

No. 13-4502

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROCIO ANANI SAUCEDO-CARRILLO, *et al.*,

Appellants-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal From A Final Decision Of The U.S. District Court For The Northern
District Of Ohio
Case No. 3:12-cv-2571-JZ
Judge Jack Zouhary

APPELLANTS' MERIT BRIEF

Mark Heller (0027027)
Eugenio Mollo, Jr. (0081860)
ADVOCATES FOR BASIC
LEGAL EQUALITY, INC.
525 Jefferson Ave., Suite 300
Toledo, OH 43604
419.255.0814 (phone)
419.259.2880 (fax)
mheller@ablelaw.org
emollo@ablelaw.org

Counsel for Appellants

John T. Murray (0008793)
Leslie O. Murray (0081496)
Michael Stewart (0082257)
MURRAY & MURRAY
111 East Shoreline Drive
Sandusky, OH 44870-2517
419.987.4067 (phone)
419.624.0707 (fax)
jotm@murrayandmurray.com
lom@murrayandmurray.com
stewart@murrayandmurray.com

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument as it will aid the Court in adjudicating this Federal Tort Claim Act case dismissed below on summary judgment.

Moreover, the issues presented in this appeal could significantly affect the rights of persons alleging false imprisonment against the United States by its Border Patrol Agents in Ohio along the northern border of the United States. Thousands of arrests have been made by Border Patrol Agents along the northern border of Ohio, predominantly and disproportionately of Hispanics and overwhelmingly of persons not attempting to enter the United States without inspection. *See Muniz, et al. v. Gallegos, et al.*, 2012 WL 5197250 (N.D. Ohio 2012), *rev'd* 741 F.3d 668 (6th Cir. 2013). *See generally*, Schneider, *The Changing Shape Of Federal Civil Pretrial Practice: The Disparate Impact On Civil Rights And Employment Discrimination Cases*, 158 U. Pa. L. Rev. 517 (2014).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 13-4502

Case Name: Saucedo-Carrillo, et al. v. U.S.A.

Name of counsel: Mark R. Heller

Pursuant to 6th Cir. R. 26.1, Rocio Saucedo-Carrillo

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on January 10, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Mark R. Heller

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**Disclosure of Corporate Affiliations
and Financial Interest**

Sixth Circuit

Case Number: 13-4502

Case Name: Saucedo-Carrillo, et al. v. U.S.A.

Name of counsel: Mark R. Heller

Pursuant to 6th Cir. R. 26.1, Rosa Carrillo-Vasquez

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on January 10, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Mark R. Heller

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

TABLE OF CONTENTS

REQUEST FOR ORAL ARGUMENT.....2

DISCLOSURE OF CORPORATE AFFILIATIONS.....3

TABLE OF CONTENTS.....5

TABLE OF AUTHORITIES7

I. JURISDICTIONAL STATEMENT.....11

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW.....11

III. STATEMENT OF THE CASE.....12

IV. STATEMENT OF FACTS.....13

V. SUMMARY OF THE ARGUMENT.....20

VI. ARGUMENT.....22

A. Standard of Review22

B. The Elements of False Imprisonment Under Ohio Tort Law...23

C. District Court Decision.....25

D. A Jury Could Find Appellants Proved The Elements Of
The Tort Of False Imprisonment25

1. Factors A Reasonable Person Would Consider In Deciding
Whether They Are Detained.....25

2. A Jury Could Find That The Appellants Were Intentionally
Confined By The Border Patrol Agent.....26

3. A Jury Could Find That The Appellants Were Intentionally Confined Without Lawful Justification Or Privilege By The Border Patrol Agent.....	30
4. A Jury Could Find That The Appellants Were Intentionally Confined Without The Appellants' Consent.....	31
5. A Jury Could Find That The Appellants Were Intentionally Confined In A Limited Area By The Border Patrol Agent.....	36
6. A Jury Could Find That The Appellants Were Intentionally Confined For An Appreciable Time By The Border Patrol Agent.....	37
VII. CONCLUSION.....	37
CERTIFICATION	39
CERTIFICATION OF COMPLIANCE.....	40
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS.....	41

TABLE OF AUTHORITIES
CASES

<i>Anderson v. Liberty Lobby</i>	
477 U.S. 242 (1986).....	22, 23
<i>Bauman v. Bob Evans Farms, Inc.</i>	
2007-Ohio-145 at ¶ 18 n.4 (Ohio Ct. App. 2007).....	28, 29
<i>Bennett v. Ohio Dep't of Rehab. & Corr.</i>	
60 Ohio St. 3d 107 (1991).....	23
<i>Brendlin v. California</i>	
551 U.S. 249 (2007).....	33, 34
<i>California v. Hodari D.</i>	
499 U.S. 621 (1991).....	24
<i>Celotex Corp. v. Catrett</i>	
477 U.S. 317 (1986).....	22
<i>Feliciano v. Kreiger</i>	
50 Ohio St. 2d 69 (1977).....	24, 37
<i>Florida v. Bostick</i>	
501 U.S. 429 (1991).....	24
<i>Frazier v. Honda of Am. Mfg., Inc.</i>	
431 F.3d 563 (6th Cir.2005).....	22, 23
<i>Kinney v. Ohio Dep't of Admin. Servs.</i>	
1988 WL 92433 (Ohio Ct. App. 1988).....	28

<i>LeFever v. Ferguson</i>	
956 F. Supp. 2d 819 (S.D. Ohio 2013).....	24
<i>Logsdon v. Hains</i>	
492 F.3d 334 (6th Cir. 2007).....	23
<i>Michigan v. Chestnut</i>	
486 U.S. 567 (1988).....	36
<i>Moore v. Philip Morris Cos.</i>	
8 F.3d 335 (6th Cir.1993).....	23
<i>Muñiz-Muñiz v. Gallegos</i>	
2012 WL 5197250 (N.D. Ohio 2012), <i>rev'd</i> 741 F.3d 668 (6th Cir. 2013)	
.....	2,12
<i>Perkins v. Vill. Of Lincolnshire</i>	
94 C 7745, 1996 WL 613159 (N.D. Ill. Oct. 22, 1996).....	37
<i>Radvansky v. City of Olmsted Falls</i>	
395 F.3d 291 (6th Cir.2005).....	24
<i>Richards v. United States</i>	
369 U.S. 1 (1962).....	11, 13
<i>Scott v. Harris</i>	
550 U.S. 372 (2007).....	23
<i>Sharp v. Cleveland Clinic</i>	
176 Ohio App. 3d 226 (2008):.....	28
<i>State v. Johnston</i>	
85 Ohio App.3d 475 (1993).....	24
<i>State v. Wallace</i>	
145 Ohio App. 3d 116 (2001).....	24, 25

<i>State v. Washington</i>	
144 Ohio App.3d 482 (Ohio App. 2001).....	24
<i>Terry v. Ohio</i>	
392 U.S. 1 (1968).....	24
<i>United States v. Hinojosa</i>	
534 Fed.Appx. 468 (6th Cir. 2013).....	32
<i>United States v. Jones</i>	
562 F. 3d 768 (6th Cir. 2009).....	32
<i>United States v. Mendenhall</i>	
446 U.S. 544 (1980).....	24, 29, 32, 34, 35
<i>United States v. Sharpe</i>	
470 U.S. 675 (1985).....	35
<i>United States. v. Smith</i>	
594 F.3d 530 (6th Cir. 2010).....	31, 33
<i>United States v. Quintana</i>	
623 F.3d 1237 (8 th Cir. 2010).....	30, 31
<i>Williams v. Franklin County Bd. Of Comm'rs</i>	
145 Ohio App. 3d 530 (2001).....	26 , 27

STATUTES, REGULATIONS AND RULES

8 U.S.C. § 1357.....	31
28 U.S.C. § 1291.....	10
28 U.S.C. § 1346.....	10, 11, 12
28 U.S.C. § 2674.....	13

OTHER

Black’s Law Dictionary, (9th Ed., 2009).....23 fn.2

Harper & James, *The Law of Torts* (1956) 226, Sec. 3.7.....23

Katz, *Summarizing The Differences Between A Consensual Encounter, A Stop, And An Arrest*, Oh. Arrest, Search & Seizure § 15:10 (Baldwin 2013)25

Elizabeth M. Schneider, *The Changing Shape Of Federal Civil Pretrial Practice: The Disparate Impact On Civil Rights And Employment Discrimination Cases*, 158 U. Pa. L. Rev. 517 (2014)2

Wright & Miller, *Obligation of Party Opposing Summary Judgment to Present Evidence*, 10B Fed. Prac. & Proc. Civ. § 2739 (3d ed.).....22

I. JURISDICTIONAL STATEMENT

The District Court had original subject matter jurisdiction pursuant to 28 U.S.C. § 1346(b). 28 U.S.C. § 1346(b) grants federal district court jurisdiction over 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).

The Federal Tort Claims Act (“FTCA”) is a limited waiver of federal sovereign immunity providing a tort remedy for persons injured by wrongful acts or omissions of the federal government. Applicable state tort law determines the type or types of tort actions and establishes the elements of the torts that plaintiffs may bring under the FTCA.

Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1291 as an appeal from the final decision of the District Court.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Appellants abandon and waive all claims relating to assault, intentional infliction of emotional distress, negligent infliction of emotional distress, and deprivation of civil rights through ethnic intimidation. This appeal will thus only address the false imprisonment claim.
2. The only issue presented is: Did Appellants present evidence in support of their false imprisonment tort claim that could justify a jury decision in their favor and thus make the decision below granting summary judgment reversible error?

III. STATEMENT OF THE CASE

Appellants are two individuals, a daughter and mother, who alleged that a federal Border Patrol Agent profiled them at a gasoline station in northern Ohio because of one's obvious Hispanic appearance, falsely imprisoned them without any reasonable suspicion or probable cause, and then arrested them after establishing probable cause. The court below held that the Appellants were not detained (confined) until probable cause had been established during a consensual encounter and thus there was no false imprisonment. It also granted summary judgment to the United States on the other FTCA claims.

The Appellants are also plaintiffs in a related case that this Court earlier remanded to the federal district court when reversing the district court's dismissal on sovereign immunity grounds. *Muñiz-Muñiz v. United States Border Patrol*, 741 F.3d 668 (6th Cir. 2013). The Appellants had sought to add their Federal Tort Claims Act claims into *Muñiz-Muñiz* after completing the required administrative process, but the federal district judge denied leave to add those claims to that case.

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). *See also* 28 U.S.C. § 2674.

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 Appellants brought a number of claims under the Federal Tort Claims Act for Ohio torts, including false imprisonment. The District Court granted the United States’ motion for summary judgment on all claims. This appeal followed, although Appellants are only pursuing their false imprisonment claim on appeal.

IV. STATEMENT OF FACTS

The Parties agree that the two Appellants 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’ renditions of the events that followed differs significantly, and more importantly, materially.

Appellant Rocio Saucedo-Carrillo, the daughter and driver, exited her vehicle and entered the gasoline station to prepay for gasoline. RE 28-3: Page ID 326, lines 3-7.¹

The following paragraphs detail the contested material facts in the testimony and other evidence between the Appellants and the Border Patrol Agent regarding what occurred at the gas station on September 13, 2009, after the Appellants parked at the gas pumps. These paragraphs also may state uncontested material facts.

1. When she exited the station after paying, Saucedo-Carrillo testified that Border Patrol Agent Shaver was driving *south* on U.S. 250 in his Border Patrol vehicle. RE 28-3: 323, 13–18; 327, 23-25; and, RE 29-3: 405 (photograph). Border Patrol Agent Shaver stated he was driving *north* on U.S. 250. RE 28-1: 155, 18-22. (emphasis added). Agent Shaver testified he was not in the “border zone,” RE 28-1: 154, 2-20, nor was he “patrolling,” *id.* at lines 23-24, but rather orienting himself after his recent transfer to Ohio in the previous month, August 2009. RE 28-1: 155, 1-22; 173, 4-6.

2. Saucedo-Carrillo testified that Border Patrol Agent Shaver saw her exiting the Marathon store after she completed prepaying for gasoline, their eyes met, and he then activated his turn signal to turn into the Marathon station. RE 28-

¹ Future citations to the record will be as follows: RE [number]:[PageID #],[line numbers] for the sake of clarity.

3: 326, 19–24. Agent Shaver stated he saw the Appellant’s truck and turned in and that Saucedo-Carrillo exited the Marathon store after he had already turned into the Marathon station. RE 28-1: 64, 8-10.

3. Saucedo-Carrillo testified that while there were a number of customers parked at the pumps purchasing gas, she “was the only Hispanic there [at the gas station] and that’s why he stopped me.” RE 28-3: 352, 16-20. Carrillo-Vasquez also testified that she and her daughter, Saucedo-Carrillo, were the only Hispanics at the gas station. RE 28-2: 259, 4-24. Agent Shaver testified that the reason he engaged with the Appellants was because of the “vehicle itself” they were using. RE 28-1: 161, 2-24; 162, 19-20.

4. Saucedo-Carrillo testified that the rear window decal stating “Durango” and the decals showing scorpions were indicators of her family’s place of origin in Mexico, the State of Durango. RE 28-3: 314, 21-24; 315, 1-3. She also testified that there was a normal amount of space between the ground and the truck and that the wheel wells were not “anything out of the ordinary.” RE 28-3: 316, 4-18. Agent Shaver states the decals “Durango” and the scorpions indicated the state of Durango, Mexico, and that there were drug-trafficking organizations in that area. RE 28-1: 161, 13-21. Agent Shaver testified that the “extra after-market ground effects on the vehicle, the flares at the bottom, . . . in [his] experience on the southern border, was often used to hide narcotics on the undercarriage of the

vehicle.” RE 28-1: 161, 8-12. He did not testify nor is there any evidence in the record that this was a concern along the northern border of Ohio on Lake Erie. Shaver stated the personalized Ohio license plates on Appellant’s vehicle stating “Anani” appeared to him to be a Hispanic name. RE 28-1: 162, 17-24.

5. 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 Appellant’s in a manner that blocked her vehicle, exited the Border Patrol vehicle, and “approached [her] aggressively asking for an ID.” RE 28-3: 334, 6-24; 332, 4-25; 333, 22-25; 334, 1-18; RE 29-4: 405. 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 “right in front of me” and was “very close” to Appellants’ vehicle so that a person but not a vehicle could pass through. RE 28-2: 254, 12-19; 257, 19-25; 258, 1-10.

Agent Shaver testified that as he pulled up to the gas pumps Saucedo-Carrillo exited the gas station and that “I rolled down my window and I simply said hello and asked her how she was doing.” RE 28-1: 164, 8-18; 177, 22-24 through 178, 1; 178, 7 - 9 and 14 - 16. But Agent Shaver changed his story later during his deposition, stating “When I walked up to her and said, “Hi, how are you doing,” she responded.” RE 28-1:165, 22-23. Agent Shaver states that after greeting

Saucedo-Carrillo from within his vehicle he then asked if she was from the area, who owned the truck, then exited his vehicle and talked to Saucedo-Carrillo "across the hood" of her truck. RE 28-1: 166, 4-24; 167, 3.

6. 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." RE 28-3: 334, 1-8. 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 Appellants' truck. RE 28-2: 255, 4. Carrillo-Vasquez stated that after Shaver parked his car he started asking her daughter questions without any greeting. RE 28-2: 259, 25 to 260, 7. Saucedo-Carrillo testified that after she presented a Michigan license in response to Agent Shaver's demand for an ID, the next question Agent Shaver asked her was "for my papers." RE 28-3: 334, 21-25; 335, 1-2. Carrillo-Vasquez testified that Agent Shaver asked her daughter for ID and then asked both of them for "papers." RE 28-2: 260, 4-15. Saucedo-Carrillo testified that after she gave her Michigan license to Agent Shaver he held onto her license thereafter for "the whole time." RE 28-3: 338, 15-17. Agent Shaver testified that the incident changed from a consensual encounter to an immigration inspection when "I asked about the license plates and said she couldn't get them registered in her name." RE 28-1: 175, 12-17. Agent Shaver also testified in his

deposition that his interrogation of Saucedo-Carrillo and her answers were in English. RE 28-1: 164, 15-18.

8. Saucedo-Carrillo testified she did not feel free to refuse to answer Agent Shaver's questions. RE 28-3: 347, 21-25. She 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 questioning of her without any preliminary greeting. RE 28-3: 334, 4-18; 340, 22-23; 341, 1-6; 347, 21-25 through 348, 1-14; 350, 4-22. Agent Shaver stated in his report after the fact that:

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.

RE 29-4: 406-409.

9. Appellants testified that the questioning by Agent Shaver lasted 30 to 45 minutes. RE 28-3: 344, 10-17. At the end of the questioning Shaver ordered Saucedo-Carrillo to move her truck to the side of the Marathon station away from the gas pumps. RE 28-3: 341, 10-16. Appellants said they were then placed by Agent Shaver in the back of his locked vehicle. RE 28-3: 344, 8-9. Agent Shaver's written documents confirm this type of timeframe for the actual stop. He wrote in his I-213 report that he

encountered the Appellants in Norwalk around 2 p.m., and the I-213's he completed on returning to the station in Sandusky state they were completed at 3:46 p.m. *Id.* That leaves approximately 75 minutes for the actual gas station incident, travel time between Norwalk and the Border Patrol Station in Sandusky, and any work Agent Shaver did at the Border Patrol Station.

10. Saucedo-Carrillo testified that she saw an acquaintance at the gas station and asked Agent Shaver if she could give her vehicle keys to the acquaintance. RE 28-3: 343, 12-20. Carrillo-Vasquez also stated her daughter initiated turning the keys over to the acquaintance. RE 28-2: 266, 13-17. Agent Shaver states he initiated the contact with the acquaintance. RE 28-4: 376, 8.

11. Appellants' vehicle was never inspected or searched at the time of the arrest nor was any drug related suspicion noted in his written report immediately after the incident. Only in later deposition testimony did Agent Shaver indicate that the reason he initiated the encounter with the Appellants was because the truck's appearance led him to suspect drug issues. He testified that "I was still trying to connect the vehicle to see if there was, in fact, any kind of narcotic smuggling occurring, which was diminishing at this point due to them just being here illegally, having overstayed their visas." RE 28-1: 169, 1-8.

12. Agent Shaver attempted to classify the initial encounter with the Appellants as a consensual encounter. He then made contradictory statements as to when his consensual characterization ended: 1. when he asked Saucedo-Carrillo about her vehicle and she replied that “she couldn’t get the vehicle registered in her name,” RE 28-1: 166, 1–20; and, 2. when Saucedo-Carrillo “mentioned that she had overstayed her visa.” RE 28-1: 180, 5–11.

V. SUMMARY OF THE ARGUMENT

Agent Shaver’s conduct satisfies the elements of the Ohio tort of false imprisonment if a jury were to credit Appellants’ testimony. This makes the granting of summary judgment to the United States reversible error.

The testimony of the Appellants, if credited by a factfinder, would prove they reasonably believed they were not free to leave the scene during the incident. While significantly different than the testimony of the Border Patrol Agent, Appellants testified in depositions that:

- Agent Shaver saw Saucedo-Carrillo exiting the station after prepaying for gasoline and believed they were singled out as the only Hispanics at the gas station when Agent Shaver drove past;
- Agent Shaver intentionally blocked their vehicle in the front;

- Agent Shaver did not approach them in a friendly manner with a greeting from within his own vehicle, but rather came within a few feet and immediately demanded ID from Saucedo-Carrillo;
- all of the initial conversation between Agent Shaver and Saucedo-Carrillo was in English;
- After Saucedo-Carrillo produced a driver's license, Agent Shaver then demanded "papers" from both Saucedo-Carrillo and her mother;
- There was nothing out of the ordinary about her truck, whereas Agent Shaver testified that along the southern border, where he had just been transferred from, the "after-market ground effects," along with the Durango and scorpion decals, would make him suspicious of drug activity;
- Agent Shaver agreed to release the vehicle to pedestrians passing the gas station after arresting the Appellants without inspecting the vehicle, thus negating his later rationalization of his suspicions due to the vehicle itself;
- Agent Shaver changed his testimony during his deposition about his first encounter, stating initially that he "greeted" Saucedo-Carrillo from within his own vehicle and later in the deposition stating that he "greeted" her as he approached her truck on foot; and,

- Agent Shaver admitted in his deposition that he did not develop reasonable suspicion or probable cause of criminal or immigration violations until he had talked to Saucedo-Carrillo for some time, although changing his own testimony as to when in the conversation that occurred.

The Appellants at no time consented to the detention and based on a reasonable person standard could believe that they were being detained and required to answer Agent Shaver's questions from the moment he blocked their vehicle.

VI. ARGUMENT

A. Standard of Review Of Summary Judgment Grant

This court reviews de novo the district court's grant of summary judgment. *Frazier v. Honda of Am. Mfg., Inc.*, 431 F.3d 563, 565 (6th Cir.2005).

A court may only grant summary judgment as a matter of law when the moving party has identified, as its basis for the motion, an absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). The evidence of Appellants here is to be

believed and all justifiable inferences are to be drawn in Appellants' favor. *Id.* at 255. A court views the facts in the light most favorable to the nonmoving party, unless that party's version of events is "blatantly contradicted by the record, so that no reasonable jury could believe it." *Scott v. Harris*, 550 U.S. 372, 380 (2007). Or, put another way, "[t]he nonmoving party must present "significant probative evidence" to show that there is more than "some metaphysical doubt as to the material facts." *Frazier v. Honda of Am. Mfg., Inc.*, 431 F.3d 563, 565-66 (6th Cir. 2005), citing *Moore v. Philip Morris Cos.*, 8 F.3d 335, 339-340 (6th Cir.1993).

There is a genuine issue for trial if there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson, supra*, at 249. See generally, Wright & Miller, *Obligation of Party Opposing Summary Judgment to Present Evidence*, 10B Fed. Prac. & Proc. Civ. § 2739 (3d ed.).

B. The Elements of False Imprisonment Under Ohio Tort Law

The elements of the Ohio tort of false imprisonment are (1) intentional confinement;² (2) without lawful justification or privilege; (3) without consent; (4) within a limited area; and, (5) for an appreciable time, however short. *Logsdon v. Hains*, 492 F.3d 334, 347 (6th Cir. 2007); *Bennett v. Ohio Dept. of Rehab & Corr.*,

² *n.* The act of imprisoning or restraining someone; the state of being imprisoned or restrained <solitary confinement>. See solitary confinement. — confine, *vb.* confinement, Black's Law Dictionary (9th ed. 2009).

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.

A finding of probable cause defeats a claim of false imprisonment. See *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 315 (6th Cir.2005) (applying Ohio law); *LeFever v. Ferguson*, 956 F. Supp. 2d 819, 841 (S.D. Ohio 2013).

Ohio courts have relied on federal caselaw to determine whether an encounter is consensual; if consensual there is no confinement (detention) and requirement of reasonable suspicion or probable cause (lawful privilege). The court in *State v. Wallace*, 145 Ohio App. 3d 116

(2001) stated:

Some general rules have evolved over time to determine whether an encounter is consensual. First, as the state points out in its argument, the United States Supreme Court in *Terry v. Ohio*, 392 U.S. at 19, fn. 16, indicated that an encounter does not change from consensual into a seizure unless the officer uses force or a show of authority to restrain the liberty of the person the officer has approached to question. Second, *in regard to whether a restraint has occurred, courts must consider whether the reasonable, innocent person would feel free to leave or to end the encounter with the police officer.* See, e.g., *Florida v. Bostick*, 501 U.S. 429, 439 (1991). Third, the subjective intent of the officer to allow the individual to leave is irrelevant; the test is objective and is based upon whether a reasonable person would have felt free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 at fn. 6 (1980). Fourth, courts must look at the totality of the circumstances of each case to decide whether, under the facts in that case, the encounter changed from consensual to a seizure that triggered Fourth Amendment rights. See, e.g., *State v. Johnston*, 85 Ohio App.3d at 477-478; and, *State v. Washington*, 144 Ohio App.3d 482. Finally, the Supreme Court of the United States has indicated that there must be both a show of authority and a submission to that

authority to constitute a seizure. *California v. Hodari D.*, 499 U.S. 621, 626 (1991).
State v. Wallace, 145 Ohio App. 3d 116, 122 (2001)(emphasis added). *See also*,
*Katz, Summarizing The Differences Between A Consensual Encounter, A Stop, And
An Arrest*, Oh. Arrest, Search & Seizure § 15:10 (Baldwin 2013).

C. The District Court Decision

The District Court's decision here found that the Appellants were not detained (confined) "until after [Appellants] told [the Border Patrol Agent] they entered the United States on a ten-year visa and admitted that they were in the country illegally." RE 31: 419. The District Court then found that since no detention (confinement) had occurred until probable cause for arrest was established there could be no Ohio tort of false imprisonment. *Id.*

D. A Jury Could Find Appellants Proved All The Elements Of The Tort Of False Imprisonment

1. Factors A Reasonable Person Would Consider In Deciding Whether They Are Detained.

Logically and from the caselaw, *infra*, whether a reasonable person can correctly conclude that they are not free to leave a situation where they are not so instructed depends on a number of factors, including, but not limited to:

- the identity and apparent authority of the individual taking action against them, e.g., a federal state, or local law enforcement officer

versus a clerk in a KMart store versus an employee's supervisor
versus a fellow employee;

- whether the person is armed;
- the manner in which the incident is initiated, e.g., greeting or demands;
- use or non-use of physical blocking of the person and/or their vehicle;
and,
- the tone and aggressiveness of the person doing the questioning.

Here, the District Court stated that the Appellants were not detained at the outset of the encounter, because Agent Shaver never told them they could not leave and cited Saucedo-Carrillo's action of continuing to put gasoline in her truck to conclude that Appellants were free to conduct their business. The Court further states that the Appellants could have backed up their vehicle and left the gas station. RE 31: 417 - 419.

**2. A Jury Could Find That The Appellants Were Intentionally Confined
By The Border Patrol Agent.**

The District Court cited *Williams v. Franklin County Bd. Of Comm'rs*, 145 Ohio App. 3d 530 (Ct. App: 2001) as support for its decision that Appellants were not confined (detained). The plaintiff there argued that because she was not allowed to be present when police interviewed her daughter, on the front porch,

about a domestic violence incident at her home, she had been falsely imprisoned. *Id* at 550. The court held that Williams had not been falsely imprisoned because “there was no evidence...that she would have been prevented from leaving had she tried,” and that “there was at least one other means of egress.” The court further states that there was no indication that Williams desired to leave her house and that Williams could have left the house through the garage if she wanted. *Id*.

The present case is distinguishable from *Williams*. Williams was merely prevented from accompanying her daughter onto the front porch while the police officers questioned the daughter, she was never physically blocked from leaving, nor is there record of the police officer acting in a manner that would cause a reasonable person to feel that she was not free to leave. Additionally, the officers in the *Williams* case were investigating a family violence incident called in by the daughter during the incident and wanted to speak to her as a witness outside the parents’ presence. *Id*. at 536-37.

In this case, however, there was no ongoing criminal investigation as in *Williams*. Instead, Saucedo-Carrillo’s vehicle was physically blocked from any forward motion by Agent Shaver. The use of his vehicle to restrict her movements, combined with his close physical presence and aggressive questioning would have led a reasonable person to feel that they were not free to leave.

The District Court also cited *Sharp v. Cleveland Clinic*, 176 Ohio App. 3d 226 (2008), for the proposition that false imprisonment may not be predicated on a person's unfounded belief that she was restrained and therefore the Appellant's belief that they were confined was not determinative. The court in *Sharp* held that there was no detention because *the Appellant was expressly told that she was free to leave* (emphasis added). *Id.* at 229. Our case is distinguishable from *Sharp*, as Saucedo-Carrillo and Carrillo-Vasquez were never told that they were free to leave. In fact, Agent Shaver's conduct would lead a reasonable person to conclude that Appellants were not free to leave if their testimony was credited. Agent Shaver detained Appellants at the gas station by using his vehicle to block them from moving their vehicle forward. He intentionally restricted their ability to maneuver about the gas station or move away from his questioning. He also stood in close proximity to Saucedo-Carrillo while demanding documents without any preliminary greetings or talk.

The District Court cited *Bauman v. Bob Evans Farms, Inc.*, 2007-Ohio-145 at ¶ 18 n.4 (Ohio Ct. App. 2007) (quoting *Kinney v. Ohio Dep't of Admin. Servs.*, 1988 WL 92433 (Ohio Ct. App. 1988)) for the proposition that "mere submission to verbal direction, unaccompanied by force or threat, cannot constitute confinement or detention." In *Bauman*, the court dismissed claims, including false imprisonment, against the corporate employer and a supervisor since another

employee's desire to search fellow employees was not endorsed or approved by Bob Evans Farms, Inc., nor the supervisor. The plaintiffs' claims against the fellow employee conducting the searches, who had been fired by Bob Evans for her conduct, were not dismissed. The only false imprisonment claims dismissed were those against Bob Evans and the supervisor who was not present during the search.

The present case is distinguishable from *Bauman*. First, *Bauman* does not decide any legal issue about false imprisonment by the defendant who actually wanted to search employees; it only decided that a corporate entity and a supervisor who was not present were not liable for any false imprisonment by the defendant who did want to search employees. Second, the Supreme Court of the United States, in *United States v. Mendenhall*, 446 U.S. 544 (1980), lists several examples of circumstances that might indicate detention, even in cases where the detained person did not attempt to leave. The examples listed include "the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554. It is reasonable to conclude that an employee could reasonably refuse to follow a demand to submit to a strip search from another employee, especially, as in *Bauman*, a police officer called to the scene had refused to do a strip search, taken a report, and left the Bob Evans restaurant. It is not reasonable to conclude that Saucedo-Carrillo was free to refuse to comply

with Agent Shaver's demand for identification. Agent Shaver's initiation of the contact after seeing Saucedo-Carrillo, blocking their vehicle, and demanding language and aggressive tone effectively indicated that compliance with his request was compelled.

3. A Jury Could Find That The Appellants Were Intentionally Confined Without Lawful Justification Or Privilege By The Border Patrol Agent.

A jury could reasonably find that Agent Shaver's conduct was not legally justified or privileged. There was no basis for Agent Shaver's conduct in demanding first an ID from Saucedo-Carrillo and then "papers" from both Appellants and Shaver admitted he did not have legal justification for detaining them until later in his conversation with Appellants. Therefore, summary judgment was improper.

The District Court cited *United States v. Quintana*, 623 F. 3d 1237, 1241 (8th Cir. 2010). In *Quintana*, officers conducted a valid traffic stop during which an officer was unable to verify Quintana's Mexican driver's license and contacted the United States Border Patrol. Quintana claimed that he entered the country under a valid Mexican passport, but record checks failed to produce any immigration information. Quintana was taken into custody, and a fingerprint search revealed that he had been deported twice.

The *Quintana* court found that the Border Patrol Agent had probable cause

to believe Quintana was an alien subject to deportation, as required to make a warrantless administrative arrest under 8 U.S.C. § 1357. This case is distinguishable from *Quintana* because the border patrol agent in *Quintana* conducted a valid traffic stop that led to probable cause for the detention.

Agent Shaver did not conduct a valid stop. He unlawfully detained Appellants without probable cause or reasonable suspicion. It was only after Appellants had been detained without reasonable suspicion or probable cause for 20 to 45 minutes and subjected to aggressive questioning, that Agent Shaver developed reasonable suspicion or probable cause. Agent Shaver lacked any lawful privilege for his initial detention of Appellants.

Additionally, Saucedo-Carrillo and Carrillo-Vasquez did not consent to the detention. By answering Agent Shaver's questions, Appellants submitted to his authority, but this does not amount to consent, because a reasonable person would not have felt free to refuse to answer.

4. A Jury Could Find That The Appellants Were Intentionally Confined Without The Appellants' Consent.

A seizure occurs when an encounter is not consensual and the officers use physical force or the individual submits to the officer's show of authority. *United States v. Smith*, 594 F.3d 530, 535 (6th Cir. 2010). The test to determine if a seizure has occurred is whether, "in view of all the circumstances surrounding the

incident, a reasonable person would have believed that he was not free to leave.” *United States v. Jones*, 562 F.3d 768, 772 (6th Cir.2009) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

There are three types of reasonable, warrantless encounters between law enforcement and citizens: (1) consensual encounters, during which people are free to leave; (2) a temporary involuntary detention which must be predicated upon reasonable suspicion; and, (3) arrests which must be based on probable cause. *United States v. Jones*, supra, at 772.

The District Court cited *United States v. Hinojosa*, 534 Fed.App'x 468 (6th Cir. 2013), stating that Agent Shaver was free to ask for Appellants' identification, as long as he did not condition their departure on production of identification or “convey a message that compliance with his requests was required.”

In *Hinojosa*, a police officer approached Hinojosa's vehicle, knocked on the window, and asked “Hey, can I talk to you real quick?” *Hinojosa* at 469. The stop in *Hinojosa* was therefore a consensual encounter. Hinojosa was given the opportunity to decline to speak with the officer. This is distinguishable from our case since testimony varies materially between Agent Shaver and Appellants as to whether there was a consensual encounter. Appellants did not believe they could decline to answer Agent Shaver's questions. RE 28-3: 347, 21-25. A jury could

find that this was not a consensual encounter if they credited Appellants' testimony rather than Agent Shaver's.

A jury could find that the encounter between Agent Shaver and Appellants constituted a seizure. A seizure occurs when, in view of all the circumstances surrounding the incident, a reasonable person would feel that he was not free to leave. *Smith, supra*, at 536. A jury could find the encounter between Agent Shaver and the Appellants was a seizure by finding that a reasonable person in Appellants' position would not have felt free to leave.

The fact that Saucedo-Carrillo continued to put gasoline in her vehicle does not demonstrate that she was not free to leave. By answering Agent Shaver's questions, Appellants submitted to his authority, but this does not amount to consent, because a reasonable person would not have felt free to refuse to answer.

In *Brendlin v. California*, 551 U.S. 249 (2007), officers stopped a car to check its registration without reason to believe it was being operated unlawfully. One of the officers then recognized the defendant, a passenger in the car. Upon verifying that defendant was a parole violator, the officers formally arrested him and searched him, the driver, and the car, finding, among other things, methamphetamine paraphernalia. The State conceded that the police had no adequate justification to pull the car over. The Court held that the relevant question was to ask whether a reasonable person in defendant's position after the

car was stopped would have believed he was free to end the encounter with the police. The Court thought that in such circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission.

The court stated “absent the intentional application of physical force, even if there is a show of authority and a reasonable person would not feel free to leave, in order for a seizure to occur there must also be submission to the show of authority: ‘there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned.’” *Id.* at 254. *Brendlin* went on to state that “what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away.” *Id.* at 262. Saucedo-Carrillo submitted to Agent Shaver’s authority by remaining at the gas pump, but the submission does not amount to consent. Again, the facts and law indicate that summary judgment here was inappropriate since a jury could find in Appellants’ favor.

The District Court also relied on *United States v. Mendenhall*, 446 U.S. 544, 553 (1980), to state that Agent Shaver was permitted to ask questions without cause because “the purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry.” *Mendenhall*, however, was an

investigatory stop by DEA agents who had reasonable suspicion for detaining Mendenhall. The agents approached Mendenhall after observing that her conduct appeared to be characteristic of persons unlawfully carrying narcotics. *Id* at 554. The agents identified themselves to Mendenhall as federal agents and asked for her identification. The agents briefly questioned Mendenhall before asking if she would accompany them to the DEA office. In the office Mendenhall was asked if she would consent to a search of her person and her belongings. Mendenhall was informed that she was free to refuse to consent to the search. Mendenhall verbally consented to the search. *Id* at 549.

The case here is distinguishable in several ways. First, in *United States v. Sharpe*, 470 U.S. 675, 686 (1985), the court stated that “in assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.”

Agent Shaver’s initial detention of Appellants was not predicated upon a reasonable suspicion. Agent Shaver claims that he was suspicious about the vehicle Appellants were driving. RE 28-1: 161, 2-24. Agent Shaver stated that his suspicions were aroused because of the vehicle, not the Appellants themselves. However, upon detaining Appellants Agent Shaver did not diligently pursue an

investigation of the vehicle to confirm or dispel his suspicions. There is no record that Agent Shaver examined the vehicle in any way before letting a friend of the Appellants drive it away. Agent Shaver was not conducting an investigative stop.

Second, Agent Shaver did not ask, but demanded identification from Appellants. Agent Shaver's aggressive tone and mannerisms implied that Appellants were required to comply with the request.

Third, Appellants were at no time informed that they could refuse questioning.

5. A Jury Could Find That The Appellants Were Intentionally Confined In A Limited Area By The Border Patrol Agent.

The facts here also satisfy the element of false imprisonment requiring confinement in a limited area. In *Michigan v. Chesternut*, 486 U.S. 567 (1988) police officers drove their vehicle alongside the defendant as he ran. The defendant argued that he had been unlawfully seized at that time. The court held that the defendant was not seized when the police followed him. Stating:

“The record does not reflect that the police activated a siren or flashers; displayed any weapons; or operated the car aggressively to block his course or to control his direction or speed.”

Id. at 575.

The present case is distinguishable from *Michigan* because Agent Shaver did operate his car in an aggressive manner to block the forward movement of Appellant's vehicle.

Perkins v. Vill. Of Lincolnshire, 1996 WL 613159 (N.D. Ill. Oct. 22, 1996), found that “[i]t is reasonable to believe that a jury could conclude that when a uniformed police officer stands in the way of a person’s exit from a public building demanding identification, a reasonable person would not feel free to leave.” The fact that Agent Shaver physically blocked Saucedo-Carrillo from moving her car forward and demanded documents from her while standing in close proximity showed confinement in a limited area, allowing a jury to find in Appellants’ favor and thus making summary judgment inappropriate.

6. A Jury Could Find That The Appellants Were Intentionally Confined For An Appreciable Time By The Border Patrol Agent.

False imprisonment also requires the person be confined for an appreciable time, however short. *Feliciano v. Kreiger*, 50 Ohio St. 2d 69, 71 (1977). According to Saucedo-Carrillo’s deposition, the questioning by Agent Shaver lasted from 20 to 40 minutes. RE 28-3: 344, 10-17. This timeframe is directly supported by the incident report filled out by Agent Shaver. The evidence would support a jury finding that Agent Shaver detained Appellants for an “appreciable” amount of time.”

VII. CONCLUSION

For the reasons set forth above, the District Court’s decision with respect to summary judgment as to the false imprisonment claim must be reversed. This

Court should find that there are disputed material facts as to whether Agent Shaver's conduct constituted the tort of false imprisonment under Ohio law and that the facts could support a jury finding in favor of the Appellants. This case should be remanded to the District Court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Mark R. Heller

Mark R. Heller (0027027)

Direct Dial: (419) 930-2423

mheller@ablelaw.org

Eugenio Mollo, Jr. (0081860)

emollo@ablelaw.org

ADVOCATES FOR BASIC LEGAL EQUALITY, INC.

525 Jefferson Ave., Suite 300

Toledo, Ohio 43604

Telephone: (419) 255-0814

Facsimile: (419) 259-2880

John T. Murray (0008793)

jotm@murrayandmurray.com

Leslie O. Murray (0081496)

lom@murrayandmurray.com

Michael Stewart (0082257)

stewart@murrayandmurray.com

MURRAY & MURRAY CO., L.P.A.

111 East Shoreline Drive

Sandusky, Ohio 44870-2517

Telephone: (419) 624-3125

Facsimile: (419) 624-0707

Attorneys for the Appellants-Appellants

CERTIFICATION

I hereby certify that on April 30, 2014, the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Mark R. Heller

Mark R. Heller (0027027)

ADVOCATES FOR BASIC LEGAL EQUALITY, INC.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(A), (B), and (C), and Sixth Circuit Rule 32(a), the undersigned certifies that this brief complies with the type limitations of those Rules.

1. Exclusive of the exempted portions of Fed.R.App.P. 32(a)(7)(B)(i) and (ii), the brief contains no more than 6,500 words in its entirety.
2. The brief has been prepared in 14-point Times New Roman typeface using Word.
3. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.
4. The undersigned understands a material misrepresentation in completing this certificate of the Fed.R.App.P. 32(a)(7)(A), (B), and (C), and Sixth Circuit Rule 32(a) may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

/s/ Mark R. Heller

ADVOCATES FOR BASIC LEGAL EQUALITY, INC.

525 Jefferson Ave., Suite 300

Toledo, Ohio 43604

Telephone: (419) 930-2423

Attorney for Appellants

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Saucedo-Carrillo, et al., v. United States of America

Northern District of Ohio Case No. 3:12-cv-02571-JZ

Record Entry No.	Page ID#	Date Filed	Description
1	1 – 9	10-15-2012	Complaint
28	88 - 115	7-15-2013	Summary Judgment Motion – United States of America
28-1	116 – 230	7-15-2013	Deposition of Border Patrol Agent Bradley Shaver
28-2	231 – 294	7-15-2013	Deposition of Appellant Rosa Carrillo-Vasquez
28-3	295 - 374	7-15-2013	Deposition of Appellant Rocio Anani Saucedo-Carrillo
28-4	375 - 377	7-15-2013	Declaration of Border Patrol Agent Bradley Shaver
29-1	403	8-12-2013	Photos of Gasoline Station Where Agent Shaver Arrested Appellants I-213 forms regarding Appellants
29-2	404	8-12-2013	
29-3	405	8-12-2013	
29-4	406-409	8-12-2013	

31	412 - 423	10-21-2013	Memorandum Opinion and Order
----	-----------	------------	---------------------------------