No. 99-841

In the Supreme Court of the United States

LESA M. PRIMEAUX,
FKA LESA M. LAMONT,
FKA LISA M. BAD WOUND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1) (1994 & Supp. III 1997), which waives the United States' sovereign immunity and subjects it to liability for government employees' actions within the scope of their employment, the United States can be held liable for the acts of an employee that were outside the scope of his employment as a matter of the pertinent state law.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. A1- A35) is reported at 181 F.3d 876. The first panel decision of the court of appeals (Pet. App. B36-B51) is reported at 102 F.3d 1458. The second panel decision of the court of appeals (Pet. App. C52-C73) is reported at 149 F.3d 897. The January 19, 1996 bench ruling of the district court (Pet. App. D74-D89) and the June 4, 1997 opinion of the district court are unreported.[1]

[1] The June 4, 1997 district court opinion is reproduced in this brief at App., *infra*, 1a-16a.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1999. The petitions for rehearing were denied on August 17, 1999 (Pet. App. I127). The petition for a writ of certiorari was filed on November 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 9, 1991, petitioner was walking toward the town of Martin, South Dakota, after her car became stuck in a snowbank. Pet. App. D74-D76. Kenneth Michael Scott, a Bureau of Indian Affairs officer from the nearby Rosebud Indian Reservation, was returning home from an out-of-state physical training seminar when he saw the car stuck in the snow. Scott was in a government vehicle with official license plates and a police light bar on the roof. *Id.* at D76. Scott stopped to offer petitioner a ride and she accepted. *Id.* at D76-D77. On the ride, Scott told petitioner he was a police officer from the Rosebud Reservation. He then pulled off the highway. *Id.* at D77. After ordering petitioner out of the vehicle, Scott sexually assaulted her. *Id.* at D79.

2. Petitioner sued the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, in the United States District Court for the District of South Dakota, seeking damages for the assault. After a trial, the district court entered judgment in favor of the United States on the ground that Scott was not acting within the scope of his employment at the time of the assault because he was not on duty, not within his jurisdiction when he picked up petitioner, and not acting to enforce any law during his assault of petitioner. Pet. App. D75, D83-D89.

3. A divided panel of the court of appeals reversed stating, "[o]ur review of South Dakota respondeat superior law convinces us that the district court did not apply the South Dakota test in its entirety." Pet. App. B44. The panel decided that the district court failed "to take into account the doctrine of apparent authority inherent in respondeat superior law." *Id.* at B45. It explained that in South Dakota, "a principal may be held liable for fraud and deceit committed by an agent within his apparent authority, even though the agent acts solely to benefit it [*sic*] himself." *Id.* at B46 (quoting *Leafgreen* v. *American Family Mut. Ins. Co.*, 393 N.W.2d 275, 277 (S.D. 1986)). The Eighth Circuit remanded the case to the district court for it to determine whether Scott had used his apparent authority as a police officer to accomplish the assault. Pet. App. B49-B50.

4. On remand, the district court decided in the government's favor, ruling that Scott's conduct did not fall within the doctrine of apparent authority because Scott's "significant physical advantage" rather than "any reliance on [Scott's] actual or apparent authority" as a BIA policeman caused petitioner to submit to Scott "out of fear and physical intimidation." App., *infra*, 11a. The district court added that petitioner "failed to show by a preponderance of the evidence that she relied on the cloak of Scott's apparent authority as an officer to enter into the front seat of his vehicle" and the court was "not convinced that the police vehicle had anything to do with the assault which later took place." *Id.* at 13a.

5. On appeal of that decision, the Eighth Circuit again vacated the judgment of the district court. Pet. App. C52-C73. The court determined that Scott's status as a law enforcement official, his red lights atop

the police car, and his command to petitioner to get out of the car gave him apparent authority to accomplish his tort and thus to subject his employer to liability under South Dakota law. See *id.* at C64. A dissent, however, argued that the majority was in error because, even if the United States would be liable under South Dakota's apparent authority law, it was still immune from suit under 28 U.S.C. 1346(b)(1). Pet. App. C67. The dissent reasoned that the statute requires claimants to demonstrate that an employee has acted "within the scope of his office or employment," *ibid.*, and "[s]cope of employment and apparent authority are two different theories of vicarious liability," *id.* at C69.

6. The court of appeals vacated the second panel opinion, reviewed the case en banc, and affirmed the district court's judgment. Pet. App. A1-A35. It concluded that under South Dakota law, vicarious liability for conduct within the scope of employment is distinct from vicarious liability for conduct within an agent's apparent authority. See *id.* at A12. Because the FTCA requires that an employee's actions be within the scope of employment as a condition of the waiver of the United States' sovereign immunity, the previous panels erred in applying the doctrine of apparent authority to Scott's actions. See *ibid.*

7. Petitioner (Pet. App. F94-F105) and Judge Lay (*id.* at G106-G111) each sought reconsideration of the decision by the en banc court; the court denied reconsideration on August 17, 1999. *Id.* at I127.

ARGUMENT

Petitioner contends (Pet. 8-12) that the court of appeals failed to apply South Dakota's law of respondeat superior as required under the Federal Tort Claims Act (FTCA). However, the en banc court of appeals correctly applied South Dakota law and concluded that the apparent authority doctrine does not define the scope of employment, but is instead a separate theory of liability under the law of respondeat superior. Because the FTCA waives the United States' sovereign immunity for only those tortious acts within a government employee's scope of employment, and the district court found that Scott's actions were outside the scope of his employment, petitioner's action was accordingly barred. The court of appeals' decision turns on an interpretation of state law and does not conflict with the decisions of this Court or of any other court of appeals. The case does not merit further review.

1. The FTCA provides in relevant part:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims 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) (1994 & Supp. III 1997) (emphasis added). See *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994). Though the respondeat superior law of the State where

a tortious act occurs determines the liability of the United States for acts of its employees, that liability is additionally subject to the statutory requirement that the employee was "acting within the scope of his office or employment." 28 U.S.C. 1346(b)(1). As this Court noted in *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 801 (1998), scope of employment is an "entirely separate category of agency law" from actual or apparent authority. See also *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 755-761 (1998). Thus, even if a private employer would be liable for the tortious conduct of one of its employees under a respondeat superior theory (including the doctrine of apparent authority), the United States can be held liable only when, in addition, its employee has acted within the scope of his employment.

2. Petitioner argues (Pet. 8-9) that the court of appeals' decision "directly contradicts" this Court's decision in *Williams* v. *United States*, 350 U.S. 857 (1955). In *Williams*, a two-sentence *per curiam* opinion, this Court remanded the Ninth Circuit's decision in an FTCA case for reconsideration under the governing principle of "the California doctrine of *respondeat superior*." *Ibid.* *Williams*, however, is not instructive here because the Court did not address the extent to which the statutory "scope of employment" requirement may limit the application of a State's respondeat superior doctrine. In the original panel decision in *Williams*, the Ninth Circuit had crafted a special rule in FTCA cases involving tortious acts of a member of the armed forces, asking whether the soldier was acting in the line of duty. See *Williams* v. *United States*, 215 F.2d 800, 806-810 (9th Cir. 1954). In rejecting this special rule, this Court vacated and remanded the case, instructing the Ninth Circuit simply to apply the state

rule. *Williams* thus established that scope of employment under the FTCA is a question of state, not federal, law. See *O'Toole* v. *United States*, 284 F.2d 792, 795 (2d Cir. 1960), cert. denied, 366 U.S. 927 (1961). However, *Williams* did not obviate the statutory requirement that a government employee must have been acting within the scope of his employment according to that State's law in order to impose liability on the United States.

On remand, the Ninth Circuit applied California law which "does not impose a respondeat superior liability unless at the time of the accident the employee of the Government was actively engaged in furthering his employer's business rather than his own personal ends." *Williams* v. *United States*, 248 F.2d 492, 502 (9th Cir. 1957), cert. denied, 355 U.S. 953 (1958). Under California law then, imposition of vicarious liability on an employer required a finding that the employee was acting within the scope of his employment. See *id.* at 505. *Williams* in no way suggests that in this case the Eighth Circuit was incorrect in holding that, in a State that imposes respondeat superior liability for actions outside the scope of employment, 28 U.S.C. 1346(b)(1) requires an additional finding that the government employee acted within the scope of his employment.

The court of appeals correctly acknowledged that state law determines the scope of employment within the meaning of the FTCA (Pet. App. A4), the principle recognized in *Williams*. The court was equally correct in rejecting the argument that a State's respondeat superior law, including the law of apparent authority, could substitute for the statutory "scope of employment" requirement in 28 U.S.C. 1346(b)(1), which determines the extent of the United States' waiver of sovereign immunity.

3. Petitioner next argues (Pet. 9-12) that decisions of other courts of appeals which have cited *Williams* are in conflict with the ruling here. This is incorrect. Each of the cases cited holds only that the scope of employment inquiry is governed by state law, a conclusion with which the government and the Eighth Circuit agreed. None of the cases cited (Pet. 9-11), discusses the distinction between scope of employment doctrine and apparent authority doctrine within the law of respondeat superior. Most of these are FTCA or Westfall Act certification cases discussing the determination of scope of employment under state law. See, *e.g.*, *Rodriguez* v. *Sarabyn*, 129 F.3d 760, 766-767 (5th Cir. 1997); *Richman* v. *Straley*, 48 F.3d 1139, 1144-1146 (10th Cir. 1995); *Johnson* v. *Carter*, 983 F.2d 1316, 1322-1324 (4th Cir.), cert. denied, 510 U.S. 812 (1993), overruled on other grounds, *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417 (1995); *Brown* v. *Armstrong*, 949 F.2d 1007, 1011-1012 & n.7 (8th Cir. 1991); *Kelly* v. *United States*, 924 F.2d 355, 356-357 (1st Cir. 1991); *James* v. *United States*, 467 F.2d 832, 833 (4th Cir. 1972); *United States* v. *Farmer*, 400 F.2d 107, 109-111 (8th Cir. 1968); *O'Toole*, 284 F.2d at 795-796.

In support of her claim of a circuit conflict, petitioner cites one case (Pet. 11) that mentions "apparent authority"—*Tonelli* v. *United States*, 60 F.3d 492 (8th Cir. 1995). *Tonelli* does not, however, demonstrate a circuit conflict. First, any conflict with the instant case would at most demonstrate an intra-circuit conflict because both cases were decided by the court of appeals for the Eighth Circuit.[2] Second, there is in fact no

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[2] A conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari. See *Davis* v. *United States*, 417 U.S. 333, 340

conflict. In *Tonelli*, the Eighth Circuit found that a postal employee, while performing an illegal act, could still have been acting within the scope of his employment if his superiors, who were aware of his behavior, allowed him to act illegally. The court addressed "apparent authority" in determining whether "the post office tacitly authorized [the employee's] actions by failing to stop the [mail] interference after [the plaintiffs] provided notice of it." 60 F.3d at 495. "Apparent authority" as used in *Tonelli* concerned an employee who was "tacitly" acting within the scope of his employment as authorized by his employer. By contrast, "apparent authority" as petitioner attempts to apply it here concerns the employee's apparent identity as an agent for his employer when viewed by the plaintiff, without any knowledge of the employee's actions by the employer. Hence *Tonelli* is simply irrelevant to this case.

The Eighth Circuit properly applied South Dakota's law of respondeat superior to conclude that Scott's actions, while possibly actionable on an alternative theory against a private employer, were nonetheless outside the scope of his employment, and thus that under 28 U.S.C. 1346(b)(1), petitioner's claim against the United States was barred.

(1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2000

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ. No. 94-5048

LESA M. PRIMEAUX, F/K/A LESA M. LAMONT,
F/K/A LISA M. BAD WOUND, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Jun. 4, 1997]

JUDGMENT

Consistent with the memorandum opinion issued this 4th day of June, 1997, it is hereby

ORDERED that defendant shall have judgment against plaintiff without costs.

Dated this 4th day of June, 1997.

BY THE COURT:

/s/ RICHARD H. BATTEY
RICHARD H. BATTEY
CHIEF JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civ. No. 94-5048
1997 DSD 15

LESA M. PRIMEAUX, F/K/A LESA M. LAMONT,
F/K/A LISA M. BAD WOUND, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Jun. 4, 1997]

MEMORANDUM OPINION AND ORDER

NATURE AND PROCEDURAL HISTORY

[¶1] On July 11, 1994, plaintiff commenced this action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(a), 2671 *et seq.* (FTCA). She seeks damages arising from a sexual assault by Bureau of Indian Affairs (BIA) police officer Kenneth Michael Scott (Scott). At the conclusion of a three-day trial, the court entered its findings of fact and conclusions of law whereby the Court found that while there was a sexual assault, it was committed while Scott was on a frolic of his own and not acting in the course or scope of his employment. (T.T. 259). Thereafter, judgment was entered in favor of the government.

[¶2] Upon appeal to the Eighth Circuit Court of Appeals, the majority opinion determined that this Court's "finding that Scott's assault was not foreseeable because he was not acting within the scope of his actual authority-that is, exercising law enforcement duties-was too narrow." *Primeaux v. United States*, 102 F.3d 1458, 1463 (8th Cir. 1996). On February 24, 1997, the Eighth Circuit issued its mandate remanding the case for reconsideration of the factual findings with application of South Dakota law relating to apparent authority. *Id.* The Court issued a revised briefing schedule which required the parties to complete their submissions on or before April 15, 1997. the parties have submitted briefs in support of their positions in regard to Scott's apparent authority and the matter is ripe for adjudication. Based on the following discussion, the court finds that the unique facts and circumstances present in this case do not support a finding that Scott's conduct falls within the doctrine of apparent authority.

FACTS

[¶3] On November 9, 1991, at approximately 1 a.m., plaintiff was driving on South Dakota Highway 18 (T.T. 243). When she turn [*sic*] her car around, it became stuck in a snowbank (T.T. 26, 245). After several futile attempts to free her vehicle, she began walking toward the nearest town of Martin, South Dakota, a distance of approximately two to three miles (T.T. 245).[1] It was

[1] At trial plaintiff testified that after she unsuccessfully attempted to free her vehicle, she remained in her car until officer Scott came upon the scene (T.T. 27). However, officer Scott testified that he came upon plaintiff while she was walking down the highway toward Martin (T.T. 120). Based on express evidence and inferences naturally flowing from that evidence, the Court made its finding that plaintiff was walking toward Martin (T.T. 245).

dark and cold, but was not snowing (T.T. 26, 38, 120, 245). Scott, a police officer on the Rosebud Indian Reservation who was outside his jurisdiction while returning from a physical fitness training seminar in Artesia, New Mexico, came upon plaintiff's car (T.T. 118). He stopped to offer assistance; however, no one was there. *Id.* Scott was driving a white government vehicle with government license plates, a police light bar on the roof, and a radio, but no decals on the side or cage inside (T.T. 71, 120, 139, 246). The government paid for the training and travel expenses (T.T. 142, 259). In addition, Scott did not use leave time to attend the session but was on "travel status," continuing to draw his BIA salary (T.T. 140-41, 150-51). Although Scott was not dressed in official uniform,[2] he was wearing clothing that a civilian could reasonably mistake for a police uniform (T.T. 28, 133, 252).

[¶4] After he determined that the car was abandoned, Scott continued to proceed toward Martin (T.T. 119-20). Approximately 300 to 400 yards down the road, Scott came upon plaintiff walking on the shoulder of the road (T.T. 120). Scott stopped, turned on the red lights on the roof, and offered her a ride (T.T. 27). At trial, Scott testified that he stopped to offer a ride as an individual, not as a police officer (T.T. 134, 145). Plaintiff accepted and got in the front seat of the car (T.T. 30). Plaintiff testified on direct examination that when she was sitting in the car she was fearful Scott would arrest her for drinking and driving or turn her over to the Martin authorities, although she acknowledged that he did not ask her if she had been drinking or threaten to arrest

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[2] Scott was unarmed without a night stick and was not wearing a badge (T.T. 82, 217, 190-91).

her (T.T. 30-31, 134). On cross examination she testified that she voluntarily got into the vehicle because she wanted a ride (T.T. 72).

[¶5] While en route to Martin, Scott informed plaintiff that he was police officer from Rosebud Indian Reservation (T.T. 88, 121). Soon thereafter, Scott pulled off the highway onto a side road, ostensibly to stretch his legs and to relieve himself (T.T. 32-33, 122-23, 248). After driving a short distance on the side road, Scott stopped the vehicle and ordered plaintiff to step out of the vehicle (T.T. 33, 123, 248-49). Plaintiff testified that one of the reasons she got out of the vehicle was because of his status as a police officer (T.T. 33). He then grabbed her, unzipped and pulled down her jeans, pulled her by the hair, and committed an act of sexual penetration (T.T. 249).[3] Thereafter, he attempted oral intercourse with her. *Id.*

DISCUSSION

[¶6] A. GOVERNING PRINCIPLES

[¶7] The applicable South Dakota law governing the scope of employment issued presented by this case is set forth in *Primeaux v. United States*, 102 F.3d 1458 (8th Cir. 1996). The three primary authorities relied on by the Eighth Circuit for determining the scope of employment test to be used in this case consist of *Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177 (S.D.

[3] In the end, plaintiff, having a very submissive and passive personality, submitted out of fear and intimidation to Scott who maintained a significant physical advantage (T.T. 247, 252, 254).

1987),[4] *Leafgreen v. American Family Mut. Ins. Co.*, 393 N.W.2d 275 (S.D. 1986), and *Red Elk v. United*

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[4] In *Deuchar*, the South Dakota Supreme Court relied on the factors listed in Restatement (Second) of Agency § 229 in determining whether a ranch hand was acting within the scope of his employment when he accidentally shot a hunter. *Deuchar*, 410 N.W.2d at 180 n.2. The *Deuchar* court quoted from § 229 in relevant part:

> (1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.
>
> (2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters of fact are to be considered:
>
> (a) whether or not the act is one commonly done by such servants;
>
> (b) the time, place and purpose of the act;
>
> (c) the previous relations between the master and the servant;
>
> (d) the extent to which the business of the master is apportioned between different servants;
>
> (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
>
> (f) whether or not the master has reason to expect that such an act will be done;
>
> (g) the similarity in quality of the act done to the act authorized;
>
> (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
>
> (i) the extent of departure from the normal method of accomplishing an authorized result; and
>
> (j) whether or not the act is seriously criminal.

Id. at 180 n.2 (quoting Restatement (Second) of Agency § 229).

States, 62 F.3d 1102 (8th Cir. 1995). These cases, in addition to other cases applying South Dakota law, establish that foreseeability is the linchpin of the South Dakota scope of employment test. *Primeaux*, 102 F.3d at 1461.

[¶8] In *Leafgreen*, the South Dakota Supreme Court stated that "a principal is liable for tortious harm caused by an agent where a nexus sufficient to make the harm foreseeable exists between the agent's employment and the activity which actually caused the injury." *Leafgreen*, 393 N.W.2d at 280. The *Leafgreen* court further recognized that foreseeability is governed by the following standard: "[T]he employee's conduct must not be so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business." *Id.* at 280-81. The South Dakota court applied Restatement (Second) of Agency § 261, which discusses apparent authority as it relates to fraud. *Id.* at 277. As stated by the Eighth Circuit in *Primeaux*, the analogous section of the Restatement relating to tortious wrongdoing reads as follows:

> (2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
>
> . . . .
>
> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

Primeaux, 102 F.3d at 1462 (quoting Restatement (Second) of Agency § 219(2)(d)).

[¶9] The *Primeaux* court further noted that section 265(1) of the Restatement gives the general rule for apparent authority, which is that "'[a] master or other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent's apparent authority.'" *Id.* (quoting Restatement (Second) of Agency § 265(1)).[5] Based on the foregoing, the Eighth Circuit reads South Dakota law to hold the employer vicariously liable not only for foreseeable tortious wrongs committed pursuant to the employee's actual authority, but also for those committed when apparent authority of the employee "puts him in a position where his harmful conduct would not be 'so unusual or startling that it would

[5] The Eighth Circuit further noted that South Dakota cases consistently articulate respondeat superior law as including principles of apparent authority. *Id.* (citing *Leafgreen*, 393 N.W.2d at 277 ("Under general rules of agency law, a principal may be held liable for fraud and deceit committed by an agency within his apparent authority, even though the agent acts solely to benefit himself."); *McKinney v. Pioneer Life Ins. Co.*, 465 N.W.2d 192, 194 (S.D. 1991) ("Generally, a principal may be held liable for the fraud and deceit of his agent acting within the scope of his actual or apparent authority, even though the principal was unaware of or received no benefit from his agent's conduct.") (citing *Dahl v. Sittner*, 429 N.W.2d 458, 462 (S.D. 1988)); *State v. Hy Vee Food Stores, Inc.*, 533 N.W.2d 147, 149 (S.D. 1995) (discussing vicarious criminal liability and noting, "Well settled is the basic principle that criminal liability for certain offenses may be imputed to corporate defendants for the unlawful acts of its employees, provided that the conduct is within the scope of the employee's authority whether actual or apparent"); *Siemonsma v. David Mfg. Co.*, 434 N.W.2d 70, 73 (S.D. 1988) (relying on Restatement (Second) of Agency § 265(1))).

be unfair to include the loss by the injury among the costs of the employer's business.'" *Primeaux*, 102 F.3d at 1462-63 (quoting *Olson v. Tri-County State Bank*, 456 N.W.2d 132, 135 (S.D. 1990) (quoting *Leafgreen*, 393 N.W.2d at 280-81)). Hence, "[f]oreseeability necessarily includes not only instances of use or abuse of actual authority, but also of use or abuse of apparent authority." *Id.* at 1463.

[¶10] In *Red Elk v. United States*, 62 F.3d 1102 (8th Cir. 1995), the Eighth Circuit determined that under the facts and circumstances presented by that case that it was foreseeable that an on-duty tribal police officer would violated the position of trust his employment provided and sexually assault a victim. *Id.* at 1107.[6] In *Primeaux*, the Eighth Circuit expounded on this notion by stating that,

> It is no less foreseeable that such an abuse of authority could occur while the officer is not technically on duty, but rather possesses the apparent authority sufficient to cause a person to rely on or fear that authority and succumb to sexual advances.

Primeaux, 102 F.3d at 1463.[7] As to the present case, the Eighth Circuit recognized that it is possible that

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[6] This Court in its oral findings and conclusions of law distinguished the present case from *Red Elk* by noting that under the facts presented here, Scott was not on duty for enforcement purposes, was not armed, was outside of his jurisdiction, and was not picking up plaintiff for any violation of law (T.T. 259).

[7] The *Primeaux* court further recognized numerous cases holding employers liable for sexual assaults or excessive use of force by police officers for the reason that such conduct is foreseeable because of the unique position of trust held by such officers. *Primeaux*, 102 F.3d at 1463 (citing *Mary M. v. City of Los Angeles*,

Scott was aided in his assault of plaintiff by the existence of the agency relation. *Id.* (citing Restatement (Second) of Agency § 219(2)(d)). Accordingly, "[i]f Scott accomplished his objective by using this status as a police officer, and *if Primeaux relied on his position in succumbing to his advances*, then his conduct may fall within the doctrine of apparent authority." *Id.* (citing Restatement (Second) of Agency § 265) (emphasis added).

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54 Cal. 3d 202, 285 Cal. Rptr. 99, 814 P.2d 1341, 1352 (1991) (holding a police officer liable for a sexual assault because he took "advantage of his authority and control as a law enforcement officer"))' *White v. County of Orange*, 166 Cal. App. 3d 566, 571, 212 Cal. Rptr. 493 (Cal. Ct. App. 1985) (holding that a police officer could have acted within the scope of his employment when he stopped a motorist and sexually assaulted her, and noting that "the police officer carries the authority of law with him into the community . . . [and] the officer's method of dealing with this authority is certainly incidental to his duties"); *Applewhite v. City of Baton Rouge*, 380 So.2d 119, 122 (La. Ct. App. 1979) (finding employer liability for a police officer's sexual abuse of a woman in his custody, and noting "where it is found that a law enforcement officer has abused the 'apparent authority' given such persons to act in the public interest, their employers have been required to respond in damages")).

The *Primeaux* court went on to state that "[i]t is equally likely that this trust is relied upon when officers appear to be exercising their authority, especially because of the 'on-call' nature of their employment." *Id.* (citing *Osborne v. Lyles*, 63 Ohio St. 3d 236, 587 N.E.2d 825, 831 (1992) (reversing summary judgment for the city in a case of excessive force used by an off-duty police officer at an accident scene in part because the officer was to "be considered on duty at all times, for purposes of discipline"); *Daigle v. City of Portsmouth*, 129 N.H. 561, 534 A.2d 689, 699 (1987) (holding the city liable for an off-duty police officer's assault because the employment-related activities of employees who have an "obligation, or at least the option, to perform official duties whenever the need may arise" are considered within the scope of their employment)).

[¶11] B. APPARENT AUTHORITY

[¶12] While it is clear from the Court's oral findings of fact and conclusions of law that Scott's sexual act was not preceded by an assertion of actual authority, the issue remains whether it was preceded by an assertion of apparent authority. It is also manifest that under the unique facts and circumstances of this case, once plaintiff entered the front seat of the vehicle, plaintiff did not succumb to Scott's actions based on any reliance on actual or apparent authority. Rather, she submitted out of fear and physical intimidation to Scott who maintained a significant physical advantage (T.T. 247, 252, 254). The scene of the rape occurred of a side road located several miles from the town of Martin late at night. there was little or no action she cold have taken once she entered the vehicle.[8] Therefore, the Court's analysis focuses on the facts and circumstances present at the point plaintiff entered the front seat of the vehicle.

[¶13] The significance of Scott's status or appearance as an officer of the law is minimized under the unique circumstances present in this case. Unlike the vast body of case law holding the employer liable for sexual assaults committed by officers who were aided in accomplishing a sexual assault by utilizing their position of authority to detain or stop their victims, Scott did not arrest, detain, or even stop plaintiff through use of actual or apparent authority. *See generally Red Elk*,

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[8] Although plaintiff testified that one of the reasons she got out of the vehicle was because of his status as a police officer (T.T. 33), it is clear that at that point in time there was little or on action she could take under the circumstances.

62 F.3d at 1104 (officer ordered victim into back of car for curfew violation); *Bates v. United States*, 701 F.2d 737, 739 (8th Cir. 1983) (holding military policeman's conduct in stopping automobile and raping young women did not arise out of scope of employment under Missouri law); *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 285 Cal. Rptr. 99, 814 P.2d 1341 (1991) (officer detained the victim by activating his red lights and threatened to take her to jail for driving while intoxicated); *White v. County of Orange*, 166 Cal. App. 3d 566, 212 Cal. Rptr. 493 (Cal. Ct. App. 1985) (officer stopped victim's car); *Applewhite v. City of Baton Rouge*, 380 So.2d 119 (La. Ct. App. 1979) (officer used authority to place victim into police custody for vagrancy). To the contrary, plaintiff was stranded "[o]n a cold winter night in [the] middle of practically nowhere near the Indian reservation." (T.T. 252). *See also* (T.T. 26, 38, 120, 245). Although plaintiff testified that before entering the vehicle she noticed that the red lights on the roof were turned on, she acknowledged that she voluntarily got into the vehicle because she wanted a ride (T.T. 27, 72).[9]

[¶14] Plaintiff testified on direct examination that when she was sitting in the car she was fearful Scott would arrest her for drinking and driving or turn her over to the Martin authorities; however, she acknowledged that he did not ask her if she had been drinking or threaten to arrest her (T.T. 30-31, 134). In addition, Scott never requested her driver's license nor did he ask her to perform a breathalyzer or field sobriety test.

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[9] At trial, Scott testified that he stopped to offer a ride as an individual, not as a police officer (T.T. 134, 145). There is no evidence that Scott turned on his red lights to stop or detain plaintiff.

Plaintiff has failed to show by a preponderance of the evidence that she relied on the cloak of Scott's apparent authority as an officer to enter into the front seat of his vehicle. *See generally Leafgreen*, 383 N.W.2d at 280 (foreseeability of an agent's criminal or tortious conduct when operating with apparent authority is seen through the eyes of the third party who was harmed by the agent's conduct rather than from the principal's or the agent's point of view). Plaintiff attempts to convince the Court that she relied upon Scott's authority as a police officer in submitting to his demands. This she must do to bring her case under the umbrella of the *Red Elk* and *Deuchar*. The Court finds her attempt lacking credibility. On the dark, cold night in practically the middle of nowhere, plaintiff accepted the ride in order to escape the elements. Based upon the facts, the Court is not convinced that the police vehicle had anything to do with the assault which later took place. In any event, she has not met her burden in this regard.

[¶15] It is this significant point that distinguishes this case from the decisions of *Red Elk*,[10] *Deuchar*,[11] and *Leafgreen*.[12] In *Red Elk*, the two officers were clearly aided by their status as police officers and the victim had relied on said status. *Red Elk*, 62 F.3d at 1107. When the officers picked up the victim ostensibly to return her safely home as a curfew violator, they were on duty, in uniform, armed, and patrolling in a marked police car. *Id.* The victim clearly relied on their authority when she entered the rear seat of the patrol

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[10] *Red Elk v. United States*, 62 F.3d 1102 (8th Cir. 1995).

[11] *Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177 (S.D. 1987).

[12] *Leafgreen v. American Family Mut. Ins. Co.*, 393 N.W.2d 275 (S.D. 1986).

car from which she had no way to exit without the officers' help. *Id.* To the contrary, officer Scott was not purporting to act on behalf of the government by stopping, detaining, or arresting plaintiff or any violation of the law. Moreover, plaintiff has not shown that she relied on Scott's apparent authority when entering the front seat of the vehicle.

[¶16] In *Deuchar*, the South Dakota Supreme Court held that a genuine issue of material fact existed as to whether a ranch hand without the required specific authority of the ranch owner to hunt on a particular occasion was acting within the scope of his employment, as measured by the foreseeability test, when he shot a hunter he was guiding. *Deuchar*, 410 N.W.2d at 182. The ranch owner had testified that hunters could not hunt on the ranch unless accompanied by corporate employees. *Id.* at 179. Thus, under this unique factual scenario, it could be foreseeable that a hunter could rely on the ranch hand's apparent authority to guide a hunt which was in furtherance of the ranch business. The present case is distinguishable in that Scott was not purporting to act on behalf of the government when he offered plaintiff a ride. Furthermore, plaintiff did not rely on any apparent authority of an agent, as the hunter presumably did under the circumstances present in *Deuchar*.

[¶17] In *Leafgreen*, insureds brought suit against their insurer for damages stemming from the wrongful acts of the insurer's agent. *Leafgreen*, 393 N.W.3d at 276. The agent had gained access into the insureds' home for the ostensible purpose of writing liability insurance for them. *Id.* However, the agent was really gaining the information to assist two professional burglars, who

latter burglarized the residence. *Id.* In affirming the trial court's grant of summary judgment in favor of the insurer, the South Dakota Supreme Court held that there was an insufficient nexus between the agent's employment as an insurance agent and the burglary as to make the ham foreseeable and impute liability to insurer. *Id.* at 281. The South Dakota court based its decision in part on the fact that the agent had learned that the insureds would be out of town the day of the burglary through his friendship with the insureds, and not because of this status as an insurance agent. *Id.* Similarly, plaintiff entered the front seat of the vehicle because she needed a ride that cold, dark night, not because of Scott's status as a law enforcement officer. *Leafgreen* is authority for the rule that there must be a sufficient nexus between the agent's employment and the agent's acts to impute liability upon the principal. Plaintiff fails to establish such nexus between Scott's employment and his assaultive conduct.

CONCLUSION

[¶18] Plaintiff has failed to meet her burden of proving that Scott accomplished his objective by using his status as a police officer or that she relied upon Scott's apparent authority when she entered the front seat of his vehicle. Hence, Scott's assault was not foreseeable because he was not acting within the scope of his actual or apparent authority. However reprehensible Scott's actions, to hold otherwise under the unique facts and circumstances presented by this case would blur the settled law of South Dakota as determined by the *Red Elk*, *Deuchar*, and *Leafgreen* trilogy. In short, plaintiff's case is not a *Red Elk* and *Deuchar* case. Accordingly, judgment of the government shall be issued forthwith.

Dated this 4th day of June, 1997.

BY THE COURT:

/s/ RICHARD H. BATTEY
RICHARD H. BATTEY
CHIEF JUDGE