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

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

DEFENDANT UNITED STATES OF AMERICA'S
MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

COMES NOW Defendant United States of America, by and through Christopher J. Wilson, United States Attorney for the Eastern District of Oklahoma, and Alexander Sisemore and Joshua Mitts, Assistant United States Attorneys for the Eastern District of Oklahoma, and moves the Court for an order entering a dismissal and judgment in Defendant's favor.

Plaintiffs' alleged claims against the United States are jurisdictionally dependent upon Cherokee Nation Deputy Marshal Buddy Clinton being in the course and scope of his employment when he collided with Plaintiffs' vehicle on December 14, 2019. The undisputed material facts establish Deputy Clinton was acting *outside* the course and scope of his employment as a Deputy with the Cherokee Nation Marshal Service ("CNMS") when, without the knowledge of CNMS, he drove in the opposite direction of the location of an armed robbery call to instead transport friends to his personal residence with alcohol to consume later in the evening despite admitting that time was of the essence to respond to the robbery. Furthermore, Clinton was only specifically authorized to be on duty after his scheduled shift ended. Such conduct was contrary to the interests and benefits of the CNMS. By Deputy Clinton's own, express admission, dropping off his friends served no law enforcement purpose.

Further, even assuming this Court determines Deputy Clinton was in the course and scope of his employment, Plaintiffs failed to claim their alleged property damages in their administrative

claim; therefore, Plaintiffs failed to exhaust their administrative remedies for that claim and such must be dismissed for lack of subject matter jurisdiction.

I. UNDISPUTED MATERIAL FACTS

The Location of the Collision

1. On December 14, 2019, at approximately 8:43 pm, Plaintiff Gwendolyn Proctor was driving her vehicle on Stickross Mountain Road in Tahlequah, Oklahoma, with her husband, Plaintiff Jarrod Proctor, in the front seat. (Ex. 1, *Collision Report*).

2. Plaintiffs were travelling northbound on Stickross Mountain Road toward the intersection with Highway 51 Spur. (Ex. 1).

3. Upon reaching the intersection, Plaintiff Gwendolyn Proctor drove through the intersection. (Ex. 1).

4. When Plaintiffs were proceeding through the intersection, they collided with Cherokee Nation Deputy Marshal Buddy Clinton, who was travelling west on Highway 51 Spur in a 2020 Chevy Tahoe owned by the Cherokee Nation. (Ex. 1; Ex. 2, *Title*).

The Day's Events Leading Up To the Collision and the Scope of Deputy Clinton's Authority to Respond to a Robbery in the Opposite Direction

5. On December 14, 2019, Deputy Clinton was scheduled for duty with the CNMS from 8:00 am to 6:00 pm. (Ex. 3, *Clinton Dep.*, at 36:15-19). Deputy Clinton, in fact, went on duty at 8:12 am and went off duty at 18:05. (Ex. 4, *CAD*, at 1, 15; Ex. 3 at 77:2 – 78:1).

6. During his shift, at about 4:20 pm, Deputy Clinton picked up Wade Smittle and Philipe Ayala. (Ex. 5, *CNMS Officer Report* at 2-3; Ex. 3 at 70:11 – 71:10).

7. Smith and Ayala are Deputy Clinton's personal friends. (Ex. 3 at 70:25 – 71:6).

8. Smith and Ayala were in town helping Deputy Clinton train for a professional, mixed martial arts bout Clinton was getting ready for. (Ex. 3 at 70:22 – 71:24).

9. Once off duty, Deputy Clinton drove to Northeastern State University to play basketball with CNMS Sergeant Tony Asbill and CNMS Deputy Erik Fuson. (Ex. 3 at 80:4 – 83:18; Ex. 5 at 2).

10. Smittle and Ayala accompanied Clinton to NSU and played basketball with Clinton, Asbill, and Fuson. (Ex. 3 at 36:20 – 37:10; Ex. 5 at 2).

11. Before going to play basketball, Deputy Clinton drove to Reasor's where his friends

purchased alcohol—beer and wine—for the three of them to drink later. (Ex. 3 at 82:7 – 83:5).

12. While playing basketball at NSU, a call from dispatch came over Deputy Fuson's radio at 8:07 pm, (Ex. 3 at 85:2-10; Ex. 4 at 16), which requested a license plate check of a suspicious vehicle at the John Ketcher Youth Shelter, (Ex. 3 at 37:13-22, 84:7-21).

13. When the call from dispatch came in, Deputy Clinton asked to go back on shift at approximately 8:07pm—approximately two hours after his regularly scheduled shift ended—to respond to a call at the Ketcher Youth Center. (Ex. 3 at 84:8 – 85:7).

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

15. Sergeant Asbill cleared Deputy Clinton to respond to the Youth Shelter call, (Ex. 3 at 53:21 – 54:1), so Deputy Clinton was back on duty at 20:10 and dispatched to the Youth Shelter, (Ex. 4 at 17).

16. Deputy Cliton arrived at the Youth Shelter at 20:28 pm, (Ex. 4 at 16), and cleared the call at 20:32, (Ex. 3 at 38:12-20).

17. At 20:30, dispatch received a call for a robbery in progress, (Ex. 4 at 18), which was assigned to Fuson (Unit 17) at 20:31, (Ex. 4 at 18).

18. After the robbery call came in, Deputy Clinton contacted Deputy Fuson and asked if he needed at the robbery. (Ex. 3 at 38:24 – 39:4).

19. Deputy Clinton asked for authority to go to the robbery call because he believed the two officers on duty—Sergeant Asbill and Deputy 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. 3 at 87:3-8, 90:8-12).

20. Deputy Clinton 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. 3 at 38:24 – 39:17).

21. Deputy Clinton testified that in response to his request to go to the robbery call, Fuson responded, "Yes, go ahead and *head that way*." (Ex. 3 at 38:24 – 39:19 (emphasis added)).

22. According to the Computer Automated Dispatch, Deputy Clinton was assigned to respond to the robbery call at 20:32. (Ex. 4 at 18).

23. Deputy Clinton testified he decided before leaving the Youth Shelter, he would take his friends back to his apartment before responding to the robbery call. (Ex. 3 at 93:2 – 94:9; Ex. 5 at 2).

24. According to CNMS, Deputy Clinton's decision to take his friends to his apartment "gives reason as to why Clinton was driving West instead of turning East onto the 51 spur" when the collision with Plaintiffs occurred. (Ex. 5 at 2).

25. Deputy Clinton admitted he did not advise dispatch he had people in his vehicle between 8:17pm to 8:28pm, (Ex. 3 at 86:2-5, 103:18-21), and did not advise dispatch he was going to his apartment to drop off passengers. (Ex. 3 at 103:22-25).

26. In fact, 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. 5 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 . . . ." (emphasis added))).

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

27. Deputy Clinton's apartment is located at 1308 W. Choctaw Street, Tahlequah, Oklahoma. (Ex. 3 at 8:4-6, 11:17-19).

28. Briggs Tobacco Outlet[1] is located at 23957 Highway 51, Tahlequah, Oklahoma. (Ex. 6, *Yellow Pages*, accessible at https://www.yellowpages.com/tahlequah-ok/mip/briggs-tobacco-outlet-463394707).

29. The John A. Ketcher Youth Services Center is located at 21834 S. Jules Valdez Rd., Tahlequah, Oklahoma. (Ex. 7, *Cherokee Nation Human Services Website*, accessible at https://www.cherokee.org/all-services/human-services/youth-services-special-projects/).

30. 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. 8, *Google Maps from 21834 S. Jules Valdez Rd. to 23957 Highway 51*).[2]

[1] 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. 3 at 96:15 – 97:1 (Clinton's attorney's commentary)).

[2] 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.

31. At the time of the collision, after leaving the Ketcher Youth Services Center, Deputy Clinton was travelling ***west*** on Highway 51 Spur. (Ex. 1).

32. 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. 3 at 72:18 – 74:2).

33. Deputy Clinton testified that had he gone straight to Briggs Smoke Shop to respond to the robbery call as assigned (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. 3 at 96:4-14).[3]

34. From the John A. Ketcher Youth Services Center, it is 6.6 miles to Deputy Clinton's apartment. (Ex. 10, *Google Maps from 21834 S. Jules Valdez Rd. to 1308 W. Choctaw Street*).

35. Deputy 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. 3 at 98:21 – 99:11).

36. 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. 11, *Google Maps from 1308 W. Choctaw Street to 23957 Highway 51*).

The Reasons Deputy Marshal Clinton Was Dropping Off His Friends at His Own Residence with Alcohol to Be Consumed Later That Establish He Was Not Acting in the Course and Scope of His Employment

37. Deputy Clinton testified that in response to a robbery, time is of the essence. (Ex. 3 at 94:13-16).

38. Deputy Clinton admitted he wasn't serving any purpose of the Marshal Service by going to his apartment before going to the robbery call. (Ex. 3 at 94:17-24).

39. Deputy Clinton admitted there was no law enforcement purpose for dropping off

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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)).

[3] The testimony is in reference to the route identified in Exhibit 3 to Deputy Clinton's deposition, attached hereto as Exhibit 9.

his friends before going to the robbery call. (Ex. 3 at 95:11-16)

40. Deputy Clinton testified he was not travelling to his apartment to get anything he needed for the robbery call. (Ex. 3 at 40:17-20).

41. Deputy Clinton testified the reason he was travelling to his apartment was to drop his friends off for their safety. (Ex. 3 at 94:25 – 95:10). At the time of the collision, Clinton was also transporting the alcohol that he intended to consume later with his friends. (Ex. 5 at 3; Ex. 3 at 104:4-8).

42. Deputy Clinton testified instead of going to his apartment to drop his friends off, he could have left them at the youth shelter. (Ex. 3 at 95:17-20).

43. Deputy 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. 3 at 95:21 – 96:3).

The Cherokee Nation's Applicable Policies

44. 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. 12, *CNMS Law Enforcement Handbook*, at § 1-01-01(F)).

45. Deputy Clinton was subject to the Cherokee Nation Transportation Department Policies and Procedures Manual, (*see* Ex. 13, *CN Employee Acknowledgement*, § D), which 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. 14, *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. 14 at Ch. 6, subsection 6.7).

Facts Establishing Plaintiffs Failed to Exhaust Their Administrative Remedies for Property

Damages

46. Plaintiffs each submitted a Standard Form 95 for their claims, dated April 14, 2021. (Ex. 15, *SF 95s*).

47. Plaintiff Jarrod Proctor identified no owner of any damaged property, no description of property damage, and no amount being claimed for property damage when specifically prompted to do so. (Ex. 15 at 1).

48. Plaintiff Jarrod Proctor's SF 95 provides only a narrative for his alleged personal injuries and identifies an amount being claimed specifically for personal injuries. (Ex. 15 at 1).

49. Plaintiff Gwendolyn Proctor affirmatively stated in her SF 95, "NONE," when asked to identify the name and contact information for the owner of any damaged property being claimed. (Ex. 15 at 4).

50. Plaintiff Gwendolyn Proctor affirmatively stated in her SF 95, "NONE," when asked to briefly describe the nature and extent of any property damage being claimed. (Ex. 15 at 4).

51. Plaintiff Gwendolyn's SF 95 provides only a description of the nature and extent of her alleged personal injuries being claimed. (Ex. 15 at 4).

52. Plaintiff Gwendolyn Proctor did not identify any amount being claimed for property damage in her SF 95 when prompted to do so and, instead, only provided an amount being claimed specifically for alleged personal injuries. (Ex. 15 at 4).

II. ARGUMENTS AND AUTHORITIES

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Kendall v. Watkins*, 998 F.2d 848, 850 (10th Cir. 1993). "Summary Judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." *Celotex*, 477 U.S. at 327. "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts…. Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'"

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) (citations omitted). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff." *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986).

A. Deputy Clinton was Outside the Course and Scope of His Employment When He Was Transporting His Friends and Alcohol to His Apartment for His Own Personal Benefit Instead of Responding to the Robbery Call in the Opposite Direction

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*. Importantly, analysis of a waiver of sovereign immunity requires observance of three guiding principles: (1) that a "waiver of sovereign immunity must be strictly construed, in terms of its scope, in favor of the sovereign," *Sossamon v. Texas*, 563 U.S. 277, 292 (2011) (internal quotation marks and citation omitted); (2) that "[e]xceptions to the FTCA are to be narrowly construed," *Miller v. United States*, 710 F.2d 656, 662 (10th Cir. 1983) (citations omitted); and (3) that the party suing the government bears the burden to prove a waiver of sovereign immunity, *James v. United States*, 970 F.2d 750, 753 (10th Cir. 1992) (citation omitted).

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) (emphasis added). Thus, the United States has waived its sovereign immunity, and can be liable under the FTCA, only for tortious acts committed by its employees "acting within scope of [their] office or employment." *Id.* Consequently, the determination of the employee's "course and scope of employment" is a jurisdictional prerequisite to finding the United

States has waived its sovereign immunity under Title 28, section 1346(b)(1) of the United States Code. *See Brownback v. King*, 592 U.S. 209, 212 (2021) ("Federal courts have jurisdiction over these claims if they are 'actionable under § 1346(b).'" (quoting *FDIC v. Meyer*, 510 U.S. 471, 477 (1994))); *see also Two Eagle v. United States*, 57 F.4th 616, 621 (8th Cir. 2023) (course and scope is a jurisdictional issue per Supreme Court's *Brownback* decision).

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, Defendant disputes Clinton was acting in the course and scope of his employment.

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). 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).

Defendant has not found an Oklahoma case involving an employee driving in the complete opposite direction from the employee's assigned duties like here; however, Louisiana similarly requires an employee to be acting n the course and scope of employment for vicarious liability to apply. *Timmons v. Silman*, 761 So. 2d 507, 510 (La. 2000). Much like Oklahoma law, Louisiana law analyzes one's course and scope of employment by determining whether the employee's action is "of the kind that he is employed to perform, occurs substantially within the authorized limits of time and space, and is activated at least in part by a purpose to serve the employer." *Id.* (citations omitted).

In *Timmons v. Silman*, the Louisiana Supreme Court found an employee to be acting outside the course and scope of employment when she was involved in a motor vehicle collision with the plaintiffs in the case. *Id.* at 513. There, the employee was a legal assistant who was involved in a motor vehicle collision when she was supposed to be going to/from the post office to refill the firm's postage meter. *Id.* at 509-10. The assistant did, in fact, go to the post office to refill the firm's postage, but rather than return to the firm, she proceeded to the bank to cash her Christmas bonus check; she did so by passing within one or two blocks of the firm, failing to stop, and then driving 18 blocks away. *Id.* Before reaching the bank, the employee was involved in an automobile collision. *Id.* at 510. The employee still had the firm's refilled postage meter in her car that she was going to return to the firm after depositing her check. *Id.* at 511.

The Louisiana Supreme Court found the employee was acting outside the course and scope of her employment when she collided with the plaintiff. The Louisiana Supreme Court found significant that the employee was "going away from the business route and toward a personal objective" and in the "opposite direction." *Id.* at 511-12. The Louisiana Supreme Court further found that although part of the employee's regular duties included going to the post office *and the*

bank, the employee was not instructed, or expected, to go to the bank when the collision occurred. *Id.* at 512. Thus, the scope and purpose of duties was analyzed by looking at what the employee was *supposed* to be doing *at the time of the collision.*

Here, like in *Timmons*, Deputy Clinton was acting outside the course and scope of his duties when the motor vehicle collision occurred. Indeed, Deputy Clinton's actions to take himself outside the course and scope of employment are even more striking under the circumstances. Deputy Clinton was acting in his personal capacity and had completely abandoned his law enforcement duty to respond to the robbery call at Briggs Tobacco Outlet in the opposite direction. Deputy 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 and because the only officers on duty purportedly, according to Deputy Clinton, would not have been able to respond to the robbery call in a timely manner. Instead of fulfilling the obligation to respond as quickly as possible to the robbery call, Deputy 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 with alcohol he intended to consume later that evening.

By policy, Deputy Clinton was precluded from possessing any alcohol while on duty and was precluded from having any visitors in his vehicle unless he had authorization from the Executive Director. Those policy violations notwithstanding,[4] Deputy 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. Indeed, CNMS expected Deputy Clinton to go straight to the robbery call and to turn east on highway 51 spur. CNMS Captain Craig's report, in fact, expresses confusion as to why Clinton was even at the intersection where the collision occurred. It was only once Captain Craig learned Deputy Clinton that he had, in fact, decided to drop his friends off at his apartment before going to the robbery call that Deputy Clinton's presence at the collision location made sense. Deputy Clinton himself admitted the route he would've taken to go to the location of the robbery call he was assigned to did not take him through the location where he collided with Plaintiffs. Thus, but for Deputy Clinton's decision to drop his friends off at his

[4] Indeed, even if such conduct was permitted, the fact that Deputy Clinton had passengers and alcohol in his vehicle would not change the fact Deputy Clinton was not fulfilling the duties assigned to him by the CNMS.

apartment instead of responding to the robbery call, Deputy Clinton would not have been at the location where the collision with Plaintiffs occurred. Had Deputy Clinton been fulfilling the duties for which CNMS authorized him to be on duty, Deputy Clinton would not have been at Stickross Mountain Road and Highway 51spur where his collision with Plaintiffs ultimately occurred.

Unlike in *Silman* where the employee was conducting business that otherwise had been part of her regular duties,[5] Deputy Clinton acknowledged expressly there was no law enforcement purpose to taking his friends to his personal residence with the alcohol to be consumed later. Deputy Clinton admitted not only that there was no law-enforcement need to go to his residence before responding to the robbery call, but also that there was nothing needed at his residence to respond to the robbery call, and there were multiple points at which he could have stayed *en route* to the robbery call and dropped off his friends. Deputy Clinton also admitted he simply could have left his friends at the Youth Shelter and proceeded straight to the robbery call. Deputy Clinton's route to the robbery call changed significantly in the opposite direction only because of his decision to drop off his friends and alcohol at his apartment for private, personal benefit. Thus, 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; such was not even tangentially incidental to his duties as a law enforcement officer. Such conduct was, admittedly, *contrary* to Deputy Clinton's duties.

Dropping off friends at his personal residence with alcohol to be consumed later was not what the Cherokee Nation Marshal Service authorized Deputy Clinton to be on duty for when the collision occurred. Dropping off friends at his personal residence with alcohol to be consumed later was not proper, necessary, or usual for responding to a robbery call in the opposite direction—a call for which time was of the essence. Dropping off friends at a personal residence with alcohol to be consumed later by the law enforcement officer is not a customary duty of a law enforcement officer. Deputy Clinton abandoned his law enforcement duties when he turned west, instead of east, on Highway 51 spur and he had not returned to the course and scope of his duties by the time he and Plaintiffs collided.

Defendant anticipates Plaintiffs will attempt to argue that Clinton cloaked himself in superficial trappings of his employment, such as being in uniform, being on duty, and tracking his

[5] And still deemed outside the course and scope of employment.

mileage in his Cherokee Nation vehicle and that such is sufficient to establish Deputy Clinton was in the course and scope of his duties; however, 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 his employer's vicarious liability without the employer's consent.

Because Deputy Clinton was outside the course and scope of his employment when the collision occurred, Plaintiffs' claims fail. The United States has not waived its sovereign immunity and consented to suit to the acts and omission of its employee outside the course and scope of employment.

B. Plaintiffs Did Not Exhaust Their Administrative Remedies for a Property Damage Claim; Therefore, This Court Lacks Subject Matter Jurisdiction Over Those Claims and Such Must Be Dismissed

Assuming the Court allows this case to proceed, this Court nonetheless has no subject matter jurisdiction over any purported property damage claims.

Before instituting an action under the Federal Tort Claims Act, a claimant must first exhaust his or her administrative remedies; it is a jurisdictional prerequisite to an FTCA action. *Pipkin v. U.S. Postal Serv.*, 951 F.2d 272, 273 (10th Cir. 1991). Title 28, section 2675(a) of the United States Code states a tort action "shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing . . . ." A claim is "deemed to have been presented when a Federal agency receives from a claimant . . . an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain . . . ." 28 C.F.R. § 14.2(a). "Because the [Federal Tort Claims Act] constitutes a waiver of the government's sovereign immunity, the notice requirement established by the FTCA must be strictly construed." *Bradley v. United States*, 951 F.2d 268, 270 (10th Cir. 1991). "The goal of the administrative claim requirement is to let the government know what it is likely up against: mandating that a claimant propound a definite monetary demand ensures that '[t]he government will at all relevant times be aware of its maximum possible exposure to liability and will be in a position to make intelligent settlement decisions.'" *Reilly v. United States*, 863 F.2d

149, 173 (1st Cir. 1988) (quoting *Martinez v. United States*, 780 F.2d 525, 530 (5th Cir. 1986)).

"The Federal Court derives its jurisdiction to entertain damages against the United States from 28 U.S.C. § 2675(a)." *Bradley*, 951 F.2d at 270. Failure to completely exhaust administrative remedies deprives the court of subject matter jurisdiction to entertain the action. *Deutsche v. United States*, 67 F.3d 1080, 1091 (3d Cir. 1995); *GAF Corp. v. United States*, 818 F.2d 901, 905 (D.C. Cir. 1987). "[B]ringing an administrative claim is a jurisdictional prerequisite to suit, imposed by Congress, which the courts have no power to waive." *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1463 (10th Cir. 1989).

Courts have long held that property damage claims are separable from personal injury claims for purposes of determining whether such claims have been properly exhausted. *See Kokaras v. United States*, 980 F.2d 20 (1st Cir. 1992); *Carter v. United States*, 667 F. Supp. 2d 1259 (D. Kan. 2009); *Schwartzman v. Carmen*, 995 F. Supp. 574 (E.D. Pa. 1998).

Here, Plaintiffs exhausted their administrative remedies only for their personal injury claims. Plaintiffs affirmatively represented they were not claiming any damages for property loss and identified the nature of their alleged damages as only personal injuries. Consequently, this Court has no subject matter jurisdiction over any alleged property damage claims and such must be dismissed.

III. 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 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 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, dismissal of Plaintiffs' claims and judgment in Defendant's favor is proper.

WHEREFORE, premises considered, Defendant United States of America requests the Court dismiss Plaintiffs' claim, enter judgment in Defendant's favor, and award Defendant any other relief the Court deems just and equitable.

Respectfully Submitted,

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CERTIFICATE OF MAILING

I hereby certify that on April 15, 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:

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s/Alexander J. Sisemore