IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DASON MUSICK,

Plaintiff,

v. Case No. 2:24-cv-02299-DDC-TJJ

PRAIRIE BAND OF THE POTAWATOMI NATION; TANNER LEMERY, in his individual capacity; DEREK TUCK, in his individual capacity; TERRY CLARK, in his individual capacity; THE BOARD OF COUNTY COMMISSIONERS OF JACKSON COUNTY, KANSAS; JACKSON COUNTY SHERIFF TIM MORSE, in his official capacity,

Defendants.

Reply re *Doc. 15*, Motion for Judgment on the Pleadings

Defendants Board of County Commissioners of the County of Jackson, Kansas (BOCC or Jackson County) and Sheriff Tim Morse (collectively, the Jackson County Defendants) submit this reply in support of their motion for judgment on the pleadings, *Doc. 15.*

Argument and Authorities

II. The BOCC is not a proper party.

The response misses the point. The citation and discussion of *Bledsoe v. Board of County Commissioners of County of Jefferson, Kansas*, 501 F. Supp. 3d 1059, 1139-44 (D. Kan. 2020), *aff'd in part, rev'd in part and remanded* 53 F.4th 589 (10th Cir. 2022), and *Couser v. Gay*, 959 F.3d 1018 (10th Cir. 2020) are inapposite and misplaced. The issue addressed in those cases was the availability of Eleventh Amendment Immunity to the sheriff. This court expressly declined to decide the issue as to the propriety of suing both the Sheriff and the BOCC where for a *Monell* municipal liability claim. 501 F. Supp. 3d at 1144. Further, when applying Kansas law, the court follows the decisions of the state's appellate courts. *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 665–66 (10th Cir. 2007). If no controlling decision exists, the court is to predict what the Kansas

Supreme Court would do, "seek[ing] guidance from decisions rendered by lower courts in the relevant state, … ." *Id.* at 666 (internal quotation marks and citations omitted). Here, the controlling decision is *Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 287, 261 P.3d 943 (2011), as discussed in this Court's on-point decision in *Gardiner v. McBryde*, No. 15-3151-DDC-JPO, 2020 WL 42272, at *7 (D. Kan. Jan. 3, 2020).[1] Jackson County is not a proper party for any of the claims asserted.

III. The statute of limitations bars a Fourth Amendment claim for false arrest/false imprisonment against Jackson County and Sheriff Morse.

Plaintiff's response does not address or refute the fact his claims against Jackson County and Sheriff Morse are barred by the statute of limitations. The failure constitutes either an abandonment or a waiver. *Hinsdale v. City of Liberal*, 19 Fed. Appx. 749, 768-69 (10th Cir. 2001) (affirming district court's ruling that plaintiff abandoned claim by failing to address it in response to motion for summary judgment); *Palmer v. Unified Gov't of Wyandotte Cty./Kan. City*, 72 F. Supp.2d 1237, 1250–51 (D. Kan. 1999) ("[T]he court deems plaintiff's failure to respond to an argument raised in defendants' papers tantamount to an express abandonment of any such claim.").

Without regard to abandonment/waiver, for the balance of the claims plaintiff's theory seems to be the actions of the Prairie Band Nation of Potawatomie (PBNP) and its individual police officers are "attributable to" Sheriff Morse. Not so.

"Permitting" the police officers of a sovereign Indian Nation to "detain, arrest, and transport individuals outside of the Reservation to the Jackson County Jail to be prosecuted in Jackson County courts" does not make the conduct of the PBNP or its officers attributable to

[1] This Court observed:

> Plaintiff's claims against the Board fail as a matter of law. Under Kansas law, county commissioners are "not legally responsible for the hiring or training of personnel or promulgation of procedures ... particularly with regard to jail operations."

Gardiner v. McBryde, 2020 WL 42272, at *7 (quoting *Estate of Belden,* 46 Kan. App. 2d 247, 287)).

Sheriff Morse and the Complaint does not allege facts supporting any such conclusion.

For a private individual's conduct (here, the conduct of the PBNP police officers) to constitute state action, "the private party must have acted together with or obtained significant aid from State officials or engaged in conduct otherwise chargeable to the State." *Scott v. Hern*, 216 F.3d 897, 906 (10th Cir. 2000). Here, no fair attribution of the PBNP's conduct or that of its officers to Sheriff Morse. The Complaint expressly alleges the PBNP and its officers are acting *without* authorization or agreement by Sheriff Morse. *See Doc. 1*, ¶¶ 17 ("knew that there was no such agreement between PBNP and a state, county, or city law enforcement agency"), 86 ("did not have any agreement with a law enforcement agency to exercise such authority"), and 94 ("did not have legal authority to act as law enforcement because it did not have any agreement with a law enforcement agency to exercise such authority"). In fact, the Complaint does not allege that Sheriff Morse had knowledge of any of the activities of the PBNP's officers connected with Plaintiff. What is alleged is that Musick was booked into the Jackson County jail on the basis of a probable cause affidavit. Plaintiff alleges the affidavit contains false statements. There is no allegation (nor could there be) that Sheriff Morse knew the probable cause affidavit (which served as his basis for housing Musick in his jail) contained false statements. *See Wolford v. Lasater*, 78 F.3d 484, 489 (10th Cir. 1996) (plaintiff bears the burden of alleging facts that defendant acted on false statements "knowingly, or with reckless disregard for the truth") (quoting *Franks v. Delaware*, 438 U.S. 154, 155 (1978)).

The public function test has no application. There's no allegation Sheriff Morse delegated his law enforcement authority to the PBNP or its officers. Sheriff Morse does <u>not</u> deputize PBNP Officers as Sheriff's deputies. There is no nexus between Sheriff Morse and the conduct of the PBNP Officers. As alleged, the PBNP Officers possess and exercise law enforcement authority on the reservation. As discussed in the opening brief, it is proper (without regard to K.S.A. 22-2401a)

for tribal authorities to arrest non-Indian offenders on the reservation and tender them to the appropriate local authorities for prosecution. Sheriff Morse, however, is not the prosecuting authority and the Complaint alleges no facts that Sheriff Morse initiated, continued, or procured criminal proceedings against the plaintiff. *See Gaschler v. Scott County*, 963 F.Supp. 971, 979 (D.Kan. 1997).

Much like a sheriff is not responsible for the conduct of police officers employed by a city within the county—whether within without the city's boundaries—Sheriff Morse is not responsible for the conduct of the PBNP Officers on or off the PBNP's Reservation.

IV. The complaint fails to allege a malicious prosecution claim against Jackson County or Sheriff Morse.

The response misses the point. Sheriff Morse did not detain or arrest Musick nor did he continue or procure the prosecution of Musick—nor did any of Sheriff Morse's deputies. Again, the Complaint is devoid of any factual allegations that Jackson County or Sheriff Morse caused Musick's prosecution, or that he acted with malice. The response does not address the fact the Complaint does not allege a lack of probable cause for the disorderly conduct and/or criminal trespass charges. Even if the DUI charge was faulty, there was still probable cause for the detention, arrest and prosecution. Nothing Sheriff Morse did, and none of his policies, practices, and/or customs was the moving force behind the constitutional deprivation alleged by Musick. *See, e.g.*, *Gaschler v. Scott County*, 963 F.Supp. 971, 979 (D.Kan. 1997) (elements for malicious prosecution under § 1983 and Kansas law are the same and include requirement that plaintiff prove the defendant initiated, continued, or procured criminal proceedings against the plaintiff); *Lindenman v. Umscheid*, 255 Kan. 610, 624, 875 P.2d 964 (1994) (malicious prosecution requires showing defendant initiated, continued, or procured the proceeding of which complaint is made); Further, malice as required for a malicious-prosecution claim requires that the defendant acted either "knowingly" or with "reckless disregard for the truth" with respect to statements in an

affidavit. *See Sanchez v. Hartley*, 810 F.3d 750, 755–56 (10th Cir. 2016). Plaintiff has not alleged or shown any such facts against Jackson County defendants.

V. The Complaint fails to allege a negligence claim against Jackson County or Sheriff Morse. There was no duty owed Jackson County or Sheriff Morse that was breached and any such claim is time-barred by the two-year statute of limitations.

The response ignores the fact the Complaint does not allege that any of the alleged PBNP officers were Sheriff's deputies or employees. Sheriff Morse has no duty to train or supervise Tribal police officers. There is no negligence claim against the county or Sheriff Morse.

VI. The state law false imprisonment claim fails. It is time-barred and the complaint does not allege that plaintiff's detention was without probable cause.

The response does not address the time-barred false imprisonment claim or the fact that probable cause existed for the arrest and detention of Musick. Those claims are abandoned or waived. *Hinsdale*, 19 Fed. Appx. At 768-69; *Loudon v. K.C. Rehab. Hosp., Inc*., 339 F. Supp. 3d 1231, 1242 (D. Kan. 2018) (claim deemed abandoned by plaintiff when failing to respond to Defendant's arguments in dispositive motion).

Conclusion

Jackson County and Sheriff Morse are entitled to judgment on the pleadings.

Fisher, Patterson, Sayler & Smith, LLP
3550 SW 5th Street | Topeka, Kansas 66606
Tel: (785) 232-7761 | Fax: (785) 232-6604
dcooper@fpsslaw.com | cbranson@fpsslaw.com
tokeefe@fpsslaw.com

s/David R. Cooper
David R. Cooper #16690
Charles E. Branson #17376
Timothy A. O'Keefe #18525
Attorneys for Defendants Board of County Commissioners of Jackson County and Sheriff Tim Morse

Certificate of Service

On September 23, 2024, the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to counsel of record:

Christopher S. Dove, #21251 | Brennan P. Fagan, #20430
FAGAN & EMERT, LLC
800 New Hampshire Street, Suite 110
Lawrence, Kansas 66044
Tel: (785) 331-0300 | Fax: (785) 331-0303
cdove@faganemert.com
bfagan@faganemert.com
ATTORNEYS FOR PLAINTIFF

Rachel E. North, D. Kan. #79121
STINSON LLP
1201 Walnut Street, Suite 2900
Kansas City, Missouri 64106
Tel: (816) 691-3162 | Fax: (816) 412-8195
rachel.north@stinson.com
ATTORNEY FOR DEFENDANTS TERRY CLARK, TANNER LEMERY, AND DEREK TUCK

s/David R. Cooper