

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 29 2019

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

BERTHA VAZQUEZ FAJARDO, an  
individual; BLANCA URIOSTEGUI, an  
individual,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant,

MARCO RICO,

Defendant-Appellee.

No. 18-56510

D.C. No.

3:16-cv-02980-LAB-MDD

MEMORANDUM\*

Appeal from the United States District Court  
for the Southern District of California  
Larry A. Burns, District Judge, Presiding

Argued and Submitted November 5, 2019  
Pasadena, California

Before: MURGUIA and HURWITZ, Circuit Judges, and GUIROLA,\*\* District  
Judge.

---

\* This disposition is not appropriate for publication and is not precedent  
except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable Louis Guirola, Jr., United States District Judge for the  
Southern District of Mississippi, sitting by designation.

The government appeals the district court's order granting a petition for certification filed by Marco Rico under 28 U.S.C. § 2679(d)(3). The sole question in this interlocutory appeal is whether the district court erred in finding that Rico acted within the scope of his federal employment when engaging in the actions that form the basis of claims under the Federal Tort Claims Act ("FTCA") by Plaintiffs Bertha Vazquez Fajardo and Blanca Uriostegui (Fajardo's daughter). We have jurisdiction under 28 U.S.C. § 1292(b) and affirm.

"The Attorney General's decision regarding scope of employment certification is subject to *de novo* review in both the district court and on appeal. Where facts relevant to this inquiry are in dispute, however, we review the district court's factual findings for clear error." *Kashin v. Kent*, 457 F.3d 1033, 1036 (9th Cir. 2006) (quoting *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993) (per curiam)).

We evaluate whether Rico acted within the scope of his employment by applying "the principles of *respondeat superior* of the state in which the alleged tort occurred." *Saleh v. Bush*, 848 F.3d 880, 888 (9th Cir. 2017) (quoting *Pelletier v. Fed. Home Loan Bank of S.F.*, 968 F.2d 865, 876 (9th Cir. 1992)). The events at issue in this case took place in California.

Applying this Court's decision in *Xue Lu v. Powell*, 621 F.3d 944 (9th Cir. 2010), the district court did not err in holding that Rico acted within the scope of his employment. In *Powell*, this Court held that an asylum officer acted within the scope

of his employment when he traveled to two asylum applicants' homes to discuss their asylum cases and sexually assaulted them during those home visits. *Id.* at 946, 948–49. Here, Plaintiffs similarly allege that Rico assaulted Fajardo when he visited the Plaintiffs' home to discuss a passport fraud investigation. It is undisputed that Rico was a Special Agent of the Department of State at all relevant times, that Fajardo invited Rico over to her home to discuss the passport fraud investigation, and that Rico was involved in the investigation as part of his official duties as a federal employee. Therefore, under *Powell*, Rico acted within the scope of his employment when he allegedly engaged in the actions that form the basis of the Plaintiffs' FTCA claims.

**AFFIRMED.**