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

	*	**Case No. 3:12CV2571**
Rocío Anani Saucedo-Carrillo, et al.	*	
	*	
Plaintiffs,	*	**JUDGE JACK ZOUHARY**
	*	
v.	*	**MOTION FOR SUMMARY**
	*	**JUDGMENT AND MEMORANDUM**
United States of America,	*	**IN SUPPORT**
	*	
Defendant.	*	

NOW COMES Defendant United States of America, by and through its counsel, and hereby moves for summary judgment pursuant to Fed. R. Civ. P. 56(a) in that there is no genuine issue as to any material fact and Defendant is entitled to judgment as a matter of law. Memorandum in support follows and is incorporated herein.

Respectfully submitted,

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I. Introduction

Plaintiffs filed their complaint on October 15, 2012. Plaintiffs allege that the United States is liable under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), on the common law torts of "false arrest/false imprisonment, assault, deprivation of civil rights through intimidation, negligence, and intentional infliction of emotional distress." Doc. 1, ¶ 2.

Defendant files this Motion for Summary Judgment on all of Plaintiffs' claims.

II. Facts

Plaintiffs Rosa Carrillo-Vasquez ("Plaintiff Rosa"), and Rocío Anani Saucedo-Carrillo ("Plaintiff Rocío"), are mother and daughter who entered the United States on or about January 13, 2001, through the port of entry in Laredo, Texas, as visitors with authorization to remain in the United States until July 12, 2001. Dep. Rocío p. 8; Dep. Rosa pp. 9, 10. Decl. Shaver 4. Plaintiffs have never obtained an extension of their visa and are currently in the United States without proper immigration documentation, Dep. Shaver p. 96.

On September 13, 2009, U.S. Border Patrol Agent Bradley Shaver, ("Agent Shaver") while traveling on Route 250 near Norwalk, Ohio, observed an old model blue Chevrolet pickup truck, with an extended cab, parked at a pump at a Marathon gas station. Dep. Shaver p. 46. The vehicle had "extra after-market ground effects… flares at the bottom …[and] very dark tinted windows … ." Id. pp. 48-49. The rear windows of the vehicle had large reflective silver scorpion decals facing each other with the words "Durango" on each side. Id.; Dep. Rocío pp. 19-21; Dep. Rosa pp. 16-17. The truck had flares on each side, blocking the view of the undercarriage. Dep. Shaver pp. 46, 48-49; Dep. Rocío pp. 19-21; Dep. Rosa pp. 16-17. Based on his experience as a Border Patrol agent on the southern border, Agent Shaver knew Durango to be a state in Mexico that is known for drug trafficking. Dep. Shaver pp. 46-48; see also Dep. Rocío p. 27; Dep. Rosa p. 18. He also noticed

that the license plate of the vehicle was personalized with a unique name on it. Dep. Shaver p. 46; Dep. Rocío pp. 21-22. The appearance of the vehicle and the fact that it was close to the I-80/90 corridor caused Agent Shaver to believe that the vehicle could be involved in narcotic smuggling from the southern border. Dep. Shaver pp. 47, 67.

Agent Shaver pulled into the gas station to get a "closer look at the vehicle." Dep. Shaver p. 47. Agent Shaver observed a passenger in the front seat of the car, but did not see a driver. Id.; Dep. Rosa p. 15. As he pulled up, Plaintiff Rocío exited the gas station and walked in front of Agent Shaver's car. Dep. Shaver p. 49; Dep. Rosa pp. 24-25. As Plaintiff Rocío walked by, Agent Shaver said hello (through an open car window) asked how she was doing, and Plaintiff Rocío responded that she was doing good. Dep. Shaver pp. 49, 63; but see Dep. Rosa p. 30. Plaintiff Rocío continued to walk to the truck in question and began pumping gas. Dep. Shaver pp. 51, 102; Dep. Rocío. p. 36.

While Plaintiff Rocío was gassing up her truck, Agent Shaver asked her if she was from the area. Dep. Shaver p. 51; Dep. Rosa p. 30; Dep. Rocío pp. 40-43. Plaintiff Rocío responded that she was from Norwalk and had gone to Norwalk High School. Dep. Shaver p. 51. Agent Shaver then asked Plaintiff Rocío if the car was registered to her. Id.; Dep. Rosa pp. 31-33; Dep. Rocío pp. 43-45. Plaintiff Rocío responded that she couldn't get the vehicle registered in her name so she had to register it in her brother's name, which aroused Agent Shaver's suspicion. Dep. Rocío pp. 22-25, 45; Dep. Shaver pp. 51, 103. Based on Agent Shaver's experience it is common for persons present in the country illegally to have someone else register their vehicle. Dep. Shaver p. 107. During this conversation, Plaintiff Rocío continued putting gas in her truck. Id. p. 61; Dep. Rocío pp. 40, 52. Agent Shaver's car was perpendicular to Plaintiff Rocío's truck, but there was space to pull forward or reverse without striking Agent Shaver's car and for other vehicles to pass between the two cars.

Dep. Shaver pp. 50, 64. Plaintiff Rocío has testified that there was no room to pull forward, but she could have backed out. Dep. Rocío pp. 38-39; Dep. Rosa pp. 27-28.

Plaintiff Rocío then leaned into the truck's window and spoke to the passenger, Plaintiff Rosa, in Spanish. Dep. Shaver p. 51. Agent Shaver put his car in park and exited the vehicle, and was standing at the front corner of the truck on the passenger side, speaking across the hood of the truck. Id. pp. 51-52, 63-65. Agent Shaver, who is fluent in Spanish, greeted Plaintiff Rosa in Spanish and asked if she spoke English. Id. pp. 49, 52. Plaintiff Rosa responded no. Id. p. 52. Agent Shaver asked if she was from the area and Plaintiff Rosa said no, originally they were from Mexico. Id. Agent Shaver asked Plaintiff Rosa if she was a naturalized citizen, or had a resident or green card, all to which Plaintiff Rosa answered no. Id. Agent Shaver then asked how Plaintiff Rosa had entered the country and she responded that she came with a passport and visa. Id. Agent Shaver asked for Plaintiff Rosa's ID and she gave him an insurance card. Dep. Rocío p. 51; Dep. Rosa pp. 31-32, 34. Plaintiffs stated that they entered together with a visa permitting them to stay in the country for ten years. Dep. Shaver p. 52; Dep. Rocío pp. 41-42, 46, 51-52. There is no visa that allows a person to visit in the country legally for ten years. Decl. Shaver 5. Agent Shaver's suspicion regarding the Plaintiffs' immigration status continued to rise due to Plaintiffs' answers and at that point he obtained their names and dates of birth to contact the Detroit sector via radio for an immigration inquiry in the system. Dep. Shaver p. 61. Meanwhile, Plaintiff Rocío was still gassing up her truck. Id.; Dep. Rocío pp. 51-52; Dep. Rosa pp. 34-35

Up to that point, Plaintiffs had freely answered Agent Shaver's questions. Dep. Shaver pp. 60-61. Once Agent Shaver obtained the Plaintiffs' dates of birth and ran the immigration check, he believed the Plaintiffs were not free to leave. Id. pp. 59-60. However, prior to this, Plaintiffs had the right to refuse to answer his questions. Id. Agent Shaver never told Plaintiffs they were not free to leave. Dep. Rocío p. 54; Dep. Rosa p. 39. He never told Plaintiffs they had to answer his

questions. Dep. Rocío p. 54; Dep. Rosa p. 40. While awaiting the Detroit sector's response on Plaintiffs' immigration status, Agent Shaver continued questioning Plaintiffs. Decl. Shaver 6. Before Agent Shaver could obtain a response from Detroit sector regarding Plaintiffs' immigration status, Plaintiff Rocío admitted that she and her mother were present in the United States illegally. Dep. Shaver p. 96; Decl. Shaver 6; Dep. Rocío p. 46. Agent Shaver then asked Plaintiff Rocío to move her car away from the gas pump and into a parking spot at the side of the gas station. Decl. Shaver 7; Dep. Rocío pp. 47-48; Dep. Rosa pp. 35-36. Agent Shaver moved his car next to the truck and asked Plaintiffs to retrieve their personal articles from the truck, arrested them, and placed them in the Border Patrol vehicle. Decl. Shaver 7. Although Agent Shaver performed a cursory pat-down for officer safety purposes, he did not handcuff Plaintiffs and allowed them to keep their personal articles in the backseat with them. Id.

Soon thereafter, another woman approached Agent Shaver's vehicle and asked Agent Shaver if she could help Plaintiffs. Id. ¶ 8. She said that she was Plaintiffs' friend; that Plaintiff Rocío was seven months pregnant, and the pregnancy was high risk because she had two miscarriages in the past five years. Id. Unaware Plaintiff Rocío was pregnant, Agent Shaver confirmed this fact with her. Id. Agent Shaver allowed the woman to approach his vehicle, rolled the window down so she could converse freely with Plaintiffs, and allowed Plaintiff Rocío to turn over her car keys to her friend. Id; Dep. Rocío pp. 49-50; Dep. Rosa p. 36. Agent Shaver then told the woman he was going to take Plaintiffs to the station for processing, and if Plaintiffs indeed did not have lawful status, he would contact Immigration and Customs Enforcement ("ICE") in an effort to ensure Plaintiffs would be released on their own recognizance. Decl. Shaver ¶ 8.

Soon after leaving the gas station, Plaintiff Rocío began crying. Id. ¶ 9. Agent Shaver asked her why she was crying, and she stated that she had a five-year old child in kindergarten. Id. Agent Shaver reminded her that it was Sunday, and Plaintiff Rocío replied that the child was with a baby-

sitter. Decl. Shaver ¶ 9. Agent Shaver told her that she could use her cell phone to make travel arrangements for her child. Id, Dep. Shaver p. 105. Agent Shaver then contacted his supervisor, Robert Bradley Simon, to inform him Plaintiff Rocío was pregnant. Decl. Shaver ¶ 9. Supervisory Agent Simon said he would start the paperwork and would contact ICE for authorization to release Plaintiff Rocío on her own recognizance. Id. Soon thereafter, Plaintiff Rocío informed Agent Shaver that her mother was a diabetic. Id. Although Plaintiff Rosa admitted that she was not on medication for diabetes (though she stated that she was given medication when visiting her doctor), Agent Shaver contacted his supervisor, Agent Simon, a second time and requested that he also begin paperwork for Plaintiff Rosa and contact ICE for authorization to release Plaintiff Rosa on her own recognizance. Dep. Shaver pp. 105-106.

At the station, Plaintiffs were processed and were found to have entered the United States with B-2 visitor visas that were issued in 2001, with an authorization to remain in the United States for a period not to exceed six months. Dep. Shaver p. 96; Dep. Rosa pp. 41, 43-44. Plaintiffs were therefore visa overstays, without legal status in the United States. Dep. Shaver p. 96. During the processing, Plaintiffs were processed in the lobby of the station, and were not placed in cells or handcuffed. Dep. Shaver pp. 104-106. Plaintiffs also received Notices to Appear for administrative proceedings before the Immigration Court and were released the same day on their own recognizance until their immigration hearings. Dep. Shaver pp. 105-106; Dep. Rosa p. 42.

The next day, Agent Shaver realized Plaintiffs were inadvertently released without securing their signatures on the paperwork authorizing their release. Decl. Shaver ¶ 10. Realizing Plaintiffs may be living with other persons unlawfully present in the United States; he contacted them and requested they meet him in a public place to sign the paperwork, in an effort not to cause undue disturbance or fear to the other occupants of Plaintiffs' home. Id. Plaintiffs met Agent Shaver at the end of their block, signed the paperwork, and received a copy. Id. That was the last encounter

that any agent from the Sandusky Bay station had with either Plaintiff. Id. Before September 13, 2009, neither Plaintiff had ever been stopped by Border Patrol Agents. Dep. Rocío p. 17; Dep. Rosa p. 12. Neither Plaintiff has had any contact with Border Patrol since September 13, 2009. Dep. Rocío p. 17; Dep. Rosa p. 13.

III. Legal Arguments

A. Standard for Summary Judgment

Summary judgment is appropriate where, viewing all the evidence before the court in the light most favorable to the nonmoving party, there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp.v. Catrett, 477 U.S. 317, 322-23 (1986).

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). Only factual disputes that might affect the outcome of the action under substantive law are "material." Id. at 243. To be "genuine," a dispute must involve evidence upon which a jury could find for the nonmoving party. Id.

Initially, the burden is upon the moving party to show "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325. The burden then shifts to the nonmoving party to present significant probative evidence to defeat the motion. Anderson, 477 U.S. at 249-50.

To defeat a properly supported summary judgment motion, a plaintiff "must show that a genuine issue of material fact exists as to each element of his prima facie case." Burns v. City of Columbus, 91 F.3d 836, 843 (6th Cir. 1996). "[T]he mere existence of a colorable factual dispute will not defeat a properly supported motion for summary judgment. A genuine dispute between the parties on an issue of material fact must exist to render summary judgment inappropriate." Monette

v. Elec. Data Sys. Corp., 90 F.3d 1173, 1177 (6th Cir. 1996). Further, "a nonmoving party may not avoid a properly supported motion for summary judgment by simply arguing that it relies solely or in part upon credibility considerations or subjective evidence. Instead, the nonmoving party must present affirmative evidence to defeat a properly supported motion for summary judgment." Cox v. Ky. Dep't of Transp., 53 F.3d 146, 150 (6th Cir. 1995).

Bald, self-serving allegations are insufficient to withstand a motion for summary judgment. Johnson v. McDonald & Co. Sec., Inc., 982 F. Supp. 483 (N.D. Ohio 1997). Moreover, a trial court has discretion to determine whether the nonmoving party is pursuing an "implausible" claim. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Even, complex cases and cases involving state of mind issues may be appropriate for summary judgment. Street v. J.C. Bradford & Co., 886 F.2d 1472, 1476 (6th Cir. 1989).

Summary judgment is appropriate when pleadings, exhibits, affidavits, declarations or transcripts show that there is no genuine issue as to any material fact and that a defendant is entitled to judgment as a matter of law. See White v. Columbus Metro. Hous. Auth., 429 F.3d 232, 238 (6th Cir. 2005).

B. Applicable Law

It is undisputed that this case is brought pursuant to the FTCA, 28 U.S.C. § 1346(b), et. seq. The FTCA requires that claims in tort against the United States[1] be determined by the laws of the state in which the alleged tort occurred.[2] Sheridan v. United States, 487 U.S. 392, 398 (1988).

The United States is liable in damages to an injured party for injuries arising from a negligent act by its employees if a private person would be liable under the same circumstances in

[1] The United States is the only proper defendant in a FTCA case. 28 U.S.C. § 2679(b)(1).
[2] However, the Federal Rules of Civil Procedure (United States v. Yellow Cab Co., 340 U.S. 543 (1951)) and the Federal Rules of Evidence (Fed. R. Evid. 101) are applicable to claims under the FTCA. See generally, In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1285 (D.C.N.Y. 1985), cert. denied, 487 U.S. 1234 (1988); In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1221 (D.C.N.Y. 1985).

accordance with the law of the state where the act occurred. 28 U.S.C. § 1346(b), 2674; United States v. Olson, 546 U.S. 43, 44 (2005). The incident in question having taken place in Norwalk, Ohio (Doc. 1, ¶ 9) must be decided in accordance with Ohio tort law.

C. Agent Shaver's Actions as a Law Enforcement Officer were Privileged.

In accordance with 8 U.S.C. § 1357(a)(1), (2), Agent Shaver, as a law enforcement officer, was granted the privilege to question and arrest Plaintiffs.

> … *[F]ederal law* grants law enforcement officials special privileges that allow law enforcement officers to do their jobs without violating civil and criminal sanctions that would otherwise apply. These privileges authorize federal law enforcement officers, acting within the lawful bounds applicable to such officers, to execute search warrants on private property without committing the tort of trespass, to make valid arrests without committing the tort of false arrest and to use reasonable force in arresting suspects without committing the tort of battery. These same acts if done by private parties would often not be privileged from civil tort liability.

Tekle v. United States, 511 F.3d 839, 857 (9th Cir. 2007), Fisher, J., concurring.

Federal Circuit Courts have found that the Government may invoke law enforcement privileges when defending against an FTCA claim. Villafranca v. United States, 587 F.3d 257 (5th Cir. 2009).

> The distinction turns on the qualitative difference between an immunity and a privilege. Unlike an immunity, which affects liability but does not diminish the tort, a privilege protects the actor from a finding of tortious conduct.
>
> Put another way, an immunity insulates an individual from liability for public policy reasons, even when that individual has engaged in conduct that would otherwise be actionable. By contrast, a privilege recognizes that, because of the nature of their duties, some public officers may perform certain acts that might otherwise be tortious if committed by someone not having those duties.

Villafranca, 587 F.3d at 263, quoting Garza v. United States, 881 F.Supp. 1103, 1106 (S.D. Tex. 1995).

The Ohio Revised Code defines "privilege" as: "an immunity, license or right conferred by law bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." Ohio Rev. Code § 2901.01(12); State v. Steele, 2013 WL 3067506 (Sup. Ct. Ohio, June 18, 2013). The Supreme Court of Ohio recently addressed the privilege issue in State v. Steele. In Steele, the Court discussed the right of a law enforcement officer to arrest when "there are facts and circumstances within the police officer's knowledge that are sufficient to warrant a reasonable belief that the suspect is committing or has committed an offense." Steele, 2013 WL 3067506 * 6 (internal citations omitted). The Court analyzed:

> Under normal circumstances, the consequence of an illegal arrest is that evidence obtained therefrom is inadmissible at trial. However, a police officer is not automatically stripped of statutory privilege and exposed to criminal liability if a court finds in hindsight that the officer made an arrest on less than probable cause. When looking at a police officer's liability in a *civil* context, privilege is lost when 'a reasonable official would understand that what he is doing violates [a clearly established] right.'

Id. (alteration in original), citing Anderson v. Creighton, 483 U.S. 635, 640 (1987).

In the case at hand, Agent Shaver was acting as a law enforcement officer under the authority of 8 U.S.C. § 1357(a)(1), (2). There is nothing in Plaintiffs' testimony that indicates that Agent Shaver should have understood his actions violated a clearly established right. Agent Shaver was carrying out his official duties and performed them in a reasonable manner without any reckless or offensive behavior. Therefore, the Government is entitled to assert the law enforcement privilege for Agent Shaver's actions and Plaintiffs' claims must fail.

D. Plaintiffs' Claims are Without Merit.

1. Claim 1: Assault

Plaintiffs claim that they were assaulted under Ohio law. Doc. 1, ¶ 50. The tort of assault is defined by Ohio law as:

> the willful threat or attempt to harm or touch another offensively, which threat or attempt reasonably places the other in fear of such contact. The threat or attempt must be coupled with a definitive act by one who has the apparent ability to do the harm or to commit the offensive touching. An essential element of the tort of assault is that the actor knew with substantial certainty that his or her act would bring about harmful or offensive contact.

Smith v. John Deere Co., 83 Ohio App.3d 398, 406 (10th Dist. 1993) (internal citation omitted), citing with approval in Clutters v. Sexton, 2007 WL 3244437 *18 (S.D. Ohio Nov. 2, 2007); Johari v. City of Columbus Police Dep't, 186 F. Supp.2d 821, 833 (S.D. Ohio 2002). The undisputed facts establish that:

a) Agent Shaver did not willfully threaten Plaintiffs:

Plaintiffs testified that Agent Shaver questioned them as to where they were from, identification, and to whom the truck was registered. Dep. Rocío pp. 40-44, Dep. Rosa pp. 30-32. Plaintiff Rocío stated that she was only afraid of where he parked in relation to her truck and how he spoke to them:

> Q: Other than his tone of voice and where you were parked, was there any other reason why you were afraid?
>
> A: No.

Dep. Rocío pp. 56-57.

Plaintiff Rosa stated she was afraid because Agent Shaver blocked their path with his car and that he "spoke harshly." Dep. Rosa p. 47. Neither Plaintiff stated Agent Shaver threatened them.

b) Agent Shaver did not attempt to harm or touch Plaintiffs offensively:

Plaintiffs did not testify that Agent Shaver attempted to harm them or touch them offensively. In fact, Plaintiff Rocío stated that Agent Shaver did not touch her. Agent Shaver did not even place them in handcuffs when they were detained.

Dep. Rocío p. 54. Decl. Shaver ¶ 7. Although the Ohio Supreme Court has found: "The acts of subduing and handcuffing are undoubtedly offensive to a reasonable sense of personal dignity," Agent Shaver did not cuff the Plaintiffs in this case. Kaylor v. Rankin, 356 F.Supp. 2d 839, 854 (N.D. Ohio 2005), citing Love v. City of Port Clinton, 37 Ohio St. 3d 98, 99 (1988). (Fn 3: "In effecting an arrest, a police officer usually commits acts which, **unless privileged,** constitute

battery." Emphasis added.) Agent Shaver's actions would not have reasonably placed Plaintiffs in fear of harm or offensive contact. There was no definitive act by Agent Shaver supporting any apparent ability to do harm or commit any offensive touching. There is neither evidence nor do Plaintiffs plead that Agent Shaver knew with substantial certainty that his actions would bring about harmful or offensive contact. Id.; Doc. 1. Like the plaintiff in Smith, because no threat was uttered the tort of assault cannot be proven. Smith, 83 Ohio App.3d at 406; see also Johari, 186 F. Supp.2d at 833 (Defendants entitled to summary judgment since plaintiff provided no facts to support such a claim.).

Therefore, the United States is entitled to summary judgment on Plaintiffs' assault claim.

2. Claim 2: False Imprisonment/False Arrest[3]

Plaintiffs state that Agent Shaver's conduct constitutes false imprisonment. Doc. 1, ¶ 55. Under Ohio law, the essential elements of a false imprisonment are:

> (1) the intentional detention of the person, and (2) the unlawfulness of the detention. See Niessel v. Meijer, Inc., Warren App. No. CA2001-04-027, 2001-Ohio-8645. To establish a claim for false imprisonment, one must prove by a preponderance of the evidence that he was intentionally detained or confined **without lawful privilege** and against his consent. Id. False imprisonment is not concerned with good or bad faith or malicious motive. Barnes at ¶ 15, citing Rogers.[4]

Emphasis added, Frazier v. Clinton County Sheriff's Office, 2008 WL 4964322, *4 (12th Dist. 2008). In Ohio, to prevail on a false imprisonment claim there must be a detention that is intentionally unlawful. Carrasquillo v. City of Cleveland, 2011 WL 3841995 (N.D. Ohio Aug. 30, 2011), citing Logsdon v. Hains, 492 F.3d 334, 347 (6th Cir. 2007) (citing Evans v. Smith, 97 Ohio

[3] Although paragraph 2 of Plaintiffs' Complaint mentions false arrest, Plaintiffs' second claim for relief is titled "False Imprisonment" and does not mention the tort of false arrest. False arrest and false imprisonment have basically the same elements under Ohio tort law as will be discussed herein. Kaylor v. Rankin, 356 F.Supp. 2d 839 (ND Ohio 2005), citing Rogers v. Barbera, 170 Ohio St. 241, 243 (1960).

[4] Referring to Rogers v. Barbera, 170 Ohio St. 241 (1960) and Barnes v. Meijer Dep't Store, Butler App. No. CA2003-09-246, 2004-Ohio-1716.

App.3d 59 (1st Dist. 1994)). A false imprisonment claim "requires proof that one was intentionally confined within a limited area, for any appreciable time, against his will and **without lawful jurisdiction."** Emphasis added, Evans, 97 Ohio App.3d at 70, citing Feliciano v. Kreiger, 50 Ohio St.2d 69 (1977); accord Bennett v. Ohio Dep't of Rehab. & Corr., 60 Ohio St.3d 107 (1991); Thyen v. McKee, 66 Ohio App.3d 313 (1990).

As discussed above, Border Patrol Agents have the authority to question persons as to their right to be in the United States and to arrest persons who are in the United States illegally. 8 U.S.C. § 1357(a)(1), (2). This arrest can lawfully take place without a warrant. Id. Further, consensual encounters are appropriate police actions. 8 U.S.C. § 1357(a); United States v. Mendenhall, 446 U.S. 544, 554-55 (1980); See generally United States v. Smith, 594 F.3d 530, 533 (6th Cir. 2010). Agent Shaver was acting on his prior experience regarding drug trafficking near the southern border when he initially saw the truck and stopped to investigate further. Dep. Shaver pp. 46-49, 67; See United States v. Perkins, 177 F.Supp. 2d 570 (W.D. Tex 2001).[5] Later, when he saw Plaintiff Rocío approach the truck, she began pumping gas and he began asking her questions, including who owned the truck. Dep. Shaver pp. 51, 102. When her answers aroused his suspicion regarding her immigration status, Agent Shaver took appropriate lawful steps, under 8 U.S.C. § 1357(a), and questioned both Plaintiffs further. Dep. Shaver p. 107. He then lawfully detained both Plaintiffs after they admitted they were in the country illegally, their visa being expired. Id. pp. 52-53, 96; Decl. Shaver ¶ 5-6.

Plaintiffs' false imprisonment/false arrest claim fails because it was asserted against Agent Shaver for actions taken in the course of his law enforcement duties. Burr v. Burns, 439 F.Supp. 2d

[5] Border Patrol agents are to cross-designated as drug enforcement officers to detect drug and alien smuggling.

779, 790 (S.D. Ohio 2006); United States v. Perkins, 177 F. Supp. 2d 570, 580 n.7 (W.D. Tex. 2001).

3. Claim 3: Intentional Infliction of Emotional Distress

a) There is no waiver of Sovereign Immunity for Intentional Infliction of Emotional Distress.

The FTCA was created to waive sovereign immunity of the United States for tort claims. 28 U.S.C. § 1346(b)(1); Millbrook v. United States, 133 S.Ct. 1441, 1442, 569 U.S. ___ (2013). There are exceptions to the waiver of sovereign immunity, set forth in 28 U.S.C. § 2680(h), for intentional torts. 28 U.S.C. § 2680(h). In 1974, Congress created a proviso to this exception, extending the waiver of sovereign immunity for six intentional torts arising out of the wrongful conduct of law enforcement officers. 28 U.S.C. § 2680(h)("*Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising … out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution.") Millbrook, 133 S.Ct. at 1444, 569 US ___ quoting 28 U.S.C. 2680(h). Known as the "law enforcement proviso," it "… specifies that the conduct must arise from one of the six enumerated intentional torts …" Id. at 1445.

Plaintiffs have asserted a claim for intentional infliction of emotional distress arising out of the actions of Agent Shaver, a law enforcement officer. This claim would be analyzed under Ohio tort law. However, since this is not one of the six torts enumerated in the FTCA's law enforcement proviso, sovereign immunity has not been waived and this Court must dismiss the claim. See Denson v. United States, 574 F.3d 1318, fn. 67 (11th Cir. 2009) (summarily dismissing claim for intentional infliction of emotional distress in an FTCA complaint against U.S. Customs Officials "as it is not one of the torts enumerated within § 2680(h).").

b) Plaintiffs Cannot Prove Intentional Infliction of Emotional Distress.

Plaintiffs allege that Agent Shaver intentionally inflicted emotional distress under Ohio law. Doc. 1, ¶¶ 58-59.

> In Ohio, a plaintiff claiming intentional infliction of emotional distress must show that "(1) the defendant intended to cause emotional distress or knew or should have known that its conduct would result in serious emotional distress to the plaintiff; (2) defendant's conduct was outrageous and extreme and beyond all possible bounds of decency and was such that it can be considered utterly intolerable in a civilized community; (3) defendant's conduct was the proximate cause of plaintiff's psychic injury; and (4) plaintiff's emotional distress was serious and of such a nature that no reasonable person could be expected to endure it." Ekunsumi v. Cincinnati Restoration, Inc., 120 Ohio App.3d 557, 698 N.E.2d 503, 506 (1997); see also Yeagar v. Local Union 20, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983).

Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099, 1110 (6th Cir. 2008). Plaintiffs' testimony negates a tort under Ohio law for intentional infliction of emotional distress.

Agent Shaver was acting in the course of his law enforcement duties when he began talking to Plaintiffs. Plaintiffs have offered no testimony that Agent Shaver knew or should have known that his conduct would result in serious emotional distress. In fact, Plaintiff Rosa stated that she was not afraid of being deported when she saw Agent Shaver, she was simply afraid of Agent Shaver's tone of voice and that his car blocked their path. Dep. Rosa p. 47. Plaintiffs have offered no evidence that Agent Shaver's conduct was beyond all possible bounds of decency, nor have they offered evidence of psychic injury. Agent Shaver took care when detaining Plaintiffs including processing them in a more comfortable area at the station and obtaining permission for their release the same day. Dep. Shaver pp. 104-106; Decl. Shaver ¶ 9.

These facts do not state actions of such a nature that no reasonable person could be expected to endure. As in Talley, Plaintiffs fail "to raise a genuine issue of material fact regarding outrageous conduct or serious emotional distress sufficient to survive summary judgment." See Talley, 542 F.3d at 1110-1111; see also, Pierce v. Woyma, 2012 WL 3758631 *6 (Ohio App. 8th

Dist. Aug. 30, 2012) (Summary judgment granted for law enforcement officer even when officer said highly inflammatory and insulting things to plaintiff.); Berry v. The Am. Red Cross, 2008 WL 271665 (N.D. Ohio Jan. 30, 2008) (Granting summary judgment to defendants because no reasonable juror could find conduct extreme and outrageous.) Therefore, Plaintiffs' claim for intentional infliction of emotional distress fails.

4. Claim 4: Negligent Infliction of Emotional Distress

Plaintiffs allege a claim for negligent infliction of emotional distress under Ohio law. Doc. 1, ¶¶ 62-63.

In Ohio, recovery for negligent infliction of emotional distress is limited to "instances where the plaintiff has either witnessed or experienced a dangerous accident or appreciated the actual physical peril." Doe v. SexSearch.com, 551 F.3d 412, 417 (6th Cir. 2008), citing Heiner v. Moretuzzo, 73 Ohio St.3d 80, 85-87 (1995). Plaintiffs' testimony demonstrates that their negligent infliction of emotional distress claim must fail. Neither Plaintiff testified that they felt they were in actual physical peril. They neither witnessed nor experienced a dangerous accident. "Ohio does not recognize a claim for negligent infliction of serious emotional distress where the distress is caused by the plaintiff's fear of a nonexistent physical peril." Dobran v. Franciscan Med. Cntr., 102 Ohio St.3d 54, 57 (2004). Therefore, Plaintiffs' cause of action for negligent infliction of emotional distress fails.

5. Claim 5: Deprivation of Civil Rights Through Ethnic Intimidation

a) There Is No Waiver Of Sovereign Immunity For Deprivation of Civil Rights Through Ethnic Intimidation.

As discussed above, the "law enforcement proviso," enumerates six intentional torts for which the United States has waived sovereign immunity when the claim is based on a law enforcement officer's conduct. 28 USC § 2680(h). The proviso "… specifies that the conduct must arise from one of the six enumerated intentional torts…." Millbrook, 569 U.S. ___ (2013).

Plaintiffs have asserted a claim for deprivation of civil rights through ethnic intimidation, a civil remedy available under Ohio tort law. However, since this is not one of the six torts enumerated in the FTCA's law enforcement proviso, sovereign immunity has not been waived and this Court must dismiss the claim.

b) Plaintiffs Cannot Prove Deprivation of Civil Rights Through Ethnic Intimidation.

Plaintiffs allege a tort of deprivation of civil rights through ethnic intimidation due to Agent Shaver's actions. Doc. 1, ¶¶ 66-68.[7]

Ohio law recognizes a civil remedy for violation of Ohio Rev. Code § 2927.12, the criminal statute prohibiting ethnic intimidation. Ohio Rev. Code § 2307.70. In order to recover damages for ethnic intimidation, Ohio Rev. Code § 2307.70 requires action which is equivalent or tantamount to a violation of criminal statute § 2927.12. Hayes v. Heintz, 2002 WL 1041370, *3 (8th Dist. Ohio App. May 23, 2002); see Lewis v. Cleveland State Univ., 2010 WL 2379031, fn 2 (Ohio Ct. Cl. May 26, 2010). Ohio Rev. Code § 2927.12 lists five types of conduct that can be the basis for a civil remedy when committed ". . . by reason of the race, color, religion, or national origin of another person or group of persons." Ohio Rev. Code § 2927.12; Ohio Rev. Code § 2307.70. These five types of conduct are: (1) Ohio Rev. Code § 2903.21, aggravated menacing; (2) Ohio Rev. Code § 2903.22, menacing; (3) Ohio Rev. Code § 2909.06, criminal damaging or endangering; (4) Ohio Rev. Code § 2909.07, criminal mischief; and (5) Ohio Rev. Code § 2917.21, telecommunications harassment.

Plaintiffs' Complaint is void of any facts as to property or telecommunications harassment. Doc. 1. The only possible type of conduct that Plaintiffs could be referring to is aggravated menacing or menacing as harm to a person. Aggravated menacing reads in pertinent part:

[7] To any extent that this claim is deemed a constitutional tort, it is not cognizable under the jurisdictional grant of the FTCA. See FDIC v. Meyer, 510 U.S. 471, 477 (1994).

> (A) No person shall knowingly cause 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.

Ohio Rev. Code § 2903.21. Menacing reads in pertinent part:

> (A) No person shall 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.

Ohio Rev. Code § 2903.22. To prevail on their civil liability claim for ethnic intimidation under Ohio Rev. Code § 2307.70(A), Plaintiffs must establish that Agent Shaver's conduct violated Ohio Rev. Code § 2903.21 (aggravated menacing) or Ohio Rev. Code § 2903.22 (menacing) pursuant to Ohio Rev. Code § 2927.12.

Neither Plaintiff testified that they were afraid Agent Shaver would cause them physical harm. As discussed above, Plaintiff Rocío testified that she was afraid of Agent Shaver's tone of voice and that he parked his car blocking her path. Dep. Rocío pp. 46-47, 53-54, 56-57. Plaintiff Rocío characterizes Agent Shaver as being "harsh" and "aggressive," but she does not indicate that she thought he would cause her physical harm. Id. pp. 46-47. In fact, she stated that he did not touch her. Id. p. 54. She also testified that she continued putting gas in her car and she could have backed up and left, had she wanted to. Dep. Rocío pp. 38-39. Plaintiff Rocío testified that Agent Shaver did not tell her she had to answer his questions, nor did he say they could not leave. Id. p. 54.

Plaintiff Rosa testified that she was afraid of Agent Shaver's authority and the way he stopped in front of them. Dep. Rosa p. 38. She also stated she was afraid of how Agent Shaver spoke to her daughter, "harshly and aggressively." Id. p. 47. However, she does not indicate that she thought Agent Shaver would cause them physical harm. She also testified that Agent Shaver did not tell them they could not leave. Id. p. 39 ("Q: … Did he ever tell you that you weren't free to

leave? A: No, he didn't say anything. He only asked me for the ID, that's it."). These facts do not support Plaintiffs having a reasonable belief that serious physical harm was about to befall them.

"The gist of the offense [aggravated menacing] is the victims reasonable belief that serious physical harm is about to befall him." State v. Chopak, 2012 WL 1142700 *3 (Ohio App. 8th Dist. April 5, 2012). "A person acts knowingly when he 'is aware that his conduct will probably cause a certain result or will probably be of a certain nature.'" Id. at *4, quoting Ohio Rev. Code § 2901.22(B). It is not a reasonable belief that Agent Shaver's actions would cause any harm or that Agent Shaver would be aware that his actions would probably cause Plaintiffs to feel threatened of any physical harm. The general rules of statutory construction require a criminal statute to be strictly construed against the accuser. State v. Richard, 129 Ohio App.3d 556, 560 (7th Dist. Aug. 26, 1998), citing State v. Conley, 147 Ohio St. 351, 353 (1947). Because Ohio Rev. Code § 2307.70 (civil statute for ethnic intimidation) requires actions arising to the level of a violation of Ohio Rev. Code § 2927.12 (criminal statute for ethnic intimidation), Plaintiffs' evidence must be subject to a strict scrutiny against them in determining if the criminal elements have been met. The application of this analysis denies Plaintiffs' ethnic intimidation claim.

Further, the racial motivation to constitute ethnic intimidation under Ohio Rev. Code § 2927.12 goes beyond mere words. Chopak, 2012 WL 1142700 at *4, citing State of Ohio v. Kingery, 2012 WL 439598 *4 (Ohio App. 2d Dist. Feb. 10, 2012).

> The United States Supreme Court has held that selecting a victim based on race, color, religion, and the like falls outside of the range of conduct that the First Amendment protects. Wisconsin v. Mitchell, 508 U.S. 476, 487, 133 S.Ct. 2194, 124 L.Ed.2d 436 (1993). Ethnic intimidation statutes proscribe conduct (rather than speech) that is not protected under the First Amendment. Dayton v. Smith, 68 Ohio Misc.2d 20, 646 N.E.2d 917 (Dayton Mun.1994), citing Mitchell; In re M.J.M., 858 A.2d 1259 (Pa.Super.2004), citing Mitchell. Thus, Kingery's [defendant's] words alone could not have established the offense of ethnic intimidation.

Kingery, 2012 WL 439598 *3. Plaintiffs' testimony is that she believed Agent Shaver targeted them based on race, however this is nothing more than her "feeling" and is not supported by any evidence provided by Plaintiffs. Dep. Rocío p. 58-59. Additionally, when Agent Shaver first approached the truck he did not know Plaintiff Rocío was the owner. Dep. Shaver p. 102.

Furthermore, even if Plaintiffs presented sufficient evidence of ethnic intimidation, they must still present sufficient evidence of the elements of emotional distress in order to recover any damages caused by the alleged ethnic intimidation. Hayes, 2002 WL 1041370 *3. As discussed above, Plaintiffs cannot prove emotional distress, therefore Plaintiffs' claim for ethnic intimidation fails.

E. The United States is Entitled to Immunity.

Plaintiffs' claims were analyzed above according to the relevant Ohio tort law. However, even if Plaintiffs can establish the elements of any of their claims, immunity prohibits any recovery. Under the FTCA and Ohio law, the United States is entitled to immunity for the Border Patrol Agents' actions. Ohio Rev. Code § 2744.03 (A)(6) grants immunity to an employee of a political subdivision from damages for injury, death, or loss to person or property unless such employee is shown to have acted outside the scope of employment or official responsibilities or acted with malicious purpose, in bad faith, in a wanton manner, or with recklessness. Peña v. City of Toledo, 2011 WL 4565786 *9 (N.D. Ohio Sept. 29, 2011).

It is undisputed that Border Patrol Agent Shaver acted within the scope of his employment. Decl. Shaver ¶¶ 1-3. Plaintiffs brought their claims under the FTCA. Doc. 1, ¶ 2. The FTCA only applies when a federal employee is acting within the scope of employment. 28 U.S.C. § 2679(b)(1); Dolan v. United States, 514 F.3d 587, 592 (6th Cir. 2008). Plaintiffs cannot show Agent Shaver acted with malice, bad faith, in a wanton manner, or with recklessness.

Malice, bad faith, and wanton misconduct are defined under Ohio law as follows:

> 'Malice' is the willful and intentional design to do injury or the intention or desire to harm another, usually seriously, through conduct which is unlawful or unjustified. Van Hull v. Marriott Courtyard, 87 F.Supp.2d 771, 777 (N.D.Ohio 2000) (citing Cook v. Cincinnati, 103 Ohio App.3d at 90, 658 N.E.2d 814 § [sic] citing Jackson v. Butler County Board of Commissioners, 76 Ohio App.3d 448, 602 N.E.2d 363 (1991)). 'Bad faith' involves a dishonest purpose, conscious wrongdoing, the breach of a known duty through some ulterior motive or ill will, as in the nature of fraud, or an actual intent to mislead or deceive another. Id. Wanton misconduct is the failure to exercise any care whatsoever. Id. (citing Fabrey v. McDonald Police Department, 70 Ohio St.3d 351, 639 N.E.2d 31 (1994) (citing Hawkins v. Ivy, 50 Ohio St.2d 114, 116–18, 363 N.E.2d 367 (1977)). 'Mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor.' Id. (citing Roszman v. Sammett, 26 Ohio St.2d 94, 96–97, 269 N.E.2d 420 (1971)). Such perversity must be under such conditions that the actor must be conscious that his conduct will, in all likelihood, result in an injury. Id.

Peña, 2011 WL 4565786 *9. The standard for showing wanton misconduct is high. Fabrey, 70 Ohio St.3d at 356. To establish wanton misconduct, a plaintiff must show that a law enforcement officer was aware that his actions would result in injury. Howard v. Taggart, 2007 WL 2840369 *9 (N.D. Ohio Sept. 27, 2007), citing Fabrey, 70 Ohio St.3d at 356.

"The standard for recklessness employed by Ohio courts holds that '[t]he actor's conduct is in reckless disregard of the safety of others if . . . such risk is substantially greater than that which is necessary to make his conduct negligent.'" Ewolski v. City of Brunswick, 287 F.3d 492, 517 (6th Cir. 2002), citing Fabrey, 70 Ohio St.3d at 356. Recklessness is subject to a "reasonable man test" where the conduct is such that a reasonable man would realize that his conduct creates an unreasonable risk of physical harm to another and that such risk is substantially greater than that which is necessary to make the conduct negligent. Howard, 2007 WL 2840369 *8, citing Thompson v. McNeill, 53 Ohio St.3d 102, 104-105 (1990), quoting 2 Restatement of the Law 2^{d}, Torts at 587, § 500 (1965). Recklessness requires that the actor be bound by a duty to the plaintiff. Pierce, 2012 WL 3758631 *4.

The immunity provided under Ohio Rev. Code § 2744.03(A)(6) applies to the United States when sued under the FTCA. Ellerbe v. United States, 2011 WL 4361616 *6 (N.D. Ohio April 21,

2011); Priah v. United States, 590 F. Supp.2d 920, 943 (N.D. Ohio 2008)[6]; Howard, 2007 WL 2840369 *8; see also Chin v. Wilhelm, 2006 WL 827343 *8 (D. Md. Mar. 24, 2006). Hereat, the United States specifically asserts the immunity defense pursuant to Ohio Rev. Code § 2744.03.

Plaintiffs' description of their encounter with Agent Shaver establishes a lack of malice, bad faith, wanton manner, or recklessness. See generally Dep. Rocío; Dep. Rosa. Plaintiffs' testimony describes a constitutionally permissible consensual encounter, which lead to their detention upon their admission of being in the country illegally. None of the exceptions to the Ohio immunity statute can be shown by Plaintiffs:

a) **Malice:** nothing in the Plaintiffs' testimony establishes any design, intention or desire on the part of Agent Shaver to harm them through unlawful or unjustified conduct. Border Patrol Agents are legally authorized to question any person believed to be present in the country illegally as to their rights to remain in the United States. 8 U.S.C. § 1357(a)(1);

b) **Bad faith:** there was no dishonesty, conscious wrongdoing, breach of a known duty with ulterior motive or ill will, actual intent to mislead or deceive Plaintiffs when Agent Shaver asked Plaintiffs where they were from. Agent Shaver as a Border Patrol Agent, has the authority to question and detain persons believed to be in the country illegally. 8 U.S.C. § 1357(a)(1), (2).

c) **Wanton misconduct:** Agent Shaver exercised great care once Plaintiffs admitted they were illegally present in the country. Plaintiffs' testimony does not show wanton misconduct by Agent Shaver.

d) **Reckless manner:** Plaintiffs' testimony does not show that Agent Shaver acted in a disregard for their safety and in such a way that would make them realize that he was creating an unreasonable risk to Plaintiffs. Agent Shaver took many steps to ensure the Plaintiffs' comfort once he detained them. Agent Shaver allowed them to keep their personal belongings, including food and cell phones, processed them in the lobby, offered them water, and released them after processing that same day. He also allowed them to speak with a friend and give the friend their keys before leaving the gas station. Moreover, he contacted his supervisor to help facilitate release on recognizance as soon as he became aware of Plaintiff Rocío's pregnancy and Plaintiff Rosa's diabetes.

[6] This statement is from the Magistrate's Report and Recommendation portion of the case which was accepted and adopted by the District Court. Priah, 590 F. Supp.2d at 933.

Decl. Shaver ¶ ¶ 7-9; Dep. Shaver pp. 104-106.

Like in Howard (in which the court granted summary judgment for the officer), Plaintiffs cannot show that any conduct was pervasive, done with an awareness that any action would result in injury, or in disregard for their safety. Howard, 2007 WL 2840369. Therefore, the United States is entitled to immunity as to Agent Shaver's actions.

Conclusion

For the aforestated reasons, the Motion for Summary Judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(f) the undersigned declares that Defendant's Memorandum in Support of Motion for Summary Judgment, filed July 15, 2013, is 22 pages in length. It is in excess of the page limitations for a matter assigned to the standard track. However, on July 15, 2013, Defendant filed a Motion to Exceed Page Limitations, which this Court granted in part on July 15, 2013. (Doc.26, Def.'s Mot. to Exceed Page Limitations; Doc. 27, Order, July 15, 2013.)

/s/Angelita Cruz Bridges
Angelita Cruz Bridges
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2013, the foregoing Motion 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/Angelita Cruz Bridges
Angelita Cruz Bridges
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