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

Alfonso Vasquez-Palafox,	)	**Case No. 3:12CV2380**
	)	
Plaintiff,	)	
	)	**JUDGE JACK ZOUHARY**
v.	)	
	)	**MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT**
United States of America,	)	
	)	
Defendant.	)	
	)	
	)	

Now comes Defendant United States of America, by and through its counsel, to move for summary judgment pursuant to Fed. R. Civ. P. 56(a) in that there is no genuine issue as to any material fact and that 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

On September 21, 2012, Plaintiff Palafox filed a Complaint against the United States of America pursuant to the Federal Tort Claims Act (FTCA). Doc. 1, ¶ 2. Plaintiff alleges wrongdoing on the part of United States Border Patrol Agents claiming "false imprisonment, assault, deprivation of civil rights through ethnic intimidation, negligent infliction of emotional distress and intentional infliction of emotional distress."[1] Id., ¶¶ 1-2.

Defendant files this Motion for Summary Judgment in response.

II. Facts

On November 3, 2009, Plaintiff was walking his 3 or 4 year-old son home from school, on the sidewalk of a residential street in Fremont, Ohio, when two Border Patrol Agents in a Border Patrol vehicle pulled alongside.[2] Doc. 1, ¶¶ 8-9; Palafox Dep. 14, 17-18; Decl. Corona ¶ 5; Decl. Richardson ¶ 5. Plaintiff does not recall anyone else being around. Palafox Dep. 15, 19, 20; see also Decl. Corona ¶ 5; Decl. Richardson ¶ 5. A Hispanic looking Border Patrol Agent asked Plaintiff for directions from inside the Border Patrol vehicle but Plaintiff was unable to help. Palafox Dep. 17-18. The Border Patrol Agents, being new to the area, were unfamiliar with street locations. Decl. Corona ¶ 3; Decl. Richardson ¶ 3. The Border Patrol vehicle did not have a GPS system. Decl. Corona ¶ 4; Decl. Richardson ¶ 4. Only one Border Patrol Agent

[1] Generally, these types of allegations are not covered by the FTCA; however, there is an exception for investigative or law enforcement officers. 28 U.S.C. § 2680(h).

[2] The facts in this section are taken in part from those stated in the Federal Defendants' Motion filed July 16, 2012 (Doc. 170) in Muñiz, et al. v. Gallegos, et al., Case No. 3:09CV02865. Plaintiff's deposition referred to in this Memorandum was taken in the Muñiz case and referenced in Plaintiff's Complaint. Doc. 1, footnote 1. Palafox's deposition can be accessed by the Court in Muñiz at docket number 179 per Stipulation filed by parties in this pending lawsuit. Doc. 17.

spoke with Plaintiff. Palafox Dep. 18-19, 23. This Border Patrol Agent has been identified as Agent Corona. Decl. Corona ¶ 5; Decl. Richardson ¶ 7. Plaintiff testified that the Border Patrol Agent then asked him whether he used drugs or if he knew anyone in the area who sold drugs. Palafox Dep. 21-22. Plaintiff stated that he knew of past drug deals. Id. at 22. The Border Patrol Agent then asked for his address and telephone number and "if they could have business with him" which Plaintiff assumed "that they were wanting to know about turning people in," but he was not sure for what purpose. Id. at 22-23, 32. The Border Patrol Agents were tasked in part with investigating drug activities. Decl. Corona ¶¶ 2, 4. Plaintiff also testified that the Border Patrol Agent asked him if he knew "what state the other people had gone to that was working in the fields." Palafox Dep. 24. Investigating undocumented aliens was within the scope of employment for the Border Patrol Agents. Decl Corona ¶ 4. Plaintiff did not recall any other questions being asked by the Border Patrol Agent. Palafox Dep. 25.

Plaintiff testified that the Border Patrol Agents never asked him about his immigration status. Id. In fact, when Plaintiff tried two or three times to show the Border Patrol Agents his work permit, the Border Patrol Agent said, "no, no, no, I'm not asking for that . . .". Id. at 25-26.

Additionally, the Border Patrol Agent never told Plaintiff that he could not leave. See Id. at 29; Decl. Corona ¶ 7; Decl. Richardson ¶ 7. Plaintiff claims that he tried to leave because his son was pulling on him, but that the Border Patrol Agent said, "Wait, wait, you know, let's talk a little bit more." Palafox Dep. 29. Plaintiff did not tell the Border Patrol Agents that he wanted to go. Id. at 29-30.

The Border Patrol Agents neither drew a weapon nor accused Plaintiff of a crime. Id. at 29-30. Plaintiff states solely that the Border Patrol Agent was intimidating "with his tone of

voice." Id. at 29. Plaintiff testified that the Border Patrol Agents stayed in the vehicle during the entire encounter. Id. at 24.

At the end of the conversation, Plaintiff asked whether he could take a picture of his son with the Border Patrol Agents because he "thought it was kind of funny." Id. at 35-37; see Decl. Corona ¶ 8; Decl. Richardson ¶ 8;. Plaintiff said, "I was just wanting to take the picture for my son." Palafox Dep. 36-37. The Border Patrol Agents declined the photo. Id. at 31. Plaintiff stated that the Border Patrol Agents left in a "bigger hurry than me." Id. at 36.

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[3] be determined by the laws of the state in which the alleged tort occurred.[4] 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 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 Fremont, Ohio (Doc. 1, ¶ 8) must be decided in accordance with Ohio tort law.

C. Plaintiff's Claims are Without Merit.

1. Claim 1: Assault

Plaintiff claims that he was assaulted under Ohio law. Doc. 1, ¶ 22. 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. See Scott v. Perkins, 74 O.O.2d 280.

Smith v. John Deere Co., 83 Ohio App.3d 398, 406 (10th Dist. 1993), citing with approval in

[3] The United States is the only proper defendant in a FTCA case. 28 U.S.C. § 2679(b)(1).

[4] 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; In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1221 (D.C.N.Y. 1985).

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) the Border Patrol Agents did not willfully threaten Plaintiff:

> Plaintiff testified that one Border Patrol Agent asked him for directions, then about drug activity in the area, to what state field workers were going, and for his contact information. Palafox Dep. 17-18, 21-24. He was not questioned as to his immigration status. Id. at 25-26. The Border Patrol Agents neither drew a weapon nor accused Plaintiff of a crime. Id. at 29-30.

b) the Border Patrol Agents did not attempt to harm him or touch Plaintiff offensively:

> Plaintiff testified that the Border Patrol Agents stayed in the Border Patrol vehicle during the entire encounter. Id. at 24.

See also, Decl. Corona ¶¶ 9-12; Decl. Richardson ¶¶ 9-12. These actions do not reasonably place Plaintiff in fear of harm or offensive contact. There was no definitive act by a Border Patrol Agent supporting any apparent ability to do harm or commit any offensive touching. There is neither evidence nor does Plaintiff plead that the Border Patrol Agents knew with substantial certainty that their 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.2d at 406; see also Johari, 186 F. Supp.2d at 833 (Defendants entitled to summary judgment in that plaintiff provided no facts to support such a claim.).

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

2. Claim 2: False Imprisonment

Plaintiff states that the Border Patrol Agents' conduct constitutes false imprisonment. Doc. 1, ¶ 27. 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.[5]

Frazier v. Clinton County Sheriff's Office, 2008 WL 4964322 (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 *5 (N.D. Ohio Aug. 30, 2011), citing Logsdon v. Hains, 492 F.3d 334, 347 (6th Cir. 2007) (citing Evans v. Smith, 97 Ohio 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." 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).

Plaintiff's own testimony establishes that he was not confined in a limited area for an appreciable time against his will without lawful jurisdiction. He admits the conversation took place on a residential street and that the Border Patrol Agents never exited their vehicle. Palafox Dep. 17-18, 24. The conversation was consensual and for a minimal amount of time. Palafox's testimony is that he couldn't recall the Border Patrol Agents asking him more than approximately eight questions. Id. at 17-25. He stated the first questions were in English and then a few in Spanish. Id. at 21. Palafox testified that, ". . . I couldn't really tell you how long . . . perhaps maybe 30 minutes or so," referring to the length of the conversation. Id. at 24.[6]

[5] 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.

[6]The Border Patrol Agents declare that the conversation with Plaintiff was approximately 5-10 minutes in duration. Decl. Corona ¶ 5; Decl. Richardson ¶ 5. However, for the purposes of this Motion, the United

Further, the Border Patrol Agents have lawful justification in that consensual encounters are appropriate police actions. 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).

Therefore, the false imprisonment claim fails.

3. Claim 3: Intentional Infliction of Emotional Distress

Plaintiff alleges that the Border Patrol Agents intentionally inflicted emotional distress under Ohio law. Doc. 1, ¶ 31.

> 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). Plaintiff's testimony negates a tort under Ohio law for intentional infliction of emotional distress. Plaintiff testified that the Border Patrol Agents stopped to ask him directions (Palafox Dep. 17-18); asked him several other questions (Palafox Dep. 17-25); stayed in their vehicle (Palafox Dep. 24); never asked his immigration status (Palafox Dep. 25); did not display a weapon (Palafox Dep. 28-29); and did not make any direct threat (Palafox Dep. 29). Palafox did not recall the Border Patrol Agents accusing him of a crime. Palafox Dep. 30. Additionally, Plaintiff testified that he

States does not challenge Plaintiff's statement.

asked the Border Patrol Agents to let him take a picture of his son with them because he thought it would be funny. Id. at 35; see also Decl. Corona ¶ 8; Decl. Richardson ¶ 8.

Clearly, these facts do not state actions of such a nature that no reasonable person could be expected to endure. As in Talley, Plaintiff "fails 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, Plaintiff's claim for intentional infliction of emotional distress fails.

4. Claim 4: Negligent Infliction of Emotional Distress

Plaintiff alleges a claim for negligent infliction of emotional distress under Ohio law. Doc. 1, ¶ 35.

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). Plaintiff's testimony demonstrates that his negligent infliction of emotional distress claim must fail. His testimony evinces that no physical impact happened in that the Border Patrol Agents never exited their vehicle or displayed a weapon. Palafox Dep. 24, 28-29. For the same reasons, Plaintiff cannot establish that he was in immediate risk of physical harm. He neither witnessed nor experienced a dangerous accident.

Plaintiff's own action indicates no fear of the Border Patrol Agents in that he wanted to have a picture of his young son with the Border Patrol Agents because it would be funny. Id. at 35; see also Decl. Corona ¶ 8; Decl. Richardson ¶ 8. "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, Plaintiff's cause of action for negligent infliction of emotional distress fails.

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

Plaintiff alleges a tort of deprivation of civil rights through ethnic intimidation due to the Border Patrol Agents' actions. Doc. 1, ¶ 40.[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. Civil statute Ohio Rev. Code § 2307.70 requires action which is equivalent or tantamount to a violation of criminal statute § 2927.12 in order to recover damages for ethnic intimidation. 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). Criminal statute 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.

[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).

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

> (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 his civil liability claim for ethnic intimidation under Ohio Rev. Code § 2307.70(A), Plaintiff must establish that the Border Patrol Agent's conduct violated Ohio Rev. Code § 2903.21 (aggravated menacing) or Ohio Rev. Code § 2903.22 (menacing) pursuant to Ohio Rev. Code § 2927.12.

Plaintiff's testimony is that the Border Patrol Agents initially stopped to ask him for street directions (Palafox Dep. 17-18); they never left their vehicle (Palafox Dep. 24); they did not draw a weapon (Palafox Dep. 28-30); they did not accuse Plaintiff of a crime (Palafox Dep. 30); and they did not ask for any immigration papers (Palafox Dep. 25). One Border Patrol Agent simply asked Plaintiff questions. Palafox Dep. 17-26. Plaintiff's factual statements regarding the Border Patrol Agents' conduct establishes that there was no threat of any kind of physical harm. "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 the Border Patrol Agents' actions would cause any harm or that the Border Patrol Agents would be aware that the conversation would probably cause Plaintiff 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), Plaintiff's evidence must be subject to a strict scrutiny against him in determining if the criminal elements have been met. The application of this analysis denies Plaintiff's 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. Plaintiff's testimony is that only an exchange of words occurred between himself and the Border Patrol Agents. Palafox Dep.; see also Decl. Corona; Decl. Richardson. Additionally, when the Border Patrol Agents first approached Plaintiff, they did not

know he or his son were Hispanic. Decl. Corona ¶ 5; Decl. Richardson ¶ 5.

Furthermore, even if Plaintiff presented sufficient evidence of ethnic intimidation, he 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.

Therefore, Plaintiff's claim for ethnic intimidation fails.

6. The United States is Entitled to Immunity.

Even if Plaintiff can establish the elements of any of his 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 the Border Patrol Agents acted within the scope of their employment. Plaintiff brought each of his claims under the FTCA. Doc. 1, ¶¶ 23, 28, 32, 36, 41; see also Decl. Corona ¶¶ 1-4; Decl. Richardson ¶¶ 1-4. 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).

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

> "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, 356, 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" under which: the conduct must be 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)[8]; 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.

Plaintiff's description of his encounter with the Border Patrol Agents establishes a lack of malice, bad faith, wanton manner and recklessness. Palafox Dep. Plaintiff's testimony describes a constitutionally permissible consensual encounter. None of the exceptions to the Ohio immunity statute can be shown by Plaintiff:

a) malice: the Border Patrol Agent asking approximately eight questions of Plaintiff regarding directions, any drugs in the area, location of workers, and contact information, as Plaintiff stood freely on the street, does not establish any design, intention or desire on the part of the Border Patrol Agents to harm Plaintiff through unlawful or unjustified conduct - such encounter is constitutional and therefore cannot be with malice;

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 Plaintiff when the Border Patrol Agent asked for street directions; as to drug activity in the area, workers' location, and contact information, there was no ruse to discover entry status – immigration was not raised by the Border Patrol Agent;

c) wanton misconduct: Plaintiff's testimony that the Border Patrol Agents stayed in their vehicle, did not ask about his immigration status, and did not accuse him of a crime denies a failure to exercise any care whatsoever on the part of the Border Patrol Agents;

d) reckless manner: again, Plaintiff's testimony does not show that the Border Patrol Agents acted in disregard for Plaintiff's safety and in such a way that would make them realize that they were creating an unreasonable risk to Plaintiff. The Border Patrol Agent was merely speaking to Plaintiff – not arresting him. During the consensual encounter, the Border Patrol Agents owed no duty to Plaintiff.

[8] 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.

Like in Howard (in which the court granted summary judgment for the officer), Plaintiff cannot show that any conduct was perversive, done with an awareness that any action would result in injury, or in disregard for his safety. Howard, 2007 WL 2840369 *9.

Therefore, the United States is entitled to immunity as to the Border Patrol Agents' actions.

Conclusion

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

Respectfully submitted,

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UNITED STATES ATTORNEY

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(f) the undersigned declares under penalty of perjury that the foregoing Memorandum in Support of Motion to Dismiss is within the limitations of a matter assigned to the standard or unassigned track.

/s/Holly Taft Sydlow
Holly Taft Sydlow
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 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/ Holly Taft Sydlow
Holly Taft Sydlow
Assistant U.S. Attorney