

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DEBRA JONES, et al.,)	
)	
)	
Plaintiffs,)	
)	
v.)	No. 1:13-cv-00227-MBH
)	
THE UNITED STATES OF AMERICA,)	Judge Richard A.
Hertling)	
)	
Defendant.)	

RESPONSE TO MOTION FOR SUMMARY JUDGMENT

I. THE UNITED STATES MOTION FOR SUMMARY JUDGMENT IS DEPENDENT UPON ITS ASSERTION THAT THIS COURT CANNOT INDEPENDENTLY REVIEW THE EVIDENCE. THAT ARGUMENT IS CONTRARY TO THE APPELLATE COURT MANDATE, AND CONTRARY TO THE LAW OF COLLATERAL ESTOPPEL

In its response brief in the prior appeal in this case, the United States started its “Summary of Argument” as follows: ¹

“Todd Murray died after he shot himself in the head. . . . The only witnesses to that shooting were state and local police officers involved in the pursuit. Those officers [sic]² testified that Mr. Murray shot himself.”

¹ In its section V of its brief, the United States sets out 9 statements of undisputed facts. Those are undisputed. The United States also makes other assertions of fact in other areas of its brief, many of which are not admitted, and some of which are improper based upon this Court’s spoliation order. The United States also falsely asserts that the Murray family did not timely response to request for admission. The Murray Family did timely respond, and it admitted most of the request and objected to some as legal issues.

² Only one officer testified that Mr. Murray shot himself. That officer was Norton, the person that the Court of Appeal, in this case, noted may have been shown to have killed Mr. Murray but for the destruction of evidence.

Jones v. United States, Fed. Cir App., Resp. Brief at *6-7.

Defendant asserted that this Court could not weigh the evidence for itself, that it was required to conclude that Mr. Murray had shot himself because a court in Utah had reached that conclusion after it had denied any spoliation sanctions against Norton and his friends and colleagues.

The Murray Family disagreed with Defendant's collateral estoppel argument.

The Court of Appeals agreed with the Murray Family. It held:

But for the destruction of the cited evidence, Jones may have shown that Murray was, in fact, shot by Norton.

Jones v. United States, 846 F.3d 1343, 1363 (Fed. Cir. 2017) (emphasis added)

The Court of Appeals provided a clear mandate to this Court.

If it determines that sanctions are appropriate and do change the evidentiary landscape, the CFC should *independently* consider Jones's substantive allegations of bad men violations.

Id. (emphasis added).

This Court has now imposed sanctions, and those sanctions change the evidentiary landscape. This Court is *required*, as a matter of appellate mandate, to independently consider the Murray Family's argument. It is required to independently assess the evidence. It can no longer rely upon the Utah District Court's conclusion.

Dispositively, and making short work for this Court on Defendant's misguided motion, Defendant's argument is wholly dependent upon its return to its

prior, rejected, collateral estoppel argument. It does not argue that when this Court independently weighs the evidence, this Court should conclude that summary judgment is proper. U.S. Br. §1. Defendant instead argues that this Court cannot assess the evidence. *Id.*

This Court must reject Defendant's argument, and therefore must deny Defendant's motion for summary judgment.

Ever since this case was remanded, the United States has been fighting to prevent this Court from independently considering the evidence. Defendant is, for good reason, scared of this Court reviewing the evidence. It is, for good reason, scared to have Norton, at long last, testify in an open court, and to have he and his friends and colleagues try to explain away their contradictory testimony regarding what happened on April 1, 2007. It is, for good reason, not wanting the federal investigator who chose not to investigate the shooting (and then lied to the Murray family after making that decision not to investigate) testify. Norton's story depends on Norton's credibility. He was the only witness. His story is contrary to other's stories. His story is contrary to Mr. Murray's bloodless left hand.

There are two separate reasons why this Court is required to independently review the evidence, now that it has imposed spoliation sanctions.

First, this Court is required to scrupulously follow the appellate court mandate. Defendant will not dispute that legal point. The appellate court mandate is quoted above. It is clear.

This Court issued a spoliation order which “changed the evidentiary landscape” from the evidentiary record that the Federal District Court in Utah had before it. While the parties vastly disagree about how *much* the order changed the evidentiary landscape, there is no good faith argument that the landscape is unchanged. That, by itself, as a matter of law, bars Defendant’s current motion for summary judgment.

Second, the appellate court mandate was based upon the appellate court’s underlying review of the application of collateral estoppel to the facts of this case. As the Appellate Court explained, this Court is not bound by the Utah Court’s analysis unless the evidence in the two courts is the same. The evidence is not the same.

II. THIS COURT MUST DENY SUMMARY JUDGMENT BECAUSE DEFENDANT HAS NOT EVEN MADE AN ARGUMENT REGARDING MOST OF THE CRIMES THAT THE BAD MEN COMMITTED.

Independent of the above, this Court must deny summary judgment because Defendant did not provide any argument for summary judgment on most of the crimes that the Bad Men are alleged to have committed.

Instead, Defendant attempts to reduce this case down to whether Norton shot Mr. Murray at close range, and Plaintiff then asserts that the crimes from Norton shooting Mr. Murray must be rejected based upon the Utah District Court's decision. Even if we assume, contrary to the legal analysis above, that Defendant were to prevail on the legal issue presented in section I of this brief, that does not support Defendant's conclusion that the Bad Men did not commit the other crimes related to a coverup, to trespass, and other crimes. Some of the crimes alleged by Plaintiff are dependent on a conclusion that Norton shot Mr. Murray, but most of the crimes are not. When courts analyze crimes, they do so based upon the elements of the crime. Most of the crimes that Plaintiff alleges do not contain as an element that Norton shot Mr. Murray. They instead are crimes regarding coverup, trespass, unlawful arrest or attempted arrest, submission of false police reports as part of the cover-up, and related crimes.

Defendant chose not to provide any argument regarding most of those crimes. For those that it did provide an argument, its argument is only a weaker version of its collateral estoppel argument, discussed in section I, above. Its failure to provide an argument precludes summary judgment.

Footnote 7 of Defendant's motion to dismiss is disingenuous. In that footnote, Defendant states that it is not going to even make an argument about many of the crimes that the Bad Men are alleged to have committed.

For this reason alone, its motion to dismiss must be denied. Defendant has the burden on its motion for summary judgment. It cannot shift the burden to the Murray Family.

Additionally, many of the crimes that Defendant refuses to discuss are crimes that are very well-supported by the evidence. Defendants' discussion in footnote 7 and its other discussions in which it makes conclusory assertions regarding the cover-up appear to be based upon a naïve believe that the defendants could not have committed any crimes related to a coverup unless there was a murder that they were covering up. Defendant in this case is not represented by a prosecutor or public defender, but by attorneys from the Department of Natural Resources. But whether innocent or not, their decision not to even provide an argument bars summary judgment.³

As we see in the news every month, a person can commit any of the many federal crimes regarding covering up facts even if the facts they are covering up were to turn out not to be a crime. For example, Martha Stewart was not convicted of insider trading. She was convicted because, fearing the potential of an insider trading charge, she lied to federal investigators. Two presidents have been impeached in the last 25 years for obstruction of justice; and President Nixon is often

³ Defendant also asserts that any off-reservation coverup is not actionable under the Bad Man clause, because, it asserts, there was no on-Reservation cover-up. For the reasons discussed above, Plaintiff disagrees. There was an on-Reservation cover-up which then continued off the Reservation.

the first example used when someone explains the adage that the cover-up is often worse than the crime. *E.g., Bridgeview Health Care Center, Ltd. v. Clark*, 2012 WL 12033940 (N.D. Ill. 2012).

For example, Defendant asserts that there is no plausible basis to allege obstruction of a criminal investigation. It is plainly wrong. It is only necessary for the Bad man to have 1. *believed* that a witness might give information to federal officials, and to then 2) a) prevented the witness from testifying or b) encouraged the witness to lie to an investigator or c) encouraged a witness not to cooperate with a federal investigation. *United States v. Leisure*, 844 F.2d 1347 (8th Cir. 1988) (element (2)(a) *United States v. Coiro*, 922 F.2d 10008 (2d Cir. 1991) (element (2)(b); *United States v. Murray*, 751 F.2d 528 (9th Cir. 1985) (element 2(c)). See also *United States v. Spalliero*, 602 F. Supp. 417 (conviction for giving intentional evasive testimony to a grand jury). The crime does not require that the encouragement or attempt to obstruct was successful. *E.g. Coiro, Murray; United States v. Cortese*, 554 F. Supp. 1227 M.D. Pa. 1983)

There is, at the very least, a very strong claim that the Bad men committed that crime. Any coverup at all meets the definition of this relatively broad crime.

Similarly Defrauding the government, is a broad crime, that the Defendants appears to have committed. “Defrauding” within meaning of statute prohibiting conspiracies to defraud the United States, means obstructing operation of *any*

government agency by *any* deceit, craft or trickery, or at least by means that are dishonest. *United States v. Caldwell*, 989 F.2d 1056 (9th Cir. 1993). This Court cannot possibly reject that claim without a motion by the United States and legal argument.

Defendant also alleges that the Defendants could not possibly have committed wire fraud. Wire fraud is also a broadly defined crime, and if there was a coverup, then there was wire fraud. The elements of wire fraud require person to engage in interstate telephone conversation for purpose of executing fraudulent scheme. *Seaman v. Arvida Realty Sales, Inc.*, 910 F.Supp. 581 (M.D. Fla. 1995)

Plaintiff defines Plaintiff's claims. Defendant does not get to define Plaintiff's claims. Defendant does not get to change eliminate Plaintiff's claims, and thereby pick and chose what claims it wants to discuss.

In recent discovery, Defendant asked Plaintiff to list the crimes that it believed the Bad Men had committed. Plaintiff provided that list. It included many crimes that were part of the cover-up. Instead of providing an argument regarding those other crimes, Defendant inexplicably asserts that Plaintiffs have no good faith basis for alleging a conspiracy to cover up the facts of the events on April 1, 2007.

On this point, Defendant is seeking to retreat from its own prior admission in its brief to the Court of Appeal. There, it repeatedly acknowledges that the Murray Family alleged a wrongful shooting and alleged that the Murray Family alleged that

the cover-up was one of the “‘wrongs’ that they have alleged that fall under the ‘bad men clause.’” 2016 WL 1181968 at *12.

There are many reasons the Murray Family does not believe Norton’s uncorroborated story: lack of blood on Mr. Murray’s hand, etc. But one of the reasons is that it appears that the other officers at the scene either did not believe Norton or knew Norton was lying. They did not want to gather the evidence that they knew, or were concerned would or might, disprove Norton’s uncorroborated story.

They chose not to investigate; and as specific to officer Ashdown, he not only chose not to investigate but he had the audacity to tell Mr. Murray’s mother, Plaintiff Jones, that he would make a thorough investigation. He knew that was required, but then chose not to do it.

Even if Norton did not shoot Mr. Murray, there were numerous crimes by Norton, by Ashdown, and by others on and around April 1, 2007. Defendant’s refusal to even brief the cover-up requires that its motion for summary judgment must be denied.

Defendant’s assertion to the contrary would be a shock to the numerous federal criminal prosecutors who regularly bring such cases. Further, and apparently unknown to the federal Natural Resources Section attorneys who filed the motion for summary judgment, co-participants in a conspiracy each have liability.

Defendant also dismisses, out of hand, that the officers committed kidnapping, assault, reckless endangerment, homicide by failing to provide medical care, or any other crime of violence and conspiracy to commit those crimes. U.S. Br. at 21-29. In doing so, the United States admits that for some or all of these crimes, the United States would have to show that the officers were acting lawfully. *Id.* at 21. Sadly, the United States now asserts that even though the State and County officers were more than 25 miles outside of their jurisdiction, and were not cross-deputized, the officers were acting lawfully. Tribes should expect the United States, the trustee for tribes, to never make an argument like that. Be that as it may, the United States sole support for its attempt to diminish tribal sovereign authority is an assertion that the District court in Utah issued a binding holding on that point; and that this Court is bound by that ruling. Defendant is wrong on both counts. The United States cites to a District Court ruling on a federal constitutional claim, not the standard that would apply to the Bad Men for criminal defense, and as discussed above, this Court is required to make its own analysis of the evidence, now that the evidentiary landscape has changed. Further, the District Court did not make any findings related to the federal officers, who are also alleged to be bad men, and in fact the District Court ruled in favor of the state and county officers in part because the federal officers had legal responsibility in this case.

Defendant attempts to hide that flaw in its argument, but that flaw cannot be hidden, and summary judgment for the Bad Men who are federal officers cannot be granted. For example, when it discusses conspiracy, U.S. Br. at 26, Defendant does not dispute that the federal bad men could have conspired with each other, and it admits that the District Court did not even make any ruling regarding whether there was such a conspiracy. Similarly, the District Court did not issue any holding regarding the federal officers' potential liability for other crimes or wrongs.

III. DEFENDANT'S MOTION MUST BE DENIED BECAUSE DEFENDANT HAS NOT CARRIED ITS BURDEN ON ITS LEGAL ARGUMENT REGARDING INTERPRETATION OF THE TREATY WITH THE UTE TRIBE.

The law governing interpretation of treaties is well established. The treaty must be interpreted as the members of the Ute Tribe would have understood the Treaty.

For this Court to interpret the Tribe's treaty, it would need the relevant "legislative history." In *Minnesota v. Mille Lacs Band of Chippewa Indians*, the State of Minnesota made an argument similar to Defendant's argument here, seeking to interpret a tribal treaty as if it were any other federal statute. The Supreme Court rejected that argument, and it held:

to determine whether this language abrogates Chippewa Treaty rights, we look beyond the written words to the larger context that frames the Treaty, including "the history of the treaty, the negotiations, and the practical construction adopted by the parties."

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999)

The Court further explained that this unique rule for interpreting tribal treaties was based upon the Court's repeated holding that this method of interpretation is required because "we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them. *Id.* Determining the meaning of a tribal treaty is a laborious task. *E.g. Yankton Sioux Tribe v. S. Miss. Waste Mgmt. Dist.*, D.S.D. case CIV94-4217 (court created voluminous record, and case involved multiple appeals over 16 years, regarding the meaning of the Yankton Tribe's treaty). It would include the minutes from the time of treaty formation, historical information, and potentially information regarding how concepts in the treaty would have translated into the Ute language.

Defendants have not provided any of that information. Instead, Defendants assert that how their 21st century attorneys would interpret the treaty based upon 21st century legal education controls how the Utes in 1863 would interpret the treaty. That is not the methodology that this Court is required to apply. This is Defendant's motion for summary judgment, While the burden will later shift to the Murray Family as plaintiff, it is currently with the Defendant, and Defendant has failed to carry its burden of proof on their legal assertion regarding of how the Utes would have interpreted the treaty.

For example, Defendant asserts that Ute Tribal members would not have viewed coverup of a crime against a member as a wrong against the member. But

the United States fails to discuss the origin of the Bad Man clause, or how the Utes would have understood that clause, and the Murray Family contends that based upon the history and purpose, e.g. *A Bad Man is Hard to Find*, 127 Harv. L. Rev. 2521, 2525 (2014), that the Utes would have most definitely have viewed a coverup as a wrong upon the person.

Similarly, and much more obviously, the United States admits that Mr. Murray's body was taken off of the Reservation and desecrated by the Bad Men. The Murray Family contends that any Ute member, or any but the most adamant atheists, would view that as a crime against the person whose body was desecrated, and that the Utes would have understood that desecration to be actionable under the Bad Man clause.

CONCLUSION

This Court will follow the Court of Appeals mandate. Under that mandate, it must deny the United States motion

Dated this 17th day of June, 2020.

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