

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

JARROD PROCTOR and)	
GWENDOLYN PROCTOR,)	
)	
Plaintiffs,)	
v.)	Case No.: CV-21-307-RAW
)	
THE UNITED STATES OF AMERICA,)	
UNITED STATES DEPARTMENT OF)	
INTERIOR, and BUREAU OF INDIAN)	
AFFAIRS,)	
)	
Defendants.)	

**PLAINTIFFS’ REPLY TO DEFENDANT UNITED STATES OF AMERICA’S
RESPONSE TO PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT
[DKT. NO. 57]**

COME NOW Plaintiffs Jarrod and Gwendolyn Proctor (“Plaintiffs”), by and through its attorneys of record, Hugh Robert and Meredith Dibert Lindaman of Sherwood & Robert, and submits the following Reply to Defendant United States of America’s Response to Plaintiffs’ Motion for Partial Summary Judgment [Dkt. No. 53]. In support of their Reply, Plaintiffs submit the following:

INTRODUCTION

On March 20, 2024, Plaintiffs submitted its Partial Motion for Summary Judgment and Brief in Support [Dkt. No. 40] ("Plaintiffs' Motion"). Defendant United States of America ("Defendant") subsequently filed a Response to Plaintiffs' Motion for Partial Summary Judgment [Dkt. No. 53] ("Response"). The Response contends that various facts set forth by Plaintiffs, although supported by evidence, are in dispute. However, it ultimately fails to raise any legitimate, evidence-supported factual contentions that would preclude this Court from granting the relief sought by the Plaintiffs in the Plaintiffs' Motion.

RESPONSE TO DEFENDANT’S ADDITIONAL MATERIAL FACTS

1. Undisputed.

2. Undisputed.

3. Undisputed

4. Disputed in that Defendant’s attached Exhibit is improper. While the Tenth Circuit recognizes a Court may take judicial notice of distances and geographical facts, it is improper for Defendant to purport its Motion’s Exhibit 5 as a proper use of judicial notice¹ Defendant’s Exhibit 5 states that the route is 17 minutes based on current traffic conditions at the time and date of the screenshot (April 3, 2024, at 10:30 a.m.). Not only does this likely not represent the traffic flow on the day of the incident in the evening, but we can only assume that this time estimate is from following posted speed limits. It is undisputed that Clinton was using his lights and sirens in an official law enforcement vehicle. Accordingly, this time is likely inaccurate for a multitude of reasons. These reasons combined show this fact is subject to a reasonable dispute, so judicial notice of this timing would be improper.

5. Undisputed.

6. Undisputed.

7. Undisputed.

8. Disputed in that Defendant’s attached Exhibit is improper. Defendant’s Exhibit 7 shows two different routes with different distances. Stating it is 6.6 miles away is improper, as any number of reasons (traffic, road closures, accidents) could have made one route more effective. Defendant is not attempting to measure these distances as the crow flies but to state that the fastest route is

¹ The court may judicially notice a fact that is *not subject to reasonable dispute* because it is (1) generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

6.6 miles. This cannot be proven based on the attached Exhibit. These reasons combined show this fact is subject to a reasonable dispute, so judicial notice of this timing would be improper.

9. Undisputed.

10. Disputed in that the Defendant's attached Exhibit is improper due to its time estimate.

Plaintiff does not dispute the route, as described, is 7.5 miles.

11. Undisputed.

12. Undisputed.

13. Undisputed.

14. Disputed in part. While Clinton testified that he was not serving any purpose of the Marshal Service by going to his apartment before going to the robbery call, this is taken out of context. Clinton stated multiple times in his deposition that the armed robbery call was more dangerous and had a higher potential for injury to anyone at the scene of the robbery. *See* Deputy Clinton's Deposition, attached as Exhibit 1 at 42:1-17; *see also* 94:17-25 to 95:1-16 (where Clinton states multiple times in response to Defendant's question about whether there was a police purpose for heading to his apartment that he was dropping them off there for their safety). The CNMS job description requires deputies like Clinton to provide for citizens, not merely address violators. *See* CNMS job description, attached as Exhibit 2. Accordingly, keeping two civilians safe is in furtherance of a police purpose.

15. Disputed in part. While Clinton testified that there was no law enforcement purpose in going to his apartment before going to the robbery call, this is taken out of context. Clinton stated multiple times in his deposition that the armed robbery call was more dangerous and had a higher potential for injury to anyone at the scene of the robbery. Exhibit 1 at 42:1-17; *see also* 94:17-25 to 95:1-16 (where Clinton states multiple times in response to Defendant's question about whether

there was a police purpose for heading to his apartment that he was dropping them off there for their safety). The CNMS job description requires deputies like Clinton to provide for citizens, not merely address violators. Exhibit 2. Accordingly, keeping two civilians safe is in furtherance of a police purpose.

16. Undisputed.

17. Undisputed.

18. Undisputed.

19. Undisputed, but not material. Clinton was acting within the scope of his job when dropping off the passengers to avoid taking them to the scene of an armed robbery. Where he dropped the passengers off is not material.

20. Undisputed, but not material. Clinton was acting within the scope of his job when dropping off the passengers to avoid taking them to the scene of an armed robbery. Where he dropped the passengers off is not material.

21. Undisputed, but not material. While the CNMS Officer Report says it was later determined that Clinton had two passengers, this does not mean that a supervisor was unaware that Clinton had two passengers. Sergeant Asbill invited Clinton and his two passengers to play basketball with him and Deputy Erik Fuson. Exhibit 1 at 37:1-6. Clinton further testified that he, Ayla, and Smittle left the gym together after Sergeant Asbill approved Clinton going on a call and that Sergeant Asbill knew the passengers went with Clinton and raised no concerns. Exhibit 1 at 38:6-11. Also, Clinton had reported that he was "10/12," meaning he had passengers in his vehicle. *See* CNMS Officer Report, attached as Exhibit 3 at pp. 2-3; *see also* Exhibit 1 at 70:25-71:10.

22. Undisputed, but not material. While the CNMS Officer Report says Clinton could no longer be 10/12, that does not mean that Clinton could no longer be 10/12 when he first went off duty.

Clinton stated that the presumption in not coming off 10/12 is that the passengers were still in the vehicle. Exhibit 1 at 44:19 – 45:8.

23. Disputed in that it attempts to mischaracterize Clinton's testimony. While he did not explicitly advise dispatch that he had passengers in his vehicle between 8:17 p.m. and 8:28 p.m., the presumption remained that the passengers remained in the vehicle because he had not gone off 10/12. Exhibit 1 at 44:19 – 45:8.

24. Undisputed but immaterial.

25. Undisputed.

26. Undisputed.

27. Undisputed.

28. Undisputed.

29. Undisputed.

30. Undisputed.

31. Undisputed but immaterial. Whether “head that way” was meant in its figurative or literal meaning is irrelevant to the fact that Clinton was on duty and acting within the scope of his duty.

32. Undisputed but immaterial.

33. Undisputed.

34. Undisputed but immaterial.

35. Undisputed but immaterial. This was not an enforced policy, as evidenced by Clinton going 10/12, giving the names of his passengers, and no issues being raised by dispatch. *See* CAD Full Report at p. 12, attached as Exhibit 4. Further, Clinton’s supervisor knew he had passengers in his vehicle and invited them to play basketball. Exhibit 1 at 37:1-6. Sergeant Asbill knew Clinton left

to respond to the Youth Center call with the two passengers and raised no concerns. Exhibit 1 at 38:6-11.

I. ARGUMENTS & AUTHORITIES

A. Standard for Response to Summary Judgment

Once a movant sets forth undisputed material facts that warrant summary judgment, the burden shifts to the non-moving party to "demonstrate there exists a material fact in dispute which would justify a trial." *Ind. Nat'l Bank v. State Dep't of Human Servs.*, 1993 OK 101, ¶ 1, 857 P.2d 53, 57. To defeat a motion for summary judgment, evidence must be based on more than mere speculation, conjecture, or surmise. *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004)(internal citations omitted). In similar terms, the non-moving party "must come forward with facts supported by *competent evidence*. If the nonmovant fails to carry this burden, summary judgment is appropriate." *Nahno-Lopez v. Houser*, 625 F.3d 1279, 1280 (10th Cir. 2010)(emphasis added). Further, where summary judgment is proper on some, but not all issues, then the court should grant summary judgment on those issues not in controversy. *RST Service Mfg., Inc. v. Musselwhite*, 1981 OK 45, ¶ 8, 628 P.2d 366, 368, (citing *Pettit v. Vogt*, 1972 OK 34, ¶ 1, 495 P.2d 395, 396).

B. The Undisputed Material Facts Entitle Plaintiffs to Partial Summary Judgment.

Several facts espoused by Plaintiffs that Defendant admits are undisputed. A narrative consisting only of the Undisputed Material Facts set forth in Plaintiffs' Motion to which Defendant has not contested, would read as follows:²³:

1. On December 14, 2019, at approximately 20:43, **Plaintiff Gwendolyn Proctor was lawfully operating her vehicle** and traveling on Stick-Cross Mountain Road in

² For any partial disputes, Plaintiff has omitted facts Defendant claims are in dispute.

³ In its Argument & Authorities, Plaintiff will refer to these statements of facts as UMF ¶ ____.

Tahlequah, Cherokee County, Oklahoma. Plaintiff Jarrod Proctor was a front passenger in Plaintiffs' vehicle.

2. Plaintiffs' vehicle was traveling northbound on Stick-Cross Mountain Road toward the intersection with State Highway 51 Spur.
3. This intersection is controlled by a 4-way traffic light.
4. On December 14, 2019, **Buddy Lee Clinton, Jr. ("Clinton") was employed with the Cherokee Nation Marshal Service ("CNMS"), as a Deputy Marshal.**
5. On December 14, 2019, Clinton was scheduled for duty with the CNMS from 08:00 until 20:00. He went on shift at 08:12.
6. At 16:20, **Clinton announced "10-12" to dispatch meaning he had a visitor or other occupant in his vehicle.** He had picked up two visitors in his vehicle – Philippe Ayala ("Ayala") and Wade Smittle ("Smittle").
7. Clinton was "10/45" (lunch or dinner break) and was on lunch break at 17:11. He was returned on shift at 18:05 and then immediately "10/7" (off duty) at 18:05.
8. After he was off duty, Clinton drove in the CNMS vehicle to NSU to play basketball with CNMS Sergeant Tony Asbill ("Asbill") and Deputy Erik Fuson ("Fuson").
9. While playing basketball, a call from dispatch came over Deputy Fuson's radio at 20:07. The dispatch call requested a license plate check of a suspicious vehicle at the John Ketcher Youth Shelter ("youth shelter").
10. Sergeant Asbill and Deputy Fuson were not in uniform while playing basketball. Deputy Clinton was still in his uniform despite being off duty.
11. **Sergeant Asbill verbally cleared Deputy Clinton to respond to the youth shelter call. As such, Clinton was back on shift at 20:10** and officially dispatched to the youth shelter at 20:17.
12. **Ayala and Smittle left the NSU gym with Deputy Clinton to respond to the youth shelter call.**
13. Deputy Clinton arrived at the youth shelter at 20:28. He cleared the call to the youth shelter at 20:32 p.m., but **he was authorized to be on duty to respond to the robbery call.**
14. At 20:30, dispatch received a call for a robbery in progress. According to the CAD Full Report, Fuson (Unit N17) received the first dispatch assignment at 20:31 for this robbery.

15. After the robbery call came over the radio, Deputy Clinton contacted Fuson and asked if he was needed at the robbery. Because Asbill and Fuson were not in uniform and the urgent situation, Clinton offered to take the dispatch call. **Fuson again verbally dispatched Clinton to the robbery at 20:32 from the youth shelter.**
16. According to the CAD report, Deputy Clinton was **reassigned to the robbery call at 20:39, and he activated his lights and sirens.**
17. Deputy Clinton headed to his apartment to drop off the visitors at his apartment complex.
18. Deputy Clinton was on duty with activated lights and sirens as he approached the intersection of Stick-Ross Mountain Road and State Highway 51 spur.
19. At approximately 20:42, Deputy Clinton drove the CNMS vehicle through a red light as he proceeded through the intersection. **As a result of Clinton's actions, the CNMS vehicle struck the Plaintiffs' vehicle.**
20. **Clinton remained on duty for the CNMS from the time he responded to the youth shelter call at 20:17 through the time of this accident.**
21. Deputy Clinton did not consume any alcohol while on duty.
22. Clinton was not required to track personal mileage for the CNMS vehicle.
23. At the end of every shift, Deputy Clinton was allowed to drive his patrol car home which he did as a matter of routine.

These facts alone show that Deputy Clinton, while acting within the course and scope of his government employment, caused a loss of property and personal injury due to his negligent or wrongful act, causing a waiver of sovereign immunity under the FTCA. Accordingly, a partial summary judgment is proper. However, there are also several facts set forth by Plaintiffs that Defendant fails to adequately deny. Although these facts are deemed by Defendant to be contested, in reality Defendant fails to actually contest their veracity. In support of these "contested" facts, Defendant either cites to inadmissible evidence, surmise, speculation, or to no evidence at all. Defendant's unsupported beliefs are not admissible evidence to defeat the granting of a summary

judgment. See, *Mengel v. Rosen*, 735 P.2d 560, 563 (Okl. 1987) (holding that an appellant's statement and hearsay did not act as competent evidence in refuting a fact for the purposes of summary judgment).

As stated above, this failure to respond adequately renders these facts admitted since they are contested only by improper means. Given their status as effectively admitted, the undisputed factual narrative continues as follows:

24. Plaintiffs' vehicle approached the intersection and then lawfully traveled through with a green traffic light.
25. On December 14, 2019, Clinton was employed with the Cherokee Nation Marshal Service ("CNMS"), as a Deputy Marshal *with the Bureau of Indian Affairs ("BIA")*. *At the time of the collision, Clinton was operating a 2020 Chevrolet Tahoe owned by the BIA.*
26. When Ayla and Smittle left the NSU gym with Deputy Clinton to respond to the youth shelter call, *Sergeant Asbill observed Clinton leave the gym with both visitors.*
27. Deputy Clinton *was en route to the robbery* [and to] drop off the visitors at his apartment complex.

With the addition of these additional undisputed material facts, it is clear that Plaintiffs' Motion for Partial Summary Judgment should be granted.

C. The Factual Disputes Raised by Defendant are Refuted by Evidence.

In efforts to survive summary judgment, Defendant has submitted copious amounts of maps, deposition quotes, and reports purported to dispute material facts set forth by Plaintiffs in Plaintiffs' Motion. The reality, however, is that these evidentiary materials serve no purpose other than to mislead the Court. They do not change the reality that undisputed material facts exist which render Plaintiffs entitled to partial summary judgment.

To add clarity to the record on certain important facts, Plaintiffs have submitted supplementary evidence herewith which further supports the undisputed nature of the material facts to which they relate:

1. *Plaintiffs' vehicle approached the intersection and then lawfully traveled through with a green traffic light.* (Statement of Undisputed Material Fact 4⁴ [hereinafter "SOF ¶ ____"]).

Defendant denies SOF ¶ 4 because "Plaintiffs provided no support for the assertion that Plaintiffs' vehicle 'lawfully traveled through with a green light.'" However, Defendant failed to dispute Plaintiffs' SOF ¶ 1, which states, "Plaintiff Gwendolyn Proctor was lawfully operating her vehicle and traveling on Stick-Cross Mountain Road in Tahlequah, Cherokee Oklahoma." Defendant also failed to dispute SOF ¶ 20, which states in part, "[a]s a result of Clinton's actions, the CNMS vehicle struck the Plaintiffs' vehicle." Further, Plaintiff submitted its Exhibit 3, CNMS Officer Report, which states as a concern, "Clinton failed to stop or slow for the red light at the intersection of 51 Spur and Stickcross Mountain Road causing an accident." Defendant only cited a statute while speculating that Plaintiff's actions were unlawful, but failed to provide actual evidence to refute the Plaintiff's statement that Plaintiff drove lawfully.

2. *On December 14, 2019, Clinton was employed with the Cherokee Nation Marshal Service ("CNMS"), as a Deputy Marshal with the Bureau of Indian Affairs ("BIA"). At the time of the collision, Clinton was operating a 2020 Chevrolet Tahoe owned by the BIA.* (SOF ¶ 5).
3. *Ayla and Smittle left the NSU gym with Deputy Clinton to respond to the youth shelter call. Sergeant Asbill observed Clinton leave the gym with both visitors.* (SOF ¶ 13).

Defendant disputes that Sergeant Asbill observed Clinton leave the gym with his friends, stating Clinton "merely speculates that Sergeant Asbill knew they were with him, but does not explain the basis for this knowledge," citing Clinton's Deposition at 38:5-11. However, Defendant seems to ignore the rest of Plaintiffs' citation to Clinton's Deposition at 37:25 – 38:12, which states

⁴ This refers to Plaintiffs' Motion. Specifically, to its Statement of Undisputed Material Facts, starting on p. 3.

that Clinton based this statement on Sergeant Asbill knowing that Clinton arrived at the gym with two passengers, Sergeant Asbill, Clinton, Ayla, and Smittle playing basketball together, and Clinton stating that Clinton, Ayla and Smittle left the gym together.

4. *Deputy Clinton arrived at the youth shelter at 20:28. He cleared the call to the youth shelter at 20:32, but his shift did not end.* (SOF ¶ 14).

Defendant disputes this Statement of Fact as to the characterization as being of shift and claims that Clinton's shift was over, stating that he was later authorized to be on duty only to respond to the robbery call. Defendant cites Clinton's deposition as its rationale for disputing SOF ¶ 14. However, Clinton's deposition states he continued to be on duty. Exhibit 1 at 38:12–20. Further, the statements Defendant cite do not disprove SOF ¶ 14. It simply shows that Clinton asked dispatch if they wanted Clinton to respond to the robbery call. Further, the CNMS Officer Report states that, "Clinton was on a scheduled shift from 0800 to 1800 hours. Clinton had gone off duty at 18:05 hours and *then came back on duty at 20:10 hours* after speaking with shift supervisor Sergeant Tony Asbill." Exhibit 3 at p. 1 (emphasis added). The CNMS Officer Report then states, "Clinton received a request to respond to the scene and hold it for other Marshal's on duty to arrive." *Id.* The Report ends by stating, "Clinton *went off duty at 23:58 hours.*" *Id.* at 3 (emphasis added).

5. *Deputy Clinton was en route to the robbery [and to] drop off the visitors at his apartment complex.* (SOF ¶ 18).

Defendant disputes that Clinton was *en route* to the robbery because he was headed home to drop off the passengers and "there was no police purpose for heading to [Clinton's] apartment." Clinton was on his way to the robbery, which means he was *en route* to the robbery. Defendant states there was no police purpose for Clinton to drop off the passengers at his apartment, citing Clinton's deposition. However, this is a mischaracterization of Clinton's deposition. Clinton stated

multiple times in his deposition that the armed robbery call was more dangerous and had a higher potential for injury to anyone at the scene of the robbery. Exhibit 1 at 42:1-17; *see also* 94:17-25 to 95:1-16 (where Clinton states multiple times in response to Defendant's question about whether there was a police purpose for heading to his apartment that he was dropping them off there for their safety). The CNMS job description requires deputies like Clinton to provide for citizens, not merely address violators. Exhibit 2. Accordingly, keeping two civilians safe is in furtherance of a police purpose.

D. The Remaining Undisputed Facts Prove Clinton was Acting Within the Course and Scope of His Employment When the Accident Occurred.

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). Further, 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). In its Response, Defendant cites the following test to determine if an individual is acting within the scope of his employment:

[T]he correct test to be applied is not so much whether the conduct of the servant was a departure or a mere deviation from his line of duty, but whether, taking into consideration the purpose of his mission and the distance traveled, it could be said that the servant was stepping aside in some marked or unusual manner, for some purpose wholly disconnected with his employment.

Heard v. McDonald, 1935 OK 155, ¶ 5, 172 Okla. 180, 181, 43 P.2d 1026, 1027.

In the present case, Clinton, who was employed with the CNMS as a deputy Marshal, was on shift from 8:12 until 20:00 and from 20:17 to the time of the accident. UMF ¶ 4-5, 11, 20. Accordingly, Clinton is an employee of the United States and was on duty at the time of the accident. Clinton was cleared to go on duty to respond to a call at a Youth Center, and the supervisor who assigned him knew Clinton had two passengers in the vehicle, as well as dispatch

who Clinton had earlier reported 10/12 to. UMF ¶ 6, 11-12, 26. Clinton was cleared to respond to an armed robbery call at 20:39. UMF ¶ 15-16. Due to the dangerous nature of the call and Clinton's duty as a Marshal to keep civilians safe, Clinton headed to his apartment, lights and sirens on, to drop off the passengers. UMF ¶ 17; Exhibit 2; Exhibit 1 at 42:1-17; *see also* 94:17-25 to 95:1-16. The evidence is exceedingly clear that Clinton was acting within the scope of his duty and certainly not for a purpose "wholly disconnected" from his employment.

The purpose of Clinton's mission was to get the civilians out of his vehicle so he could get to the robbery and assist. The CNMS Job Description states that deputies must provide for citizens and not merely address violators [of law]. Exhibit 2. So, both acts were in furtherance of his job as a deputy Marshal. Accordingly, Clinton was not deviating from his line of duty and was acting within the scope of his employment when the accident occurred.

Defendant makes arguments as to why dropping the civilians off at Clinton's apartment was such a deviation from Clinton's line of duty that the United States could not be held liable for the accident. First, Defendant states 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. However, since Clinton's job description includes protecting civilians, and he was acting to protect civilians while on his way to an active robbery, it is clear this is not an abandonment of his duties.

Next, Defendant argues that Marshals are only to help in emergency situations, and that accepting Plaintiffs' argument "will lead to finding that officers performing personal errands for friends and family" are within the scope of employment. However, the CAD REPORT from December 19, 2019, shows a multitude of calls where Marshals were dispatched simply to help civilians in non emergent situations. The day of the incident, Clinton was dispatched at 11:21 hours to help a motorist with a flat tire get to a mechanic's shop. Exhibit 4 at p. 4. Another event in the

report shows Deputy Erik Fuson was called to a woman's house that had flooded because she couldn't get ahold of maintenance. *Id.* at p. 13. In fact, the Deputy even contacted the woman's housing authority on her behalf to get her help. *Id.* Yet another event shows Erik Fuson and Sergeant Asbill, Clinton's supervisor, dispatched to help someone change their tire. *Id.* at 21. None of these would likely fit Defendant's definition of an "emergency" situation; however, at least three, seemingly non emergent, acts to assist civilians were performed on the same day, one by Clinton's supervisor. Accordingly, it appears that dropping off civilians so they would not be taken to the scene of an armed robbery was an active pursuit of Clinton's employer's tasks.

Next, Defendant argues that Clinton was authorized to be on duty outside his scheduled shift *solely* to respond to the robbery call. Defendant cites no evidence for this statement. The evidence shows that Clinton was initially put back on shift at 20:10 to respond to the call from the youth center and that he went off shift after the accident. UMF ¶¶ 11, 14, 18, 20. Defendant also fails to cite that Clinton's obligation was "to respond as quickly as possible to the robbery call." Defendant is speculating that this was Clinton's obligation because Clinton agreed that time is of the essence when answering a robbery call. However, evidence cannot be based on speculation to defeat a motion for summary judgment. *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004)(internal citations omitted).

Defendant heavily relies on Clinton's statements in his deposition that there was "no law enforcement need" to go to his residence. However, that does not negate the fact that it accomplished a law enforcement purpose. As Clinton stated numerous times, he dropped the passengers off to keep them safe. Exhibit 1 at 42:1-17; 94:17-25 to 95:1-16. Additionally, Sergeant Asbill invited the two passengers to play basketball with himself, Clinton, and another deputy and authorized Clinton to go on shift and respond to a call while Clinton had the two passengers with

him. UMF ¶ 25; Exhibit 1 at 37:25 – 38:12. Clinton had called in a 10-12 to report his passengers. UMF ¶ 6. So, even if Clinton did not have a law enforcement reason to have passengers in his vehicle, he was given authority by his supervisor when he was knowingly assigned to duty while having passengers in his car, and when he was not reprimanded for reporting having the passengers in his vehicle.

Accordingly, under the *Heard v. McDonald* Test for scope of employment, the conduct of Clinton was not a departure nor a deviation from his line of duty because he was not stepping aside his duty in a marked or unusual manner purposefully disconnected with his employment. So, the United States is liable under the FTCA.

E. Even if Clinton Broke A Written Policy, He Still Acted Within the Scope of His Employment.

“Scope of Employment” can also be defined as “performance by an employee acting in good faith within the duties of his office or employment or of tasks lawfully assigned by a competent authority...with *actual or implied consent of the supervisor of the employee.*” *DeCorte v. Robinson*, 1998 OK 87, ¶ 1, 969 P.2d 358, 359 (emphasis added).⁵ In *DeCorte*, an off-duty police officer who had ingested multiple alcoholic drinks saw a car he thought was driving dangerously. *Id.* at 2. The off-duty officer began pursuit of the driver’s car, reaching speeds up to 85 mph and driving on the center median, pulling a handgun on the driver when the car eventually stopped. *Id.* at 3. After the driver sued to off-duty officer, the jury held that the off-duty officer was acting within the scope of his employment as a police officer, and the jury verdict was later affirmed by the Supreme Court of Oklahoma⁶. *Id.* at 6.

⁵ While Defendant claims Plaintiff’s citation to *DeCorte* in its Motion is “inapposite” to this case, this is false. While this case does not fit Defendant’s theory of the case, that does not mean it is inappropriate.

⁶ The Court of Civil Appeals reversed and remanded, reasoning that the verdict was internally consistent as the off-duty officer could not have been acting within the scope of his employment while also acting in a way that warranted

This makes it exceedingly clear that Clinton acted within the scope of his employment as a police officer. Defendants argue that the fact there was unopened alcohol in the vehicle, which was supposedly against policy, Clinton could have been acting within the scope of his employment.

Regardless, Clinton was authorized to use the vehicle for personal reasons, such as driving home, and was not required to track personal mileage. UMF ¶ 22-23. Therefore, it was implied that Clinton could transport personal items in his vehicle. Regardless, if Clinton had to remove the alcohol to respond to the call, his only other option would be to take the alcohol out of the car and leave it on the street or at some other venue to fall into the hands of any stranger or underaged person who came upon it. Surely that would not be in furtherance of Clinton's duty as a marshal.

Similarly, Defendant proposes that transporting passengers was not within the scope of Clinton's duties. However, seeing as Clinton had reported the passengers in the vehicle and received no reprimand, and his Sergeant was aware of their presence when putting Clinton back on duty, it was implied that Clinton was allowed to have passengers in his vehicle while on (or off) duty. Also, doing as Defendant seems to suggest, dropping off the two civilians carrying alcohol at random destinations (that may or may not let them in while in possession of alcohol) in the middle of December does not seem appropriate. Marshals are expected to use their judgment in the execution of their duties, and that is what Clinton did. Accordingly, taking the passengers to his apartment and carrying alcohol while on shift would be under the implied consent of his supervisors and within the scope of his employment.

II. CONCLUSION

punitive damages. *Id.* at 8. The Oklahoma Supreme Court held that under the theory of scope of employment, there was competent evidence to serve as the basis for the verdict and affirmed the jury's findings.

WHEREFORE Plaintiffs, Jarrod Proctor and Gwendolyn Proctor, pray this Court will enter partial summary judgment against the Defendant, The United States of America for liability only with damages to be determined at a later date, and for any such other and further relief as may be deemed just, equitable, and fair.

Respectfully submitted,

SHERWOOD & ROBERT

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of April 2024, I electronically filed the foregoing with the Clerk of Court using the ECF System and the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrant:

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s/ Meredith Dibert Lindaman