UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Nathan Strei,

Plaintiff,

v.

Deputy Scot Blaine et al,

Defendants,

Civ. No. 12-1095 (JRT/LIB)

ORDER

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of 28 U.S.C. § 636(b)(1)(A), and upon Defendants John McArthur and Merlin Deegan's motion to substitute the United States in their place for the state common law claims against them.[1] A hearing on the motion was held on June 4, 2013. For the reasons outlined below, the Court grants Defendants' motion to substitute.

I. BACKGROUND

Plaintiff Nathan Strei brought this action against Defendants Deputy Scot Blaine, Investigator John McArthur, Officer Merlin Deegan, Nichole Myree Hensen, Joseph Merz and County of Becker alleging thirteen causes of action including: 1) several violations of 42 U.S.C. § 1983; 2) false imprisonment; 3) trespass to property; 4) trespass to chattel; 5) conversion; 6) civil theft; 7) malicious prosecution; 8) abuse of process; 9) defamation; 10) civil conspiracy; 11) negligence. (Am. Compl. [Docket No. 38] ¶¶ 27-40). Plaintiff's claims arise out of his arrest

[1] At the hearing, Defendants also noted that although the White Earth Tribe is not a named Defendant, to the extent that the claims at issue apply to the White Earth Tribe, the United States is the proper Defendant. For all of the reasons more fully explained below, the Court agrees

and removal on November 5, 2011, from real property in which he alleges he had a right to possession. (Id. ¶ 1). He alleges that he was wrongfully removed and detained and charged without probable cause or arguable probable cause. (Id.)

Plaintiff alleges that he and Defendant Hensen "were previously involved in a significant relationship and lived together." (Id. ¶ 11). During the relationship, they jointly purchased a home (the real property where the arrest and removal occurred) in August 2008 and both made mortgage payments to the home. (Id.) After the parties terminated their relationship in 2011, Plaintiff continued to live at the home. (Id.) Eventually, however, Defendant Hensen demanded that Plaintiff leave the home, which Plaintiff refused because he believed he had equal ownership in the home. (Id. ¶ 12).

Defendant Hensen filed an unlawful detainer action on August 3, 2011, which was eventually dismissed after the presiding Judge determined that "there was no landlord-tenant relationship, and that there was a dispute over ownership of the property." (Id. ¶ 13). Plaintiff alleges that rather than attempt to determine ownership through the courts, Defendant Hensen and her then boyfriend Defendant Merz changed the locks to the home. (Id. ¶ 14). Defendant Hensen also posted no trespassing signs. (Id.) In October 2011, Defendant Hensen began to contact law enforcement in an attempt to convince them to remove Plaintiff from the property. (Id. ¶¶ 15-17). When the police came to the property to discuss the matter with Plaintiff, he alleges he showed them documentation, including the unlawful detainer decision, demonstrating that he had a claim of ownership in the property. (Id. ¶ 17).

Plaintiff alleges that on November 5, 2011, Defendant Deegan returned to the residence, arrested Plaintiff, and removed him from the home. (Id. ¶ 19). Plaintiff was taken to jail

without being informed of what the charges against him were and remained there for more than 24 hours. (Id. ¶¶ 20-22). After being released, because he could not return to the home, he remained homeless for more than a month. (Id. ¶ 23). Although Plaintiff retained an attorney to defend against the criminal trespass charges against him, in January of 2012, the charge was voluntary dismissed by the prosecutor. (Id. ¶ 24).

Plaintiff seeks damages against Defendants for pain and suffering, "pain, mental and emotional distress, embarrassment and humiliation, the invasion of his person and property, loss of liberty, loss of property, economic losses, and . . . other losses." (Id. ¶ 25).

On January 11, 2013, the Court granted Plaintiff's motion to amend the complaint, which sought to add Kevin Miller as a Defendant. (See Order [Docket No. 37]). The claim against Miller alleges that he is a county prosecutor who advised law enforcement officers that Plaintiff had committed trespass and could be arrested. (See Am. Compl ¶¶ 5, 18).

On April, 24, 2013, the Pretrial Scheduling Order was amended for the second time to provide that discovery terminated on June 1, 2013. (See Docket No. 47).

On May 1, 2013, Defendants Merlin Deegan and John McArthur filed the present motion to substitute the United States. (See Docket No. 48).[2] On May 24, 2013, one business day before the scheduled hearing on the motion, Defendants filed a motion seeking permission to file a reply via two exhibits. (See Docket Nos. 55-56). The same day, the Court issued an order permitting Defendants to file a "reply and any exhibits in support of their motion . . . by 5:00 p.m. on May 28, 2013." (Order [Docket No. 58] at 1). The Court also permitted any party

[2] Although Defendants filed their supporting materials for the motion on May 1, 2013, Plaintiff did not file his memorandum in opposition to the motion until May 21, 2013—13 days after the deadline to do so. See D. Minn. LR 7.1(b)(2).

wishing to file a surreply to do so by 5:00 p.m. on May 31, 2013. (Id. at 1-2). Finally, to ensure that the Court would have sufficient time to consider the newly filed materials and prepare for the hearing, the Court struck the previously scheduled hearing for May 28, 2013 and rescheduled it for June 4, 2013. (Id. at 2). No party filed any additional written argument.[3]

II. DEFENDANTS' MOTION TO SUBSTITUTE

Defendants bring the present motion to substitute the United States as the defendant in place of Defendants McArthur and Deegan only as to the common law tort actions brought against them or their employer. (Mem. in Supp. of Substitution [Docket No. 50] at 1).[4]

Plaintiff's Amended Complaint alleges that "Defendant Investigator John McArthur, is and at relevant times hereto was a White Earth tribal police officer, who participated in the decision to arrest and detain Plaintiff on November 5, 2011." (Am. Compl. ¶ 6). As to Defendant Deegan, Plaintiff alleges that "Defendant Officer Merlin Deegan, is and at relevant times hereto was a White Earth tribal police officer, who arrested and detained Plaintiff, and booked him into jail on November 5, 2011." (Id. ¶ 7). Both Defendants are sued in their individual and official capacities. (Id. ¶¶ 6-7).

Defendants argue that, under the Federal Tort Claims Act (FTCA), "the United States is the only, exclusive, and proper defendant to a common law tort action arising out of the conduct of a government employee acting in the scope of his or her employment." (Mem. in Supp. of Substitution at 2-3) (citing 28 U.S.C. § 2679). The exclusiveness of remedies section indeed

[3] Defendants Becker County and Deputy Scot Blaine advised the Court that they are not taking a position on the motion for substitution. (See Letter to the Court [Docket No. 59]).

[4] Specifically, the claims at issue are counts 4 through 13: false imprisonment; trespass to property; trespass to chattel; conversion; civil theft; malicious prosecution; abuse of process; defamation; civil conspiracy; and negligence. (See Am. Compl. [Docket No. 38] ¶¶ 30-39). They do not seek to substitute the United States as the defendant for the civil rights § 1983 claims asserted against them.

supports Defendants' argument. See 28 U.S.C. § 2679(b)(1) ("The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government **while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee.** Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred." (emphasis added)); see also Anthony v. Runyon, 76 F.3d 210, 212-13 (8th Cir. 1996) ("These amendments—commonly known as the Westfall Act because they were a response to Westfall v. Erwin, 484 U.S. 292, 300, 108 S. Ct. 580, 585, 98 L.Ed.2d 619 (1988)—provide that an action against the United States is the only remedy for injuries caused by federal employees acting within the scope of their employment."). The only exception for this broad limitation is for an action "brought for a violation of the Constitution of the United States" or "brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized." 28 U.S.C. § 2679(b)(2).

In a case where an employee is sued within the exclusion provided by § 2679(b)(1), upon delivery by the service information, the Attorney General shall defend the employee. See 28 U.S.C. § 2679(c).

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court **shall** be deemed an action against the

> United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

Id. § 2679(d)(1) (emphasis added).

Thus, the Court has no discretion and must substitute the United States for the common law claims if it finds that: 1) Defendants McArthur and Deegan were employees of the United States at the time of the incident; and 2) they were acting within the scope of their office or employment with regard to the allegations made against them. See Forrest City Mach. Works, Inc. v. United States, 953 F.2d 1086, 1087 (8th Cir. 1992). Before addressing the merits of the motion, however, the Court first addresses Plaintiff's extraneous arguments that the motion is untimely and that Defendants have waived any immunity.

a. The motion to substitute is timely

Plaintiff argues that this motion comes at a late stage in the case and that "Defendants [did not] provide notice of any intent to invoke any protection as federal employees." (Pl.'s Mem. in Resp. [Docket No. 54] at 2). However, Plaintiff offers no authority for why this motion is untimely or that Defendants were required to provide notice.

The Second Amended Pretrial Scheduling Order provides that any motions other than those seeking to "amend the pleadings or add parties" must be filed and heard by July 1, 2013. (Second Am. Pretrial Scheduling Order [Docket No. 47] at 2). Thus, the motion is timely under the Court's Pretrial Scheduling Order.

Furthermore, the statute permitting Defendants to bring such a motion does not provide any time limit within which it must be brought. To the contrary, the statute specifically allows an employee who believes that the Attorney General has wrongfully refused to certify that he or she was acting within the scope of his office or employment to petition the Court for relief "at

any time before trial." 28 U.S.C. § 2679(d)(4). If the Court grants the relief, "such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant." Id. Thus, the statute permits an individual to bring a motion for substitution at any time prior to trial.[5]

Finally, the Court finds no merit to Plaintiff's argument that he would be prejudiced without an additional opportunity to complete discovery regarding the issue of substitution. The discovery deadline was June 1, 2013. The motion for substitution was filed on May 1, 2013, and Plaintiff never sought an extension from the Court prior to the expiration of the deadline, nor has Plaintiff demonstrated any effort to request discovery for this issue prior to the expiration of the discovery deadline. Additionally, where the party challenging the substitution fails to come forward with contrary evidence to rebut the certification, the Court need not permit further discovery on the issue. See Brown v. Armstrong, 949 F.2d 1007, 1012 (8th Cir. 1991) (explaining that the party opposing the motion to substitute carries the burden of "coming forward with specific evidence in rebuttal" but that in the absence of such evidence, the Court need not permit the party to "probe the basis for the certification in discovery"); Forrest City Mach. Works, Inc., 953 F.2d at 1088.

[5] The Court notes that, from a practical standpoint, the certification from the Attorney General may take some time, and, depending on the length of the process, it may not allow a party to immediately bring the motion to substitute at the moment it decides to pursue it. Indeed, at the hearing, counsel for Defendants represented on the record that Defendants began the process within approximately 60 days of when this lawsuit was filed.

b. Plaintiff's argument that the White Earth Band of Chippewa has waived its immunity

Plaintiff argues that "the White Earth Band of Chippewa waived any immunity from state tort liability through the plain language of its contract with Becker County." (Pl.'s Mem. in Resp. at 2, 4-6). Thus, Plaintiff asserts, "[r]egardless of whether or not Deegan and McArthur can be deemed as federal employees pursuant to the ISDEAA and therefore protected by federal immunity, the tribe has explicitly waived any such immunity through its 'Cooperative Law Enforcement Agreement' with Becker County." (Id. at 5). This question, even if true, is irrelevant to the issues before the Court in this motion.

Plaintiff is correct that the Cooperative Law Enforcement Agreement between the White Earth Tribe and Becker County (see Docket No. 51, Ex. 9), provides that the White Earth Tribe waived its tribal sovereign immunity from state tort liability; however, the Cooperative Law Enforcement Agreement speaks only to tribal immunity. In other words, to the extent that a plaintiff could bring a respondeat superior claim, the Cooperative Law Enforcement Agreement removes the potential for the White Earth Tribe to assert a tribal immunity defense. However, because the White Earth Tribe was not authorized to speak on behalf of the United States, the White Earth Tribe cannot waive the immunity of the United States. See Gaddis v. United States, 381 F.3d 444, 467 (5th Cir. 2004) (explaining that neither the Rules Committee nor the court could waive the United States' sovereign immunity because they "lack[ed] the authority to speak on behalf of the United States"). Indeed, generally, only Congress can waive the United States' immunity from suit. See United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 660-61 (1947) ("It has long been settled that officers of the United States possess no power through their

actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of some express provision by Congress. . . . Only Congress can take the necessary steps to waive the immunity of the United States from liability for interest on unpaid claims."); Poor Richard's, Inc. v. United States Dept. of Agriculture, No. 97-cv-700 (JRT/RLE), 1998 WL 315380, at *4 (D. Minn. Feb. 15, 1998) ("Since only Congress can waive the United States' sovereign immunity . . . ."); Jewish Ctr. for Aged v. United States Dept. of Housing and Urban Dev., 2007 WL 2121691, at *3 (E.D. Mo. Jul. 24, 2007) ("Only Congress can waive sovereign immunity . . . ."). Furthermore, because the United States has not asserted that it is immune from suit at this time, the question before the Court in this motion is not whether the United States is immune from suit but only whether the United States is the proper Defendant for the claims at issue. As such, Plaintiff's argument that the White Earth Tribe has waved its tribal immunity for state tort claims is wholly irrelevant to the issue before the Court.

c. Defendants McArthur and Deegan were employees of the United States Government

Defendants argue that their employment "was funded by the Indian Self Determination and Education Act through a contract between White Earth Band of Chippewa and the federal government." (Mem. in Supp. of Substitution at 1) (citing 25 U.S.C. § 450f). "Although Officer Deegan and Investigator McArthur work for the White Earth Band Police Department, by statute they are treated the same as federal employees for purposes of tort liability." (Id. at 3).

The 1990 amendment to the Indian Self-Determination Education Assistance Act provided that:

> With respect to claims resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the Indian

> Self-Determination and Education Assistance Act . . . an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs 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 to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act

Locke v. United States, 215 F. Supp.2d 1033, 1037-38 (D. S.D. Jul. 29, 2002) (quoting Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959 (codified at 25 U.S.C. § 450f notes)) (emphasis added).

Plaintiff makes a conclusory argument, without any discussion of the purported supporting authority, that "[w]hen determining whether tribal police officers are deemed to be federal officers pursuant to 25 U.S.C. § 450f, the Eighth Circuit has examined the language of the contract to determine if the contract applies to the case at hand." (Pl.'s Mem. in Response to Mot. [Docket No. 54] at 2-3) (citing United States v. Roy, 408 F.3d 484, 490 (8th Cir. 2005) and United States v. Schrader, 10 F.3d 1345, 1350 (8th Cir. 1993)). Furthermore, Plaintiff argues that Defendants have "not produced any such contract as part of the record in this case." (Id. at 2). Thus, Plaintiff argues, but cites no authority, that"[w]here the U.S. has failed to provide a copy of any contract or authorizing resolution, there is no basis for determining that the tribal officers who are Defendants in this case are entitled to be treated as federal officers pursuant to any purported contract under the ISDEAA." (Id. at 3).

First, the cases Plaintiff cites did not directly address the issue of whether a tribal officer is a federal employee for purposes of the FTCA. Rather, Roy addressed the question of whether

"the 638 contract, taking into account the manner in which it delegates the Bureau's law enforcement authority, is sufficient to authorize officers of the Flandreau City Police Department to exercise the Bureau's law enforcement functions under 25 U.S.C. § 2804(a)." Roy, 408 F.3d at 490. Indeed, contrary to Plaintiff's assertion, the court made no mention whatsoever of 25 U.S.C. § 450f. Rather, the court analyzed whether certain counts of the indictment should have been dismissed because "the government failed to prove that Van Roekel was a federal officer, for purposes of 18 U.S.C. § 111, at the time of the incident." Id. Similarly, Schrader also involved the issue of whether a count in the indictment should be dismissed because the arresting officers "were not federal officers performing official duties for purposes of § 111." 10 F.3d at 1350.

In finding that the arresting officers were federal employees, the court explained that "[i]n 1990, Congress passed the Indian Law Enforcement Reform Act, 25 U.S.C. §§ 2801–2809, to clarify and strengthen the authority of the law enforcement personnel and functions within the BIA." Schrader, 10 F.3d at 1350 (internal quotation marks). Under the Act, "the Secretary may contract with a tribe to assist BIA in enforcing tribal laws and, in connection with such a contract, may authorize a tribal law enforcement officer 'to perform any activity the Secretary may authorize under section 2803.'" Id. (quoting 25 U.S.C. § 2804(a)). "While acting under authority granted by the Secretary under subsection (a) of this section, a person who is not otherwise a Federal employee shall be considered to be . . . an employee of the Department of the Interior only for purposes of . . . (A) the provisions of law described in section 3374(c)(2) of Title 5, and (B) sections 111 and 1114 of Title 18 . . . ." 25 U.S.C. § 2804. As it appears on the face of the statute, however, there is no such provision stating that it applies to the FTCA. Thus,

the Court's analysis in both Roy and Schrader is not relevant to the issue before the Court, since it dealt with the interpretation of a statutory provision on who is a federal employee that plainly limits its applicability to only 5 U.S.C. 3374(c)(2) and 18 U.S.C. §§ 111, 1114. In fact, the question of whether a tribal officer is a "law enforcement officer" under § 2800 is separate and distinct from the question of whether a tribal officer is a federal employee under the FTCA. See Bob v. United States, 2008 WL 818499, at *2 (D. S.D. Mar. 26, 2008); Buxton v. United States, 2011 WL 4528337, at *9-10 (D. S.D. Apr. 1, 2011); Dupris v. McDonald, c, *13 (D. Ariz. Jan. 24, 2012) (citing Bob and explaining that "even though tribal defendants may be considered federal employees under the FTCA, they were not federal 'investigative or law enforcement officers' in light of government's affidavit stating that none of the tribal officers involved in the disputed incident held an SLEC from the BIA."); Boney v. Valline, 597 F. Supp.2d 1167, 1181 (D. Nev. Jan. 22, 2009).

Second, Plaintiff's argument that no contract exists is mooted because Defendants have filed with the Court the 2011 and 2012 Annual Funding Agreements for the § 638 contract between the United States Department of Interior and the White Earth Band of Chippewa Indians. (See Docket No. 57). Plaintiff has presented no evidence to dispute the existence of a § 638 contract between the United States and the White Earth Tribe, nor has Plaintiff offered any evidence to suggest that the § 638 contract is invalid.

The FTCA specifically provides a definition of who is an "employee of the government":

> (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender

> organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18

28 U.S.C. § 2671.

"[T]ribal law enforcement officers are considered employees of the BIA for FTCA purposes when tribal law enforcement functions are funded and performed pursuant to an Indian Self Determination Act ('ISDA') contract." Johnson v. United States, 2007 WL 2688556, at *2 (D. S.D. Sept. 11, 2007).

Here, the Annual Funding Agreements for 2011 and 2012 (Docket No. 57, Exs. 1 and 2), demonstrate the existence of the agreement between the United States and the White Earth Tribe for the White Earth Tribe to assume certain responsibilities for the implementation of programs agreed upon in the agreement, which are "funded by or flow through the Bureau of Indian Affairs . . . for the benefit of the Tribe." (Docket No. 57, Ex. 1 at 2). Section 2 of the Annual Funding Agreements provides that one of the categories of programs the White Earth Tribe assumed responsibility for was "Law Enforcement and Community Fire Protection." (Docket No. 57, Ex. 1 at 2-3). As part of the agreement, the White Earth Tribe had "broad authority to consolidate and redesign the programs . . ." (Id. at 2). There is no indication in the Annual Funding Agreements that the United States retained any involvement or responsibility with regard to law enforcement. Nor has Plaintiff provided any authority that the agreement must specifically name each individual officer or specifically identify each and every aspect of law enforcement that is the responsibility of the White Earth Tribe.

Because Defendants were employed by the White Earth Tribe and, as more fully discussed below, were performing law enforcement duties as dictated by the White Earth Tribe, they were acting pursuant to the § 638 agreement and "are considered employees of the BIA for

FTCA purposes." Johnson, 2007 WL 2688556, at *2; Snyder v. Navajo Nation, 382 F.3d 892, 897 (9th Cir. 2004) ("Congress therefore provided that the United States would subject itself to suit under the Federal Tort Claims Act ('FTCA') for torts of tribal employees hired and acting pursuant to such self-determination contracts under the ISDEAA."); Big Crow v. Rattling Leaf, 296 F. Supp.2d 1067, 1071 (D. S.D. Jan. 2, 2004) (finding that a tribal employee was acting within the scope of his employment under a § 638 contract and that the United States should be substituted in his place as the proper defendant); see also Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1915, 1959 (codified at 25 U.S.C. § 450f notes)) (stating that "[w]ith respect to claims resulting from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the Indian Self-Determination and Education Assistance Act . . . an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs 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").

d. Defendants McArthur and Deegan were acting within the scope of their employment

Plaintiff argues that "[t]he evidence establishes that the tribal officers were not acting within the scope of their tribal employment but were acting at the behest of the Becker County pursuant to a contract with Becker County." (Pl.'s Mem. in Resp. [Docket No. 54] at 2).

After the Attorney General receives notice that a federal employee has been sued, a process known as "Westfall certification" follows:

> After a federal employee is sued in a state court, the Attorney General reviews the case to determine if the employee was acting within the scope of his or her

> employment when he or she engaged in the allegedly harmful conduct. 28 U.S.C. § 2679(d)(2). The Attorney General may then file a Certification of Scope of Employment, a document certifying that the employee was acting within the scope of his or her employment, and may remove the case to federal court. Id. The Attorney General then notifies the federal court that the United States should be substituted as party-defendant for the federal employee. Id.

See Anthony, 76 F.3d at 213. A "Westfall certification" acts "as prima facie evidence that the defendants were acting within the scope of their employment." Id. It does not, however, "conclusively establish that the United States should be substituted as party-defendant." Id. Thus, "[i]f the plaintiff challenges the certification, the district court must independently review the case and determine whether the defendant was in fact acting within the scope of his or her employment." Id. However, the Plaintiff must come forward with at least some evidence to contradict the certification. See Brown v. Armstrong, 949 F.2d 1007, 1012 (8th Cir. 1991) ("'[T]he burden of altering that status quo' is on the plaintiff, who must come forward with specific facts rebutting the government's scope-of-employment certification" (quoting S.J. & W. Ranch v. Lehtinen, 913 F.2d 1538, 1543 (11th Cir. 1990)); Forrest City Mach. Works, Inc., 953 F.2d at 1088. The Court's review, however, is performed under a de novo standard. See S.J. & W. Ranch, 913 F.2d at 1543 ("Although we are persuaded by the statutory language that the plaintiff has the burden of proving that the employee's conduct was not encompassed by the scope of his employment, we agree with the majority of federal courts that the district court determines scope de novo."). If the Court finds that the employee was acting within the scope of his or her employment, the case proceeds against the United States, otherwise, the Court must refuse to substitute the United States. Anthony, 76 F.3d at 213.

"The issue of scope of employment is controlled by the 'applicable state law of respondeat superior.'" Forrest City Mach. Works, Inc., 953 F.2d at 1089 n.5 (quoting Piper v.

United States, 887 F.2d 861, 863 (8th Cir. 1989)). "However, FTCA claims are strictly limited to a scope of employment analysis, regardless of state law doctrines of respondeat superior and apparent authority." St. John v. United States, 240 F.3d 671, 676 (8th Cir. 2001). In making its analysis, this Court has previously relied on Minnesota's model jury instruction for determining if "an employee acts within the scope of his or her authority":

> 1. The employee's conduct was substantially within work related limits of time and place; and
>
> 2. The employee's conduct is of a kind authorized by the employer or reasonably related to that employment; and
>
> 3. The employee's act was motivated at least in part by the employee's desire to further the employer's interests; and
>
> 4. The employer should have foreseen the employee's conduct, given the nature of the employment and the duties relating to it.

Murray ex rel. Murray v. United States, 258 F. Supp.2d 1006, 1012 (D. Minn. 2003).

Defendants argue that "each of the four factors weigh in favor of accepting the U.S. Attorney's scope of employment certification and substituting the United States for Investigator McArthur and Officer Deegan." (Mem. in Supp. of Substitution at 6).

Plaintiff's does not address the above factors and, in fact, does not even appear to argue at all that Defendants were not acting within their scope of duties as police officers; rather, Plaintiff appears to argue that Defendants were acting as police officers for Becker County instead of the White Earth Tribe:

> The evidence presented by the U.S. establishes that Deegan and McArthur were acting pursuant to a "Cooperative Law Enforcement Agreement" with Becker County, were purporting to enforce state rather than tribal or federal laws, arrested Plaintiff under instructions from and at the behest of Becker County officials, placed Plaintiff in the custody of Becker County based on criminal charges under state law. The Cooperative Law Enforcement Agreement itself establishes that the

> Tribe understood itself to be acting under state jurisdiction and outside any federal auspices because it specifically included provisions to be subject to state tort liability and waive any sovereign immunity. (Exhibit 9, page 1 of Government's submissions).
>
> The question is not one of merely whether Deegan or McArthur were acting within the scope of their employment as officers, but whether they were acting within the scope of their tribal duties which could conceivably lead to a claim that they were deemed federal officers if Defendants has produced evidence that the prerequisites of the ISDEAA were met. It is clear that they were fulfilling duties outside the scope of tribal officers, and in reality fulfilling Minnesota state law enforcement duties. Based on the plain language of the tribe's agreement with Becker County, these duties were intended to fall within the jurisdiction and potential liability imposed by the laws of the State of Minnesota.

(Pl.'s Mem. in Resp. at 3-4).[6]

Defendants appropriately highlight that the claims against these two Defendants are for actions taken in "their official capacity," which by its very nature demonstrates that they were within their scope of employment. (Mem. in Supp. of Substitution at 6). Even if the meaning of official capacity and scope of employment are distinct and separate questions, see Coleman v. Smith, 814 F.2d 1142, 1148 n.2 (7th Cir. 1987) ("[T]hese two concepts, as well as the concept of "under color of state law," while analytically similar, are distinct"), there can be no doubt that when a plaintiff by his own complaint asserts that an individual was acting within their official capacity, it strongly suggests that the employee's actions were "within work related limits of time and place."

Indeed, here, the actions complained of were performed while Defendants were engaging in law enforcement.

[6] Plaintiff also asserts that he "is unfairly handicapped from fully addressing this issue because the U.S. ha[d] not produced the alleged contract between the tribe and federal government it is relying on"; however, in addition to the fact that Defendants provided the Annual Funding Agreements and the Court provided Plaintiff with the opportunity to file a surreply, which Plaintiff failed to take advantage of, the agreement between the United States and the White Earth Tribe bears no relevance to Plaintiff's argument that the Cooperative Law Enforcement Agreement between Becker County and the White Earth Tribe somehow converted Defendants into police officers for Becker County.

It is undisputed that the basis of the allegations took place at a residence in Becker County. However, the White Earth Reservation is "a large tract of land in the northern part of Becker County." (See Docket No. 51, Ex. 9 at 9-10) (depicting the location of the White Earth Reservation within the boundaries of Becker County); see also Becker County History, http://www.co.becker.mn.us/our_county/history.aspx (last visited July 1, 2013). At the hearing, the parties confirmed that the residence which is at the heart of this lawsuit, while in Becker County, is also within the White Earth Reservation boundaries.

Moreover, even Plaintiff's Complaint alleges that "Defendant Investigator John McArthur, is and at relevant times hereto was a White Earth tribal police officer" and that "Defendant Officer Merlin Deegan, is and at relevant times hereto was a White Earth tribal police officer." (See Am. Compl. [Docket No. 38] ¶¶ 6-7). There is no allegation that Defendants were employed at any time as Becker County employees. Thus, there is no basis to conclude that they could act in their "official capacity" as Becker County employees.

Furthermore, the fact that the White Earth Tribe had a Cooperative Enforcement Agreement with Becker County makes them no less employees of the White Earth Tribe. Indeed, the Cooperative Law Enforcement Agreement between Becker County and the White Earth Tribe pertained only to "enforcement of the laws of the State of Minnesota, and laws of the White Earth Reservation, **on that portion of the White Earth Reservation that lies within Becker County**." (Docket No. 51, Ex. 9 at 1) (emphasis added). Nothing in the agreement suggests that an employee becomes an employee of the other agency by assisting the other agency in a cooperative investigation. To the contrary, the agreement specifically provides that:

> Any peace officer acting under this agreement shall, at all times, be considered to be an employee of his or her employing agency. Any peace officer acting under

> this agreement shall continue to be covered by his or her employing agency for purposes of wages, benefits, workers, compensation, unemployment compensation, disability, other employee benefits, **and civil liability purposes**.

(Docket No. 51, Ex. 9 at 4-5) (emphasis added).

In a letter to the U.S. Depart of Interior, Randy Goodwin, the Police Chief for the White Earth Tribal Police Department for the White Earth Band of Chippewa, expressed his belief that Defendants were acting within the scope of their employment during the incidents that gave rise to this lawsuit, and provided details to support his belief:

> Both Investigator John McArthur and Officer Merlin Deegan are, and were, police officers employed by the Tribe at all relevant times, and were responsible for enforcing the law within the jurisdiction of the White Earth Police Department. Both employees work normally scheduled hours, however, they are both required to answer their telephones 24/7 in case of emergencies, or when their respective jobs require them to do so.

(Docket No. 51, Ex. 2 at 1).

Contrary to Plaintiff's conclusory argument that "[i]t is clear that [Defendants] were fulfilling duties outside the scope of tribal officers, and in reality fulfilling Minnesota state law enforcement duties," it is clear that Defendants were acting within their scope of employment as tribal officers, regardless of the fact that they were enforcing state laws. The residence at which the alleged conduct took place was within the boundaries of the White Earth Reservation, and pursuant to the Cooperative Law Enforcement Agreement, Defendants, as tribal officers, were working in conjunction with county officials, to enforce laws within the territory of the White Earth Tribe.

Aside from Plaintiff's categorical and conclusory argument that Defendants were actually acting as Becker County officers, Plaintiff does not dispute whatsoever that Defendants actions were "within work related limits of time and place; . . . [were] of a kind authorized by the

employer or reasonably related to that employment; . . . [were] motivated at least in part by the employee's desire to further the employer's interests; and [that] [t]he employer should have foreseen the employee's conduct, given the nature of the employment and the duties relating to it." As such, Plaintiff has offered no evidence to rebut the certification.

Therefore, the Court finds that Defendants were federal employees and were also acting within the scope of their employment in taking the actions that gave rise to the common law claims against them. Thus, the Court finds that the United States should be substituted as the proper Defendant in place of Defendants McArthur and Deegan with respect to the common law tort claims only.

III. CONCLUSION

NOW, THEREFORE, It is –

ORDERED:

That Defendants' motion to substitute [Docket No. 48] is **GRANTED** as more fully described above.

BY THE COURT:

Dated: July 11, 2013

s/Leo I. Brisbois
Leo I. Brisbois
U.S. MAGISTRATE JUDGE