

**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 REPLY TO
PLAINTIFFS’ RESPONSE TO DEFENDANT’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 ask this Court to erroneously find Cherokee Nation Deputy Marshal Buddy Clinton was the in course and scope of his employment when, without the knowledge or authority of the Cherokee Nation Marshal Service (“CNMS”), Deputy Clinton drove in the *opposite direction* of the location of the armed robbery call *to which he was specifically assigned* to instead transport his 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 and admitting dropping off his friends served no law enforcement purpose. Plaintiffs’ response asks this Court to adopt an overly broad understanding of what constitutes the course and scope of employment and therefore disregard the fact and circumstance specific inquiry required, and to ignore the specific task that Deputy Clinton was assigned to complete at the time of the collision. Plaintiffs asks this Court to disregard the: “time is of the essence” nature of that call, the location of the collision, the fact the people being transported by Deputy Clinton were personal friends, and the fact Deputy Clinton was transporting those personal friends to Deputy Clinton’s *private residence*. Plaintiffs refuse to

acknowledge the geographical locations of the robbery call and Deputy Clinton's personal residence. In addition, Plaintiffs disregard the fact Deputy Clinton advised CNMS he was responding to the robbery call and failed to advise CNMS he was instead going to his personal residence in the opposite direction or that he was doing so to drop friends off.

Plaintiffs further ask this Court to find that Deputy Clinton's friends were in harm's way and needed protection to justify an erroneous finding of course and scope; however, not only is Plaintiffs' characterization of Deputy Clinton's friends' safety simply unsupported by the evidentiary record, but it is also *expressly contradicted* by the record. Thus, Plaintiffs also ask this Court to ignore the fact Deputy Clinton testified there was no risk of personal harm at the Youth Shelter, and to disregard the fact Deputy Clinton testified he made the decision to drive his friends to his personal residence before leaving the Youth Shelter, despite Deputy Clinton's acknowledgment that he could have left his friends at the Youth Shelter.

Plaintiffs' alleged claims against the United States are jurisdictionally dependent upon Deputy Clinton being in the course and scope of his employment when he collided with Plaintiffs' vehicle on December 14, 2019. But, the undisputed material facts establish Deputy Clinton was acting *outside* the course and scope of his employment as a Deputy with CNMS. The number of material facts Plaintiffs ask this Court to ignore underscores the fallacy of Plaintiffs' arguments. This case must be dismissed for lack of subject matter jurisdiction.

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 the property damage claim must be dismissed for lack of subject matter jurisdiction.

I. RESPONSE TO PLAINTIFFS' ADDITIONAL MATERIAL FACTS

1. As to paragraph 26 of Plaintiffs' response to the Defendant's statement of material facts, disputed. Plaintiffs' attempt to obfuscate the literal statement made is not supported with any evidence. Plaintiffs argue that the literal words may have a meaning opposite of what the words were¹.

2. As to paragraph 30 of Plaintiffs' response to the Defendant's statement of material

¹ See *Arason Enterprises, Inc. v. CabinetBed Inc.*, No. 16-CV-03001-PAB-NRN, 2019 WL 7049989, at *4 (D. Colo. Dec. 23, 2019)([because] conclusion is only "reached using words in ways that contradict their plain meaning," this testimony is insufficient to create a genuine dispute of material fact.) citing *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1278 (Fed. Cir. 2004).

facts, disputed in part. Defendant agrees that the time estimate within Exhibit 8 should not be given judicial notice and has not asserted it should have been; however, the remainder of the exhibit is subject to judicial notice.

3. As to paragraph 33 of Plaintiffs' response to the Defendant's statement of material facts, disputed. Defendant does not rely on nor reference the time contained within Exhibit 9. The Exhibit is proper and is used for a geographical purpose, not the time estimate contained.

4. As to paragraph 34 of Plaintiffs' response to the Defendant's statement of material facts, disputed. The geographical distance is within the scope of information that the Court may take judicial notice of.²

5. As to paragraph 36 of Plaintiffs' response to the Defendant's statement of material facts, disputed in part. Defendant agrees that the time estimate within Exhibit 8 should not be given judicial notice, however, the remainder of the exhibit is subject to judicial notice.

6. As to paragraph 38 of Plaintiffs' response to the Defendant's statement of material facts, disputed. The CNMS job description contains a provision for "assistance to citizens *in emergency situations*." (Dkt. No. 63-3 at 1) (emphasis added). Deputy Clinton admitted that he served no police purpose by going to his apartment before going to the robbery call. (Dkt. No. 59-3 at 95:11-16). He further testified that he could have dropped them off anywhere along Highway 62 instead of going to his apartment. (Dkt. No. 59-3 at 95:21). Plaintiffs' argument that Deputy Clinton needed to go to his apartment to keep civilians safe is belied by Deputy Clinton's own testimony.

7. As to paragraph 39 of Plaintiffs' response to the Defendant's statement of material facts, disputed. The CNMS job description contains a provision for "assistance to citizens *in emergency situations*." (Dkt. No. 63-3 at 2) (emphasis added). Deputy Clinton was transporting friends to his home instead of performing his job duties as a police officer. (Dkt. No. 59-3 at 95:11-16). Deputy Clinton's friends were not in an emergency situation prior to the collision. (Dkt. No. 59-3 at 42:15-20 (testifying there was no potential injury at the Youth Shelter)).

8. As to paragraph 41 of Plaintiffs' response to the Defendant's statement of material facts, disputed in part. Deputy Clinton intended to drink the alcohol with his friends later that

² *U.S. v. Orozco-Rivas*, 810 Fed App'x 660, 668 n.7 (10th Cir. 2020) (citing *Pahls v. Thomas*, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013); David J. Dansky, *The Google Knows Many Things: Judicial Notice in the Internet Era*, 39 *Colo. L. Rev.* 19, 24 (2010)).

evening. (Dkt. No. 59-3 at 83:3-5).

9. As to paragraph 42 of Plaintiffs' response to the Defendant's statement of material facts, disputed. Plaintiffs' legal conclusion is improper in a statement of facts. Furthermore, the CNMS job description contains a provision for "assistance to citizens *in emergency situations.*" (Dkt. No. 63-3 at 1) (emphasis added). Deputy Clinton admitted that there was no danger to his friends when he received the call for the robbery in progress at the youth center. (Dkt. No. 59-3 at 42:15-20).

10. As to paragraph 43 of Plaintiffs' response to the Defendant's statement of material facts, disputed. Plaintiffs' legal conclusion is improper in a statement of facts. Furthermore, the CNMS job description contains a provision for "assistance to citizens *in emergency situations.*" (Dkt. No. 63-3 at 1) (emphasis added). Deputy Clinton admitted that there was no danger to his friends when he received the call for the robbery in progress at the youth center. (Dkt. No. 59-3 at 42:15-20).

11. As to paragraph 44 of Plaintiffs' response to the Defendant's statement of material facts, disputed. Plaintiffs' assumption of fact is controverted by the official policy that he cannot possess certain items while on duty. (Dkt. No. 59-12, *CNMS Law Enforcement Handbook*, at § 1-01-01(F)).

12. As to paragraph 45 of Plaintiffs' response to the Defendant's statement of material facts, disputed. Plaintiffs' assertion that the policy was not enforced is based purely on speculation.

13. As to paragraph 46 of Plaintiffs' response to the Defendant's statement of material facts, not disputed but Plaintiffs' additional assertions are immaterial.

14. As to paragraph 51 of Plaintiffs' response to the Defendant's statement of material facts, disputed. The narrative in the SF-95 does not indicate what actual damage the vehicle sustained or the amount of the damage. (Dkt. No. 59-15). The Accident Report is not the same as the SF-95, nor does the existence of an accident report preserve claims required to be made on the SF-95.

II. ARGUMENTS AND AUTHORITIES

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

Plaintiffs' attempt to obfuscate the issues in opposition to Defendant's motion should be ignored by this court. The legal standard in Oklahoma is clear, "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) (emphasis added). "[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).

Despite Plaintiffs' claim, the Louisiana Supreme Court's holding in *Timmons v. Silman*, 761 So. 2d 507, 510 (La. 2000), is very applicable. Plaintiffs attempt to distinguish the case by arguing that Deputy Clinton was in a department vehicle with lights and sirens active, and once again by trying to create a CNMS policy that does not exist. However, it is apparent that Plaintiffs have failed to grasp the holding of *Timmons*. The Court clearly established that a finding on whether an employee is in the course and scope of employment requires a fact specific analysis of the employee's conduct at the time the accident occurs.

The *Timmons* Court found an employee to be acting outside the course and scope of employment when she was involved in a motor vehicle collision. *Id.* at 513. The Court relied on very specific facts that the employee, who was authorized to drive to the post office and then return, instead drove past her work, and then drove an additional 18 blocks in the opposite direction, solely for her personal benefit of cashing her bonus check. *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 scope and purpose of duties was analyzed by looking at what the employee was *supposed* to be doing *at the time of the collision*.

Plaintiffs rely on the *Heard v. McDonald* test to argue that Deputy Clinton's actions were not a deviation from his line of duty. Plaintiffs' reliance is misplaced because, as explained below, the specific actions of Deputy Clinton display that his conduct was for "some purpose wholly disconnected with his employment." *Heard v. McDonald*, 1935 OK 155, ¶ 5, 172 Okla. 180, 181, 43 P.2d 1026, 1027.

Furthermore, Plaintiffs' reliance on *DeCorte v. Robinson* to argue that Deputy Clinton's conduct furthered a police purpose is disingenuous. The *DeCorte* Court held that when an intoxicated officer who used his authority as a police officer to pursue a suspected violator of the law were within the scope of his employment. 1998 OK 87, ¶ 1, 969 P.2d 358, 359. The Court relied on the fact that the officer engaged in a police pursuit which was within the normal job duties he had as an officer. That he was intoxicated against policy, while a factor in determining scope, did not remove him from the scope. Plaintiffs' analysis is only to compare drinking alcohol with possessing alcohol, displaying their failure to grasp the Defendant's argument in its entirety.

Moreover, *DeCorte* actually supports the United States's arguments. The *DeCorte* case exemplifies just how fact intensive the Court's inquiry must be instead of relying upon broad characterizations of job duties. There, the Court determined that the offending officer could in one moment be in the course and scope of employment and outside of it the next—all during the course of the same arrest. The Oklahoma Supreme Court found it entirely consistent with Oklahoma law that an officer would be in the course and scope of employment for some of the use of force during an arrest and outside the course and scope for the use of other force during the same arrest. As such, whether an officer, generally, is authorized to use force during to make an arrest, see *Morales v. City of Okla. City*, is not particularly relevant to whether the use of force is in the course and scope of employment. 230 P.3d 869 (Okla. 2010). That determination is only made by taking into account the facts and circumstances surrounding the use of force and whether such is warranted. In the instant matter, Deputy Clinton's friends were visiting from other parts of the state to help him train for a mixed martial arts fight, an activity unrelated to his employment. He picked them up during his shift and properly advised dispatch that he had visitors in the car. Deputy Clinton eventually finished his shift, brought his friends to obtain alcohol to consume later in the night, and brought his friends to play basketball - conduct which was unrelated to his employment and not within CNMS policy. Deputy Clinton then returned to duty to respond to a call for a non-emergency situation and brought his friends with him, without informing dispatch that he had

anyone in the car. He then heard a call for a robbery in progress over the radio, and asked whether he could respond to that robbery because time was of the essence. He was given permission to *respond to the robbery call*. Instead, he decided that he would take his friends to his apartment. He was acting in his personal capacity and had completely abandoned his law enforcement duty to respond to the robbery call at Briggs Tobacco Outlet by driving in the opposite direction to drop off his friends and alcohol at his own home.

Although *Plaintiffs attempt to create a new policy within CNMS* that allows for the transport of personal friends to an officer's home, Deputy Clinton was not furthering a legitimate police purpose when he abandoned his duty to take his friends home. Despite relying on this policy, Plaintiffs fail to cite to the provision, nor do Plaintiffs acknowledge the plain text of the policy. CNMS's policy is very clear that an officer's duty is to the public to assist civilians in emergency situations. (Dkt. No. 63-3 at 1). Even Deputy Clinton himself seemingly understood the policy, and stated there was no police purpose in transporting his friends. (Dkt. No. 59-3 at 95:11-16). His friends were not in an emergency situation before he decided to take them home. Deputy Clinton admitted that there was no danger at the youth center. (Dkt. No. 59-3 at 42:9-20). He further admitted that he could have left his friends at the youth shelter, the Cherokee Casino, or anywhere along the highway *on the way* to the robbery. (Dkt. No. 59-3 at 95:17-96:3). Instead, he chose to abandon the robbery call and its route, drive the opposite direction of the call, and go to his home. Plaintiffs' argument that CNMS officers are generally allowed to render help to citizens and therefore are always in the course and scope when doing so *irrespective of what the officer is supposed to be doing at the time* is contradicted by the Oklahoma Supreme Court's decision in *DeCorte*.

Plaintiffs then attempt to compare CNMS acts of helping the public with Deputy Clinton's transporting friends to *his home*. This is erroneous at best. While Plaintiffs cite the full CAD report, many of the incidents cannot be found in the attached exhibit that counsel obtained from the docket. However, even taking these referenced instances at face value, Plaintiffs describe these instances to involve *calls to CNMS by the public for help* and *calls for which CNMS officers were assigned*. Each of these resulted in a CAD memorializing that the officer was helping individuals, who they were helping, where they were helping, and how they were helping. Conspicuously, and unsurprisingly, none of those calls involve an officer transporting civilians *to the officer's private residence*. Plaintiffs offer no fact, no policy, and no case law to support a finding that an officer

taking civilians *to the officer's private residence* is within the course and scope of law enforcement duties. Indeed, the fact Deputy Clinton was headed to his private residence underscores the personal—not public—nature of his actions. *Where* Deputy Clinton was taking his friends is material and cannot be disregarded. Plaintiffs' argument is tenuous at best.

Moreover, there is no CAD referencing that Deputy Clinton was going to his apartment instead of going to the robbery. In fact, there is no memorialization that Deputy Clinton was transporting anyone in his vehicle until a CAD is generated for the motor vehicle accident. Captain Scott Craig was unaware that Deputy Clinton had passengers until after the accident, expressing confusion about the location of the accident to begin with. Deputy Clinton knew that his actions served no legitimate police purpose and admitted as much. Plaintiffs' attempt to conflate Deputy Clinton's personal frolic outside the scope of employment with prior legitimate police calls have no merit.

Deputy Clinton's action of taking friends to his personal home instead of responding to the robbery call to which he was assigned cannot fall within his duties as a police officer under both *Heard v. McDonald* and *Timmons v. Silman*. Plaintiffs' position amounts to an argument that officers may abandon emergency situations to take friends to the officer's home and still somehow further a police purpose. Nowhere within the CNMS handbook can such a policy be found, because such a policy would be publicly unpalatable. Plaintiffs understand that such a policy would be problematic, because throughout their entire opposition they refuse to acknowledge the Deputy Clinton was transporting friends to his own home. Plaintiffs' characterization that he was helping civilians get to safety is simply disingenuous and underscores the false equivocation argued by Plaintiffs.

This Court is obligated to take into account what Deputy Clinton was *supposed to be doing* at the time (responding to a robbery call where time was of the essence) and whether dropping friends off at his personal residence (when they did not call for help by the CNMS, when they were in no potential harm where they were, and when Deputy Clinton failed to advise CNMS of his activities) furthered that mission. If such is done, the undisputed material facts establish the Court must find Deputy Clinton was outside the course and scope of employment at the time of the collision.

B. The Court does not have Subject Matter Over Plaintiffs' Property Claims.

Plaintiffs' SF-95 specifically indicated a sum certain of 235,972.00 in 12d. for Total Damages. (Dkt. No. 59-15). The amount of claim in 12a. for Property Damage contains no number. The amount of claim in 12b. for Personal Injury contains 235,972.00. *Id.* The number in 12c. for Wrongful Death contains no number. *Id.* It is clear that the sum certain is derived solely from the Personal Injury claim within the SF-95. *Id.* Plaintiffs' contention that they merely need to mention damage to a vehicle is simply incorrect. 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). The deficiency of a sum certain for property damage in the SF-95 "deprives [the] Court of subject matter jurisdiction and the "[f]ailure to comply with the sum certain requirement results in the case being treated 'as if no administrative claim had ever been filed.'" *Webb v. United States*, No. CIV-23-126-JAR, 2023 WL 8477995 at *3 (E.D. Okla. Dec. 7, 2023) citing *Bradley v. U.S. by Veterans Admin.*, 951 F.2d 268, 270 (10th Cir. 1991).

III. CONCLUSION

Plaintiffs' arguments in opposition to Defendant's motion are without merit. Deputy Clinton was not acting within the scope of his employment when he drove his friends to his personal home instead of responding to an emergency. Deputy Clinton's friends were not in an emergency situation, and "dropping off the two civilians carrying alcohol" at an officer's home is not a policy of CNMS. Plaintiffs' contention that officers can take members of the public to the officer's home instead of responding to emergency situations should not be entertained. 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. Furthermore, Plaintiffs did not exhaust their administrative remedies regarding the property damage claims when they failed to assert it in the SF-95.

Finally, even if this Court does hold that Deputy Clinton was within the scope of his employment when he abandoned his police duty in order to take his friends to his own apartment, no argument has been made as to whether he acted with a conscious disregard to human life, and therefore acted recklessly, when he proceeded through a steady red light with turret lights and sirens active. As such, no finding of liability can be found against the United States of America based on the determination of scope of employment alone.

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 May 13, 2024, I electronically filed the foregoing with the Clerk of Court using the ECF System. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following counsel of record:

Hugh M. Robert
Meredith Lindaman
Daniel Phillips

s/Joshua M. Mitts
