IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

JARROD PROCTOR and GWENDOLYN PROCTOR,	)	
Plaintiff,	)	
vs.	)	**Case No. CV-21-307-GLJ**
THE UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF INTERIOR, and BUREAU OF INDIAN AFFAIRS,	)	
Defendants.	)	

DEFENDANT UNITED STATES OF AMERICA'S RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Respectfully Submitted By:

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Defendant United States of America, by and through Christopher J. Wilson, United States Attorney for the Eastern District of Oklahoma, and Alexander J. Sisemore and Joshua M. Mitts, Assistant United States Attorneys for the Eastern District of Oklahoma, submit its Response to Plaintiff's Partial Motion for Summary Judgment (Doc. 49).[1]

The Court should reject Plaintiffs' request to find Cherokee Nation Deputy Marshal Clinton was acting in the course and scope of his employment as a law enforcement officer when, without the knowledge of Cherokee Nation Marshal Service ("CNMS"), he was transporting friends to his personal residence with alcohol to consume later in the evening in the opposite direction of the location for an armed robbery call—a call for which Clinton admitted time was of the essence and which Clinton was specifically authorized to be on duty after his scheduled shift ended.

Plaintiffs' Partial Motion omits material facts, mischaracterizes the nature of the relationship between Clinton and his personal friends as one of mere law enforcement officer and citizens, misstates the Cherokee Nation's policies, and relies upon speculation by Clinton as to what knowledge CNMS had of Clinton's actual activities when the collision occurred and of CNMS's actual policies. At the time of the subject collision, Deputy Marshal Clinton had already completed his scheduled shift but returned to duty for the sole purpose of responding to a specific call. Clinton was authorized only to respond to an armed robbery in progress at Briggs Tobacco Outlet. Instead of responding to that robbery call, which Clinton testified time was of the essence, Clinton unilaterally chose to drive in the complete opposite direction of the robbery for his own personal benefit to drop off friends at his residence with alcohol to consume later. CNMS did not authorize or direct Clinton to drop his friends off at his residence before responding to the robbery call; Clinton never advised CNMS of his intent to do so. Clinton further admitted his friends were not faced with any emergency or danger that necessitated any protection by law enforcement. Contrary to Plaintiffs' argument, CNMS is not a transportation company for officers' friends.

By Clinton's own admission, dropping off his friends served no law enforcement purpose and was, instead, for his personal benefit and for the benefit of his friends. Dropping off his friends was not even tangentially beneficial to the task for which Clinton was specifically on duty; in fact, it was *detrimental* to that duty. While Clinton admittedly had plans to return to the course and scope of his employment and actually respond to the robbery call *after* dropping off his alcohol

[1] Plaintiffs' Partial Motion includes claims against the Department of Interior and the Bureau of Indian Affairs; however, those defendants have been dismissed. (*See* Dkts. 34, 35).

and his friends at his apartment, Clinton had not yet done so when he collided with Plaintiffs' vehicle. The Court should deny Plaintiffs' Partial Motion accordingly.

I. RESPONSE TO PLAINITFF'S PURPORTED UNDISPUTED MATERIAL FACTS

1. Not disputed.
2. Not disputed.
3. Not disputed.
4. **Disputed**. Plaintiffs provided no support for the assertion that Plaintiffs' vehicle "*lawfully* traveled through with a green traffic light." Such is not a statement of fact, but a conclusion of law. Additionally, as a matter of law, Plaintiffs owed a duty to yield to emergency vehicles, including Deputy Clinton's, which Plaintiffs contend was utilizing its lights and sirens, (*see* Pltfs.' SOF ¶ 19). Okla. Stat. tit. 47, § 11-405(A). Further, the conclusion is immaterial as it pertains to the underlying merits of the alleged negligence action, which is not at issue in Plaintiff's Partial Motion.
5. Not disputed that Buddy Clinton was employed with the Cherokee Nation Marshal Service (CNMS). It is **disputed** that Buddy Clinton was employed by the Bureau of Indian Affairs (BIA) and that the 2020 Chevrolet Tahoe was owned by the BIA. Plaintiffs provide no support for those facts and they therefore cannot be considered; Plaintiff's alleged evidentiary support states Clinton was employed by the Cherokee Nation and that the Tahoe was owned by the Cherokee Nation.[2]
6. Not disputed.
7. **Disputed** that the vehicle in which Clinton picked up Smittle and Ayala was a "BIA" vehicle. (*See* Dkt. 49-1 at 1 (identifying Clinton's vehicle as owned by the Cherokee Nation); Ex. 1, *Title*). The remaining facts in Pltfs.' SOF ¶ 7 are not disputed.
8. Not disputed.
9. Not disputed.
10. Not disputed.
11. Not disputed.
12. Not disputed.

[2] It appears Plaintiffs misunderstand what the BIA is. The BIA is a federal bureau within the U.S. Department of Interior. The CNMS is *not* part of the BIA or the Department of the Interior, but rather the law enforcement agency of the sovereign tribe of the Cherokee Nation.

13. **Disputed** that Sergeant Asbill observed Clinton leave the Gym with his friends. Clinton merely speculates that Sergeant Asbill knew they were with him, but does not explain the basis for this knowledge. (Ex. 2 at 38:5-11).

14. Disputed as to characterization as being on a "shift." Clinton's shift was over, (*see* Pltfs.' SOF ¶ 6 (identifying Clinton's shift)), but he was authorized to be on duty to respond to the robbery call. (*See* Part II, infra, at ¶¶ 28-31).

15. Not disputed.

16. Not disputed.

17. Not disputed.

18. **Disputed** that Clinton was *en route* to the robbery; Clinton admitted that he was headed home to drop off his friends and that there was no police purpose for heading to his apartment. (*See* Ex. 2 at 94:5 - 95:16; *see also* Part II, infra, at ¶¶ 1-10 (identifying the relative locations of the Youth Center, Clinton's residence, and the robbery call and identifying Clinton's own testimony he was on his way to his residence—in the complete opposite direction of the robbery call—when the collision occurred)).

19. Not disputed. Immaterial. Being on duty is immaterial to what actions an individual is undertaking and whether those actions are in the course and scope of employment. Further, the underlying merits on liability are not at issue in Plaintiffs' Partial Motion.

20. Not disputed. **Immaterial** to the extent underlying merits on liability are not at issue in Plaintiffs' Partial Motion.

21. Not disputed.

22. **Disputed** that Clinton had permission from the BIA to operate the vehicle as CNMS and the BIA are separate and distinct entities and it is undisputed Clinton's vehicle is owned by the Cherokee Nation, (*see* Dkt. 49-1 at 1 (identifying vehicle owner as Cherokee Nation)).

23. Not disputed. **Immaterial**. CNMS's rules and prohibitions regarding intoxicants, such as alcohol, while on duty are not limited to consumption, but also include possession. (*See* Part II, infra, quoting the CNMS Law Enforcement Handbook).

24. Not disputed. **Immaterial**. An employee cannot create course and scope by complying with an employer's regulations while conducting activities not authorized by the employer to begin with.

25. Not disputed. **Immaterial**. Whether a CNMS Deputy Marshall is entitled to drive a CNMS vehicle home after the end of a shift (i.e., outside the course and scope of employment) is not material to whether Clinton was acting in the course and scope of his employment at the time of the collision.

II. ADDITIONAL MATERIAL FACTS ESTABLISHING PARTIAL SUMMARY JUDGMENT CANNOT BE ENTERED FOR PLAINTIFF

Geographical Facts Establishing Deputy Marshal Clinton Was Not Driving to the Robbery Call When The Subject Collision Occurred

1. Clinton's apartment is located at 1308 W. Choctaw Street, Tahlequah, Oklahoma. (Ex. 2 at 8:4-6, 11:17-19).

2. Briggs Tobacco Outlet[3] is located at 23957 Highway 51, Tahlequah, Oklahoma. (Ex. 3, *Yellow Pages*, accessible at https://www.yellowpages.com/tahlequah-ok/mip/briggs-tobacco-outlet-463394707).

3. The John A. Ketcher Youth Services Center is located at 21834 S. Jules Valdez Rd., Tahlequah, Oklahoma. (Ex. 4, *Cherokee Nation Human Services Website* accessible at https://www.cherokee.org/all-services/human-services/youth-services-special-projects/).

4. From the John A. Ketcher Youth Services Center, it is 10.2 miles to Briggs Tobacco Outlet, and requires turning ***east*** at the intersection/bypass of Highway 51 and Highway 62. (Ex. 5, *Google Maps from 21834 S. Jules Valdez Rd. to 23957 Highway 51*).[4]

5. At the time of the collision, after leaving the Ketcher Youth Services Center, Clinton was travelling ***west*** on Highway 51 Spur. (Dkt. 49-1).

6. Clinton testified his route to his apartment when the collision occurred was to go west at the intersection of Highway 62 and 51 and to take Highway 51 west over to Choctaw Road. (Ex. 2 at 72:18 – 74:2).

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[3] Throughout the case and throughout the document, Briggs Tobacco Outlet may have also been referred to as "Briggs Smoke Shop" interchangeably since "Tobacco Outlet" is the politically correct name for a "Smoke Shop." (*See, e.g.,* Ex. 2 at 96:15 – 97:1 (Clinton's attorney's commentary)).

[4] The Tenth Circuit recognizes the Court may take judicial notice of distances and geographical facts from private commercial websites, such as Google Maps. *U.S. v. Orozco-Rivas*, 810 Fed. App'x 660, 668 n.7 (10th Cir. 2020) (citing *Pahls v. Thomas*. 718 F.3d 1210, 1216 n.1 (10th Cir. 2013); David J. Dansky, *The Google Knows Many Things: Judicial Notice in the Internet Era*, 39 Colo. L. Rev. 19, 24 (2010)).

7. Clinton testified that had he gone straight to Briggs Smoke Shop (instead of dropping his friends off at his apartment), he would have turned ***east*** (and not west) at the intersection/bypass of Highway 51 and Highway 62. (Ex. 2 at 96:4-14).[5]

8. From the John A. Ketcher Youth Services Center, it is 6.6 miles to Deputy Clinton's apartment. (Ex. 7, *Google Maps from 21834 S. Jules Valdez Rd. to 1308 W. Choctaw Street*).

9. Clinton testified the route he would have taken to respond to the robbery call at Briggs Tobacco Outlet after dropping his friends off at his apartment would be to take "Choctaw to Water to Downing . . . . Choctaw Street to Water Street [sic] . . . Water Street [sic] and go left; go back north to Downing, take a right, and then you go east into town." (Ex. 2 at 98:21 – 99:11).

10. From Deputy Clinton's apartment, it is 7.5 miles to Briggs Tobacco Outlet, going from Choctaw St. to Water Ave. to Downing St. (Ex. 8, *Google Maps from 1308 W. Choctaw Street to 23957 Highway 51*).

Facts Regarding The Reasons Deputy Marshal Clinton Was Dropping Off His Friends at His Own Residence Establishing He Was Not Acting in the Course and Scope of His Employment

11. Smith and Ayala are Clinton's personal friends. (Ex. 2 at 70:25 – 71:6).

12. Smith and Ayala were in town helping Clinton train for a professional, mixed martial arts bout Clinton was getting ready for, (Ex. 2 at 70:22 – 71:24), and, on the day in question, playing basketball with Clinton while Clinton was off duty. (Ex. 2 at 36:20 – 37:10).

13. Clinton testified that in response to a robbery, time is of the essence. (Ex. 2 at 94:13-16).

14. Clinton admitted he wasn't serving any purpose of the Marshal Service by going to his apartment before going to the robbery call. (Ex. 2 at 94:17-24).

15. Clinton admitted there was no law enforcement purpose for dropping off his friends before going to the robbery call. (Ex. 2 at 95:11-16)

16. Clinton testified he was not travelling to his apartment to get anything he needed for the robbery call. (Ex. 2 at 40:17-20).

17. Clinton testified the reason he was travelling to his apartment was to drop his friends off for their safety. (Ex. 2 at 94:25 – 95:10).

[5] The testimony is in reference to route identified in Exhibit 3 to Deputy Clinton's deposition, attached hereto as Exhibit 6.

18. The alcohol in Clinton's vehicle at the time of the collision, (Ex. 2 at 86:6-8), was purchased for the purpose of being consumed by Ayala, Smith, and Deputy Clinton later in the evening. (Ex. 2 at 82:12 – 83:14).

19. Clinton testified instead of going to his apartment to drop his friends off, he could have left them at the youth shelter. (Ex. 2 at 95:17-20).

20. Clinton testified instead of going to his apartment to drop his friends off, he could have dropped them anywhere along the way on Highway 62 before he had to decide whether to go east or west on the bypass, which included *inter alia* at the Cherokee Casino. (Ex. 2 at 95:21 – 96:3).

Facts Regarding CNMS's Lack of Knowledge of Clinton's Plans to Drop Off His Friends

21. According to CNMS Captain Scott Craig, CNMS was made aware of Clinton's two friends being in his vehicle at the time of the collision only after the fact. (Ex. 9, *CNMS Officer Report*, at 1 ("*It was later determined* Mr. Clinton had two passengers inside his Patrol Unit as well as un-opened alcohol that was purchased on the night in question at Reasor's Grocery Store." (emphasis added))).

22. According to CNMS Captain Scott Craig, when "Clinton went off duty at 18:05 hours [his regularly scheduled shift] . . . he could no longer be 10/12 with visitors or officials." (Ex. 9, *CNMS Officer Report*, at 2).

23. Clinton admitted in his deposition he did not advise dispatch he had people in his vehicle between 8:17pm to 8:28pm. (Ex. 2 at 86:2-5, 103:18-21).

24. Clinton admitted in his deposition he did not advise dispatch he was going to his apartment to drop off passengers. (Ex. 2 at 103:22-25).

Facts Establishing the Scope of Duties for Which Clinton Was Authorized to Conduct When the Collision Occurred

25. On the day of the collision, Clinton's regularly scheduled shift ended at 6:00pm. (Ex. 2 at 36:15-19).

26. When Clinton asked to go back on shift at approximately 8:07pm—approximately two hours after his regularly scheduled shift ended—he asked to do so to respond to a call at the Ketcher Youth Center. (Ex. 2 at 84:8 – 85:7).

27. Clinton asked the on duty Sergeant, Tony Asbill, if he wanted him to go on duty because Clinton was still in uniform and the two on-duty CNMS agents, Asbill and Fuson, were in athletic shorts, t-shirts, and Nikes. (Ex. 2 at 36:3 – 37:24, 40:4-10).

28. Clinton testified that when a call for the armed robbery came in, he asked Erik Fuson if they wanted him to go to the call. (Ex. 2 at 38:12 – 39:4).

29. Clinton asked for authority to go to the robbery call because he believed the two officers on duty—Asbill and Fuson—would have had to change their clothes when the robbery call in, and that would have delayed them, and he wanted to try and get someone to the robbery call faster. (Ex. 2 at 87:3-8, 90:8-12).

30. Clinton testified he asked to go to the robbery call because "at the time Cherokee County didn't exactly always respond when we asked. They just – not to bore you with that, but issues with sovereign nations and other municipalities. I queued up Erik Fuson, and I said, 'I can get there a little faster than you guys. We need to get somebody there.'" (Ex. 2 at 38:24 – 39:17).

31. Clinton testified that in response to his request to go to the robbery call, Fuson responded, "Yes, go ahead and *head that way*." (Ex. 2 at 38:24 – 39:19 (emphasis added)).

Additional Facts Contradicting Plaintiffs' Representations of Applicable Policies

32. The Cherokee Nation Marshal Service Law Enforcement Handbook states the following *inter alia* is prohibited while on duty: "*Possessing*, purchasing, using, or being under the influence of intoxicants or controlled substances other than those prescribed by a physician, and only with the knowledge of their supervisor and to the extent that such drug use does not impair an officer's performance." (Ex. 10, *CNMS Law Enforcement Handbook*, at § 1-01-01(F)). The only exceptions to that rule are when a plainclothes officer purchases or uses intoxicants during the performance of their duty (i.e., while undercover) and when such is necessary to perform a law enforcement task, such as entering evidence into a property storage area. (Ex. 10, § 1-01-01(F)).

33. Clinton executed and initialed a Cherokee Nation Employee Orientation Acknowledgement. (Ex. 11, *CN Employee Orientation Acknowledgement*).

34. Section D of the Cherokee Nation Employee Orientation Acknowledgement executed and initialed by Clinton states, "I understand that my failure to comply with the policies and procedures outlined in the Administrative Services – Transportation Department Policies and Procedures Manual may result in me losing the privilege of utilizing a Cherokee Nation vehicle." (Ex. 11, *CN Employee Orientation Acknowledgement*).

35. The Cherokee Nation Transportation Department Policies and Procedures Manual prohibits passengers in tribally owned vehicles unless the passengers are approved by the Executive Director and states, "Only persons employed by the Nation are authorized to drive Nation vehicle. Persons other than employees may, *at the discretion of the Executive Director*, occupy the vehicle as long as the purpose is for official tribal business only and they occupy the vehicle solely as a passenger." (Ex. 12, *CN Trans. Dept. Policies and Procedures Manual*, at Ch. 6, subsection 6.7 (emphasis added). All non-employees who occupy a Cherokee Nation vehicle must execute a waiver of liability form with approval from the Executive Director and concurrence from the Principal Chief. (Ex. 12 at Ch. 6, subsection 6.7).

III. ARGUMENTS AND AUTHORITIES

The Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346, constitutes a "limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *Garling v. United States Environmental Protection Agency*, 849 F.3d 1289, 1294 (10th Cir. 2017). The FTCA is a specific, congressional exception to the general rule of sovereign immunity. *Suarez v. United States*, 22 F.3d 1064, 1065 (11th Cir. 1994) (per curiam). It permits suits against the United States only under certain circumstances, which "must be scrupulously observed, and not expanded, by the courts." *Id*. Under § 1346(b), the United States has only waived sovereign immunity for a certain category of claims. Claims must be:

> [1] against the United States, [2] for money damages…[3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5]while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

Relevant here, Congress has consented to suit under the FTCA for particular claims arising out of the performance of Indian self-determination contracts and compacts. *See Hinsley v. Standing Rock Child Protective Services*, 516 F.3d 668, 672 (8th Cir. 2008). The Cherokee Nation operates a law enforcement agency, the Cherokee Nation Marshal Service, for which it receives funding from the United States through its self-determination Compact entered into according to the Indian Self Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. Chapter 46.

The FTCA's waiver of sovereign immunity and conferral of jurisdiction to district courts extends to those certain "claims arising from the performance of functions . . . under a contract, grant agreement, or cooperative agreement authorized by the [ISDEAA]" by a "tribal employee." Pub. L. No. 101-512, Title III § 314, 104 Stat. 1915, 1959-60 (1990). A tribal employee is only deemed a federal employee "while acting within the scope of their employment in carrying out the contract or agreement." *Id.* Generally, the court must first determine whether the alleged activity is encompassed by "the relevant federal contract or agreement" and then "decide whether the allegedly tortious action falls within the scope of the tortfeasor's employment under state law." *Temple v. United States*, Civ. 20-5065-JLV, 2021 WL 42 67858, at *3 (D.S.D. Sept. 20, 2021) (citing *Shirk v. United States*, 773 F.3d 999, 1006 (9th Cir. 2014); *Colbert v. United States*, 785 1384 (11th Cir. 2015)). Here, the United States disputes Deputy Clinton was acting in the course and scope of his employment.

A. Deputy Clinton was Not Acting in the Course and Scope of His Employment When He Was Transporting His Friends to His Apartment for His Own Personal Benefit Instead of Responding to the Robbery Call in the Opposite Direction

The United States is liable under the FTCA only for tortious acts committed by its employees "acting within the scope of [their] office or employment." 28 U.S.C. § 1346(b)(1). To determine the "scope of employment," the law where the alleged tortious act occurred shall be used. *Fowler v. United States*, 647 F.3d 1232, 1237 (10th Cir. 2011); *see also* 28 U.S.C. § 1346(b)(1).

As an initial matter, Plaintiffs' citation to the statutory definition of "course and scope" under the Oklahoma Governmental Tort Claims Act, Okla. Stat. tit. 51, § 152(12) is in error. Under the FTCA, the United States' liability is co-extensive "only to the extent that a *private* person would be liable under similar circumstances." *Ewell v. United States*, 776 F.2d 246, 248 (10th Cir. 1985) (emphasis added). Because private defendants are not subject to state Tort Claims Acts, such provisions are inapplicable to the United States under the FTCA. *See id.*; *see also Proud v. United States*, 723 F.2d 705 (9th Cir. 1984) ("Congress—not the Hawaii Legislature—determined the tort liability of the United States. And the FTCA specifically provides that the federal government's tort liability is co-extensive with that of a private individual under state law.").

Under Oklahoma common law, one "acts within the scope of employment if engaged in work assigned, or if doing that which is proper, necessary and usual to accomplish the work

assigned, or doing that which is customary within the particular trade or business." *Sheffer v. Carolina Forge Co., L.L.C.*, 306 P.3d 544, 550 (Okla. 2013); *Tuffy's, Inc. v. City of Okla. City*, 212 P.3d 1158, 1163 (Okla. 2009). Oklahoma recognizes that an employee can be acting in the course and scope of employment in one moment, abandon it in the next, and ultimately return to the course and scope of employment later. *See Hintergardt v. Operators, Inc.*, 940 F.2d 1386, 1389 (10th Cir. 1991) (citing *Heard v. McDonald*, 43 P.2d 1026, 1027 (Okla. 1935)). "[T]he correct test to be applied [is] . . . taking into consideration the purpose of his mission, and the distance traveled, it could be said that the servant is stepping aside, in some marked or unusual manner, for some purpose wholly disconnected with his employment." *Heard v. McDonald*, 43 P.2d 1026, 1027 (Okla. 1935). "[T]he controlling point is whether the servant in deviating from the directed route completely abandoned his master's business." *Lee v. Pierce*, 239 P. 989, 991 (Okla. 1925).

Here, Deputy Clinton was acting in his personal capacity when the collision occurred and had completely abandoned his law enforcement duty to respond to the robbery call at Briggs Tobacco Outlet. It does not matter that Clinton was wearing a uniform or had his lights and sirens on, or whether he was tracking his mileage. The course and scope of an employee's employment is determined by whether the employee is pursuing the *employer's task* with the *employer's authority*, regardless of whether the employee is cloaking himself with the superficial formalities of employment. An employee cannot extend, even mistakenly, the scope of its employer's vicarious liability without the employer's consent.

Here, Clinton was authorized to be on duty outside of his scheduled shift solely to respond to the robbery call because time was of the essence. Instead of fulfilling the obligation to respond as quickly as possible to the robbery call, Clinton chose to drive in the complete opposite direction of the robbery call by four miles to his personal residence for his own benefit of dropping off his friends and alcohol that he intended to consume later that evening. Clinton abandoned his authorized response to the robbery call without advising the Cherokee Nation Marshal Service of his intent to do so, and without advising the Cherokee Nation Marshal Service that he had passengers in his vehicle at the time. Clinton acknowledged expressly there was no law-enforcement need to go to his residence before responding to the robbery call, that there was nothing needed at his residence to respond to the robbery call, and that there were multiple points at which he could have stayed *en route* to the robbery call and dropped off his friends. Clinton testified his route to the robbery call changed only because of his decision to drop off his friends

and alcohol at his apartment. It is undisputed Clinton was at the intersection where he collided with plaintiffs' vehicle solely because he was traveling to his apartment for his personal benefit.

Plaintiffs' argument to the contrary rests upon misapplication of the law and a misunderstanding of the material facts. According to Plaintiffs, simply because Clinton believed it was not a violation to have alcohol or passengers in his vehicle and because he was on duty at the time of the collision, Clinton must have been in the course and scope of his employment. Plaintiffs err.

Plaintiffs rely upon what Clinton believes CNMS policies are; however, an employee's understanding of policies does not alter what the policies actually are. The CNMS policies speak for themselves and expressly prohibit possession of alcohol on duty (not just consumption) and allow passengers in tribally owned vehicles only with permission from the Executive Director. There is no evidence the Executive Director ever authorized Ayala and Smittle to be in Clinton's vehicle. Even if alcohol and passengers would otherwise be allowed in Clinton's vehicle under CNMS policies, it matters not whether that was the case. What matters is what task Clinton was *actually conducting* at the time he had passengers and alcohol in his vehicle. Again, an employee cannot unilaterally extend the scope of his employer's vicarious liability. Here, he was driving away from the robbery call he was supposed to be responding to so he could drop off his friends and alcohol at his personal residence where he needed nothing in order to respond to the robbery call.

Plaintiffs' citations to *Decorte v. Robinson*, 969 P.2d 358 (Okla. 1998), and *Barnes v. United States*, 707 Fed. App'x 512 (10th Cir. 2017), are inapposite. Plaintiffs appear to cite to those cases for support for a proposition that being in the course and scope of employment is not limited to the specific authority given to an employee. That proposition, as used by Plaintiffs here, is misleading and inaccurate. Those cases stand for the proposition that an employee who *abuses* the authority given to him or her can still be in the course and scope of employment. For example, just because law enforcement officers are only authorized to use reasonable force, and not authorized to use excessive force, the fact an officer exercises excessive force does not automatically take them outside the course and scope of employment. Just because a law enforcement officer is only authorized to make arrests based on probable cause and is not authorized to fabricate the bases for the probable cause, the fact an officer fabricates the probable cause does not automatically take the officer outside the course and scope of employment. Those cases do *not* stand for the

proposition that an employee remains in the course and scope of employment when the employee takes action separate and apart from the nature of actions authorized by the employer.

Here, Plaintiffs attempt to argue that Clinton driving to his personal residence to drop off his friends with beer and wine that he and his friends were going to drink later in the evening is within the scope of regular duties of a CNMS officer simply because Clinton's friends are "citizens." According to Plaintiffs, because CNMS officers aren't just authorized to address violators, but also authorized to provide for citizens, and because Clinton was worried about his friends' safety, Clinton's actions were within the course and scope of his employment as a CNMS officer. (Dkt. 49 at 9). Plaintiffs err.

First, Plaintiffs cite to the CNMS job description to argue CNMS officers are to provide for citizens and not just violators. Yet, that job description specifically says that CNMS officers' duties include, "provision of assistance to citizens *in emergency situations*." (Dkt. 49-7 at 1 (emphasis added)). Here, there was no emergency situation presented to Ayala and Smittle requiring law enforcement intervention. Clinton testified he simply could have left them at the Youth Center or dropped them off anywhere along the route to Briggs Tobacco Outlet. Clinton chose, however, to abandon his route to the robbery, and drive in the opposite direction from the robbery call to provide Ayala and Smittle a ride to Clinton's personal residence with everyone's alcohol so they all could consume it later.

Secondly, Plaintiffs' argument simply disregards the basic facts and circumstances of Clinton's relationship to his passengers to characterize the relationship as of "officer and citizen" and further disregard the basic circumstances surrounding their transportation to Clinton's personal residence. Clinton was not answering a call for help from Ayala and Smittle. Ayala and Smittle are friends with Clinton who were socializing with Clinton before he was authorized to return to duty, and were planning on socializing with Clinton at his apartment with alcohol later that night. There was no law enforcement need to transport Ayala and Smittle to Clinton's apartment; they were, at all times safe.

Further, Plaintiff's argument takes the transport of Ayala and Smittle out of context and without reference to the actual robbery call Clinton was specifically authorized to be on duty for—a situation for which time was of the essence. Indeed, the entire reason Clinton asked to be on duty was because he could respond to the robbery call faster than the other officers on duty and because CNMS "needed to get there." It strains credulity to argue an officer is acting in the course

and scope of his employment while transporting friends to the officer's private residence with alcohol to be consumed later when the officer is supposed to be responding to a robbery call in the complete opposite direction when time is of the essence.

Accepting Plaintiffs' argument will lead to finding that officers performing personal errands for friends and family are in the course and scope of employment simply because the friends and family are "citizens." Law enforcement agencies are not transportation carriers for the general public. The Court should reject Plaintiffs' argument.

B. Neither the Court Nor Public Policy Can Waive the United States' Sovereign Immunity

Plaintiffs' argument that state law and policy demands the United States be treated as an insurer of Deputy Clinton's vehicle irrespective of whether he was driving the vehicle in the course and scope of his employment is in error. Plaintiff's argument is contrary to established United States Supreme Court precedent and contrary to the very concept of sovereign immunity. Congress, and Congress, alone can waive the federal government's sovereign immunity and has done so under limited circumstances under the FTCA which do not apply here. States cannot, by either the enactment of their laws or policies, or through their courts, create a waiver of the federal government's sovereign immunity. Plaintiffs' recourse should not be to ask this Court to violate the federal government's sovereign immunity without its consent; rather, Plaintiffs' recourse should be to sue Deputy Clinton in his individual capacity and attempt to collect from him and his motor vehicle insurer, which Plaintiffs are already attempting to do.

"The basic rule of federal sovereign immunity it that the United States cannot be sued at all without the consent of Congress. A necessary corollary of this rule is that when Congress attached conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly construed, and exceptions thereto are not to be lightly implied." *Block v. N. Dakota*, 461 U.S. 273, 287 (1983). "[B]ecause the power to waive the federal government's sovereign immunity is Congress's prerogative . . . [The Supreme Court] applies a 'clear statement' rule. Under the rule's terms, [the Court] will permit a suit against the government only when a statute 'unmistakably allows it. . . . one way or another, a waiver of sovereign immunity must be 'unmistakably clear in the language of the statute." *Dep't of Ag. Rural Dev. Rural Housing Serv. v. Kirtz*, 601 U.S. 42, 48-49 (2024).

This case is governed by the FTCA, which waives the federal government's sovereign

immunity for *acts and omissions* occurring *in the course and scope of an employee's employment*. *See* 28 U.S.C. § 136(b)(1) ("[C]aused by the *negligent or wrongful act or omission* of any employee of the Government *while acting within the scope of his office or employment*." (emphases added)). The FTCA is a specific, congressional exception to the general rule of sovereign immunity. *Suarez*, 22 F.3d at 1065. It permits suits against the United States only under certain circumstances, which "must be scrupulously observed, and not expanded, by the courts." *Id*. Plaintiff cites to no provision in the FTCA, and Defendant is not aware of any, whereby Congress has agreed that the United States shall be liable as a property insurer for tribal property used outside the course and scope of employment. Without an express waiver by Congress for alleged acts/omissions occurring outside the course and scope of employment, and without any waiver by Congress to permit suit against the United States as an insurer of a tribal government's vehicle, Plaintiff's purported public policy argument fails. The United States is not the owner of Deputy Clinton's vehicle; the Cherokee Nation owned Deputy Clinton's vehicle. (*See* Dkt. 49-1, *Exhibit 1 to Plaintiff's Partial Mot. for Summary Judgment*). The United States is not the insurer of Deputy Clinton's vehicle; private insurer, Brown and Brown, is the insurer of Deputy Clinton's vehicle. (*See* Dkt. 49-1).

Because *Congress* holds the power to waive the federal government's sovereign immunity, it is axiomatic that a *state* law and policy, like that of the State of Oklahoma, cannot be used to waive the federal government's sovereign immunity. Appellate courts, including the Tenth Circuit, have long held in similar contexts it is improper to consider state laws and policies as a basis of finding a waiver of federal sovereign immunity under the FTCA. *See, e.g., Sydnes v. United States*, 523 F.3d 1179 (10th Cir. 2008) (state law and policy cannot be used to waive federal government's sovereign immunity for discretionary acts under FTCA); *Carroll v. United States*, 661 F.3d 87 (1st Cir. 2011) (same); *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (same).

Additionally, the impropriety of imposing liability against the United States for any reasons other than those expressly permitted under the FTCA notwithstanding, Plaintiffs' implied argument they would somehow be left without recourse if this Court determines Clinton was acting outside the course and scope of his employment when the collision occurred is false. Plaintiff's recourse would be to sue Clinton in his personal capacity and collect from him and the vehicle's insurer.

Unsurprisingly, Plaintiffs recognize the very tenuous nature of their course and scope arguments against the United States and have—rightfully—sued Clinton in his individual capacity

in Oklahoma State court. (*See* Cherokee County, Oklahoma, Case No. CJ-2021-115, accessible at https://www.oscn.net/dockets/GetCaseInformation.aspx?db=cherokee&number=cj-2021-115). A courtesy copy of Plaintiffs' Petition against Buddy Clinton Jr. is attached as Exhibit 13 hereto. Plaintiffs' decision to sue Clinton in his personal capacity in state court not only underscores Plaintiffs' error in their own argument that Clinton was acting in the course and scope of his employment, but also rebuts Plaintiffs' implied argument they would have no means of recovering damages if the Court ruled Clinton was outside the course and scope of his employment.

Plaintiffs' public policy argument is contrary to established, governing law and is contrary to the factual and procedural posture of their pending claims against Deputy Clinton individually in Cherokee County, Oklahoma. Plaintiffs' argument should be summarily disregarded.

IV. CONCLUSION

By the time Clinton collided with Plaintiffs' vehicle, Clinton had abandoned his work for CNMS and was performing a personal errand by transporting his alcohol and his friends to his apartment. Clinton admitted transporting his friends and alcohol to his apartment served no law enforcement purpose and that he needed nothing from his apartment in order to respond to an armed robbery call in the opposite direction for which time was of the essence—a robbery call that was the sole reason for Clinton being authorized to be on duty after his scheduled shift had concluded hours earlier. Clinton's friends had no law enforcement reason for being transported to Clinton's personal residence—they were not members of the public faced with any danger or emergency that warranted police intervention. Rather, Clinton was simply performing a favor for friends from out of town. While Clinton admittedly had plans to return to the course and scope of his employment and actually respond to the robbery call *after* dropping off his alcohol and his friends at his apartment, Clinton had not yet done so when he collided with Plaintiffs' vehicle.

Because Clinton was outside the course and scope of his employment with CNMS at the time of his collision with Plaintiffs' vehicle, the Court must deny Plaintiffs' Partial Motion.

WHEREFORE, premises considered, Defendant United States of America requests the Court deny Plaintiffs' Partial Motion and grant Defendant any other relief the Court deems just and equitable.

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CERTIFICATE OF MAILING

I hereby certify that on April 3, 2024, I electronically filed the foregoing with the Clerk of Court using the ECF System. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following counsel of record:

Hugh M. Robert
Meredith Lindaman
Daniel Phillips

s/Alexander J. Sisemore