EXHIBIT B

HOnly the Westlaw citation is currently available.

United States District Court,
S.D. Texas,
Galveston Division.
Dana ALEGRIA, Plaintiff,
v.
The State of TEXAS, Larry Williams, Individually and in His Official Capacity, and Eddie Kelly, Individually and in His Official Capacity, Defendants.
Civil Action No. G-06-0212.

March 7, 2008.

Anthony P. Griffin, Attorney at Law, Galveston, TX, for Plaintiff.

Larry Williams, pro se.

MEMORANDUM OPINION AND ORDER

SIM LAKE, District Judge.

***1** Plaintiff, Dana Alegria, brings this action for sexual harassment and violation of rights guaranteed by the Fourteenth Amendment to the United States Constitution against defendants, the State of Texas, Eddie Kelly, and Larry Williams, pursuant to Title IX of the Education Act Amendments of 1972, 20 U.S.C. § 1681, *et seq.* (Title IX), and 42 U.S.C. § 1983. Pending before the court are Plaintiff, Dana Alegria's, Motion for Reconsideration of the Memorandum Opinion and Order (Docket Entry No. 41) and Plaintiff's, Dana Alegria, Motion for Default Judgment Directed Against Larry Williams (Docket Entry No. 40). For the reasons explained below, plaintiff's motion for reconsideration will be denied, and plaintiff's motion for default judgment will be denied.

I. *Factual and Procedural Background*

Plaintiff originally brought this action for sexual harassment and violation of rights guaranteed by the Fourteenth Amendment to the United States Constitution on April 4, 2006, against defendants County of Galveston, Texas, and Larry Williams, individually and in his official capacity (Docket Entry No. 1). Plaintiff's original complaint sought compensatory damages, declaratory judgment, and implementation of a policy designed to protect female probationers, attorney's fees, costs of court, and all legal and equitable relief to which she might be deemed entitled. On June 27, 2006, plaintiff filed her First Amended Complaint and Voluntary Stipulation of Dismissal of the County of Galveston (Docket Entry No. 9). Plaintiff's First Amended Complaint explained that

> [t]his amended complaint is filed in order to dismiss one Defendant, County of Galveston, Texas, and to modify the complaint against Larry Williams to reflect that the complaint is brought against him in his official capacity as opposed to his individual capacity, and to bring the State of Texas into the lawsuit as an entity.[FN1]
>
> FN1. Plaintiff, Dana Alegria's, First Amended Complaint and Voluntary Stipulation of Dismissal of the County of Galveston, Docket Entry No. 9, p. 1.

Like her Original Complaint, plaintiff's first amended complaint alleged claims for sexual harassment and violation of rights guaranteed by the Fourteenth Amendment to the United States Constitution, and sought compensatory damages, declaratory judgment, and implementation of a policy designed to protect female probationers, attorney's fees, costs of court, and all legal and equitable relief to which she might be deemed entitled.

On September 7, 2006, the court dismissed the plaintiff's § 1983 claims for compensatory damages against both the State of Texas and Larry Williams in his official capacity, but declined to dismiss any § 1983 claims for prospective injunctive relief that the plaintiff might have asserted or attempted to assert against Williams.[FN2]On December 1, 2006, the court granted plaintiff's motion to amend (Docket Entry No. 24), and on December 4, 2006, plaintiff filed her Third Amended Complaint (Docket Entry No. 25). Plaintiff's third amended complaint asserted Title IX and § 1983 claims against the State of Texas and against Kelly and Williams in both their official and

individual (i.e., personal) capacities. On September 11, 2007, the court dismissed the § 1983 claims asserted against Kelly in his individual (i.e., personal) capacity after concluding that he was entitled to qualified immunity for those claims, but declined to dismiss the Title IX claims asserted against the State of Texas and/or the individual defendants in either their official or their personal capacities, and ordered the plaintiff to show cause "why the court should not *sua sponte* grant summary judgment or dismiss all of the remaining claims except for the § 1983 claim for compensatory damages asserted against Williams in his individual [i.e., personal] capacity."[FN3]On September 28, 2007, the plaintiff filed Plaintiff, Dana Alegria's, Pleading in Response to Court's Order to Show Cause Showing Factual and Legal Basis for Title IX Claims (Docket Entry No. 35), in which she contested the court's proposal to grant summary judgment on her Title IX claims but stated that she was not seeking prospective injunctive relief pursuant to § 1983. On October 22, 2007, plaintiff filed a second response to the court's show cause order, which appears to have duplicated the first response (Docket Entry No. 36). On November 2, 2007, the court *sua sponte* granted the defendants summary judgment on the Title IX claims that plaintiff had asserted against them, and construed plaintiff's statement that she was not seeking prospective injunctive relief as a statement that she had abandoned any claim that she had asserted or attempted to assert for prospective injunctive relief pursuant to 42 U.S.C. § 1983.[FN4]

FN2. See Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, Docket Entry No. 15, at pp. 2-4.

FN3. Memorandum Opinion and Order, Docket Entry No. 34, p. 38.

FN4. Memorandum Opinion and Order, Docket Entry No. 37, pp. 13-38.

II. *Motion for Reconsideration*

***2** Plaintiff moves the court to reconsider its November 2, 2007, Memorandum Opinion and Order granting summary judgment to the defendants on her Title IX claims because new evidence developed during the deposition of Rebecca Alaniz taken on December 18, 2007, raises a genuine issue of material fact for trial.

A. Standard of Review

The Federal Rules of Civil Procedure do not recognize a "motion for reconsideration," and plaintiff does not address the standard of review this court should apply with respect to the pending motion to reconsider. In this circuit motions to reconsider grants of summary judgment are treated as either a motion to alter or amend judgment under Rule 59(e) if filed within ten days of the judgment at issue, or a motion for relief from judgment or order under Rule 60(b) if filed more than ten days after the judgment at issue. *See* *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 667 (5th Cir.) (en banc), *cert. denied sub nom.* *Southern Pacific Transportation Co. v. Harcon Barge Co.*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). Courts considering such motions are duty-bound to "strike the proper balance between two competing imperatives: (1) finality, and (2) the need to render just decisions on the basis of all the facts." *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 355 (5th Cir.1993) (citing *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir.1990), *cert. denied*, 510 U.S. 859, 114 S.Ct. 171, 126 L.Ed.2d 131 (1993), *overruled on other grounds by* *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir.1994)). When additional evidence not part of the summary judgment record is submitted in support of a motion for reconsideration, courts consider the reasons for the moving party's default, the importance of the omitted evidence to the moving party's case, whether the evidence was available before the party responded to the summary judgment motion, and the likelihood that the nonmoving party will suffer unfair prejudice if the case is reopened. *See* *Lavespere*, 910 F.2d at 174. "[A]n unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration." *Templet v. HydroChem, Inc.*, 367 F.3d 473, 479 (5th Cir.), *cert. denied sub nom.* *Irvin v. Hydrochem, Inc.*, 543 U.S. 976, 125 S.Ct. 411, 160 L.Ed.2d 352 (2004).

B. Analysis

In support of her motion to reconsider plaintiff has submitted the December 18, 2007, deposition testimony of Rebecca Alaniz, which she argues contradicts the following excerpt from the court's Novem-

ber 2, 2007, Memorandum Opinion and Order:

> the undisputed evidence is that when Sanchez learned of Alaniz's complaint she did not fail to take any action but, instead, met with Alaniz to investigate the complaint. When Alaniz refused to verify the complaint to Sanchez, Sanchez took no further action. Although Sanchez's response to Alaniz's complaint did not succeed at correcting Williams' misconduct, in light of Alaniz's refusal to verify the complaint and absent any evidence that Sanchez had received any other complaints about Williams' misconduct, the court is not persuaded that Sanchez's response to Alaniz's complaint was unreasonable under the known circumstances.[FN5]
>
> FN5. Memorandum Opinion and Order, Docket Entry No. 37, p. 26.

***3** During her December 18, 2007, deposition Alaniz testified that she had been a probationer under Williams' supervision and that while she was being supervised by Williams, Williams subjected her to inappropriate sexual conduct that was both verbal and physical in nature. Alaniz testified that she was eventually transferred to the supervision of another probation officer, Ms. Henry, and that during her first meeting with Henry she reported Williams' abusive conduct. When told that the state had submitted evidence showing that Henry reported her complaint about Williams to her supervisor, Magdalene Sanchez, and that Sanchez had attempted to meet with her (i.e., with Alaniz) to investigate the complaint but that she (i.e., Alaniz) had refused to verify the complaint, Alaniz testified that the state's evidence was false because after she complained to Henry about Williams no one ever contacted her to investigate her complaint, and she never refused to talk to anyone about it. Alaniz also testified that once she attempted to contact the district attorney's office about Williams but was never called back.[FN6]

> FN6. Oral Deposition of Rebecca Alaniz, December 18, 2007, Exhibit No. 20 attached to Plaintiff, Dana Alegria's, Motion for Reconsideration of the Memorandum Opinion and Order, Docket Entry No. 41, pp. 6-13.

1. *Applicable Law*

Plaintiff filed her motion for reconsideration on January 4, 2008, over two months after November 2, 2007, the date on which the court granted the summary judgment at issue. Because plaintiff's motion was filed more than ten days after the judgment she seeks to have reconsidered, her motion must be considered under Rule 60(b), which allows courts to reopen cases when the party seeking relief from judgment demonstrates

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for new trial under Rule 59(b); (3) fraud ..., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged ..., or (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b).*See Harcon Barge,* 784 F.2d at 667; *Lavespere,* 910 F.2d at 174.

Plaintiff offers Alaniz's testimony as new evidence because it was developed during a deposition taken on December 18, 2007, over six weeks after the summary judgment ruling she seeks to have reconsidered. Since plaintiff's motion for reconsideration is based on the submission of new evidence, the court concludes that it must be considered under Rule 60(b)(2). To prevail under Rule 60(b)(2), "a movant must demonstrate: (1) that it exercised due diligence in obtaining the information; and (2) that the evidence is material and controlling and clearly would have produced a different result if present before the original judgment." *Goldstein v. MCI WorldCom,* 340 F.3d 238, 257 (5th Cir.2003). The movant must show that she exercised due diligence in seeking the relevant evidence because the "[u]nexcused failure to produce the relevant evidence at the original trial can be sufficient without more to warrant denial of a[R]ule 60(b) motion." *Provident Life & Accident Ins. Co. v. Goel,* 274 F.3d 984, 999 (5th Cir.2001)."A judgment will not be reopened if the evidence is merely cumulative or impeaching and would not have changed the result." *Hesling v. CSX Transp. Inc.,* 396 F.3d 632, 640 (5th Cir.2005).

2. *Plaintiff's New Evidence*

(a) Due Diligence

***4** Plaintiff has failed either to argue or to show that with due diligence the evidence developed during the Alaniz deposition taken on December 18, 2007, could not have been obtained before the date on which the court issued its summary judgment, or in time to move for reconsideration under Rule 59(b). Moreover, plaintiff has failed to offer any explanation for her failure to discover the Alaniz evidence sooner.

Attached to the response to the court's order to show cause that plaintiff filed on September 28, 2007, is a February 7, 2006, letter from Alaniz's probation officer, Henry, to Kelly that not only identifies Alaniz but also recounts the complaint about Williams that Alaniz made to her.[FN7] Since plaintiff knew that Alaniz had complained about Williams' conduct before the court granted the summary judgment at issue, and yet plaintiff has not offered any explanation for why she failed to develop the Alaniz evidence earlier, the court concludes that plaintiff's motion for reconsideration based on that evidence should be denied. *See* Goel, 274 F.3d at 999 ("[u]nexcused failure to produce the relevant evidence at the original trial can be sufficient without more to warrant denial of a[R]ule 60(b) motion"). Alternatively, the court concludes that the motion for reconsideration should be denied because the Alaniz evidence is neither material nor controlling and would not have produced a different result if presented before the summary judgment that plaintiff seeks to have reconsidered was issued. *See* Goldstein, 340 F.3d at 257.

> FN7. See Exhibit 11 attached to Plaintiff, Dana Alegria's, Pleading in Response to Court's Order to Show Cause Showing Factual and Legal Basis for Title IX Claims, Docket Entry No. 35.

(b) Material and Controlling

Plaintiffs seeking to recover damages under Title IX for sexual harassment must establish that (1) an employee of a federal funding recipient with supervisory power over the alleged harasser (2) had actual knowledge of the harassment and (3) responded with deliberate indifference. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 118 S.Ct. 1989, 1999, 141 L.Ed.2d 277 (1998)."[T]o qualify as a supervisory employee whose knowledge of abusive conduct counts as the [funding recipient's] knowledge, ... [an] official must at least serve in a position with the authority to 'repudiate that conduct *and* eliminate the [harassment]' on behalf of the [funding recipient]." Rosa H. v. San Elizaro Indep. Sch. Dist., 106 F.3d 648, 661 (quoting Nash v. Electrospace System, Inc., 9 F.3d 401, 404 (5th Cir.1993)). Notice of harassment to employees who have no authority beyond reporting the misconduct to other employees is insufficient to expose a federal funding recipient to Title IX liability. *Id.* The actual knowledge requirement is based on the subjective standard that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he [or she] must also draw the inference." *Id.* at 658 (quoting Farmer v. Brennan, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

Alaniz testified that she reported Williams' conduct to Henry, but that she never reported it to Henry's supervisor, or to anyone else at the Galveston County Community Service & Corrections Department (GCCS & CD). Although not expressly stated, the gist of plaintiff's argument for reconsideration appears to be that because Henry stated in her letter to Kelly that she reported Alaniz's complaint about Williams to Sanchez, and that Sanchez attempted to investigate the complaint by meeting with Alaniz, Alaniz's testimony that she never met with Sanchez and was not aware that anyone at GCCS & CD ever attempted to investigate her complaint, creates a genuine issue of material fact for trial regarding whether an employee of the GCCS & CD with supervisory power over Williams had actual knowledge that Williams was harassing female probationers and responded with deliberate indifference. The court is not persuaded that Alaniz's testimony is either material, controlling, or capable of creating a genuine issue of material fact for trial because plaintiff has not presented any evidence from which a reasonable fact-finder could conclude that Sanchez had supervisory authority over Williams or the authority to take any step to stop Williams' allegedly abusive conduct other than to report it to Kelly. Moreover, the court reached the same conclusion in its November 2, 2007, Memorandum Opinion and Order:

***5** Assuming without deciding that plaintiff may satisfy *Gebser'* s actual notice standard by presenting evidence from which a reasonable trier of fact could conclude that an appropriate official had actual knowledge of a substantial risk of abuse to

probationers based on prior complaints by others, the court is still not persuaded that plaintiff has presented evidence capable of raising a genuine issue of material fact for trial. Although plaintiff has presented evidence that in 2003 Ellis-Henry communicated Alaniz's complaints about Williams' conduct to her supervisor, Sanchez, and has asserted that "Sanchez is a person of authority who could have taken action on the complaint,"[FN8] plaintiff has failed to present any evidence from which a reasonable fact finder could conclude that in 2003 (when Alaniz complained to Ellis-Henry) Sanchez had supervisory power over Williams ... Instead, plaintiff asserts that

> FN8. See Plaintiff, Dana Alegria's, Pleading in Response to Court's Order to Show Cause Showing Factual and Legal Basis for Title IX Claims, Docket Entry No. 35, p. 12 n. 17.

> [f]rom the factual record before this Court, Kelley clearly had authority to take corrective measures. Plaintiff contends that the Supervisor Officer Sanchez once informed about Larry Williams' conduct in 2003 had authority to address the grievance (Alaniz complaint) and institute corrective measures-include reporting to Kelley. By way of example, a current Community Supervision Supervisor explained that her role is to manage employees, ensure office policy and procedures are followed, to deal with Human Resource issues and to supervise case load management.

> In the case of *Murrell v. School District No. 1, Denver, Colorado,* 186 F.3d 1238 (10th Cir.1999), the Tenth Circuit when addressing the question of job titles declined to limit its analysis to a particular job title or positions (that would constitute the authority to address the alleged discrimination and to institute corrective measures). The Court explained that "deciding who exercises substantial control for the purposes of Title IX liability is necessarily a fact-based inquiry." *Id.* at 1247.[FN9]

> FN9.*Id.* at 18 n. 20.

> Plaintiff's argument appears to be that at all times relevant to this case Kelly possessed the authority to investigate and correct Williams' conduct, but that as a supervisor, Sanchez possessed the authority to address Alaniz's complaint about Williams' misconduct and take corrective measures by reporting the complaint to Kelly. However, since the Fifth Circuit has held that notice of teacher-student harassment to employees who have no authority beyond reporting the misconduct to other school district employees is insufficient to expose a federal funding recipient to Title IX liability, *Rosa H.,* 106 F.3d at 661, and since plaintiff has failed to present any evidence from which a reasonable fact finder could conclude that Sanchez possessed any authority beyond the ability to report Alaniz's complaint to Kelly, the court is not persuaded that evidence that Ellis-Henry reported Alaniz's complaint to Sanchez is sufficient to expose the State of Texas and/or the official capacity defendants to Title IX liability.[FN10]

> FN10. Memorandum Opinion and Order, Docket Entry No. 37, pp. 24-25.

***6** Nor is the court persuaded that Alaniz's testimony that she reported Williams' conduct to the Galveston County Sheriff's Department capable of establishing that Kelly and/or the State of Texas could be held liable to the plaintiff under Title IX because the plaintiff makes no showing either that the Galveston County Sheriff's Department is a branch of the Texas Department of Criminal Justice (i.e., the alleged recipient of federal funds), or that Alaniz's complaint was made or communicated to a person who had supervisory authority over Williams or anyone else at the GCCS & CD.

Alaniz testified that she complained about Williams' allegedly abusive conduct to her probation officer and to some unidentified employee of the Galveston County Sheriff's Department, but that she never spoke to her probation officer's supervisor, or anyone else of higher authority at the GCCS & CD about Williams' conduct. Alaniz's testimony that she did not complain about Williams' conduct to anyone at GCCS & CD other than her probation officer reinforces the court's conclusion that Kelly and the State of Texas are entitled to summary judgment on the Title IX claims that plaintiff has asserted against them because plaintiff has failed to present evidence capable of raising a genuine issue of material fact regarding whether an employee of the federal funding recipient with supervisory power over the alleged

harasser (i.e., Williams) had actual knowledge of the harassment and responded with deliberate indifference. *See Gebser,* 118 S.Ct. at 1999. *See also Rosa H.,* 106 F.3d at 661 ("[T]o qualify as a supervisory employee whose knowledge of abusive conduct counts as the [funding recipient's] knowledge, ... [an] official must at least serve in a position with the authority to 'repudiate that conduct *and* eliminate the [harassment]' on behalf of the [funding recipient]."). Because the court is not persuaded that the Alaniz testimony that plaintiff presents in support of her motion for reconsideration is sufficient to raise a genuine issue of material fact for the trial, the court concludes that it is neither material nor controlling and that it would not have produced a different result if submitted before the court issued the summary judgment that plaintiff seeks to have reconsidered. *See Goldstein,* 340 F.3d at 257.

C. Conclusion

Because plaintiff has failed to show that with due diligence the new evidence that she has submitted in support of her motion for reconsideration could not have been discovered before the court issued the summary judgment that she seeks to have reconsidered, and because the court concludes that the new evidence is neither material, controlling, nor capable of altering the outcome of the summary judgment, plaintiff's motion for reconsideration will be denied.

III. *Motion for Default Judgment Against Larry Williams*

Asserting that defendant "Larry Williams has been served and has failed to answer herein and/or respond in all parts (see docket entry 14),"[FN11] plaintiff moves for default judgment against Williams pursuant to Federal Rule of Civil Procedure 55 and requests a hearing on damages. Asserting that the court may not grant default judgment against Williams without differentiating between his personal and official capacities, the Attorney General's office argues that the court should deny plaintiff's motion for default judgment against Williams in his official capacity.

> FN11. Plaintiff's, Dana Alegria, Motion for Default Judgment Directed Against Larry Williams, Docket Entry No. 40, p. 1.

A. Standard of Review

*7 Federal Rule of Civil Procedure 55(a) provides that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk shall enter the party's default."Rule 55(b) provides that judgment by default may be entered by the court pursuant to application submitted by a party and that "[t]he court may conduct hearings or make referrals-preserving any federal statutory right to a jury trial-when, to enter or effectuate judgment, it needs to: ... (B) determine the amount of damages."Fed.R.Civ.P. 55(b).

B. Applicable Law

Public officials like Williams may be sued pursuant to 42 U.S.C. § 1983 in either their official and/or their personal capacities. *See Hafer v. Melo,* 502 U.S. 21, 112 S.Ct. 358, 361-63, 116 L.Ed.2d 301 (1991) (citing *Kentucky v. Graham,* 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985)). As the Supreme Court has explained,

> the distinction between official-capacity suits and personal capacity suits is more than "a mere pleading device." ...State officers sued for damages in their official capacity are not "persons" for purposes of the suit because they assume the identity of the government that employs them.... By contrast, officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term "person."

Id. at 362.Thus, the real party-in-interest in an official-capacity suit is the governmental entity and not the named official. *Id.* at 361 (citing *Graham,* 105 S.Ct. at 3105) ("Suits against state officials in their official capacity ... should be treated as suits against the State.").*See Bennett v. Pippin,* 74 F.3d 578, 584 (5th Cir.), *cert. denied,* 519 U.S. 817, 117 S.Ct. 68, 136 L.Ed.2d 29 (1996) ("When Mrs. Bennett sued the Sheriff in his individual and official capacity, she sued two defendants: the Sheriff and the County.").*See also Turner v. Houma Municipal Fire and Police Civil Service Board,* 229 F.3d 478, 483 (5th Cir.2000) ("Official-capacity suits ... generally represent only another way of pleading an action against an entity of which an officer is an agent. Accordingly, a § 1983 suit naming defendants in only

their 'official capacity' does not involve personal liability to the individual defendant.").

C. Analysis

On April 4, 2006, plaintiff filed her Original Complaint, which named Williams as a defendant "individually and in his official capacity."[FN12]On April 4, 2006, the court issued an Order for Conference and Disclosure of Interested Parties that notified plaintiff that

> FN12. Plaintiff, Dana Alegria's, Original Complaint, Docket Entry No. 1, p. 1.

> Fed.R.Civ.P. 4(m) requires defendant(s) to be served within 120 days after the filing of the complaint. The failure of plaintiff(s) to file proof of service within 120 days after the filing of the complaint may result in dismissal of this action by the court on it[s] own initiative.[FN13]

> FN13. Docket Entry No. 2, ¶ 3.

The Clerk's docket sheet reflects that a summons was issued as to Larry Williams on April 10, 2006, but contains no indication that Williams was ever served with the summons or the plaintiff's original complaint. On June 20, 2006, the Attorney General filed an answer on behalf of Larry Williams in his official capacity only,[FN14] and on June 27, 2006, the Attorney General filed a motion to dismiss on Williams' behalf.[FN15]

> FN14. See Defendant's Original Answer and Affirmative Defenses to Plaintiff's Original Complaint, Docket Entry No. 7 ("NOW COMES, Defendant, Larry Williams, in his official capacity only, represented by and through Greg Abbott, Attorney General of the State of Texas ... and file[s] this its Original Answer and Affirmative Defenses to Plaintiff's Original Complaint.").

> FN15. See Defendant Larry Williams in His Official Capacity's Motion to Dismiss for Failure to State a Claim on Which Relief Can Be Granted and Brief in Support, Docket Entry No. 8.

***8** On June 27, 2006, plaintiff filed her First Amended Complaint and Voluntary Stipulation of Dismissal of the County of Galveston (Docket Entry No. 9). In it she explained that

> [t]his amended complaint is filed in order to dismiss one Defendant, County of Galveston, Texas, and to modify the complaint against Larry Williams to reflect that the complaint is brought against him in his official capacity as opposed to his individual capacity, and to bring the State of Texas into the lawsuit as an entity.[FN16]

> FN16. Plaintiff, Dana Alegria's, First Amended Complaint and Voluntary Stipulation of Dismissal of the County of Galveston, Docket Entry No. 9, p. 1.

On June 29, 2006, the parties filed their Joint Discovery/Case Management Plan Under Rule 26(f), which stated that "Larry Williams has not been served."[FN17]

> FN17. Joint Discovery/Case Management Plan Under Rule 26(f) Federal Rules of Civil Procedure, Docket Entry No. 10, ¶ 6. The Attorney General participated in the preparation of the Plan on behalf of Larry Williams in his official capacity.

On July 11, 2006, the Attorney General filed an amended answer on behalf of "the State of Texas and Larry Williams in his official capacity."[FN18]

> FN18. Defendants' Original Answer and Affirmative Defenses to Plaintiff's First Amended Complaint, Docket Entry No. 11, p. 1.

The Clerk's docket sheet reflects that a second summons was issued as to Larry Williams on July 24, 2006. On August 31, 2006, an executed return of service was filed showing that Larry Williams was personally served with the summons and complaint on August 22, 2006 (Docket Entry No. 14).

On August 8, 2006, plaintiff filed a motion for leave to file a third amended complaint.[FN19]In the motion plaintiff explained that

> FN19. See Plaintiff, Dana Alegria's, Motion

for Leave to Amend Her Complaint to File Plaintiff's Third Amended Complaint, Docket Entry No. 13.

[t]his third amended complaint is filed in order to bring Eddie Kelly into the proceedings. Plaintiff's complaint asserts a failure to train and/or supervise. Eddie Kelly was Defendant Williams' supervisor; as such, Kelly should be a party to this lawsuit.[FN20]

FN20. *Id.* at ¶ 1.

Plaintiff also explained that "[c]onsultation was attempted with opposing counsel on August 4, 2006, without success. It should be assumed that counsel for the State opposes the motion in all parts."[FN21] Despite plaintiff's statement that she sought to file a third amended complaint only to add Eddie Kelly as a party defendant, the third amended complaint attached to plaintiff's motion added not only Eddie Kelly in both his official and individual capacities, but also Larry Williams in his individual capacity.

FN21. *Id.* at ¶ 3.

On September 7, 2006, the court dismissed the § 1983 claims for compensatory damages that the plaintiff alleged against the State of Texas and Williams in his official capacity, but declined to dismiss any § 1983 claims for prospective injunctive relief that the plaintiff might have asserted or attempted to assert against Williams in his official capacity.[FN22]

FN22. See Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, Docket Entry No. 15, at pp. 2-4.

On December 1, 2006, the court signed an order granting plaintiff's "unopposed" motion for leave to amend her complaint,[FN23] and on December 4, 2006, plaintiff's third amended complaint was filed.[FN24] The third amended complaint added Eddie Kelly in both his official and individual capacities and Larry Williams in his individual capacity.[FN25] On December 14, 2006, the Attorney General filed an answer to plaintiff's third amended complaint on behalf of Williams in his official capacity.[FN26] The clerk's docket sheet does not reflect that the third amended complaint that named Williams in his individual (i.e., personal) capacity was ever served on Williams.

FN23. See Order, Docket Entry No. 24.

FN24. See Plaintiff, Dana Alegria's, Third Amended Complaint, Docket Entry No. 25.

FN25. *Id.* at 1.

FN26. See Defendants' Original Answer and Affirmative Defenses to Plaintiff's Third Amended Complaint, Docket Entry No. 27.

*9 On November 2, 2007, the court entered a Memorandum Opinion and Order (Docket Entry No. 37) in which it *sua sponte* granted summary judgment on the Title IX and § 1983 claims for prospective injunctive relief that plaintiff had or might have asserted against the State of Texas and against Larry Williams in his official capacity. At the end of that Memorandum Opinion and Order, the court expressly stated

[f]or the reasons explained above, the court *sua sponte***GRANTS** defendants summary judgment on the Title IX claims alleged against Williams and Kelly in their individual capacities, and the Title IX and § 1983 claims alleged against the State of Texas and against Williams and Kelly in their official capacities. Since the court has already dismissed the § 1983 claims for monetary damages asserted against the State of Texas and against Kelly and Williams in their official capacities and against Kelly in his individual capacity, the only claim remaining in this action is the § 1983 claim for monetary damages alleged against Williams in his individual capacity.[FN27]

FN27. Memorandum Opinion and Order, Docket Entry No. 37, pp. 38-39.

The court reached this conclusion without conducting a thorough review of the procedural history of this case and upon now doing so realizes that it wrongly concluded that a § 1983 claim for monetary damages alleged against Williams in his individual (i.e., personal) capacity remains in this action.

As evidence that default judgment should be entered against Williams because Williams was personally served with the summons and complaint in this action

but that Williams never answered or defended the claims asserted against him, plaintiff cites the court to Docket Entry No. 14. Docket Entry No. 14 is an executed return of service showing that Williams was served with summons and complaint on August 22, 2006. Although plaintiff's original complaint alleged claims against Williams in both his official and personal capacities, the first amended complaint that plaintiff filed on June 27, 2006, expressly stated that the claims asserted against Williams were asserted against him in only "his official capacity as opposed to his individual capacity."[FN28]Because plaintiff filed her first amended complaint on June 27, 2006, because the joint discovery/case management plan filed on June 29, 2006, states that Williams had not been served, and because the return of service that plaintiff argues supports her application for default judgment shows that Williams was served with summons and complaint on August 22, 2006, the court concludes that Williams has only been served with plaintiff's first amended complaint, which only alleged claims "against him in his official capacity as opposed to his individual capacity."[FN29]Since the clerk's docket sheet demonstrates that plaintiff never served Williams with her third amended complaint in which she again named him as a defendant in his personal capacity, Williams had no cause to answer or otherwise defend himself in his personal capacity.

FN28. Plaintiff, Dana Alegria's, First Amended Complaint and Voluntary Stipulation of Dismissal of the County of Galveston, Docket Entry No. 9, p. 1.

FN29.*Id.*

***10** Federal Rule of Civil Procedure 4(m) provides:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period ...

Rule 4(m) authorizes a district court to dismiss a complaint if not timely served, unless good cause is shown for the failure. Plaintiff has neither shown that Williams was ever served with a complaint that alleged claims against him is individual (i.e., personal) capacity, nor shown good cause for her failure to do so. Moreover, the Order for Conference and Disclosure of Interested Parties issued the day this action was filed notified plaintiff that Rule 4(m) requires defendants to be served within 120 days after the filing of the complaint, and that failure to effect proof of service within 120 days after filing of the complaint may result in dismissal of this action by the court on its own initiative.[FN30]Because the court has already granted summary judgment to Williams on the claims that plaintiff alleged against him in his official capacity, and because plaintiff has failed to demonstrate that Williams was ever served with a complaint naming him as a defendant in his personal capacity, the court concludes that claims asserted against Williams in his individual (i.e., personal) capacity should be dismissed without prejudice for want of prosecution pursuant to Federal Rule of Civil Procedure 4(m), and that plaintiff is unable to demonstrate default judgment should be entered against Williams for any claims that the plaintiff attempted to allege against him in his individual (i.e., personal) capacity.

FN30. Order for Conference and Disclosure of Interested Parties, Docket Entry No. 2, ¶ 3.

IV. *Conclusions and Order*

For the reasons explained above, Plaintiff, Dana Alegria's, Motion for Reconsideration of the Memorandum Opinion and Order filed on November 2, 2007 (Docket Entry No. 41), is **DENIED,** and Plaintiff's Motion for Default Judgment Directed Against Larry Williams (Docket Entry No. 40) is **DENIED.**[FN31]

FN31. The court has allowed the plaintiff extraordinary leeway in submitting numerous briefs and other written materials. As the length of this Memorandum Opinion and Order and the length of the two previous Memorandum Opinions and Orders indicate (Docket Entry Nos. 34 and 37), the court has expended considerable time reading the plaintiff's papers and performing independent research to be as fully informed as possible when addressing her arguments. While, because of the volume and manner in which

> information has been presented it is possible that some arguments were overlooked, the parties should assume that failure to expressly address a particular argument in this or either of the other Memorandum Opinions and Orders reflects the court's judgment that the argument lacked sufficient merit to warrant discussion. Accordingly, the court strongly discourages the plaintiff from seeking reconsideration based on arguments that she has previously raised or that she could have raised.

S.D.Tex.,2008.
Alegria v. Texas
Slip Copy, 2008 WL 686161 (S.D.Tex.)

END OF DOCUMENT

HOnly the Westlaw citation is currently available.

United States District Court,
E.D. Louisiana.
Donna M. DORSEY, et al.
v.
NORTHERN LIFE INSURANCE COMPANY, et al.
No. Civ.A.04-0342.

Nov. 8, 2005.

Kevin Richard Tully, Charles W. Schmidt, III, Howard Carter Marshall, William Kearney Christovich, Christovich & Kearney, LLP, New Orleans, LA, James F. Holmes, Christovich & Kearney, LLP, Mark C. Carver, Goins Aaron, APLC, Baton Rouge, LA, for Donna M. Dorsey, et al.

Eugene R. Preaus, Mayra L. Scheuermann, Virginia N. Roddy, Preaus, Roddy & Associates, LLP, New Orleans, LA, Benjamin L. Tompkins, James F. Jorden, Jerome V. Bolkcom, W. Glenn Merten, Jorden Burt LLP, Washington, DC, for Northern Life Insurance Company, et al.

SECTION: I

AFRICK, J.

ORDER AND REASONS

***1** On August 15, 2005, this Court entered an order granting in part and denying in part defendants' motion to dismiss.[FN1] The matter now before the Court is plaintiffs' motion to reconsider this order.[FN2] For the following reasons, plaintiffs' motion is DENIED.

FN1. Rec. Doc. No. 111.

FN2. Rec. Doc. No. 130.

LAW AND ANALYSIS

The Federal Rules of Civil Procedure do not expressly recognize motions for reconsideration. *Bass v. United States Dep't of Agric.*, 211 F.3d 959, 962 (5th Cir.2000). A motion for reconsideration filed within ten days of the district court's judgment will be recharacterized as a motion to alter or amend the judgment and construed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. *See id.*(citing *Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 n. 10 (5th Cir.1998)); *see also Blanchard & Co. v. Barrick Corp.*,2003 U.S. Dist. LEXIS 20076, at *3 n. 1 (E.D.La.2003) ("A motion filed pursuant to *Rule 59(e)* requires a filing within ten (10) business days of the dispositive motion which the party seeks to have reconsidered...."). A motion for reconsideration filed more than ten days after the judgment is treated as a Rule 60(b) motion for relief of judgment. *Dial One of the Mid-South, Inc. v. Bellsouth Telecomm., Inc.*, 401 F.3d 603, 606 (5th Cir.2005) (citing *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 n. 3 (5th Cir.1991)); *see also Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir.1990), *abrogated on other grounds, Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir.1994) ("Under which Rule the motion falls turns on the time at which the motion is served.").

This Court's order, filed on August 15, 2005, would have required that a motion for reconsideration be filed by August 29, 2005, in order to be scrutinized under Rule 59(e).*See*Fed.R.Civ.P. 6(a) ("When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."). Plaintiffs' motion was docketed on October 24, 2005, but it may have been filed much earlier; its certificates of service indicate that service was effected on September 29. The effects of Hurricane Katrina, which made landfall in the New Orleans area on Monday, August 29, 2005, prompted a stay of all filing deadlines in the Eastern District of Louisiana until November 25, 2005.[FN3] Considering that the final day to file the motion as a Rule 59(e) request fell within this stay, the Court finds that a Rule 59(e) analysis is appropriate.[FN4]

FN3.*See* Order of Chief Judge Helen G. Berrigan, *at http://www.laed.uscourts.gov/GENERAL/Notices/TerminationöfÖrder1 1.03.05.pdf* (No-

vember 6, 2005). In addition, the final day of a prescriptive period may not be "a day on which weather or other conditions have made the office of the clerk of the district court inaccessible."Fed.R.Civ.P. 6(a).

FN4. Ultimately, the Rule 59(e) analysis is more generous to plaintiffs, saving their motion from the "exacting substantive requirements" of Rule 60(b).*See Lavespere,* 910 F.2d at 173-74,*citing Smith v. Morris & Manning,* 657 F.Supp. 180, 181 (S.D.N.Y.1987) (noting "the somewhat stringent requirements of Rule 60, which is aimed at protecting the finality of judgments from belated attack").

A Rule 59(e) motion "calls into question the correctness of a judgment." *In re Transtexas Gas Corp.,* 303 F.3d 571, 581 (5th Cir.2002). It is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment, *Simon v. United States,* 891 F.2d 1154, 1159 (5th Cir.1990), but instead "serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.,* 875 F.2d 468, 473 (5th Cir.1989) (internal quotations omitted). A district court has "considerable discretion in deciding whether to reopen a case in response to a motion for reconsideration arising under"Rule 59(e). *Lavespere,* 910 F.2d at 174. There are considerations that limit this discretion, however: (1) the need to bring litigation to an end, and (2) the need to render just decisions on the basis of all the facts. *Id.* (citations omitted)." 'Motions for a new trial or to alter or amend a judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence. These motions cannot be used to raise arguments which could, and should, have been made before the judgment issued. Moreover, they cannot be used to argue a case under a new legal theory." ' *Simon,* 891 F.2d at 1159 (quoting *Fed. Deposit Ins. Corp. v. Meyer,* 781 F.2d 1260, 1268 (7th Cir.1986)).

***2** Plaintiffs' motion does not demonstrate any manifest error of law or fact. Instead, plaintiffs' motion simply restates arguments and evidence presented to and considered by the Court with respect to defendants' motion to dismiss. Their motion argues that the written sales agreement was breached because: (1) plaintiffs were told that they would not be allowed to sell other Reliastar products to members of the AFT union, and (2) ING put pressure on plaintiffs to sell the AFT-endorsed ING product even though plaintiffs thought these products were not suitable for their clients.[FN5]Plaintiffs presented both arguments in their brief responding to defendants' motion to dismiss,[FN6] and this Court's order fully addressed plaintiffs' breach of contract claims with respect to the written sales agreement.[FN7]Because plaintiffs' motion to reconsider recapitulates arguments already presented to this Court, provides additional argument that should have been previously urged, and fails to provide any new evidence or allegations,[FN8] the Court concludes that plaintiffs' motion is not sufficient to warrant Rule 59(e) relief.

FN5. Rec. Doc. No. 130, pp. 2-3.

FN6. Rec. Doc. No. 74, pp. 3-5.

FN7. Rec. Doc. No. 111, pp. 15-18.

FN8. A footnote to the motion for reconsideration indicates that plaintiffs Sabadie, Pitts, and Labourdette were deposed by defendants after this Court's determination of the motion to dismiss. Rec. Doc. No. 130, p. 2. Plaintiffs' motion, however, presents no argument as to why any information elicited by these depositions sheds any new light on plaintiffs' allegations.

Plaintiffs' motion also includes a request that, should the Court agree to reconsider its order, plaintiffs be allowed to amend their pleadings.[FN9]This Court has already granted plaintiffs one previous opportunity to amend their complaint in response to defendants' Rule 12(b)(6) motion to dismiss and request for a more definite statement.[FN10]Plaintiffs have had more than sufficient opportunity to file proper pleadings. This Court need not do their work. Because this Court finds no merit in plaintiff's motion to reconsider, no further amendment is warranted.

FN9. Rec. Doc. No. 130, p. 4.

FN10. Rec. Doc. No. 38.

Accordingly,

IT IS ORDERED that plaintiffs' motion to reconsider is DENIED.

Houston, Texas, November 7, 2005.

E.D.La.,2005.
Dorsey v. Northern Life Ins. Co.
Not Reported in F.Supp.2d, 2005 WL 3541141 (E.D.La.)

END OF DOCUMENT

HOnly the Westlaw citation is currently available.

United States District Court,
D. South Dakota,
Western Division.
Perle O'DANIEL, Plaintiff,
v.
STROUD NA, and Judy Roosa, Defendants.
No. CIV. 05-5089-KES.

Dec. 9, 2008.

West KeySummary
Federal Civil Procedure 170A ⚿2655

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2655 k. Further Evidence or Argument. Most Cited Cases
Evidence of an insurance application form issued by an insurance agent with the name of an insurance company on top was not new evidence to establish that the agent had apparent authority to act on behalf of the insurance company. Therefore, the alleged insured was not entitled to reconsideration of the order granting the insurer's motion for summary judgment, in a suit for fraud and breach of contract by the insured against the agent and insurer. The insured had relied on the form in opposition to a summary judgment motion. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

James P. Hurley, Bangs, McCullen, Butler, Foye & Simmons, Rapid City, SD, Patrick M. Ginsbach, Farrell, Farrell & Ginsbach, Hot Springs, SD, for Plaintiff.

Carl S. Wosmek, Henry M. Helgen, III, McGrann, Shea, Anderson, Carnival, Straughn & Lamb, Minneapolis, MN, Patricia A. Meyers, Costello Porter Hill Heisterkamp Bushnell & Carpenter, G. Verne Goodsell, Goodsell Quinn, LLP, Rapid City, SD, for Defendants.

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER DISMISSAL OF DEFENDANT NAU COUNTRY INSURANCE COMPANY

KAREN E. SCHREIER, Chief Judge.

*1 Plaintiff, Perle O'Daniel, moves the court to reconsider dismissal of defendant NAU Country Insurance Company (NAU) pursuant to Federal Rule of Civil Procedure 60(b)(2) and (6). Defendant, NAU, opposes the motion. The motion is denied.

FACTUAL BACKGROUND

On August 8, 2006, O'Daniel filed an amended complaint in this case against NAU, Stroud NA (Stroud), and Judy Roosa, alleging fraud, negligent misrepresentation, and negligent procurement. Docket 41.Almost one year later, on June 29, 2007, Stroud and Roosa both moved for summary judgment.Docket 66.The court denied the motion because genuine issues of material fact existed as to whether Roosa engaged in the alleged conduct and as to whether Roosa was an agent of Stroud, thereby making Stroud liable for her alleged conduct. Docket 82.[FN1]NAU also moved for summary judgment.Docket 70.The court granted the motion, finding that based upon the undisputed facts of the case, Roosa was not an agent of NAU and, therefore, NAU could not be held liable for her alleged conduct. As a result of the court's ruling, NAU was dismissed as a defendant to this case. Docket 82.O'Daniel requests the court to reconsider its prior ruling granting summary judgment in favor of NAU and dismissing NAU as a defendant in this case.

FN1. More recently, the court granted Stroud and Roosa's motion for summary judgment in relation to the claim of deceit, but denied the motion with regard to the negligent misrepresentation and negligent procurement claims. Dockt 154.

DISCUSSION

Federal Rule of Civil Procedure 60(b) provides that "[o]n motion and just terms, the court may relieve a

party or its legal representative from a final judgment, order, or proceeding," because of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)," or for "any other reason that justifies relief."Fed.R.Civ.P. 60(b)(2) & (6).Rule 60(b)" 'provides for extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances.' " *Sanders v. Clemco Indus.*, 862 F.2d 161, 169 n. 14 (8th Cir.1988) (citation omitted). *See also United States v. One Parcel of Property Located at Tracts 10 & 11 of Lakeview Heights*, 51 F.3d 117, 120 (8th Cir.1995) (stating "[a] district court should grant a Rule 60(b) motion only upon an adequate showing of exceptional circumstances") and *Mitchell v. Shalala*, 48 F.3d 1039, 1041 (8th Cir.1995) (stating "[g]enerally, Rule 60(b) provides for exceptional relief, which may be granted only upon a showing of exceptional circumstances"). Although relief under the rule is "extraordinary," a Rule 60(b) motion is "committed to the sound discretion of the trial court." *MIF Realty L.P. v. Rochester Assocs.*, 92 F.3d 752, 755 (8th Cir.1996).

"Rule 60(b) is to be given a liberal construction so as to do substantial justice and to prevent the judgment from becoming a vehicle of injustice."*Id.* (internal quotations and citation omitted). The motion is derived from equity and exists "to preserve the delicate balance between the sanctity of final judgments ... and the incessant command of a court's conscience that justice be done in light of all the facts."*Id.* (internal quotations omitted). Although Rule 60(b) motions are "disfavored," the Eighth Circuit has also "recognize[d] that they 'serve a useful, proper and necessary purpose in maintaining the integrity of the trial process, and a trial court will be reversed where an abuse of discretion occurs.' " *Id.* (citation omitted). An abuse of discretion occurs "if the district court rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." *Id.* (internal quotations and citation omitted).

***2** Nevertheless, Rule 60(b) only "authorizes relief based on certain enumerated circumstances." *Broadway v. Norris*, 193 F.3d 987, 990 (8th Cir.1999).Rule 60(b)"is not a vehicle for simple reargument on the merits."*Id.* Thus, a "motion to reconsider" pursuant to Rule 60(b) is properly denied where the movant "d[oes] nothing more than reargue, somewhat more fully, the merits of their claim."*Id.* *See also Sanders*, 862 F.2d at 170 (stating that a Rule 60(b) motion may be denied where it raises only issues of law previously rejected by the court because the failure to present reasons not previously considered by the court "alone is a controlling factor against granting relief").

I. Newly Discovered Evidence

Where a Rule 60(b) motion is premised on "newly discovered evidence," the evidence must be "sufficient to justify setting aside the original judgment." *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 498 (8th Cir.2001). Moreover, "Rule 60(b) permits consideration only of facts which were in existence at the time of trial, not opinions, which can be formulated at any time."*Id.* Therefore, "[i]n order to prevail under Rule 60(b)(2), the movant must show that: (1) the evidence was discovered after trial; (2) due diligence was exercised to discover the evidence; (3) the evidence is material and not merely cumulative or impeaching; and (4) the evidence is such that a new trial would probably produce a different result." *Schwieger v. Farm Bureau Ins. Co. of Nebraska*, 207 F.3d 480, 487 (8th Cir.2000).

A. Relationship Between NAU and Roosa

1. Application Forms

O'Daniel asserts that Roosa presented him with insurance application forms to complete and that the name of NAU appeared on these forms. Based upon the identification of NAU on the application forms, O'Daniel argues that Roosa was an agent of NAU. The application forms, however, are not newly discovered evidence. Rather, O'Daniel relied on such facts in his brief in opposition to NAU's motion for summary judgment, where he argued that the fact that the names of NAU and Stroud appeared on the application forms established that Roosa had apparent authority to act on behalf of NAU, which would make NAU liable for Roosa's acts and omissions. Docket 79 at 4-5.Accordingly, such evidence was not discovered after the court's summary judgment order.

But even if the evidence was newly discovered, this evidence would not produce a different result. The court has already considered this evidence and finds that it does not establish an ostensible or apparent agency relationship between NAU and Roosa. "Os-

tensible [or apparent] agency exists where the law implies an agency relationship because the principal affirmatively, intentionally, or by lack of ordinary care causes a third party to believe another is serving as his agent." *Dahl v. Sittner*, 429 N.W.2d 458, 462 (S.D.1988). Significantly, here, O'Daniel could not have reasonably believed that Roosa was an agent of NAU because O'Daniel knew Roosa did not work for one particular insurance company based on their prior business dealings. Specifically, O'Daniel stated that over their eight- to nine-year business relationship, Roosa set him up with about two or three different insurance companies and that he was aware of the fact that she was not writing on behalf of one insurance company. Docket 73-3 at 3. Further, O'Daniel explained that he would tell Roosa what coverage he needed and she would go out and try to find a policy that would meet those needs. *Id.* at 5-6.O'Daniel's statements about his relationship with Roosa demonstrate that he knew that she did not act as an agent for one particular insurance company, in this instance NAU, and, as a result, O'Daniel could not have reasonably believed that Roosa was an agent of NAU. Thus, the identification of NAU on the application forms is not sufficient evidence from which to find that O'Daniel believed Roosa was an agent of NAU.

2. Insurance Declarations

*3 O'Daniel argues that the fact that each insurance declaration page was signed by NAU President Gregory Deal and NAU Secretary Pamela Deal and countersigned by "Authorized Representative" Roosa demonstrates that Roosa had apparent authority to bind NAU. More specifically, O'Daniel argues that the policy declarations letterhead, which included "NAU Companies, NAU Country Insurance, Stroud GA, Serviced by Stroud GA," coupled with Roosa's identification as an "Authorized Representative," is sufficient to make Roosa an ostensible agent of NAU.

While the fact the insurance declarations included the signatures of NAU President and Secretary and Roosa was not specifically presented to the court in the parties' summary judgment motions, O'Daniel did mention that he received NAU's declaration of insurance that showed cattle coverage but did not show any exclusions. See Docket 77 at 8. Therefore, the insurance declarations were not discovered after the court ruled on the defendants' summary judgment motions. Even if such evidence was discovered after the court's ruling, the court finds that such evidence does not meet the rigorous four-factor test of "newly discovered" evidence. As discussed above, based upon O'Daniel's understanding that Roosa did not work for one particular insurance company, he could not have reasonably believed that Roosa was an agent of NAU and, thus, such evidence does not demonstrate that Roosa was an ostensible agent of NAU.

3. Payment Arrangement

O'Daniel argues that the payment arrangement among NAU, Stroud, and Roosa indicates that Roosa was an agent of NAU. O'Daniel asserts that under the payment arrangement, Stroud collected the premium payments from O'Daniel and deposited the payments in a trust account, which was administered by NAU. Premiums paid to Stroud and deposited in the trust account could only be removed by NAU. NAU paid Stroud and Stroud paid commissions to agents, including Roosa. Stroud received 22 percent of the premium payments as commission, and it paid Roosa paid 15 percent of its percentage, while NAU kept 78 percent of premium payments.

Evidence of the payment arrangement among the parties was not presented to the court in the parties' summary judgment motions and the court assumes that such evidence was discovered after the court ruled on defendants' summary judgment motions.[FN2]But even if due diligence was exercised to discover the evidence and the evidence is material, such evidence does not warrant a different result.

> FN2. The court assumes that this evidence was discovered after it ruled on defendants' summary judgment motions because in his brief in support of his motion to reconsider, O'Daniel represents that this fact is attributed to depositions taken of Allen Miller, Steve Stroud, and Roosa in 2008. See Docket 128 at 8, 11.The court issued its original opinion in 2007. Docket 82.

O'Daniel contends that Roosa is an agent for the insurer because SDCL 58-30-142, which was the statute in effect at the time Roosa procured insurance for O'Daniel in 2001, controls. This statute defines an "[a]gent of the insurer" as "any insurance producer who is compensated directly or indirectly by an insurer and sells, solicits, or negotiates any product of

that insurer" and an "[a]gent of insured" as "any insurance producer or person who secures compensation from an insured or insurance customer only and receives no compensation directly or indirectly from an insurer for a transaction with that insured or insurance customer."SDCL 58-30-142(1) & (2). These definitions are located within the section concerning insurance producers and apply to "[t]erms used in §§ 58-30-141 to 58-30-195, inclusive."*Id.*

***4** While it is likely Roosa would be considered an agent of NAU under the definitions of the statute, the South Dakota Supreme Court has found that "[s]tatutes regulating licensing and defining agents, brokers and solicitors, are not intended to change or to exclude the general laws of agency." *North Star Mut. Ins. Co. v. Rasmussen*, 734 N.W.2d 352, 361 (S.D.2007) (internal quotations and citation omitted). Further, as recognized by the South Dakota Supreme Court,

> [b]y the statute's own limitation, definitions supplied in SDCL 58-30-142 apply to 'terms used in §§ 58-30-141 to 58-30-195, inclusive.'This restricting language implies that the definitions provided were not to be construed to replace general laws of agency. Thus, definitions in the code should not, by themselves, resolve the agency question.

Id.

Pursuant to the general principles of agency law, an agency relationship is either actual or ostensible. "Actual agency exists if the relationship is expressly created by an agreement whereby the principal appoints his agent who agrees to serve in that capacity." *Dahl*, 429 N.W.2d at 463.In contrast, ostensible agency, sometimes referred to as apparent agency, exists where the law implies an agency relationship because the principal causes a third party to think another is his agent. *Id.* Here, the parties have not produced an express agreement between NAU and Roosa in which NAU appointed Roosa and Roosa agreed to serve as an agent for NAU. Thus, there is no actual agency relationship between NAU and Roosa. Likewise, there is no ostensible or apparent agency relationship between NAU and Roosa. O'Daniel was not aware of the payment arrangement when he was dealing with Roosa in 2001 because he did not discover such information until 2008 and, therefore, the payment arrangement did not cause him to think Roosa was an agent of NAU. Even if he did know about the payment arrangement in 2001, other facts, particularly his past business dealings with Roosa, indicate that it was not reasonable for him to believe that Roosa was an agent of NAU. Accordingly, Roosa was not the ostensible agent of NAU. In summary, considering the statutory definitions and the general principles of agency law, the court finds that the payment arrangement among the parties is not sufficient to make Roosa an ostensible agent of NAU.

4. Availability of Insurance Companies to Roosa in 2001

O' Daniel argues that Roosa was an agent of NAU because when he made his application for insurance through Roosa in 2001, NAU was the only insurance company available to her for his requested farm and ranch insurance policy. O'Daniel further emphasizes that prior to placing his insurance with NAU, Roosa placed his insurance with Commercial Union through NAU.

Evidence regarding the availability of insurance companies to Roosa in 2001 in relation to O'Daniel's requested farm and ranch insurance was not presented to the court in the parties' summary judgment motions. Thus, the court will assume that it is evidence that was discovered after the court ruled on the defendants' motions for summary judgment.[FN3]Nonetheless, under the particular facts of this case, the court finds that such evidence does not constitute "newly discovered" evidence because this evidence does not produce a different result.

> FN3. The court assumes that this evidence was discovered after it ruled on defendants' summary judgment motions because in his brief in support of his motion to reconsider, O'Daniel represents that this fact is attributed to a deposition taken of Roosa in 2008. See Docket 128 at 8. The court issued its original opinion in 2007. Docket 82.

***5** Here, Roosa testified that prior to procuring insurance for O'Daniel from NAU in 2001, she worked through NAU to obtain insurance from Commercial Union for O'Daniel. She believes that NAU was the general agent for Commercial Union. At that time, she was an agent working directly with O'Daniel and

she went through NAU to obtain the policy from Commercial Union. Docket 133-18 at 1. Roosa further testified that in 2001, when O'Daniel asked her to obtain coverage for him, NAU was the only company available to her for farm and ranch insurance in South Dakota. Roosa described herself as a "captive agent" for Farmers Insurance Group, who is allowed "to write outside business they do not write."*Id.* at 5-6.She also stated that while she is an agent for Farmers Insurance Group, she has been an agent for other companies from time to time.*Id.* at 6.

The fact that Roosa could only obtain farm and ranch insurance in South Dakota for O'Daniel through NAU in 2001 does not, by itself, establish that Roosa was an agent of NAU. As discussed above, there was no actual agency relationship between Roosa and NAU because no evidence of an express agreement between Roosa and NAU to that effect has been submitted. Similarly, there was no ostensible or apparent agency relationship between Roosa and NAU. No evidence has been presented showing that O'Daniel knew that Roosa could only procure his requested farm and ranch insurance through NAU and, therefore, it is likely this was unknown to O'Daniel in 2001 when he asked Roosa to find insurance for him, particularly in light of the fact that O'Daniel submits that he discovered this evidence in 2008. As a result, such information could not have caused O'Daniel to think Roosa was an agent of NAU. But in the event O'Daniel had knowledge of such information in 2001, other facts, specifically his past business dealings with Roosa, demonstrate that it was not reasonable for him to believe that Roosa was an agent of NAU. O'Daniel was aware that over their eight- to nine-year business relationship, Roosa had procured insurance for him from two to three different insurance companies and, thus, he knew that Roosa did not work for one specific insurance company. See Docket 73-3 at 3. The court finds the undisputed facts show that Roosa was O'Daniel's agent for the purpose of procuring insurance and they do not support a finding that Roosa was an actual or ostensible agent of NAU.

B. Relationship Between NAU and Stroud

1. Stroud's Authority to Bind NAU

O'Daniel argues that Stroud was an agent of NAU because Stroud had the authority to issue NAU policies that bound NAU and to settle claims for NAU and, as such, NAU is a proper defendant in this case. The fact that Stroud had authority to perform certain tasks for NAU was not uncovered or exposed after the court's order on defendants' motions for summary judgment because O'Daniel used the representation that Stroud had the authority to bind NAU when he urged the court to deny NAU's motion for summary judgment. Docket 79 at 2. Even if the evidence had been uncovered after the court ruled on defendants' motions for summary judgment, the court finds that this evidence cannot be considered "newly discovered" evidence because this evidence does not change the result of this case.

***6** Here, it is undisputed that Stroud is a general agent of NAU. In fact, the agreement between NAU and Stroud gives Stroud the authority "to solicit, receive and accept applications or proposals for such contracts of insurance as Company has authority to make."Docket 73-8 at 3. Additionally, Stroud was granted the authority "to countersign (if appropriate) and issue policies of insurance and endorsements thereto effecting changes, or transfer existing policies and to effect cancellations of existing policies."*Id.* Of course, the agreement also contains restrictions on Stroud's authority to act on behalf of NAU. *See id.*Therefore, the issue the court must decide is if and to what extent the agency relationship between Stroud and NAU affects the relationship between Roosa and NAU. In other words, the court must determine whether NAU can be liable for Roosa's actions because Stroud is a general agent of NAU and Roosa may be an agent of Stroud.

The court finds that South Dakota law applies to this analysis. While the agreement creating the agency relationship between Stroud and NAU states that it is "subject to and shall be interpreted in accordance with the laws of the State of Minnesota by any court of competent jurisdiction," the relevant inquiry does not concern the relationship between Stroud and NAU but rather the effect the relationship between these two parties has on the relationship between Roosa and NAU. See Docket 73-8 at 12.Thus, the court will apply South Dakota law because in a diversity suit, a federal district court is to apply the substantive law of the state in which it sits. See *Urban Hotel Dev. Co. v. President Dev. Group, L.C.*, 535 F.3d 874, 877 (8th Cir.2008).

Under South Dakota law, the fact that Stroud was a

general agent of NAU and Roosa may have been an agent of Stroud does not necessarily make Roosa an agent of NAU. Although the South Dakota Supreme Court has not specifically addressed this issue, its ruling and analysis in *North Star* indicate that the relationship between an insurance company and a general agent does not affect the relationship between an agent of the general agent and the insurance company.[FN4] In that case, Mary Henkel, an insurance agent, worked at Puthoff Insurance Agency (Puthoff). Puthoff had an agency agreement with North Star, an insurance company, which gave Putoff and its agents authority to solicit and negotiate insurance on behalf of North Star. *North Star,* 734 N.W.2d at 354. In determining whether Henkel was an agent of North Star for purposes of imputing her negligence to North Star, the South Dakota Supreme Court focused solely on the relationship between Henkel and North Star and did not discuss the relationship between Puthoff and North Star. Because the court did not consider the relationship between Puthoff and North Star in its analysis, such relationship was irrelevant to the question of whether Henkel was an agent of North Star. The court, instead, determined that Henkel was not an agent of North Star based upon Henkel's relationship with North Star. *See id.* at 360-63.

> FN4. The court recognizes that the court in *North Star* relied upon statutes that are now repealed. But the *North Star* court stated that even if the newly enacted statutes applied, which are the statutes that apply in this case, such statutes were not dispositive of the agency issue. Instead, the definitions are to be considered along with general laws of agency. *North Star,* 734 N.W.2d at 361.

*7 Likewise, here, in determining whether Roosa was an agent of NAU for purposes of imputing her negligence to NAU, the court will focus on the relationship between Roosa and NAU and not on the relationship between Stroud and NAU. As discussed above in detail, the evidence surrounding Roosa's relationship with NAU does not indicate that Roosa was an actual or ostensible agent of NAU. Accordingly, Roosa was not an agent of NAU.

2. Application Forms and Payment Arrangement

O'Daniel also argues that the identification of Stroud and NAU on the insurance application forms and the payment arrangement among Roosa, Stroud, and NAU show that Stroud was an agent of NAU. As noted above, Stroud is a general agent of NAU; however, that relationship does not make NAU liable for Roosa's actions. Accordingly, notwithstanding these facts, regardless of whether they are newly discovered, Roosa was not an agent of NAU.

II. Any Other Reason That Justifies Relief

O'Daniel further argues that the court should reconsider its previous order granting NAU's motion for summary judgment because there are reasons justifying relief from the operation of that judgment. O'Daniel argues that the court erroneously relied upon *North Star* because in that case the court analyzed and applied statutes defining the agent and insurer relationship that were repealed and not in effect in 2001 when Roosa procured insurance for O'Daniel. Additionally, O'Daniel argues that NAU failed to inform O'Daniel's lender, Fin-Ag, Inc. (Fin-Ag) about the proper scope of insurance coverage.

With respect to the court's reliance on *North Star,* the court explained above that after considering the statutory definitions in effect during the relevant time period and the general principles of agency law, as required by South Dakota law, Roosa is neither an actual or ostensible agent of NAU. There was no express agreement of agency between Roosa and NAU. Further, O'Daniel, based on his business relationship with Roosa and the facts available to him when he was dealing with Roosa in 2001, could not have reasonably believed Roosa was an agent of NAU. Accordingly, the court's prior reliance on *North Star* does not justify the extraordinary relief of rejoining NAU as a defendant in this case.

Regarding NAU's failure to properly notify Fin-Ag about O'Daniel's insurance coverage, this is not the appropriate time to raise such an argument and O'Daniel is not the proper party to assert this claim. In fact, Fin-Ag recently filed a lawsuit against NAU, Stroud, and Roosa, alleging, among other things, breach of contract, bad faith, fraud and misrepresentation, negligent misrepresentation, deceit, and negligent procurement. *See Fin-Ag, Inc. v. NAU Country Ins.,* Civ. 08-4141-LLP, Docket 1. Thus, Fin-Ag can assert its own arguments and O'Daniel need not make such arguments for Fin-Ag. As such, this does not create an extraordinary circumstance that warrants

the court rejoining NAU as a defendant.

***8** Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion to reconsider dismissal of defendant NAU (Docket 127) is denied.

D.S.D.,2008.
O'Daniel v. Stroud NA
Slip Copy, 2008 WL 5192457 (D.S.D.)

END OF DOCUMENT