IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

ROCÍO ANANI SAUCEDO-CARRILLO and ROSA CARRILLO-VASQUEZ,	)	
Plaintiffs,	)	**No. 3:12-cv-2571-JZ**
v.	)	
UNITED STATES OF AMERICA,	)	**Judge Jack Zouhary**
Defendant.	)	
	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs Rocío Anani Saucedo-Carrillo and Rosa Carrillo-Vasquez, through counsel, hereby oppose Defendant United States of America's Motion for Summary Judgment on three of the Federal Tort Claims Act claims – false imprisonment, deprivation of civil rights through ethnic intimidation, and intentional infliction of emotional distress. Plaintiffs also oppose Defendant's arguments that Defendant is exempt from Federal Tort Claims Act liability by 1. Ohio Revised Code § 2744.03(A)(6); and, 2. because its Agent's conduct was privileged.

Plaintiffs do not oppose the Defendant's Motion for Summary Judgment as to Plaintiffs' assault and negligent infliction of emotional distress claims.

There are genuine issues as to material facts and the Defendant is not entitled to judgment as a matter of law on the false imprisonment, deprivation of civil rights through ethnic intimidation, and intentional infliction of emotional distress. A Memorandum of law follows and is incorporated herein and does not exceed the twenty pages granted by the Court after proper exclusions.

Respectfully submitted,

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BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

Plaintiffs Rocío Saucedo-Carrillo and Rosa Carrillo-Vasquez filed a Complaint in this Court alleging tort claims against the United States based on the actions of Border Patrol Agent Bradley Shaver. Doc. 1. Mrs. Saucedo and Mrs. Carrillo claim they were accosted at a gas station in Norwalk, Ohio, and Agent Shaver demanded information from them while holding them without their consent. Mrs. Saucedo and Mrs. Carrillo therefore bring their Federal Tort Claims Act ("FTCA") action alleging that Border Patrol Agent Shaver, and therefore the United States of America, committed the Ohio torts of false imprisonment, intentional infliction of emotional distress, and deprivation of civil rights through ethnic intimidation. Doc. 1, ¶¶ 2, 47 - 69.

II. Disputed Material Facts

Plaintiffs and Defendant agree that the two Plaintiffs were at a Marathon gasoline station on U.S. 250 in Norwalk, Ohio, on September 13, 2009, with their vehicle parked at one of the station's gas pumps. The Parties also agree that at the end of the incident between the Plaintiffs and Border Patrol Shaver they were placed in the back of his vehicle and transported to the Border Patrol Station in Sandusky, Ohio.

The following numbered paragraphs outline the disputed material facts about what occurred at the Marathon station on September 13, 2009. Attachments 1 through 3 are Exhibits D, E, and F used by the government when they took the deposition of Plaintiff Saucedo-Carrillo.[1]

1. Plaintiff Saucedo-Carrillo testified that Border Patrol Agent Shaver was driving south on U.S. 250 in his Border Patrol vehicle. Doc. 28-3: p. 323, lines 13–18; p. 327, lines 23-25;

[1] See Doc. 28-3, pp. 323–328, 331–332, and 342–343 where these Exhibits are discussed with Plaintiff Saucedo-Carrillo.

(left to right on Exhibit F). Agent Shaver stated he was driving north on U.S. 250. Doc. 28-1, p. 155, lines 18-22.

2. Plaintiff Saucedo-Carrillo testified that Border Patrol Agent Shaver saw her exiting the Marathon store after prepaying for gasoline, their eyes met, and he then turned on his turn signal to turn into the Marathon station. Doc. 28-3, p. 326, lines 19–24. Agent Shaver stated he saw the Plaintiff's truck, turned in, and Plaintiff Saucedo-Carrillo exited the Marathon store after he had already turned into the Marathon station. Doc. 28-1, p. 164, lines 8-10.
3. Plaintiff Saucedo-Carrillo testified that she "was the only Hispanic there [at the gas station] and that's why he stopped me." Doc. 28-3: p. 58, lines 16-20. Plaintiff Carrillo-Vasquez also testified that she and her daughter, Plaintiff Saucedo-Carrillo, were the only Hispanics at the gas station. Doc. 28-2, p. 259, lines 4-24. Agent Shaver stated that the reason he engaged with the Plaintiffs was because of the "vehicle itself" they were using. Doc. 28-1: p. 161, lines 2-4; p. 162, lines 19-20.
4. Agent Shaver stated the truck would be suspicious on the southern border because of the "extra after-market ground effects, flares, silver scorpions on the back windows, the letters "Durango Durango" on the back windows and the personalized license plates. Doc. 28-1: p. 161, lines 8-24. Agent Shaver states the personalized Ohio license plates on Plaintiff's vehicle was another reason he developed reasonable suspicion, stating that the "Anani" on the license plate appeared to him to be a Hispanic name. Doc. 28-1: p. 181, lines 18-20; p. 182, lines 2-4. In reality, "Anani" is a girl's name of the Akan language and means fourth-born child. The Akan are an indigenous group from Ghana and the Ivory Coast.[2]
5. Plaintiff Saucedo-Carrillo states the rear window decals stating "Durango" and the decals showing scorpions were indicators of her family's place of origin in Mexico, the State of

[2] *See* http://www.thinkbabynames.com/meaning/0/Anani#bCCra17Ug6eAelxA.99.

Durango. Saucedo-Carrillo stated that everyone uses the scorpion symbol in Durango. Doc. 28-3, p. 315, lines 2-3. She also stated she knew nothing about the scorpions being used as the symbols for drug cartels. Id. at lines 5-7. Agent Shaver states the decals "Durango" and the scorpions were indicators to him of Mexican drug cartels. Doc. 28-1, p. 161, lines 13-21.

6. Agent Shaver filled out incident reports at the Sandusky Bay Border Patrol Station in Sandusky, Ohio, after transporting the Plaintiffs to that office. These forms described the incident with the Plaintiffs on the I-213 Record of Deportable/Inadmissible Alien form, and using the identical language in each I-213 he stated:

> On September 13, 2009 at approximately 1400 hours, Border Patrol Agent Shaver, while patrolling Sandusky Bay areas near Norwalk, Ohio observed a blue Chevrolet pickup truck, bearing Ohio license ANANI, parked at a Marathon gas station. The rear windows of the vehicle had silver colored, reflective scorpion decals and the letters DURANGO on each side. Agent Shaver then patrolled through the parking lot of the gas station and approached the occupants at the pumps in a consensual encounter.

Attachment 4 (identical language on both pages).

Plaintiff Saucedo-Carrillo testified that there was a normal amount of space between the ground and the truck and that while the wheel wells may have flared out a bit "it did not have anything out of the ordinary." Doc. 28-3: p. 316, lines 4-18.

7. Plaintiff Saucedo-Carrillo testified that Border Patrol Agent Shaver drove around the perimeter of the Marathon station as she walked toward her truck from the store, parked his vehicle in front of Plaintiff's in a manner that blocked Saucedo-Carrillo's vehicle, exited the Border Patrol vehicle, walked toward Plaintiff, and immediately asked for identification. Doc. 28-3: p. 331, lines 6-24; p. 332, lines 4-25; p. 333, lines 22-25; p. 334, lines 1-18; Exhibit F. Plaintiff Carrillo-Vasquez testified that Shaver stopped the Border Patrol vehicle "right there in front of our truck. Just like that. Like blocking." She also testified that

Shaver's vehicle was "[r]ight in front of me" and was "very close" so to Plaintiff's vehicle so that a person but not a vehicle could pass through. Doc. 28-2: p. 254, lines 12-19; p. 257, lines 19-25 - p. 258, lines 1-10. Agent Shaver states his vehicle did not block Plaintiff's vehicle. Doc. 28-1: p. 165, lines 17-18; p. 179, lines 5-12.

8. Plaintiff Saucedo-Carrillo testified that she was "loading gasoline" when Agent Shaver got out of his truck, approached her in an aggressive manner, stood very close to her, and his first statement and demand was "if [she] had an ID.' Doc. 28-3, p. 334, lines 1-8. [CITE re physical proximity] Plaintiff Carrillo-Vasquez stated that her daughter was approaching the gas pump where they were parked when Agent Shaver pulled his truck up in front of the Plaintiffs' truck. Doc. 28-2: p. 25, line 24 - p. 25, line 4. Plaintiff Carrillo-Vasquez stated that after Shaver parked his car he started asking her daughter questions without any greeting. Doc. 28-1: p. 259, line 25 – p. 260, line 15. Agent Shaver states that as he pulled up to the gas pumps Plaintiff Saucedo-Carrillo exited the gas station, "I rolled down my window and I simply said hello and asked her how she was doing." Doc. 28-1: p. 164, lines 8-18; p. 177, lines 22-24 through p. 178, line 1; p. 178, lines 7-9, 14-16. But Agent Shaver then changes his story during his deposition, stating "When I walked up to her and said, "Hi, how are you doing," she responded." Doc. 28-1, p.165, lines 22-23.

9. Plaintiff Saucedo-Carrillo testified that after she presented a Michigan license in response to Agent Shaver's demand for an ID, the next demand Agent Shaver made was "for my papers." Doc. 28-3: p. 334, lines 21-25, p. 335, lines 1-2. Plaintiff Carrillo-Saucedo testified that Agent Shaver demanded ID and then demanded their "papers." Doc. 28-2: p. 260, lines 4-15. Agent Shaver states that after greeting Plaintiff Saucedo-Carrillo from within his vehicle he then asked her if she was from the area, about the ownership of the

truck, and then exited his vehicle and talked to Plaintiff Saucedo-Carrillo "across the hood" of Plaintiff's truck. Doc. 28-1: p. 166, lines 4-24 through p. 167, line 3.

10. Plaintiff Saucedo-Carrillo testified that after she gave the Michigan license to Agent Shaver he held onto her license thereafter for "the whole time." Doc. 28-3: p. 338, lines 15-17.

11. Plaintiff Saucedo-Carrillo testified that she feared Agent Shaver because of the way he blocked her vehicle, his very aggressive approach, his tone of voice, and his aggressive demands and questioning of her without any preliminary greeting. Doc. 28-3: p. 334, lines 4-18; p. 340, lines 22-23; p. 341, lines 1-6; p. 347, lines 21-25 through p. 348, lines 1-14; p. 350, lines 9-22.

12. Plaintiff Saucedo-Carrillo testified she did not believe she was free to leave the incident with Agent Shaver nor did she have the right to refuse to answer his questions or respond to his demands. Agent Shaver states that when the incident changed from a consensual encounter to an immigration inspection was when "I asked about the license plates and said she couldn't get them registered in her name." Doc. 28-1: p. 175, lines 12-17.

13. Plaintiffs testified that the questioning by Agent Shaver lasted 20 to 45 minutes. Doc. 28-3, p. 344, lines 10-12 (30 to 45 minutes); Doc. 28-2, p. 266, lines 1-2 (20 to 30 minutes). At the end of the questioning Plaintiff Saucedo-Carrillo was ordered to move her truck to the side of the Marathon station away from the gas pumps. Agent Shaver wrote in the I-213's that he encountered the Plaintiffs around 2 p.m. and the I-213's he completed on returning to the station state they were completed at 3:46 p.m. Attachment 4 (pp. 1 and 3 for end time and 2 and 4 for start time).

14. Plaintiff Saucedo-Carrillo testified that she saw an acquaintance at the station and asked Agent Shaver if she could give her vehicle keys to the acquaintance. Doc. 28-3, p. 343, lines

12-20. Plaintiff Carrillo-Vasquez also stated her daughter initiated turning the keys over to the acquaintance. Doc. 28-2, lines 13-17. Agent Shaver states he initiated the contact with the acquaintance. Doc. 28-4, p. 376, ¶8.

III. Legal Arguments

A. Standard for Summary Judgment

Summary judgment is appropriate where the moving party demonstrates that there is no genuine issue of material fact as to the existence of an essential element of the nonmoving party's case on which the nonmoving party would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Of course, [the moving party] always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323 (cites omitted).

A fact is "material" for purposes of a motion for summary judgment where proof of that fact "would have [the] effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984) (quoting Black's Law Dictionary 881 (6th ed. 1979)) (citations omitted). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986).

Conversely, where a reasonable jury could not find for the nonmoving party, there is no genuine issue of material fact for trial. *Feliciano v. City of Cleveland*, 988 F.2d 649, 654 (6th Cir. 1993). The court must examine the evidence and draw all reasonable inferences in favor of the non-moving party. *Bender v. Southland Corp.*, 749 F.2d 1205, 1210-1211 (6th Cir. 1984).

If this burden is met by the moving party, the non-moving party's failure to make a showing that is "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," will mandate the entry of summary judgment. *Celotex*, 477 U.S. at 322-323. The non-moving party may not rest upon the mere allegations or denials of his pleadings, but the response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts which demonstrate that there is a genuine issue for trial. Fed.R.Civ.P. 56(e). The rule requires the non-moving party to introduce evidence of evidentiary quality demonstrating the existence of a material fact. *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997).

B. Applicable Law: Federal Tort Claims Act

The Federal Tort Claims Act acts as a limited waiver of federal sovereign immunity and provides a tort remedy for persons injured by wrongful acts or omissions of the federal government. 28 U.S.C. § 1346(b) grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and "render[ed]" itself liable. *Richards v. United States*, 369 U.S. 1, 6 (1962). This category includes claims that are:

> "against the United States, for money damages, ... for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, 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).

The FTCA thus looks to the law of the state where the alleged tort occurred for the elements of tort actions. The incident in question here took place solely within Ohio and Ohio tort law therefore establishes the elements for the different torts alleged in Plaintiff's Complaint.

The FTCA accepts liability for the actions of federal employees, including law enforcement officers, for which state or local employees would not be responsible for given state immunities, privileges, other defenses enacted by state statute, or as a result of state judicial decisions. The Defendant here apparently fails to understand that Congress made a policy decision to waive federal sovereign immunity in situations where states have not waived any claim of state sovereign immunity.

C. The Defendant United States Is Not Immune From Suit Nor Do Its Officers Have Any Claim Of Privilege In Federal Tort Claims Act Cases

1. The United States Is Not Immune From Suit Under Ohio Revised Code § 2744.03(A)(6)

The government argues it is immune from suit under a section of Ohio law that provides immunity for employees of Ohio political subdivisions. But the Federal Tort Claims Act waives sovereign immunity 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). By the plain meaning of the FTCA's waiver of immunity the Defendant here must be treated as would a private person under Ohio law, not as an employee of a political subdivision.

Additionally, the Supreme Court of the United States has rejected the Defendant's reasoning since 1955. *Indian Towing Co. v. United States,* 350 U.S. 61, 64 (1955). The Supreme Court there rejected the federal government's argument that there was "no liability for negligent performance of 'uniquely governmental functions.'" The court said to look to the state-law liability of private entities, not to that of public entities, when assessing potential tort liability under the FTCA "in the performance of activities which private persons do not perform." The

Supreme Court has reaffirmed its adherence to this principle. *Olson v. United States*, 546 U.S. 43 (2005).

Applying *Olson*, the Ninth Circuit held that "*Olson* requires us to examine the law regarding the liability of a private person for false arrest, assault and battery, and intentional infliction of emotional distress." *Tekle v. United States*, 511 F.3d 839, 854 (9th Cir. 2006). In *Tekle* the officers involved were federal law enforcement officers who had gone to execute search and arrest warrants. The Ninth Circuit, interpreting *Olson*'s reversal of previous Ninth Circuit precedent, stated the analysis of the Federal Tort Claims Act causes of action against the United States must be viewed as if a private individual, not officers of California political subdivisions, took the actions.

Given longstanding Supreme Court precedents the Defendant here is plainly wrong in arguing that the FTCA claims must be view as if the Border Patrol Agents were employees of Ohio political subdivisions and thus entitled to immunity under O.R.C. § 2744.

Alternatively, the cases cited by Defendant are distinguishable. While the district court in *Ellerbe v. U.S.*, 2011 WL 4361616 (N.D. Ohio April 21, 2011) held that the Ohio Revised Code precluded Plaintiff's action, the Sixth Circuit upheld the district court's grant of summary judgment on other grounds and not under the Ohio immunity provision. *Ellerbe v. U.S., et al.* 2012 WL 006111431643 (Sixth Circuit September 13, 2012).

The Defendant also cites *Priah v. United States*, 590 F.Supp.2d 920, 943 (N.D. 2008), but that case wrongly relied on *Ewolski v. City of Brunswick*, 287 F.3d 492, 517 (6th Cir. 2002). *Ewolski* actually involved the actions of police officers in a § 1983 action so they were protected by O.R.C. § 2744. The *Priah* court also relied primarily on the discretionary function exemption to the FTCA, not O.R.C. § 2744.

The *Howard* decision cited by Defendant does uphold dismissal of FTCA claims under O.R.C. § 2744, stating without any citation that it is analogizing the federal jailers to Ohio jailers. *Howard v. Taggart*, 2007 WL 2840369 (N.D. Ohio Sept. 27, 2007). The *Howard* court provides no explanation as to how its analysis treats the United States as a "private person" as required by the plain language of the FTCA, rather than a public employee. *Howard* should be considered an outlier case prosecuted by a *pro se* prisoner and given no weight.

2. Border Patrol Agent Shaver's Conduct Is Not Privileged So As To Negate A Federal Tort Claims Act Claim Here

The Defendant argues that since the Supreme Court of Ohio recognizes a privilege for Ohio law enforcement officers that might preclude civil responsibility for arrests, this privilege is thus applicable to the incident here. Doc. 28, pp. 100-101. But again, the Federal Tort Claims Act states that the actions of the employee of the United States will be judged *as if done by a private citizen*, not an Ohio law enforcement officer. The Supreme Court of Ohio's decision in *State v. Steele*, 2013 WL 3067506 (Sup. Ct. Ohio, June 18, 2013), thus provides no relevant precedent for the case here.

Alternatively, the testimony of Plaintiff Saucedo-Carrillo here shows that she was seized based on her appearance after Agent Shaver saw her leaving the Marathon store. The United States argues "clearly established law" principles without referencing its applicability to the FTCA. Doc. 28, p. 101. This case does not involve *Bivens* claims so a qualified immunity argument has no applicability. Even so, it was clearly established law under the Fourth Amendment that law enforcement officers must have reasonable suspicion or probable cause of a legal violation – in this case that the person is in the country without authorization or, according to Agent Shaver, is involved in criminal drug activities – to either initiate a *Terry* detention or actually seize a person. *Terry v. Ohio*, 392 U.S. 1, 20 (1968). Similarly, it was clearly

established equal protection concept that the reason for the *Terry* stop or actual seizure cannot be based solely on being Hispanic. *United States v. Avery*, 137 F.3d 343, 353 (6th Cir. 1997) ("[C]onsensual encounters may violate the Equal Protection Clause when initiated solely based on racial considerations."); *United States v. Manuel*, 992 F.2d 272, 275 (10th Cir. 1993) ("[S]electing persons for consensual interviews based solely on race is deserving of strict scrutiny and raises serious equal protection concerns.").

D. There Are Genuine Issues Of Material Fact Regarding Plaintiffs' Claims That Agent Shaver Committed All The Elements Of The Ohio Tort Of False Imprisonment

The elements of the Ohio tort of false imprisonment are (1) intentional confinement;[3] (2) without lawful justification or privilege; (3) without consent; (4) within a limited area; and, (5) for an appreciable time, however short. *Bennett v. Ohio Dept. of Rehab & Corr.*, 60 Ohio St.3d 107, 109 (1991); *Feliciano v. Kreiger*, 50 Ohio St.2d 69, 71 (1977) *quoting* 1 Harper & James, The Law of Torts (1956) 226, Section 3.7.

Plaintiff Saucedo-Carrillo testified at length about her being confined (imprisoned) and held by Agent Shaver from the first moments of their encounter near the gas pumps. Her testimony is that this was not a "consensual encounter" at any time – by deciding to confront her based on her appearance, by aggressively blocking her vehicle, demanding to see her ID, retaining possession of her ID throughout the questioning, and continuing to aggressively question her. Agent Shaver made it clear that the Plaintiffs were not free to leave or refuse to answer questions.

A seizure occurs when an encounter is not consensual and the officers use physical force or the individual must submit to the officer(s) show of authority. *U.S. v. Smith*, 594 F.3d 530,

[3] Roget's Thesaurus defines "confinement" as imprisonment or restriction and lists a number of synonyms for confinement, including detention, custody, coercion, constraint, and jail. http://thesaurus.com/browse/confinement.

535 (6th Cir. 2010). A consensual encounter becomes a seizure when in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave. *Id.* at 536. The selection of Plaintiffs by Agent Shaver evidences that this encounter was inherently confrontational and intimidating, leading Plaintiffs to reasonably believe they were not free to leave or refuse to answer questions. *See generally, INS v. Delgado*, 466 U.S. 210, 255 (1984); *U.S. v. Mendieta-Garza*, 254 Fed. Appx. 307, 314 (8th Cir. 2007).

Deposition testimony of the Plaintiffs and Border Patrol Agent Shaver differs greatly regarding the elements of false imprisonment. The Plaintiffs testified that they were targeted by the Border Patrol because they were Hispanic, confined within a limited area by the blocking of their vehicle, that the armed Border Patrol Agent approached them in an aggressive manner, demanded ID without any other preliminary statements, and continued to question them for 20 to 45 minutes. Agent Shaver states he targeted them for questioning due to their vehicle, did not block their vehicle, used the standard greetings associated with a consensual encounter, and did not seize them until they had voluntarily provided him with answers to numerous questions. Additionally, the government has presented no evidence that Agent Shaver's suspicions based on Plaintiffs' vehicle were either accurate, truthful, or applicable to an Ohio vehicle in Ohio, as opposed to being along the southern border.

The Defendant's Motion for Summary Judgment as to the FTCA claim for false imprisonment should therefore be denied.

E. There Are Genuine Issues Of Material Fact Regarding Plaintiffs' Claims That Agent Shaver Committed All The Elements Of The Ohio Tort Of Ethnic Intimidation

Ohio law establishes a civil remedy for ethnic intimidation. O.R.C. § 2307.70(A). Plaintiff must show he suffered an injury or loss to person or property as a result of an act

committed in violation of, among others, O.R.C. § 2927.12. A person can violate § 2927.12, by committing certain crimes with the motivation for their commission being "by reason of the race, color, religion, or national origin of another person or group of persons." O.R.C. § 2927.12(a). Those crimes include aggravated menacing and menacing, O.R.C. §§ 2903.21 and 2903.22.

Aggravated menacing is defined as: ". . . knowingly caus[ing] another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family." O.R.C. § 2903.21. Menacing is defined as engaging in a pattern of conduct that will " . . . knowingly cause another person to believe that the offender will cause physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family.." O.R.C. § 2903.22.

Plaintiffs testified that they were afraid for themselves, each other, and for Plaintiff Saucedo-Carrillo's unborn baby. This fear was precipitated by their being targeted by a law enforcement officer who saw one of them exiting a gas station after prepaying for gas, the officer then pulling up in front of their vehicle and blocking it from departing, the officer exiting his vehicle and walking toward them in an aggressive manner, the officer then demanding an ID and then papers, and then following up with many other demands and questions.

As set out in the facts, the only evidence for Agent Shaver's deciding to initiate contact with the Plaintiffs was because they were Hispanic – Agent Shaver's own written contemporaneous statement in the I-213's filled out on both Plaintiffs and Plaintiff Saucedo-Carrillo's statement that Agent Shaver saw her, they made eye contact, and he then turned on his turn signal and turned into the Marathon station. Agent Shaver even acknowledged that the Hispanic-sounding ANANI license plate contributed to his decision to contact Plaintiffs along

with decals denoting Mexico. Especially when viewed collectively, these factors demonstrate that Agent Shaver's actions were motivated by Plaintiffs' race, color, or national origin.

F. There Are Genuine Issues Of Material Fact Regarding Plaintiffs' Claims That Agent Shaver Committed All The Elements Of The Ohio Tort Of Intentional Infliction of Emotional Distress

The elements of the Ohio tort of intentional infliction of emotional distress are (1) the tortfeasor intended to cause or know or should have known that their behavior would cause emotional distress; (2) the conduct is extreme and outrageous as to go beyond all possible bounds of decency and can be considered utterly intolerable in a civilized community; (3) the actions were the proximate cause of the plaintiff's injury; and, (4) the plaintiff suffered serious mental anguish of a nature that no reasonable person could be expected to endure. *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099, 1110 (6th Cir. 2008); *Shugart v. Ocwen Loan Servicing, LLC*, 747 F. Supp.2d 938, 944-45 (S.D. Ohio 2010); *Dunn v. Medina General Hosp.* 917 F. Supp. 1185, 1194 (N.D. Ohio 1996); *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 374 (1983)(requires the Defendant to have intentionally or recklessly caused emotional distress, rather than using the phrase "knew or should have known" that is used by the above federal courts); Torts, § 13, Ohio Jurisprudence, Third Edition.

1. There Is A Waiver Of Sovereign Immunity For Intentional Infliction Of Emotional Distress

Defendant argues in its brief that the FTCA does not waive sovereign immunity for IIED claims. As support, it cites *Denson v. United States*, 574 F.3d 1318 (11th Cir. 2009). The Sixth Circuit has not ruled on the exact point, although its affirmance of the dismissal of an IIED case against the federal government due to the *Feres* doctrine may imply that there are IIED claims that could be brought. *Lovely v. United States*, 570 F.3d 778, 785 (6th Cir. 2009) (affirming

dismissal of IIED claim under the *Feres* doctrine)(brought by ROTC cadet against commanding officer in connection with actions taken in response to allegations of sexual assault). If all IIED claims were barred the Sixth Circuit in *Lovely* would not have needed to rely on the *Feres* doctrine, but rather made clear that no IIED claims can be brought under the FTCA.

The consensus today is, according to Assistant United States Attorney David W. Fuller,[4] that IIED claims are not barred by the FTCA. The First, Second, Fifth, Eighth, Ninth, and Tenth Circuits have all upheld the validity of bringing IIED claims under the FTCA. *See, e.g.*, *Trentadue v. United States*, 397 F.3d 840, 867 (10th Cir. 2005); *Alvarez-Machain v. United States*, 331 F.3d 604, 641 (9th Cir. 2003); *Lu v. Powell*, 621 F.3d 944, 950 (9th Cir. 2010); *Kohn v. United States*, 680 F.2d 922, 924 (2nd Cir. 1982) (reversing dismissal of cause of action sounding in IIED); *Limone v. United States*, 579 F.3d 79 (1st Cir. 2009); *Santiago-Ramirez v. Sec'y of Dep't of Def.*, 984 F.2d 16, 20 (1st Cir. 1993) (allegedly wrongful theft accusation, interrogation, threatened FBI investigation, and termination); *Truman v. United States*, 26 F.3d 592, 596-97 (5th Cir. 1994) (sexual harassment); *Raz v. United States*, 343 F.3d 945 (8th Cir. 2003); *Jense v. Runyon*, 990 F. Supp. 1320, 1324 (D. Utah 1998) (sexual harassment); *Ritchie v. United States*, 210 F. Supp. 2d 1120, 1125 (N.D. Cal. 2002); *Sabow v. United States*, 93 F.3d 1445 (9th Cir. 1996); *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994).

IIED claims have been barred under the FTCA for a variety of reasons, including the Sixth Circuit *Lovely* affirmance based on the *Feres* doctrine. *See, e.g., Spotts v. United States*, 613 F.3d 559, 574 (5th Cir. 2010) (affirming dismissal of IIED and other claims based on failure to evacuate prisoners in aftermath of hurricane); *Sydnes v. United States*, 523 F.3d 1179, 1187 (10th Cir. 2008) (affirming summary judgment for government on "outrageous conduct" and

[4] David W. Fuller, Intentional Torts and Other Exceptions to the Federal Tort Claims Act, 8 U. St. Thomas L.J. 375, 390 (2011).

other claims arising from alleged wrongful termination and retaliation); *Hart v. United States,* 894 F.2d 1539, 1549 (11th Cir. 1990) (reversing grant of summary judgment for plaintiff in IIED case based on mistaken identification by military of remains of soldier shot down over Laos during Vietnam conflict); *Vallo v. United States*, 298 F. Supp. 2d 1231, 1235 (D. N.M. 2003) (summary judgment for government where assault and battery claim of former inmate who was allegedly sexually assaulted "encompasses the claim of the proposed IIED, and the allegations that support those claims cannot be separated"); *Koch v. United States*, 209 F. Supp. 2d 89, 94 (D. D.C. 2002) (granting motion to dismiss IIED claim based on alleged conduct that "could only be fairly characterized as an assault"); *Pfau v. Reed*, 125 F.3d 927, 933 (5th Cir. 1997), *vacated on other grounds*, 521 U.S. 801 (1998); *Gergick v. Austin*, 997 F.2d 1237, 1239 (8th Cir. 1993); *Awad v. United States*, No. 1: 93CV376-D-D, 2001 U.S. Dist. LEXIS 8989, at *11-12 (N.D. Miss. Apr. 27, 2001), *aff'd*, 301 F.3d 1367 (Fed. Cir. 2002). But note that IIED claims have been upheld in many of the circuits wherein these IIED cases were barred for various other reasons.

2. Plaintiffs can prove intentional infliction of emotional distress

Agent Shaver knew or should have known that his conduct would cause emotional distress. Crediting the Plaintiffs' testimony, the Plaintiffs were targeted because of their appearance as Hispanics and/or the Hispanic decals on their car. They were then seized by an aggressive Border Patrol Agent who demanded documents from the Plaintiffs.

A consensual encounter would not be extreme or outrageous, but the Plaintiffs' testimony of the incident here shows that the characterization of this incident as a consensual encounter is farcical. A pregnant mother and her mother are purchasing gasoline at a gas station when a law enforcement officer sees one of them plus other indicia that they might be or are Hispanic, pulls

up in front of their vehicle and blocks it, exits his vehicle, walks toward their vehicle in an aggressive manner, demands in an aggressive tone that the pregnant mother produce an ID, after she produces an ID he immediately demands her "papers," then demands papers from her mother, and makes other demands and asks many other questions before arresting the Plaintiffs and placing them in the back of his locked vehicle.

If credited, Plaintiffs' testimony here closely describes a police state that is beyond the bounds of decency and intolerable in a civilized society. The Plaintiffs testified of their fear for themselves, each other, their son and grandson, and the unborn baby. There is clear testimony from the Plaintiffs of all the elements of the tort of intentional infliction of emotional distress. The fact that Agent Shaver's statements vary only create a dispute of material facts and thus preclude granting Defendant's Motion for Summary Judgment as to this claim.

IV. Conclusion

Defendant United States' Motion for Summary Judgment should be denied as to the false imprisonment, deprivation of civil rights through ethnic intimidation, and intentional infliction of emotional distress since Defendant is not immune, its Agent's conduct was not privileged in a way that allows the United States to escape liability, and there are genuine issues of material fact on the false imprisonment, deprivation of civil rights through ethnic intimidation, and intentional infliction of emotional distress tort claims brought under the Federal Tort Claims Act.

Plaintiffs concede that the claims for assault and negligent infliction of emotional distress should be dismissed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(f) the undersigned declares under penalty of perjury that the foregoing Plaintiff's Memorandum in Opposition is within the twenty (20) page limitation pursuant to Judge Zouhary's Order of February 15, 2013. Doc. 19.

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2013, a copy of the foregoing Plaintiff's Memorandum in Opposition was filed electronically under Seal. Notice of this filing will be sent to all registered parties by operation of the Court's electronic filing system. An electronic version of the filing will be sent by e-mail this same date to counsel for the parties.

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