LYTTLE v. The UNITED STATES OF AMERICA et al Doc. 60

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

Case No. 4:10-cv-142-D

MARK DANIEL LYTTLE, **Plaintiff,** **v.** **UNITED STATES OF AMERICA, et al.,** **Defendants.**	**REPLY IN SUPPORT OF UNITED STATES' MOTION TO DISMISS**

REPLY IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS

As discussed below, Lyttle's explicit and tacit admissions in this case are his undoing. Far from "assum[ing] disputed facts," as Lyttle suggests in his opposition to the United States' motion to dismiss, Pl.'s Opp'n at 1, we have relied solely on the few well-pled facts *he* has alleged. It is true that a consequence of those facts is a dismissal of all three of Lyttle's claims against the United States, but it is one the law compels and no amount of discovery can change.

DISCUSSION

I. LYTTLE'S FTCA CLAIMS SHOULD BE DISMISSED UNDER RULE 12(b)(1)

We showed in our opening brief that Lyttle's three claims under the Federal Tort Claims Act ("FTCA") for false imprisonment, negligence, and intentional infliction of emotional distress ("IIED") in Counts 4-6 of his first amended complaint ("FAC"), respectively, should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). That is because the FTCA's "discretionary function" and "due care" exceptions preserve the United States' sovereign immunity in the circumstances of this case. *See* Def.'s Memo. at 6-12; 28 U.S.C. § 2680(a). In

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arguing otherwise, Lyttle openly disregards binding Fourth Circuit case law and numerous authorities from other jurisdictions that are directly on point.

A. The "Discretionary Function" Exception (Counts 5 and 6)

Lyttle appears to have silently accepted our basic framework of cabining the discussion of the discretionary function exception to his allegations concerning the manner in which ICE agents interviewed him and investigated his immigration status, and the adequacy of their training and supervision in these matters. *See* Def.'s Memo. at 7-8. These allegations form the bulk of his FTCA claims for negligence and IIED in Counts 5 and 6. *Id.* Lyttle also has tacitly conceded that the discretionary function exception knocks out his conclusory allegations about negligent training and supervision, and "creating and/or sanctioning" policies concerning detention, interrogation, and deportation. FAC ¶¶ 88-92, 155; Def.'s Memo. at 10-11.

With all that in mind, Lyttle begins his discussion of the discretionary function exception by stating that federal officers lack discretion to violate the Constitution. Pl.'s Opp'n at 4. He then cites *Medina v. United States*, 259 F.3d 220 (4th Cir. 2001)—a case in which the Fourth Circuit, *sua sponte*, actually found that the discretionary function exception *precluded* various FTCA claims arising out of the arrest and abandoned deportation of an alien, *see id*. at 229—and argues that because "he has alleged sufficient facts to establish that Defendants violated his Fourth and Fifth Amendment rights," the discretionary function exception does not bar his FTCA claims. Pl.'s Opp'n at 4. This argument suffers from two fatal fallacies.

The first is that the discretionary function exception cannot be overcome by any generalized allegation of unlawful conduct, but only by a showing that discretion is limited by a *specific* and mandatory directive. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Merely and vaguely alleging that federal

employees violated Lyttle's Fourth and Fifth Amendment rights does not come anywhere close to identifying a sufficiently specific constitutional mandate. *See Shansky v. United States*, 164 F.3d 688, 691 (1st Cir. 1999) ("Statements made at this level of generality do not satisfy *Gaubert*'s and *Berkovitz*'s specific prescription requirement. Were the law otherwise, the discretionary function exception would be a dead letter."); *accord Freeman v. United States*, 556 F.3d 326, 339 (5th Cir. 2009) (same) (collecting cases).

Second, and independently, Lyttle's allegations are woefully inadequate to establish a constitutional violation. The individual federal defendants in this case have separately and amply demonstrated that Lyttle has not alleged sufficient factual matter that they violated his constitutional rights. *See* Docket No. 51. Because Lyttle's constitutional claims against the individual defendants thus fail as a matter of law, so too do his FTCA claims against the United States. *See Medina*, 259 F.3d at 225 n.2 (noting that in an FTCA action "the United States is entitled to avail itself of any defenses its agents could raise in their individual capacities"); *accord Denson v. United States*, 574 F.3d 1318, 1336 (11th Cir. 2009) (holding that where plaintiff has sued both United States under FTCA and government official under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for same underlying conduct, but fails to establish that the latter committed a constitutional violation, the United States may "contend that 28 U.S.C. § 2680(a) of the FTCA strips the district court of jurisdiction to consider the tort claims because the officer acted within the scope of his discretion when he engaged in the disputed conduct").

Lyttle next argues that the discretionary function exception "does not apply here" because the ICE agents "disregarded" or showed "deliberate indifference" towards evidence of his citizenship, "had no reason to believe that [he] was a non-citizen," and that they did not have

discretion to deport, or even jurisdiction over, a U.S. citizen. Pl.'s Opp'n at 4-6. This grossly misstates matters in several ways.

First, there can be no serious debate that ICE has the legal authority to detain and investigate suspected criminal aliens. *See* 6 U.S.C. §§ 251-52, 542 (note). Second, Lyttle signed several documents attesting that he was exactly that. *See* FAC ¶¶ 41-45, 54-55; FAC Exh. C; Exhs. A, D, E.[1] Third, in light of those documents, ICE had a reasonable basis and the discretion to initiate deportation proceedings against Lyttle. *See*, *e.g.*, *Perez-Mejia v. Holder*, 641 F.3d 1143, 1149 (9th Cir. 2011) (observing that "admissions by an alien to facts alleged in [a Notice to Appear] . . . are binding, just as admissions made by a defendant in an answer to a civil complaint are binding in a judicial proceeding") (collecting cases); *Matter of Ponce-Hernandez*, 22 I&N Dec. 784, 785 (BIA 1999) (noting that recorded confessions of foreign citizenship are "inherently trustworthy and reliable to prove alienage or deportability"). Fourth, even assuming the ICE agents had and disregarded evidence contradicting Lyttle's repeated admissions of alienage, the discretionary function exception applies "whether or not the discretion involved be abused." 28 U.S.C. § 2680(a); *see Williams v. United States*, 242 F.3d 169, 175 (4th Cir. 2001).

Finally, the relevant question before the Court is not, as Lyttle poses it, whether "the arrest and detention of a U.S. citizen is itself discretionary." Pl.'s Opp'n at 5. It is instead whether the particular conduct at issue here—how immigration officials came to a decision about initiating deportation proceedings against Lyttle—is subject to the discretionary function

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[1] Although Lyttle states that he "has a long and well-documented history of significant mental and cognitive disorders," Pl.'s Opp'n at 2, he notably does not dispute that the ICE agent who initially interviewed him (Agent Faucette) exercised discretion in assessing his ability to understand what was being asked of him. *See* Def.'s Memo. at 10 n.6. Nor does Lyttle dispute that Faucette's judgment in this regard is confirmed by his own criminal records, which indicate that he was not found incompetent to stand trial and that the judge who sentenced Lyttle did not recommend "[p]sychiatric and/or psychological counseling" for him. Exh. G.

exception.[2] The answer to *that* question is clear, as even Lyttle expressly concedes that "ICE agents may exercise a certain level of discretion in the execution of their law enforcement duties, including the investigation of potential criminal aliens subject to removal." Pl.'s Opp'n at 5.

We have cited numerous cases, including one from the Fourth Circuit (*Medina*), holding that a law enforcement officer's conduct in interrogating a suspect, and an immigration official's conduct in investigating a suspected alien's claim of citizenship and initiating deportation proceedings, fall squarely within the discretionary function. *See* Def.'s Memo. at 8-10. Lyttle brushes off these authorities primarily on the ground that "he affirmatively asserted his U.S. citizenship to North Carolina ICE agents." Pl.'s Opp'n at 5 n.2; *see id*. at 5-6. But that is exactly the point. The way in which immigration officials investigate a claim of citizenship is the very type of conduct that the discretionary function exception is meant to protect. *See Nguyen v. United States*, 65 F. App'x 509, 2003 WL 1922969, *1-2 (5th Cir. 2001) (per curiam); *Bernado v. United States*, No. 02-0974, 2004 WL 741287, *3 (N.D. Tex. Apr. 5, 2004); *Diaz v. United States*, No. 99-6374, 2002 WL 31002842, *1 (N.D. Ill. Sept. 3, 2002).[3] Indeed, another court, citing the same authorities we have cited throughout our briefing, just recently held "there is little doubt" that allegations of ICE agents "negligently fail[ing] to ascertain or verify [the plaintiff's]

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[2] Lyttle thus has it backwards when he says the United States cannot seek dismissal "by claiming that th[e] specific misconduct" alleged here "falls under the discretionary function exception." Pl.'s Opp'n at 5. That is in fact the precise inquiry. *See*, *e.g.*, *Medina*, 259 F.3d at 227 (finding that immigration officials had discretion to arrest and initiate deportation proceedings against a suspected alien, not to arrest a suspected alien without probable cause).

[3] In *Diaz*, for example, the plaintiff "insist[ed]" he was a U.S. citizen in his lawsuit but apparently told immigration officials at the time of the underlying incident that he was a Mexican citizen, *Diaz*, 2002 WL 31002842, at *1—exactly the scenario Lyttle's lawsuit presents. The court in *Diaz* nevertheless held that the discretionary function exception barred the plaintiff's FTCA claims which were based on the immigration officers' "determination of his citizenship," and their detention, allegedly coercive interrogation, and expedited removal of the plaintiff. *Id.* This Court should do the same.

citizenship status fall squarely within the discretionary function exception." *Douglas v. United States*, No. 09-2145, 2011 WL 2471516, *11 (M.D. Fla. June 22, 2011).[4]

In contrast, Lyttle has not cited a single opinion refusing to apply the discretionary function exception where the plaintiff challenged why and how immigration officials decided to initiate deportation proceedings. Pl.'s Opp'n at 3-6. For that and all of the other reasons we have laid out, he has failed to meet his "burden of proving that the discretionary function exception does not apply" here, *Indem. Ins. Co. of N. Am. v. United States*, 569 F.3d 175, 180 (4th Cir. 2009), and the Court should dismiss most of Counts 5 and 6 on that basis.

B. The "Due Care" Exception (Counts 4-6)

As with the discretionary function exception, Lyttle has passively acquiesced to the two foundational premises underlying our discussion of the due care exception. The first is that the remainder of Counts 5 and 6, and the entirety of his false imprisonment claim in Count 4, are predicated solely on the allegation that he was detained in North Carolina for two additional days pending his removal proceedings. *See* Def.'s Memo. at 11. The second is that the due care exception is relevant only to this portion of his FTCA claims—that which is based on his alleged detention by ICE in North Carolina. *Id.* These points are critical, as Lyttle has conflated two discrete aspects of those counts in arguing against the application of the due care exception.

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[4] Lyttle argues in passing that two other cases applying the discretionary function exception to the alleged conduct of law enforcement agents in detaining and questioning a suspect—*O'Ferrell v. United States*, 253 F.3d 1257 (11th Cir. 2001), and *Mesa v. United States*, 123 F.3d 1435 (11th Cir. 1997)—"are inapposite as out-of-circuit cases that did not involve allegations of unconstitutional conduct." Pl.'s Opp'n at 5 n.2. This is rather ironic given Lyttle's blatant attempt to persuade this Court to ignore binding Fourth Circuit case law. *See infra* Section I-B. It is also wrong as a matter of fact, as those cases *did* involve allegations of unconstitutional conduct, *see O'Ferrell*, 253 F.3d at 1263; *Mesa*, 123 F.3d at 1437 n.2, and irrelevant because, as discussed above, Lyttle has failed to show that the ICE agents violated any constitutional right in connection with his detention and interrogation.

Lyttle essentially suggests that questions of fact exist about the initial decision to detain him as a criminal alien, and the immigration agents' alleged failure to investigate his claim of citizenship and their "interrogation" of him. *See* Pl.'s Opp'n at 6-9. But even assuming all of that were true (which it is not, as we have accepted any well-pled allegations for purposes of our motion to dismiss), such "questions of fact" simply refer back to those portions of Lyttle's FTCA claims concerning the investigation and interrogation methods discussed above in Section I-A under the discretionary function exception.[5] They are completely irrelevant to that part of Lyttle's FTCA claims currently under consideration—those premised on the *fact* of his detention.

On *that* issue the Fourth Circuit's decision in *Welch v. United States*, 409 F.3d 646 (4th Cir. 2005), is on all fours with this case. Lyttle does not deny that he was detained under the same statute as the plaintiff in *Welch* or that, once he "was deemed deportable, the [immigration] officers had no discretion in their actions." *Id.* at 652.

> Rather, his complaint is with the officers' decision to detain him in the first instance. However, this is a complaint regarding the statute itself, not with any of the particular officers' alleged deviation from its mandate. *Absent any allegation of such a deviation it cannot be said that the officers acted with anything other than due care.*

Id. (emphasis added). This Court likewise should find that the North Carolina immigration officials acted with due care because Lyttle does not allege they deviated from the mandate of 8 U.S.C. § 1226(c)(1)(B), which required his detention pending removal proceedings.

Lyttle may be right in a theoretical sense, *see* Pl.'s Opp'n at 19-20, that the due care exception would not apply if a "statute requires an official to take a particular action" and the "manner in which the act is undertaken" were "improper," *e.g.*, if an immigration official

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[5] And to be clear, any such "questions of fact" would not affect the discretionary function analysis. The manner in which an immigration official investigates a suspected alien is a paradigmatic example of a discretionary function. *See supra* Section I-A.

detained an individual under § 1226(c) "for a crime that was not deportable." *Welch*, 409 F.3d at 653. But this again has no bearing on the fact that immigration officials were statutorily required to detain Lyttle after he had been deemed deportable. *See Demore v. Kim*, 538 U.S. 510, 517-18 (2003). Although the due care exception may not foreclose his FTCA claims to the extent they challenge the "manner in which" or the reasons why Lyttle was detained, the discretionary function exception certainly does. *See supra* Section I-A. More to the point, Lyttle does not deny that the due care exception applies to that part of his FTCA claims resting solely on ICE's alleged two-day detention of him in North Carolina; that part of Counts 5 and 6, and all of his false imprisonment claim in Count 4, therefore should be dismissed on that basis.[6]

Relying on various cases from outside the Fourth Circuit, Lyttle also argues that the so-called "law enforcement proviso" in 28 U.S.C. § 2680(h) "supersedes" the due care exception, and that the due care exception therefore does not foreclose his false imprisonment claim (one of the torts listed in the proviso). *See* Pl.'s Opp'n at 9-11. But Lyttle also acknowledges that the Fourth Circuit has explicitly held to the contrary. *See id*. at 11 n.4 (citing *Welch*, 409 F.3d at 651; *Medina*, 259 F.3d at 226). Needless to say, this Court should follow binding Fourth Circuit precedent and dismiss Lyttle's false imprisonment claim, as well as those portions of his negligence and IIED claims resting on the fact of his detention, under the due care exception.

II. LYTTLE'S FTCA CLAIMS SHOULD BE DISMISSED UNDER RULE 12(b)(6)

A. False Imprisonment (Count 4)

Because immigration officials in North Carolina used a warrant and other types of legal process to detain Lyttle, *see* FAC ¶¶ 49-52; Exhs. C-F, and because Lyttle does not dispute that

[6] This is also why Lyttle's reliance on *Nguyen v. United States*, 556 F.3d 1244 (11th Cir. 2009), is misplaced. *See* Pl.'s Opp'n at 9. That case says nothing about the due care exception.

such process was technically valid, his false imprisonment claim fails as a matter of North Carolina law. *See* Def.'s Memo. at 13-14. In his response, however, Lyttle spends pages debating a point we have never raised: the absence of probable cause. *See* Pl.'s Opp'n at 12-15, 17. Although the individual federal defendants have thoroughly demonstrated in their own motion to dismiss that they had ample probable cause to detain him, *see* Docket No. 51, the United States has not sought dismissal of the false imprisonment claim on that basis. That is because, regardless of the existence of probable cause, a false imprisonment claim cannot lie where, as here, the detention is "made under the form of legal process." *Rhodes v. Collins*, 150 S.E. 492, 494 (N.C. 1929).

On *that* point Lyttle argues that he has "question[ed] the validity and constitutionality of the process," by which he means the manner in which North Carolina immigration officials interrogated him and investigated his alleged claim of citizenship. Pl.'s Opp'n at 16-17. The fundamental flaw in this argument is that it confuses two distinct concepts: "due process" in the constitutional sense and "procedurally valid process" in the common law sense. Lyttle may indeed be broadly challenging the "process" and "procedures" used to detain him, but his allegations of inadequate procedures or "coercive interrogation methods" have no bearing on his false imprisonment claim. As we have shown, the critical distinction relevant to that claim is one between a detention predicated on process and one predicated on *no* process. *See Melton v. Rickman*, 36 S.E.2d 276, 703 (N.C. 1945); Def.'s Memo. at 13-14. In other words, what matters is the existence (or not) of a legal document (such as a warrant) authorizing the plaintiff's detention. *See Fowle v. Fowle*, 140 S.E.2d 398, 401 (N.C. 1965). So long as such a document exists and it is not "absolutely void," North Carolina courts will not recognize a false imprisonment claim, even if the warrant was erroneously issued. *Rhodes*, 150 S.E. at 494-95.

In this sense Lyttle correctly notes that an officer may be liable for false imprisonment "if it appears on the face of the warrant that no jurisdiction exists for th[e] offense or if the charge does not constitute a criminal offense." Pl.'s Opp'n at 15. This is what the case law means by "absolutely void." *See Alexander v. Lindsey*, 55 S.E.2d 470, 474 (N.C. 1949); *Rhodes*, 150 S.E. at 494-95; *Bryan v. Stewart*, 31 S.E. 286, 288 (N.C. 1898). But Lyttle does not, and could not in good faith, claim that the warrant used to detain him suffered from such technical defects. Although he contends that it was erroneously issued for various reasons, the fact that it was issued and is not void on its face defeats his false imprisonment claim under North Carolina law.

B. Negligence (Count 5)

North Carolina law also forecloses Lyttle's FTCA negligence claim—because it would "not impose liability for breach of a duty that is sufficiently analogous to the duty" supposedly breached by the North Carolina ICE agents. *Florida Auto Auction of Orlando, Inc. v. United States*, 74 F.3d 498, 505 (4th Cir. 1996); *see* Def.'s Memo. at 15-18. Lyttle's arguments to the contrary do not withstand scrutiny.

Lyttle begins by again framing the issue far too broadly. Citing *Lumsden v. United States*, 555 F. Supp. 2d 580 (E.D.N.C.), he suggests that he has pled a "tort claim of general negligence" by alleging that "the Government 'failed to exercise ordinary care and skill in undertaking a course of conduct.'" Pl.'s Opp'n at 18-19 (quoting *Lumsden*, 555 F. Supp. 2d at 589). What Lyttle fails to mention is that the Court in *Lumsden* described the relevant question this way:

> [I]f a private person were to deliver to a known abuser of the chemical compound, ether, both the keys to the known abuser's vehicle and a canister of ether belonging to the private person, would that private person be answerable to third parties injured when the known abuser foreseeably became dangerously intoxicated from huffing the ether, resulting in a traffic collision that caused injury and death to those third parties?

Lumsden, 555 F. Supp. 2d at 588. Likewise here, the issue is whether a private person would owe a duty to a plaintiff who was in the custody of a third party (in this case, the State of North Carolina) to conduct an error-free investigation into the plaintiff, ensure that the plaintiff understood his legal rights, and provide assistance to him during an interrogation or before signing legal forms in deciding whether to extend his detention. Lyttle, however, has cited *no* authority supporting the imposition of such a duty or even a sufficiently analogous duty.

He instead appears to argue that the government undertook to render services to him and other individuals who were "in custody claiming to be U.S. citizens through the Hayes Memo and Morton Memo, which outline special procedures that ICE officers are required to follow when investigating someone claiming to be a U.S. citizen." Pl.'s Opp'n at 20. Contending that the North Carolina ICE agents "negligently fail[ed] to adhere" to these procedures, Lyttle concludes that the government is liable to him under a duty analogous to the "Good Samaritan" doctrine. *Id*. at 19-20 (citing Restatement (Second) of Torts § 323 (1965)). But according to Lyttle's own complaint, the Hayes and Morton Memos were respectively issued on November 6, 2008, and November 19, 2009—approximately three and fifteen months *after* the North Carolina ICE agents interviewed Lyttle and initiated deportation proceedings against him during the first week of September 2008. *See* FAC ¶¶ 39, 49-55, 70, 75. And even if such policies were in place at that time, under no reasonable interpretation do they "represent an effort specifically to 'render services' to" Lyttle. *Florida Auto Auction*, 74 F.3d at 504 (rejecting "Good Samaritan" doctrine as basis for imposing liability under FTCA where plaintiffs claimed that government "undertook to render services to them by enacting regulation requiring presentation of certificates of title" and that customs agents "failed to enforce that regulation with reasonable care"). As their titles

suggest and their text confirms, those policies merely provided guidance to ICE agents when investigating a claim of citizenship. Exhs. H, I.[7]

Equally flawed is Lyttle's discussion of North Carolina's public duty doctrine. Lyttle declares that the "public duty doctrine has no applicability whatsoever to claims under the [FTCA]," Pl.'s Opp'n at 21, but ignores the Fourth Circuit's holding to the contrary. *See Florida Auto Auction*, 74 F.3d at 502.[8] That said, and as we have pointed out, the relevance of the public duty doctrine is limited because private persons are not responsible for enforcing the nation's immigration laws, and "assessing the Government's liability under the FTCA in the performance of activities which private persons do not perform" requires a court to "look to the state-law liability of private entities, not to that of public entities." *United States v. Olson*, 546 U.S. 43, 46 (2005) (internal quotations and citation omitted). Lyttle thus misses the point by arguing that his case fits various "exceptions" to the public duty doctrine. *See* Pl.'s Opp'n at 21-23. Whatever the merits may be of that position, it would speak only to the potential liability of a state public official; it does not change—and indeed, only highlights—the fact that a private individual would not be liable in "like circumstances." 28 U.S.C. § 2674; *see Williams*, 242 F.3d at 177 (noting that, to find that Indian hospital owed common law duty to provide emergency services to non-Indian, plaintiff "would have to show that the Cherokee Indian Hospital was liable as a 'private individual,' not as a public utility"). Because Lyttle has not established that North Carolina

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[7] Copies of the Hayes and Morton Memos are submitted with this reply brief solely to rebut Lyttle's arguments in his response brief, and are properly before the Court under Rule 12(b)(6) because they are incorporated into Lyttle's complaint by reference. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); FAC ¶¶ 70-76.

[8] This Court's decision in *Lumsden*, which Lyttle cites for the same proposition, also did not account for the Fourth Circuit's analysis of the public duty doctrine in *Florida Auto Auction*. *See Lumsden*, 555 F. Supp. 2d at 595.

imposes upon private parties a duty analogous to the one he has proposed in this case—to use "reasonable care" when initiating deportation proceedings against a suspected criminal alien, FAC ¶¶ 154-55—his negligence claim in Count 5 should be dismissed.[9]

C. Intentional Infliction Of Emotional Distress (Count 6)

As proof that he has pled extreme and outrageous conduct sufficient to sustain an IIED claim, Lyttle points to the fact of his deportation and the North Carolina ICE agents' alleged "disregard" of evidence of his "citizenship and his mental illness." Pl.'s Opp'n at 24-26. While the former merely begs the question, the latter conveniently ignores the facts and the law.

Lyttle argues, for example, that Agent Faucette "knew [he] has bipolar disorder yet interrogated him without a witness . . . ." *Id*. at 24. But he offers no support for the notion that interviewing a bipolar individual without a witness "is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Foster v. Crandell*, 638 S.E.2d 526, 537 (N.C. Ct. App. 2007).[10] The issue instead is whether Faucette, who is not alleged to be a trained mental health care provider, engaged in extreme and outrageous conduct in assessing Lyttle's ability to understand what was being asked of him. Lyttle alleges nothing of the sort. More than that, Faucette's apparent assumption that he *could* understand appears entirely reasonable given that he was not found incompetent in connection with the criminal charge that led to his sentence at

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[9] Contrary to what Lyttle may believe, we have never suggested that physical harm is necessary to state a claim under the FTCA. *See* Pl.'s Opp'n at 23. We *have* argued that physical harm is relevant to the duty reflected in § 314A of the Restatement (Second) of Torts. *See* Def.'s Memo. at 18. But because Lyttle does not even mention, much less rely on, that section as the source of a private duty analogue, the absence of physical harm is simply a non-issue.

[10] Not to mention that the sworn statement Lyttle signed specifically said: "I am willing to make a statement without anyone else being present." Exh. A at 1.

the North Carolina correctional facility where Faucette interviewed him, or even in need of psychiatric or psychological counseling at that time. *See* Exh. G. And while Lyttle also accuses Faucette of not "allow[ing] him to review her records of the interrogation before he signed them," Pl.'s Opp'n at 24, he nevertheless went ahead and signed a sworn statement which recorded his answers to her questions, indicated that he was an illegal criminal alien, and contained the following sentence immediately preceding his signature: "I have read (or have had read to me) the foregoing statement consisting of 2 pages." Exh. A.

Nor can it be forgotten that a few days later Lyttle signed and received more documents which reaffirmed his initial claim of Mexican citizenship and reflected his consent to expedited removal. *See* Exhs. C-E. Given the reasonable presumption that Lyttle was competent to sign such documents, and given that such admissions of alienage are binding and sufficient evidence to prove deportability, *see Perez-Mejia*, 641 F.3d at 1149; *Matter of Ponce-Hernandez*, 22 I&N Dec. at 785, it would be unwarranted to cast the decision of the North Carolina ICE agents to initiate deportation proceedings against Lyttle based on his repeated admissions of alienage (among other things)—even assuming they were aware of conflicting evidence of citizenship as Lyttle alleges—as extreme and outrageous. It is clear that the North Carolina immigration officials instead were simply performing their usual duties with the information they had available to them. Lyttle's IIED claim therefore should be dismissed.[11]

[11] Lyttle has confused matters by suggesting that the North Carolina ICE agents were "reckless." Pl.'s Opp'n at 25-26. A defendant's state of mind is a separate element of an IIED claim, *see Dickens v. Puryear*, 276 S.E.2d 325, 335 (N.C. 1981), but it is not one we have put at issue in this motion to dismiss. The only question before the Court is whether Lyttle has sufficiently alleged conduct that is objectively extreme and outrageous. As we have shown, he has not.

III. LYTTLE CONCEDES THE FOREIGN COUNTRY EXCEPTION APPLIES

Though unnecessary for the Court to address given that the FTCA claims should be dismissed *in toto* for the reasons we have discussed, Lyttle concedes that the foreign country exception, 28 U.S.C. § 2680(k), "operates in this case to bar certain types of damages . . . , namely, those based solely on the additional injuries that he suffered at the hands of third parties in Central America." Pl.'s Opp'n at 28. This is another significant, if understated, concession, as Lyttle has alleged, and continues even in his response brief to highlight, four months' worth of claimed "foreign injuries." *Id.* at 27; *see id.* at 2; FAC ¶¶ 96-111. But the parties now agree that the foreign country exception precludes damages for all of those alleged injuries. That would include any allegedly ongoing damages caused by such foreign injuries. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 698, 701 (2004) (holding that foreign country exception barred false arrest claim based on plaintiff's "abduction" in Mexico, which was "kernel of a 'claim arising in a foreign country'" resulting in failed criminal prosecution in United States). Were the Court to reach the issue, it thus should find that the foreign country exception limits Lyttle's FTCA claims in this manner.

CONCLUSION

For the foregoing reasons, the Court should grant the United States' motion to dismiss.

Respectfully submitted this 10th day of August 2011,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on August 10, 2011, I electronically filed the foregoing "Reply in Support of the United States' Motion to Dismiss" using the Court's CM/ECF system, which will send notification of such filing to the following counsel of record:

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