of exhibits to motion to dismiss for lack of subject matter jurisdiction does not convert motion to a summary judgment motion). See also Rayner v. United States, 760 F.2d 1217, 1281 n.2 (11th Cir. 1985) (concluding that if a court accepts the Feres v. United States doctrine defense challenging the subject matter jurisdiction of the court, it "should label its dispositive order as a dismissal for lack of jurisdiction, as opposed to a summary judgment, which connotes a decision on the merits").

II. Plaintiffs Cannot Establish Liability Under the FTCA.

A. Sovereign Immunity

The United States is clothed with sovereign immunity and cannot be sued in any court, state or federal, unless sovereign immunity has been specifically waived. United States v. Mitchell, 445 U.S. 535, 538 (1980)(quoting United States v. Sherwood, 312, U.S. 584, 586 (1941)(stating that "the United States, as a sovereign, is immune from suit save as it consents to be sued."). A court has jurisdiction over the United States only under those circumstances where sovereign immunity has been expressly waived. McMahon v. United States, 342

U.S. 25, 27 (1951). A waiver of sovereign immunity cannot be implied and must be unequivocally expressed. Lane v. Pena, 518 U.S. 187, 192 (1996). Further, because sovereign immunity can only be waived by the sovereign, the circumstances of its waiver must be observed scrupulously, and not expanded by the courts. Suarez v. United States, 22 F.3d 1064, 1065 (11th Cir. 1994). This means that the condition under which sovereign immunity is deemed waived must be strictly construed in favor of the United States. Pena, 518 U.S. at 192.

Under the FTCA, the United States has waived sovereign immunity in limited circumstances for claims for money damages against the United States for injury, death or loss of property caused by the negligent or wrongful act or omission of a federal employee. See 28 U.S.C. § 2671 *et seq.* (2009). Pursuant to the FTCA, the remedy against the United States is the exclusive remedy for personal injury and/or loss of property claims arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment. See 28 U.S.C. § 2679(b)(1). This remedy is exclusive of any other civil action or proceeding for money damages based upon the same subject matter against the employee. Id. Hence, the FTCA immunizes a federal employee from liability for his/her negligent or wrongful acts or omissions committed while acting within the scope of his employment. See Flohr v. Mackovjak, 84 F.3d 386, 390 (11th Cir. 1996).

1. **The FTCA Has Been Extended to ISDEAA Contracts.**

By Pub. L. 101-512, § 314 (codified at 25 U.S.C. §§ 450f, Historical and

Statutory Notes), Congress expanded the United States' liability by extending FTCA coverage to ISDEAA contract employees acting within the scope of their employment in carrying out the contract or agreement. See Pub. L. 93-638, Jan. 4, 1975, 88 Stat. 2203, *codified at* 25 § U.S.C.A. 450 *et seq*. Section 314 of Pub. L. 101-512, as amended by Pub. L. 103-138, Title III, § 308, Nov. 11, 1993, 107 Stat. 1416, extended the waiver of sovereign immunity established by the FTCA to encompass negligence claims arising from ISDEAA contracted programs, providing that such claims would be deemed actions against the United States and defended by the Attorney General. See also 25 U.S.C.A. § 450f, Note (reprinting relevant section under title "Claims Resulting from Performance of Contract, Grant Agreement, or Cooperative Agreement; Civil Action Against Tribe, Tribal Organization, etc., Deemed Action Against United States; Reimbursement of Treasury for Payment of Claims"). Through various annual appropriations acts, Congress has amended the ISDEAA to extend FTCA coverage to specified tribal self-determination activities. Specifically, Congress has provided:

> With respect to claims resulting from the performance of functions during fiscal year 1991 and thereafter ... under a contract, grant agreement, or any other agreement or compact authorized by the Indian Self-Determination and Education Assistance Act of 1975 ...an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior ... while carrying out any such contract or agreement and its ***employees are deemed employees 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 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, *reprinted at* 25 U.S.C.A. § 450f, note (West Supp. 1996) (emphasis added).

The extension of the FTCA was expressly limited to "claims resulting from the performance of functions . . . under a contract, grant agreement, or any other agreement or compact authorized by [ISDEAA]...." Id. The end result of this extension is that tribal employees employed and acting to fulfill the substantive functions authorized by the contract and ISDEAA are considered to be federal employees solely for purposes of the FTCA and can only be sued as such under the FTCA subject to the protections afforded government employees under the Act. See Big Owl v. United States, 961 F. Supp. 1304, 1307-08 (D.S.D. 1997).

The extent of the United States' waiver of immunity and the federal jurisdiction provisions of the FTCA "must be interpreted solely by reference to federal law." Lopez v. United States, 998 F. Supp. 1239 (D. N.M. 1998) (citing Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977)). In other words, the terms of the statutory waiver of sovereign immunity, as defined under federal law, determine the parameters of federal court jurisdiction over suits brought against

the United States and that construction must be construed in favor of the United States.

2. **ISDEAA**

The ISDEAA was enacted to "permit an orderly transition from Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. § 450a(b). Congress stated the purposes of the ISDEAA in this language: "To provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes." P.L. 93-638. Thus, through the ISDEAA, Congress sought to provide a mechanism to promote tribal autonomy and self-determination by allowing tribes to operate programs previously operated by the federal government.

The ISDEAA provides that the Secretary of the Interior (and Health and Human Services) is authorized to enter into ISDEAA contracts for programs which the Secretary was authorized to administer for the benefit of Indians. 25 U.S.C. § 450f Nothing in ISDEAA gives the Secretary the authority to contract with tribes for activities not provided for by the agency or authorized by other

federal laws. Congress was well aware of this limited contracting authority under the ISDEAA when it extended the applicability of the FTCA to ISDEAA contracted programs. By extending the FTCA coverage to Native American tribes and its members carrying out functions previously provided by the BIA, Congress wanted the United States "to maintain the same level of exposure associated with the operation of federal Indian programs...that it had before the enactment of" the ISDEAA. S. Rep. 100-274, 1988 U.S.C.C.A.N. 2620, 2646-2647.

As defined in 25 U.S.C. § 450b(j), a "'self-determination contract' means a contract . . . between a tribal organization and the appropriate Secretary for the planning, conduct and administration of programs or services which are otherwise provided to Indian tribes and their members pursuant to Federal law. . . ." The Secretary is empowered to contract for programs "which the Secretary is authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto." 25 U.S.C. § 450f(a)(1)(B).

B. Because Defendant Kandis Martine Was Not Performing Work Under the Contract, She Is Not Deemed an Employee of the BIA.

In this case, self-determination or 638 contracts, pursuant to the ISDEAA, exist between the Nation and the United States–through the Untied States Secretary of Interior (hereinafter the "Secretary"). The Secretary contracted with the Navajo Nation for the purpose of administering a Social Services Program. See Exhibit 2. In addition, the Secretary entered into a 638 contract with the Navajo Nation for the purpose of administering ICWA through the Social Services

Program. See Martine Depo at Exhibits 5 & 6. Hence, the Navajo Nation is deemed part of the BIA while carrying out the 638 Contracts. However, Defendant Martine is not deemed an employee of the BIA because she was not employed by these Programs, much less employed to provide social services at these Program. Rather, Defendant Martine was employed by the Navajo Nation Department of Justice, which is not operated by the Navajo Nation pursuant to a 638 Contract. Hence, Defendant Martine was not deemed an employee of the BIA at the time of the accident.

Pursuant to the ISDEAA, a tribal employee may be deemed to be a federal employee for certain tort claims. See Hinsley v. Standing Rock Child Protective Services, 516 F.3d 668, 672 (8th Cir. 2008). Specifically, a tribal employee may be deemed an employee of the BIA "while acting within the scope of their employment in carrying out the contract or agreement." 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, *reprinted at* 25 U.S.C.A. § 450f, note. Thus, it is clear that tribal employees are only deemed to be federal employee under certain circumstances, not in all aspects of their employment with the tribe. See Allender v. Scott, 379 F.Supp 2d 1206, 1211 (D.N.M. 2005)(stating "[t]ribal members are not federal employees because they operate under ISDEAA contracts. However, they may be deemed federal employees for the [FTCA].") Thus, tribal employees are not treated as federal employees except when a claim results from the performance of functions for the purposes of "carrying out the

contract" with the United States. See Bob v. United States, 2008 WL 818499, at *2-*3 (D.S.D. Mar 26, 2008) (finding that the 'tribal officers were not, at the time of the incident, federal law enforcement officers for the purpose of the FTCA" and granting the United States motion to dismiss for lack of subject matter jurisdiction). For that reason, the determination of whether Defendant Martine, as an attorney of the Navajo Nation Department of Justice, is a federal employee for the purposes of the FTCA is dependent on the scope of the particular contract under the services are carried out.

Here, the very existence of the Court's jurisdiction over the United States turns on whether Defendant Martine, an employee of the Navajo Nation Department of Justice, is deemed a federal employee acting within the scope of her employment for purposes of the FTCA. Whether a tribal employee may be deemed a federal employee involves a two part analysis. Part one of the analysis involves a determination as to whether, based upon federal law, the tribal employee is a federal employee. If yes, part two of the analysis involves a determination of whether the tribal employee was acting within the scope of his employment pursuant to the applicable state law. Allender, 379 F.Supp 2d at1211; Adams v. Tunmore, 2006 WL 2591272 at *3(E.D. Wash Sept. 8, 2006).

1. Because Defendant Martine Was Neither Employed by The 638 Contracted Programs nor Employed to Perform Social Services, She is not Deemed an Employee of BIA.

Defendant anticipates that Plaintiffs (and perhaps Defendant Martine) will argue that because the parties to the 638 Contract are the Navajo Nation and the

Secretary, any Navajo employee who is performing any function under the 638 contract, whether specifically employed by the 638 Program, is covered by the FTCA. To the contrary, this is not the case. While it is true that Defendant Martine was a Navajo Nation employee at the time of the incident, she was not performing functions under the contract because she was neither an employee of the Social Services Program nor the ICWA Program. Rather, tribal employees of a program operated under a 638 contract are deemed employees of the BIA while performing work under such contract .

An issue nearly identical to the issue raised in the instant case arose in Tunmore, a case involving a grant awarded to a tribe by the BIA. In Tunmore, an employee hired by a tribal school, which was operating under a grant from the BIA, was deemed a federal employee because, at the time of the motor vehicle accident, the driver was acting within the scope of her employment pursuant to a grant awarded to the tribe by the BIA. See Tunmore, 2006 WL 2591272 at *3. There, the employee of Pascal Sherman Indian School (PSIS)– which was operated by the Confederated Tribes of the Colville Reservation (Colville Tribe) pursuant to a Tribally Controlled School Act (TCSA) grant from the BIA– was involved in a motor vehicle accident while driving a vehicle owned by the tribe and assigned to PSIS for school use. PSIS authorized the PSIS employee to operate the vehicle. Id. at *1.

The federal court, over the United States' denial of certification to the employee, concluded that the driver was deemed "a federal employee because

at the time of the incident she was an employee of the PSIS performing functions under the TCSA Grant." 2006 WL 2591272 at *3. "'[T]he purpose of the Grant [was] to allow the Colville Tribe and the PSIS to 'defray expenditures, for education related activities[.]'" Because the court found that the driver was "employed to educate children at the PSIS, which [was] operated by the Colville Tribe pursuant to a TCSA Grant," the driver was deemed an employee of the BIA. Id. The court concluded that the source of the driver's stipend "legally immaterial to whether [she] was performing functions under a TCSA Grant." Hence, the court concluded that the driver was deemed a federal employee at the time of the accident as she was "performing functions under the TCSA Grant." Id. Significantly, the court focused on employment with the school rather than simply being employed by the tribe.

In this case, it is beyond dispute that Defendant Martine was neither an employee of the Navajo Social Services Program nor the ICWA Program. Rather, Ms. Martine was a staff attorney with the Navajo Department of Justice and the Social Services Program and/or the ICWA Programs were her clients. Hence, Ms. Martine did not provide social services to Indian children or families. Further, unlike in Tunmore, Defendant Martine was not an employee of a 638 Program performing functions under such contract.

Here, like in Tunmore, the Navajo Nation and the DOI were the parties to the 638 contracts. Assuming *arguendo* that the Navajo Nation was the contractor, then the Navajo Nation is deemed part of the BIA while carrying out

the 638 Contract. However, Defendant Martine is not deemed an employee of the BIA because she was not employed to provide social services under the 638 Contracts which were operated by the Navajo Nation. As a result, Defendant Martine is not deemed a federal employee. Thus, Plaintiffs cannot show that Ms. Martine was an employee of an ISDEAA contracted program carrying out the functions of such the contract, as she was employed by the Navajo Nation Department of Justice, a non-contracted program. Simply put, Plaintiffs cannot show that general legal services are a contractible aspect of an ISDEAA program, as a function "otherwise provided to Indian tribes and their members pursuant to Federal law" or that the Secretary was "authorized to administer for the benefit of Indians under the Act of November 2, 1921 (42 Stat. 208), and any Act subsequent thereto." See 25 U.S.C. § 450f(a)(1)(B).

Alternatively, even if Defendant Martine need not be employed by the Social Services or ICWA Programs, she must, at the very least, be employed to perform social services work under the direction of the 638 contracted programs. Andrade v. United States, 2008 WL 4183011 (D. Ariz. Sept 8, 2008). In Andrade, the BIA contracted with the Colorado River Indian Tribe (CRIT) "for the purpose of administering a Social Services Program, *i.e.*, performing work under the 638 contract." 2008 WL 4183011 at *7. Because of staffing shortfalls at the CRIT Social Services program, CRIT brought in CRIT Child Protective Services (CPT) to assist CRIT Social Services in performing social services. The court found that CRIT Social Services "exercised supervisory control over [CRIT] CPS

in a manner consistent with that of a principal-agent relationship," that "[CRIT] Social Services could step in at any point that Social Services believed [CRIT] CPS was acting improperly," and that "[CRIT] CPS worked at the direction of [CRIT] Social Services and was answerable to [CRIT] Social Services for placement of the foster minors." Id. at *8 Thus, the court concluded that, "to the extent the CRIT CPS and its employees assisted in carrying out the Tribe's social services program under the '638 contract," the CRIT CPS were deemed employees of the BIA. Id.

Here, unlike in Andrade, Defendant Martine was not brought in to assist the Social Services and/or the ICWA Programs in providing social services to members of the Navajo tribe. Rather, Defendant Martine was asked to accompany her client, *i.e.*, the Social Services and/or the ICWA Programs, to Jacksonville in order to provide legal advice and/or assistance to the local contract attorney. Further, neither the Social Services nor the ICWA Programs exercised any control over Defendant Martine, much less instructed her on what to do or how to do it. Defendant Martine's immediate supervisor was a Navajo Department of Justice attorney rather than anyone in the Social Services and/or the ICWA Programs. Exhibit 3 at Interrogatory No. 3. As a result, Defendant Martine was not performing work under either 638 Contract with the Nation.

2. Defendant Martine Was Not Authorized to Rent or Drive the Social Services or ICWA Rental Vehicle

Also, Defendant Martine testified that her travel to Jacksonville was authorized by the Navajo Department of Justice. Further, she testified that she was not approved for or authorized for a rental car during the trip to Jacksonville. Thus, here, unlike in Tunmore, Defendant Martine was neither authorized by the Navajo Social Services nor the ICWA Programs to operate a rental vehicle during the trip to Jacksonville. Further, Defendant Martine's travel was not specifically authorized by the Navajo Social Services or the ICWA Programs. Plaintiffs may argue that the Navajo Social Services or the ICWA Programs requested that Defendant Martine travel to Jacksonville and that funds from the 638 Contract paid for her travel. However, the source of the funds for travel are not legally significant. Tunmore, 2006 WL 2591272 at *3 (concluding the source of funds is not legally material).

3. Legal Services Not a Function Under the 638 Contracts.

The 2007 AFA is not and can serve as a grant of authority to conduct legal activities and to extend FTCA coverage to such activities. Rather, the AFA merely contains a description of what the Navajo Nation proposes to do in its overall Social Services and/or ICWA Programs–which can include descriptions of non-ISDEAA substantive activities. The AFA provides no support for the premise that Defendant Martine was acting within the scope of her particular employment as an employee of an ISDEAA contracted program and carrying out the terms or

functions of the ISDEAA contract at the time she engaged in actions causing or contributing to the accident at issue in this proceeding. See Garcia v. United States, et al., 2010 WL 2977611 at *18 (D.N.M. June 15, 2010)(citing Allender v. Scott, 379 F. Supp. 2d 1206, 1216-17 & n.12 (D.N.M. 2005)(stating "[e]mployees of the IPD [638 contract] are considered employees of the United States and covered under the FTCA only to the extent that they are carrying out the terms or functions of the 638 contract at the time of their alleged torts."); Hinsley., 516 F.3d at 672 (concluding tort claims against tribes or their employees, acting within the scope of their employment, and that arise out of the tribe's self-determination contract, are considered claims against the United States and are covered to the full extent of the FTCA).

Rather, the AFA supports the general premise that a substantive contract program or function must be specifically identified in a contract Scope of Work (SOW) and the AFA, and it is solely those functions for which the waiver of United States' immunity would cover negligent or wrongful acts or omissions. Any assistance Defendant Martine provided to her "client" - the Navajo Nation Social Services and/or ICWA Programs–was merely in support of the contracted program/functions as "professional services," in the form of authorized contract support costs.[2] 25 U.S.C. 450j-1(k)(7). The FTCA's extension is to the

[2]To the extent that Defendant Martine asserts, albeit without the requisite showing of personal knowledge, that ICWA ISDEAA funds are provided to Navajo Nation DOJ to "help pay for" legal work, but receives no salary from ICWA ISDEAA contract or program, her testimony supports that her roles is to merely provide professional contract support services to the contracted program. Martine Depo, p. 86,

contracted program/function and that extension is not further extended merely because some federal funds are used to provide general support to the contracted program, *i.e*., the FTCA is extended to the substantive contracted program - not contract support activities. An interpretation to the contrary would impermissibly extend the waiver of sovereign immunity to cover contract support functions such as the work of an accountant, an auditor, printing service providers, insurers, *etc*. See generally 25 U.S.C. 450j-1(k)(identifying the types of functions that can be funded as contract support costs included in a contract, contrary to the direct services funded per 450j-1(a)).

C. Plaintiffs Failed to Rebut the Presumption That Ronald Colbert is the Sole Proximate Cause of the Accident.

Defendant adopts and incorporates by reference the legal arguments and citations of authority contained in section C (pg. 11-19) of Defendants' Martine, PV Holding and Budget's Motion for Summary Judgment. (Doc. 44).

CONCLUSION

Based upon the foregoing arguments and citations of authority, Defendant Martine was not deemed a federal employee of the BIA for purposes of the FTCA. Thus, Defendant respectfully request that the Court dismiss the United States from this action. Alternatively, Defendant is entitled to summary judgment

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ln 18-25 - p. 87, ln1-7.

as a matter of law on the grounds that Ronald Colbert was the sole and proximate cause of the subject action.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of October, 2010, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following CM/ECF participants listed below:

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