

**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’ RESPONSE TO DEFENDANT UNITED STATES OF AMERICA’S
MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT [DKT. NO. 59]**

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 Response to Defendant United States of America’s Motion for Summary Judgment and Brief in Support [Dkt. No. 59]. In support of their Response, Plaintiffs submit the following:

INTRODUCTION

On April 15, 2024, Defendant United States of America ("Defendant") Defendant United States of America’s Motion for Summary Judgment and Brief in Support [Dkt. No. 59] ("Motion"). The Motion inaccurately contends that various disputed facts are actually agreed upon. This Motion ultimately fails to raise any legitimate, evidence-supported factual contentions that would demonstrate that Defendant is entitled to summary judgment.

I. RESPONSE TO DEFENDANT’S “UNDISPUTED MATERIAL FACTS”

1. Undisputed.

2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Undisputed.
6. Undisputed, but immaterial.
7. Undisputed, but immaterial.
8. Undisputed, but immaterial.
9. Undisputed.
10. Undisputed.
11. Undisputed, but immaterial.
12. Undisputed.
13. Undisputed.
14. Undisputed.
15. Undisputed.
16. Undisputed.
17. Undisputed, but immaterial that the call was originally assigned to Deputy Fuson.
18. Undisputed.
19. Undisputed.
20. Undisputed.
21. Undisputed as to the information contained, but disputed as to any emphasis added in that it tends to purport Deputy Fuson said, “go ahead and head that way” in a literal sense, while there is no evidence to support this.¹

¹ Unsubstantiated allegations carry no probative weight in summary judgment proceedings. Speculation does not create a genuine issue of fact; instead it creates a false issue, the demolition of which is a primary goal of summary

22. Undisputed.

23. Undisputed.

24. Undisputed.

25. 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. *See* Deputy Clinton's Deposition, attached as Exhibit 1 at 44:19 – 45:8.

26. 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 2 at pp. 2-3; *see also* Exhibit 1 at 70:25-71:10.

27. Undisputed, but immaterial.

28. Undisputed, but immaterial.

29. Undisputed, but immaterial.

30. 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

judgment. *Young v. Finish Line*, CIVIL ACTION Case No. 94-4117-DES, 1995 U.S. Dist. LEXIS 11567, at *8 (D. Kan. July 12, 1995)(internal citations omitted).

Defendant to apply judicial notice to the Motion's Exhibit 8.² Further, 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 is premised on the assumption that Clinton at all times adhered to the posted speed limit. 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.

31. Undisputed.

32. Undisputed.

33. Disputed in that the Defendant's Exhibit 9 is improper due to its time estimate. Plaintiff does not dispute that Deputy Clinton testified he would have turned east if he went straight to Briggs Smoke Shop to respond to the robbery call.

34. Disputed in that Defendant's attached Exhibit 10 is improper. Exhibit 10 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 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.

35. Undisputed, but not material.

² 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.

36. Disputed in that the Defendant's attached Exhibit 11 is improper due to its time estimate. Plaintiff does not dispute the route, as described, is 7.5 miles.

37. Undisputed.

38. 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 3. Accordingly, keeping two civilians safe is in furtherance of a police purpose.

39. 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 3. Accordingly, keeping two civilians safe is in furtherance of a police purpose.

40. Undisputed, but immaterial.

41. Disputed in part and admitted in part. As to the first fact, undisputed. As to the second fact, disputed, as neither citations provided reflect that Deputy Clinton intended to consume the alcohol later with his friends.

42. 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. Exhibit 3. Where he dropped the passengers off is not material.

43. 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. Exhibit 3. Where he dropped the passengers off is not material.

44. Undisputed, but not material. Clinton was authorized to use the patrol vehicle for personal reasons and was not required to track personal mileage. Exhibit 1 at 54:2 – 25. Accordingly, it is implied that Clinton can transport personal items in his vehicle.

45. 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.

46. Undisputed, but not material. Plaintiff Gwendolyn Proctor, filing for the same claim as her husband, stated that Plaintiff Jarrod Proctor had to be extracted using the jaws of life, and that the “impact was severe, and airbags deployed in both vehicles.” *See* Plaintiffs’ Claims for Damage, Injury, or Death, attached as Exhibit 5 at p. 4. Additionally, the police report was attached to the

claim and stated that both vehicles were remove due to vehicle damage. *See* Accident Report, attached as Exhibit 6 at p. 3.

47. Undisputed, but not material.

48. Undisputed, but not material.

49. Undisputed, but not material.

50. Undisputed, but not material.

51. Disputed. Plaintiff Gwendolyn Proctor stated that Plaintiff Jarrod Proctor had to be extracted using the jaws of life, and that the “impact was severe, and airbags deployed in both vehicles.” *See* Plaintiffs’ Claims for Damage, Injury, or Death, attached as Exhibit 5 at p. 4. Additionally, the police report was attached to the claim and stated that both vehicles were remove due to vehicle damage. *See* Accident Report, attached as Exhibit 6 at p. 3.

52. Undisputed, but not material.

II. ARGUMENTS & AUTHORTIES

A. Standard for Summary Judgment.

Summary Judgment is only appropriate if the moving party demonstrates that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Grynberg v. Total*, 538 F.3d 1336, 1346 (10th Cir. 2008). “There is no genuine issue of material fact unless the evidence, construed in the light most favorable to the nonmoving party, is such that a reasonable jury could return a verdict for the nonmoving party.” *Bones v. Honeywell Int’l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004). In the present case, the undisputed material facts do not entitle Defendant to summary judgment, especially when viewed in the light most favorable to Plaintiffs.

B. The United States is Liable Under the FTCA because Clinton Acted Within The Scope of His Employment.

1. Clinton acted properly under CNMS policies and was acting within the 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). The test to determine if an individual is acting within the scope of his employment is as follows:

[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. Exhibit 1 at 14:20-22. 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. Exhibit 1 at 37:1-6, 38:6-11, 70:25-71:10; Exhibit 2 at pp. 2-3. Clinton was cleared to respond to an armed robbery call at 20:39. Exhibit 1 at 22:21 – 25. 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. Exhibit 1 at 42:1-17, 94:17 to 95:16; Exhibit 3. 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 3. 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 cites nonbinding, inapplicable caselaw, *Timmons v. Silman*, in its Motion. In *Timmons*, the employee was involved in an automobile collision while on the way to deposit a check for completely personal purposes. *Timmons v. Silman*, 761 So. 2d 507, 510 (La. 2000). In contrast, Clinton's job description includes protecting civilians, and he was acting to protect civilians while on his way to an active, armed robbery. Further distinguishing the two cases, the *Timmons* employee was in her personal vehicle. *Id.* at 507, 509. Clinton, however, was in his police vehicle with lights and sirens on, in uniform, responding to a call assigned to him by dispatch. Defendant improperly limits the *Timmons* Court's reasoning in its decision regarding scope and purpose of duties as an analysis of what the employee was "supposed" to be doing "at the time of the collision." However, *Timmons* Court states:

An employee is acting within the course and scope of his employment when 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...[internal citations omitted]. An employee may be within the course and scope of his employment yet step out of that realm...[but] the mere fact that an employee [performs] a personal errand while on an employment related errand does not automatically compel the conclusion that the deviation removes the employee from the course and scope of employee.

Timmons v. Silman, 99-3264 (La. 05/17/00), 761 So. 2d 507, 510 (internal citations omitted).

Accordingly, even by this nonbinding caselaw, Clinton would be acting within the scope and course of his employment because it was activated in part by a purpose to serve his employer.

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.

Defendant further argues, notably without citing any evidence, that "CNMS expected Deputy Clinton to go straight to the robbery call and to turn east on highway 51 spur" and that dropping off the civilians "was not proper, necessary, or usual." However, the CAD REPORT Defendant referenced multiple times in its own Motion contradicts this statement. Not only has it been established that the CNMS job description includes helping civilians, but the CAD REPORT shows this is commonly done. The CAD REPORT from December 19, 2019, shows a multitude of calls where Marshals were dispatched simply to help civilians with non-emergent issues. 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. While Defendant argues Clinton's actions were a severe deviation from the scope of his duties, the evidence that multiple officers, including Clinton's supervisor, were dispatched to help citizens in non-emergent situations the same day as the incident tends to dispute this argument.

Defendant also 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. Exhibit 1 at 37:25 – 38:12. Clinton had called in a 10-12 to report his passengers. Exhibit 1 at 70:25-71:10; Exhibit 2 at pp. 2-3. 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. When viewing all undisputed material facts in the light most favorable to Plaintiff, Defendant’s Motion should fail.

2. 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). 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 the 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 Oklahoma³. *Id.* at 6. Clinton's actions of carrying non opened alcohol in his is arguably less problematic than an off-duty officer under the influence of alcohol driving and pulling a handgun on a driver. It is also likely that the off duty officer's illegal behavior would be a violation of some department policy. This makes it exceedingly clear that Clinton acted within the scope of his employment as a police officer, regardless of the alcohol in his vehicle.

Regardless, Clinton was authorized to use the vehicle for personal reasons, such as driving home, and was not required to track personal mileage. Therefore, it was implied that Clinton could transport personal items in his vehicle. 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. Accordingly, it is clear this was within Clinton's scope of employment, even if it was a violation of written policy.

Similarly, Defendant seems to propose 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. Accordingly, it was implied that Clinton was allowed to have the unopened alcohol in his vehicle. 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 duties, and that is what Clinton did. Accordingly, taking the passengers to his

³ 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 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.

apartment and carrying alcohol while on shift would be under the implied consent of his supervisors and within the scope of his employment regardless of written policy. So, viewing all undisputed material facts in the light most favorable to Plaintiff, Defendant's Motion should again fail.

C. This Court has Subject Matter Jurisdiction Over Plaintiffs' Property Claims.

For a claim to be deemed presented to a Federal agency, the agency must receive an executed Standard Form 95 *or other written notification of an incident* accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury that occurred by reason of the incident. 28 CFR § 14.2(a). Plaintiffs provided a Claim for Damage, Injury, or Death for both Plaintiffs on April 14, 2021. Exhibit 5. These included a sum certain total of \$2,483,462. *Id.* The purpose of the sum certain requirement is "to facilitate settlement and to inform the agency whether [the] claim is for more than \$25,000 and the approval of the Attorney General is needed to settle a claim under 28 U.S.C. § 2672." *Burkins v. United States*, 865 F. Supp. 1480, 1491 (D. Colo. 1994), citing *Lundgren v. United States*, 810 F. Supp. 256, 258 (D. Minn. 1992). The sum certain total provided by Plaintiffs was specific, the notice included the Accident Report (including the car make and model), and stated that the jaws of life were used on the vehicle and that the impact was severe. Exhibit 5; Exhibit 6. Further, the legislative intent of the sum certain is met in that enough information was provided to facilitated settlement and to inform the agency that the claim is for more than \$25,000. This standard has been met.

III. CONCLUSION

WHEREFORE Plaintiffs, Jarrod Proctor and Gwendolyn Proctor, pray this Court will deny Defendant's request for summary judgment against Plaintiffs, and for any such other and further relief as may be deemed equitable, just, and fair by this Court.

Respectfully submitted,

SHERWOOD & ROBERT

s/ Meredith Dibert Lindaman
Hugh M. Robert, OBA #22441
Meredith Dibert Lindaman, OBA #22209
15 W. 6th St., Ste. 2800
Tulsa, OK 74119
(918) 592-1144
(918) 576-6907 (Facsimile)
hugh@smr-law.com
meredith@smr-law.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 29th 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:

Jason Poe, Esq.
Jason.poe@usdoj.gov
Alexander Sisemore
Alexander.sisemore@usdoj.gov

Attorneys for Defendant, United States of America

s/ Meredith Dibert Lindaman