



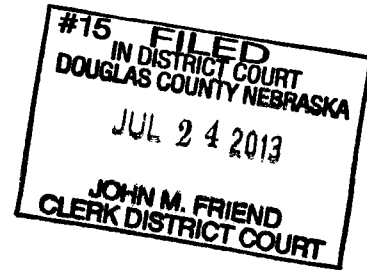
J00161116D01

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

MICHAEL OMAIR, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DOUGLAS COUNTY, NEBRASKA; )  
 DOUGLAS COUNTY SHERIFF'S OFFICE; )  
 DOUGLAS COUNTY SHERIFF TIM )  
 DUNNING, in his official and individual )  
 capacity; DEPUTY EDWARD VAN BUREN, )  
 in his official and individual capacity, )  
 )  
 Defendants. )

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**ORDER ON DEFENDANTS' PARTIAL  
MOTION TO DISMISS**



This matter comes before the Court on Defendants' Partial Motion to Dismiss filed on January 24, 2013. A hearing was held March 19, 2013. Parties appeared by counsel. Arguments were heard and the matter was taken under advisement. For the reasons discussed below, Defendants' Partial Motion to Dismiss is granted.

FACTS AND PROCEDURAL HISTORY

Plaintiff Michael Omair was a resident of the State of Colorado at the time he filed his first complaint, and currently resides in the State of New York. (Amended Complaint ¶ 1). Plaintiff is a natural born United States citizen. (Am. Compl. ¶ 1).

Defendant Douglas County, Nebraska, is, and at all relevant times was, a municipal corporation or political subdivision organized and existing under the laws of the State of Nebraska. (Am. Compl. ¶ 2). Defendant Douglas County Sherriff's Office is a division of Douglas County, and receives federal funds through federal grants for the U.S. Department of Justice or other federal agencies. As such, the Douglas County Sheriff's Office is legally required to conduct its affairs in a racially nondiscriminatory manner. (Am. Compl. ¶ 3).

Defendant Tim Dunning is the Sherriff of Douglas County and the chief administrator of the Douglas County Sherriff's Office. Sheriff Dunning directly or indirectly participated in the authorization, planning and supervision of the actions of the individual Douglas County Sheriff's Office deputies involved in this case. (Am. Compl. ¶ 4). Defendant Deputy Edward Van Buren is a resident of the State of Nebraska and is employed by the Douglas County Sheriff's Office. Plaintiff alleges that all action taken by Deputy Van Buren while working as an officer of the Douglas County Sheriff's Office was taken under color of state law. (Am. Compl. ¶5).

Plaintiff alleges that on or about August 19, 2008, he was driving his vehicle, then licensed in the state of New York, through the state of Nebraska on his way to Colorado. (Am. Compl. ¶ 6). At approximately noon on August 19, 2008, while driving on Interstate 80 in Omaha, Douglas County, Nebraska, Plaintiff passed a Douglas County Sheriff's Office cruiser which was on the shoulder of the road, and shortly thereafter, the cruiser entered traffic, caught up to Plaintiff's vehicle, and pulled alongside Plaintiff's vehicle twice, both times making eye contact with Plaintiff. This deputy is now known to be Defendant Edward Van Buren. (Am. Compl. ¶ 7). Deputy Van Buren then fell in behind Plaintiff's vehicle, activated the cruiser's lights, and signaled the Plaintiff to pull over. (Am. Compl. ¶ 8). Deputy Van Buren advised Plaintiff that he had been pulled over for speeding, and proceeded to ask questions unrelated to allegations of exceeding the speed limit. (Am. Compl. ¶ 9). Deputy Van Buren asked the Plaintiff to exit his vehicle, continued to ask questions, and ultimately requested permission to search the vehicle, which Plaintiff declined. Deputy Van Buren did a pat down search of Plaintiff and called for a K-9 unit. (Am. Compl. ¶¶ 10-11). Deputy Van Buren claimed that the dog alerted for a controlled substance in Plaintiff's vehicle, and he and other deputies of the Douglas County Sheriff's Office searched Plaintiff's vehicle for two to three hours, allegedly dismantling

a significant portion of it, rifling through Plaintiff's luggage and personal belongings, and damaging both the vehicle and personal property. (Am. Compl. ¶¶ 11-12). The search yielded no evidence of drugs or other contraband, and Plaintiff was released without citation for any offense, including speeding. (Am. Compl. ¶ 13). Plaintiff is an individual of Middle Eastern descent, with dark skin, and Plaintiff alleges that the damage to him would not have occurred but for the color of his skin and cultural heritage. (Am. Compl. ¶¶ 14-15).

Deputy Van Buren is part of a drug interdiction unit of the Douglas County Sheriff's office and held a supervisory and command position over others assigned to the unit. (Am. Compl. ¶ 16). Plaintiff alleges that Deputy Van Buren and other deputies under his direction and supervision routinely stopped persons of color in vehicles bearing out of state license plates. (Am. Compl. ¶ 17). Deputy Van Buren and other officers were required by law to fill out "bias cards" as a means of compiling statistical data regarding contacts with member of the public who were stopped by officers. (Am. Compl. ¶ 18). Plaintiff alleges that deputies assigned to the drug interdiction unit of the Douglas County Sheriff's Office and under the control and supervision of Deputy Van Buren advised Sheriff Dunning of the racial profiling by Deputy Van Buren, and questioned whether Van Buren completed the "bias cards" as required by state law. (Am. Compl. ¶ 19). Plaintiff alleges Sheriff Dunning took either no action or ineffective action to terminate such racial profiling. (Am. Compl. ¶ 20). Plaintiff alleges that as a result of its efforts on Interstate 80 in Douglas County at intercepting controlled substances and money connected with the trafficking of controlled substances, the Douglas County Sheriff's office garners substantial goodwill as well as benefits from forfeiture of property related to arrests of individuals trafficking, including vehicles which are used by the Department and substantial amounts of money which go into the office coffers. (Am. Compl. ¶ 21). Plaintiff alleges that by virtue of

financial benefits which flow from the efforts of the drug interdiction unit, Defendant Dunning and the Office itself had and has a significant inducement to allow the racial profiling engaged in by the drug interdiction unit to continue. (Am. Compl. ¶ 22).

Plaintiff claims that he submitted a tort claim to Defendants on August 7, 2009 and Defendants noted receipt of the claim on August 18, 2009. Defendants made no response to Plaintiff's claim thereafter, so he withdrew the claim on March 9, 2010. (Am. Compl. ¶ 23). Plaintiff filed a Complaint in this Court on August 16, 2010, and an Amended Complaint on January 16, 2013, alleging nine causes of action. Defendants filed a Partial Motion to Dismiss on January 24, 2013, which motion is currently pending before the Court.

#### **Standard of Review**

Whether a complaint states a cause of action is a question of law. *Tolbert v. Omaha Hous. Auth.*, 16 Neb. App. 618, 622, 747 N.W.2d 452, 456 (2008). On a motion made under Neb. Ct. R. § 6-1112(b)(6), the court accepts the plaintiff's allegations in the complaint as true and draws all reasonable inferences in favor of the nonmoving party. *Crane Sales & Serv. Co. v. Seneca Ins. Co.*, 276 Neb. 372, 375, 754 N.W.2d 607, 610 (2008). Complaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief. *McKenna v. Julian*, 277 Neb. 522, 525, 763 N.W.2d 384, 388 (2009). Dismissal under Neb. Ct. R. § 6-1112(b)(6) will be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 82, 727 N.W.2d 447, 452 (2007).

### Analysis

Defendants' Partial Motion to Dismiss seeks to dismiss three of Plaintiff's nine causes of action. Specifically, Defendants request that the Court dismiss Plaintiff's first, sixth, and ninth causes of action, which allege that: 1) During the course of the search of Plaintiff's vehicle, his vehicle and personal property were damaged because Defendants were negligent in failing to appropriately care for Plaintiff's possessions while conducting the search; 2) Defendant Douglas County Sheriff's Office uses race or ethnicity of a motorist as a criterion in determining whether to stop and/or search motorists, which has a discriminatory impact on persons of color in Omaha and Douglas County, including Plaintiff, in violation of the regulations implementing Title VI (28 C.F.R. § 42.104); and 3) Defendants violated and continue to violate the U.S. Constitution, Plaintiff fears he will again be subjected to such unlawful and unconstitutional action, and thus Plaintiff seeks a judicial declaration that Defendants' conduct has deprived and continued to deprive Plaintiff of his rights under the U.S. Constitution and its laws. The Court will address each cause of action in turn.

**1. Plaintiff's claim for damages to his vehicle and personal property does not sufficiently state a claim for negligence.**

In Plaintiff's first cause of action, he alleges that "Defendants were negligent in failing to appropriately care for Plaintiff's possessions while conducting the search," and seeks compensation for damages Defendants allegedly caused to Plaintiff's photo albums, vehicle, clothes, and Quran. Defendants argue that Plaintiff's claim is barred under the Political Subdivision Tort Claims Act (PSTCA)<sup>1</sup> because this cause of action arises from a false arrest or false imprisonment. The Court concludes that Plaintiff's bare allegation that the Defendants were negligent is not sufficient to state a claim for negligence.

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<sup>1</sup>Neb. Rev. Stat. §§ 13-901 et seq. (Reissue 2012).

At the outset, the Court finds that Plaintiff's claims against all Defendants are governed by the PSTCA, including Plaintiff's claims against Deputy Van Buren and Sheriff Dunning in their individual capacities. The Legislature declares in the PSTCA that:

[N]o political subdivision of the State of Nebraska shall be liable for the torts of its officers, agents, or employees, and that no suit shall be maintained against such political subdivision or its officers, agents, or employees on any tort claim except to the extent, and only to the extent, provided by the [PSTCA].

Neb. Rev. Stat. § 13-902 (Reissue 2012). Douglas County is a political subdivision under the PSTCA, and Deputy Van Buren and Sheriff Dunning are its employees. *See* Neb. Rev. Stat. § 13-903(1). The PSTCA reflects a limited waiver of governmental immunity and prescribes the procedure for maintenance of a suit against a political subdivision and its employees. Tort actions against political subdivisions of the State of Nebraska are governed exclusively by the PSTCA. *McKenna v. Julian*, 277 Neb. 522, 527, 763 N.W.2d 384, 389 (2009).

Where an official is sued in his or her individual capacity, but is performing within the scope of employment, the requirements of the PSTCA apply. *Cole v. Wilson*, 10 Neb. App. 156, 627 N.W.2d 140 (2001). Despite a plaintiff's attempt to characterize a suit as being against an official in his or her individual capacity, where the allegations in reality concern actions performed within the official's scope of employment, the court considers the action to be against the official in his or her official capacity. *Id.* In the present case, Plaintiff's negligence claims against Deputy Van Buren in his individual capacity clearly relates to Van Buren's duties as a police officer. Plaintiff claims that his personal property was negligently damaged during Van Buren's search of Plaintiff's vehicle following a traffic stop. Likewise, any potential liability of Sheriff Dunning for the allegedly negligent search conducted by Van Buren must arise in Dunning's official capacity as Sheriff. It is apparent from the allegations in Plaintiff's pleadings that the alleged actions or inactions by Deputy Van Buren and Sheriff Dunning arose within the

scope of their employment with the Douglas County Sheriff's Office, and thus the PSTCA applies. *See Cole, supra*.

The Legislature, through the PSTCA, has removed, in part, the traditional immunity of subdivisions for the negligent acts of their employees. *McKenna v. Julian*, 277 Neb. 522, 527, 763 N.W.2d 384, 389 (2009). A negligence action brought under the PSTCA has the same elements as a negligence action against a private individual, i.e., duty, breach of duty, causation, and damages. *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 84, 727 N.W.2d 447, 453 (2007); *Cerny v. Cedar Bluffs Junior/Senior Pub. Sch.*, 262 Neb. 66, 72-73, 628 N.W.2d 697, 703 (2001). In order to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Doe v. Bd. of Regents of Univ. of Nebraska*, 280 Neb. 492, 506, 788 N.W.2d 264, 278 (2010). Although particularized allegations of negligence are unnecessary to state a claim, a court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations. *Kellogg v. Nebraska Dep't of Corr. Servs.*, 269 Neb. 40, 44, 690 N.W.2d 574, 578 (2005).

In the present case, Plaintiff has not alleged any facts which would support a plausible claim for negligence. The only allegations Plaintiff makes to support his claim for negligence are that his personal property was damaged during the search, and that the Defendants were negligent. Destruction of property may occur during execution of a search warrant or arrest warrant, during a warrantless search or arrest, or during a warrantless seizure. Officers executing search warrants on occasion must damage property to perform their duties. Kletter, Fern, *Destruction of Property as Violation of Fourth Amendment*, 98 A.L.R.5th 305 (Originally published in 2002). Mere negligence is not enough to establish liability for property damage



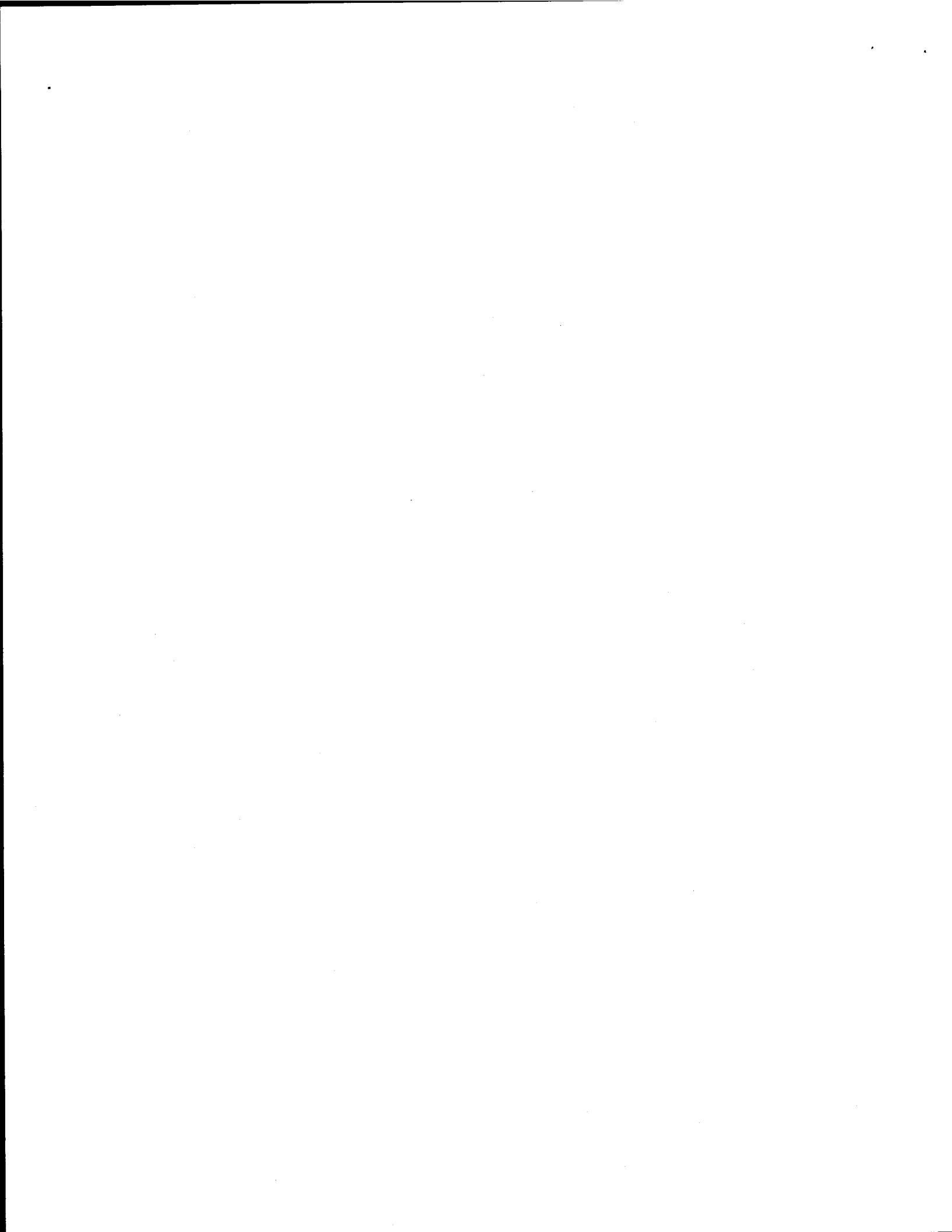


occurring in a lawful search. *See Cody v. Mello*, 59 F.3d 13, 16 (2d Cir. 1995) (noting, “It is well recognized that officers executing search warrants on occasion must damage property in order to perform their duty.”). The Court concludes that Plaintiff’s mere legal allegation that the Defendants were negligent and that his property was damaged is insufficient to state a claim for negligence. Therefore, Plaintiff’s first cause of action against all Defendants is dismissed.

**2. Defendant cannot maintain a discriminatory impact cause of action under Title VI of the 1964 Civil Rights Act.**

In his sixth cause of action, Plaintiff alleges that Defendant Douglas County Sheriff’s Office uses race or ethnicity of a motorist as a criterion in determining whether to stop and/or search motorists, which has a discriminatory impact on persons of color in Omaha and Douglas County, including Plaintiff, in violation of the regulations implementing Title VI of the 1964 Civil Rights Act. Defendants argue that Plaintiff’s sixth cause of action should be dismissed because there is no private right of action available to an individual to enforce discriminatory/disparate impact regulations promulgated under Title VI of the 1964 Civil Rights Act. The Court agrees with Defendants that Plaintiff cannot maintain a claim for discriminatory/disparate impact under Title VI.

Title VI of the 1964 Civil Rights Act provides, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C.A. § 2000d (West 2012). The regulations implementing Title VI provide that no program receiving federal assistance through the Department of Justice shall “utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or



substantially impairing accomplishment of the objectives of the program as respects individuals of a particular race, color, or national origin.” 28 C.F.R. § 42.104(b)(2).

Private individuals may sue to enforce Title VI and obtain both injunctive relief and damages. *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001); *See also, e.g., White v. Williams*, 179 F. Supp. 2d 405, 422-23 (D.N.J. 2002) (recognizing a Title VI private right of action for an intentional discrimination class action claim brought by African-American motorists against police department for racial profiling), and *Rodriguez v. California Highway Patrol*, 89 F. Supp. 2d 1131, 1139 (N.D. Cal. 2000) (denying a motion to dismiss plaintiff’s Title VI claim where plaintiffs alleged police department engaged in racial discrimination by stopping, detaining, interrogating, and searching motorists on the basis of race). However, the Supreme Court of the United States has made it clear that an individual can only bring a claim under Title VI and 28 CFR § 42.104(b)(2) for *intentional* discrimination, not disparate impact regulations. *Alexander*, 532 U.S. at 285. (emphasis added). *Sandoval* held that because Section 601 of Title VI (42 U.S.C. § 2000d), which does provide for a private right of action, prohibits only intentional discrimination, and because Section 602 of that Title (42 U.S.C. § 2000d-1) is directed at the agencies regulating the entities accepting federal funds rather than the entities themselves or the persons protected by Title VI, Department of Justice regulations promulgated under Sections 601 and 602 that prohibit disparate impacts cannot give rise to a private right of action under either section. The Section 601 private right of action is limited to actions for *intentional* discrimination, and Section 602 does not provide a private right of action. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 177-78, (2005) (“*Sandoval* held that private parties may not invoke Title VI regulations to obtain redress for disparate-impact discrimination because Title VI itself prohibits only intentional discrimination.”).

Plaintiff's Amended Complaint contains two separate causes of action against Defendants arising from alleged violations of the regulations implementing Title VI of the 1964 Civil Rights Act. In Plaintiff's fifth cause of action, he alleges that "Defendant Douglas County Sheriff's Office has *intentionally* discriminated against Plaintiff by authorizing and training its officers to stop and search motorists based on their race, in violation of Title VI of the 1964 Civil Rights Act." (emphasis added). In contrast, Plaintiff's sixth cause of action alleges Defendants' use of race or ethnicity of a motorist as a criterion in determining whether to stop and/or search a motorist "has a discriminatory *impact* on persons of color in Omaha and Douglas County, including Plaintiff, in violation of the regulations implementing Title VI of the 1964 Civil Rights Act." Reading Plaintiff's fifth and sixth causes of action together makes it clear that Plaintiff's sixth cause of action is actually claim for disparate impact, and not intentional discrimination, which has been foreclosed by the Supreme Court. *See Sandoval, supra*. Therefore, the Court finds Plaintiff fails to state a claim for disparate impact under Title VI, and dismisses his sixth cause of action against all Defendants.

**3. Plaintiff's Amended Complaint does not properly seek a declaratory judgment because there is no ongoing justiciable violation.**

Finally, Defendants seek to dismiss Plaintiff's Ninth cause of action, in which Plaintiff seeks a "judicial declaration" that Defendants' conduct has deprived and continues to deprive Plaintiff of his rights under the United States Constitution. Plaintiff alleges that "there is a real or actual controversy between the [P]laintiff and [D]efendants regarding whether [D]efendants may undertake to act as alleged herein." Defendants argue that this cause of action does not create an ongoing, justiciable violation because Plaintiff has made no claim that he has traveled to, or intends to travel to, or through, Douglas County, Nebraska. The Court concludes that regardless

of whether Plaintiff claims he intends to travel to or through Douglas County, Plaintiff has not properly sought a declaratory judgment.

In *Cole v. Clarke*, 8 Neb. App. 614, 598 N.W.2d 768 (1999), a prisoner committed to the Nebraska Department of Correctional Services sued the State and various State employees, alleging that as a result of the “wrongful and negligent acts” of the defendants, the plaintiff was illegally and unconstitutionally forced to endure personal injury in the forms of false imprisonment; “double celling”; denial of proper medical care; loss of liberty; lost wages and earning opportunities; “oppression under color of State law”; and mental, physical, and emotional pain and suffering. *Clarke*, 8 Neb. App. at 616, 598 N.W.2d at 770. The plaintiff claimed the defendants’ actions violated the Fourth and Fourteenth Amendments of the Nebraska and U.S. Constitutions. The plaintiff also sought a declaration that his constitutional rights had been violated and requested relief for damages. *Id.* The Nebraska Court of Appeals concluded the plaintiff did not properly seek a declaratory judgment. *Id.* at 618, 598 N.W.2d at 771. The Court of Appeals explained that a declaratory judgment is available only where there is a justiciable controversy. *Id.* The plaintiff’s petition sounded in tort and constitutional violations resulting from his imprisonment beyond a date which he alleges he should have been released. In order to prove his claim, the plaintiff would have to prove his detention was unlawful. *Id.* Thus, the Nebraska Court of Appeals did not view the plaintiff’s petition as properly seeking a declaration of rights “but only as attempting to state a tort claim for false imprisonment and a damage claim for constitutional deprivations.” *Id.*

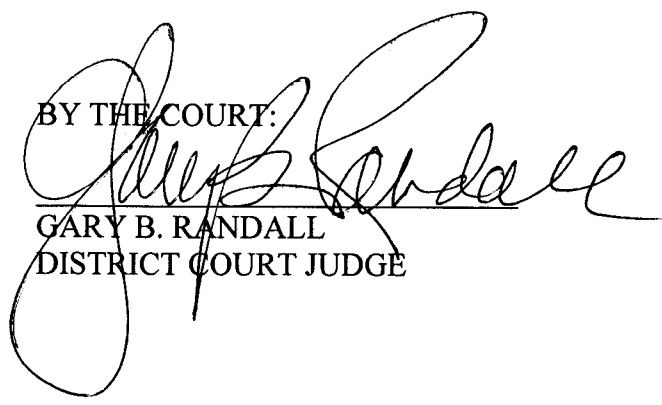
In the present case, Plaintiff’s ninth cause of action is nearly identical to the plaintiff’s claim for declaratory relief which the Nebraska Court of Appeals dismissed in *Clarke, supra*. Plaintiff seeks a “judicial declaration” that Defendants’ conduct has deprived and continues to

deprive Plaintiff of his rights under the U.S. Constitution. However, each of Plaintiff's eight other causes of action seek damages for various tort and constitutional violations resulting from alleged racial discrimination by the Douglas County Sheriff's Office. Plaintiff's second cause of action alleges Defendants' conduct violated the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution; Plaintiff's third cause of action alleges Defendants' conduct violated Plaintiff's rights under the Fourth and Fourteenth Amendments of the U.S. Constitution to be free from unreasonable searches and seizures; Plaintiff's fourth cause of action alleges that Douglas County Sheriff's office has implemented a policy that violates Plaintiff's Fourth and Fourteenth Amendment rights; Plaintiff's fifth cause of action alleges Defendants violation of Title VI of the 1964 Civil Rights Act by intentionally discriminating against Plaintiff on the basis of his race; Plaintiff's seventh cause of action alleges Defendants have interfered with Plaintiff's legal and constitutional right of travel in violation of 42 U.S.C. § 1985 (3) and his civil rights in violation of 42 U.S.C. § 1986; and finally, Plaintiff's eighth cause of action alleges Defendants have impeded Plaintiff's fundamental liberty interest in freedom of movement in violation of 42. U.S.C § 1983. Plaintiff is seeking compensatory and general damages against all Defendants. Each of Plaintiff's claims will necessarily require Plaintiff to prove an unlawful act of Defendants in violation of Plaintiff's constitutional rights. Thus, the Court concludes Plaintiff's ninth cause of action does not properly seek a declaratory judgment, and is dismissed against all Defendants.

**IT IS THEREFORE ADJUDGED, ORDERED, AND DECREED** that Defendants' Motion to Dismiss is granted. Plaintiff's First, Sixth, and Ninth causes of action are dismissed against all Defendants in their official and individual capacities.

DATED this 3 day of July 2013.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Gary B. Randall", written over a horizontal line. The signature is cursive and somewhat stylized.

GARY B. RANDALL  
DISTRICT COURT JUDGE

#15 FILED  
IN DISTRICT COURT  
DOUGLAS COUNTY NEBRASKA  
JUL 24 2013  
JOHN M. FRIEND  
CLERK DISTRICT COURT