

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

KARIM KOUBRITI,

Plaintiff,

Case No. 2:07-cv-13678

v.

Hon. Marianne O. Battani

RICHARD CONVERTINO,
MICHAEL THOMAS and
HARRY RAYMOND SMITH,
Jointly and Severally
and in their Individual Capacities
Defendants.

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**DEFENDANT MICHAEL THOMAS' REPLY TO PLAINTIFF'S OPPOSITION
TO HIS MOTION TO DISMISS OR, ALTERNATIVELY, FOR SUMMARY
JUDGMENT**

Defendant Thomas' pending motion shows plaintiff's *Bivens* claims against him should be dismissed because the specific actions or admissions attributed to Thomas (even if true) do not establish that Thomas violated a clearly established constitutional right, and thus they do not defeat the qualified immunity granted to him as an FBI Agent. In addition, plaintiff's complaint should be dismissed because the undisputed record establishes that at all times Thomas was acting in his official capacity as an FBI Agent and that he did nothing to violate plaintiff's clearly established statutory or constitutional rights. Therefore, qualified immunity applies to shield Thomas from liability.

_____ Plaintiff's opposition brief does not address the legal ramifications of the Court of Appeals' decision in *Koubriti v. Convertino*, 593 F.3d 459 (6th Cir. 2010), or the evidence and record before the court. Instead, plaintiff responds by merely reciting the conclusory allegation that Thomas violated his Fifth Amendment Rights by maliciously and intentionally withholding exculpatory evidence and fabricating evidence. Plaintiff *proffers no evidence* that Thomas committed these acts. In fact, plaintiff does not even identify the "fabricated evidence" or the "exculpatory evidence" withheld. As such, based upon the undisputed evidence, this Court should determine that as an FBI Agent Thomas is shielded from liability based upon his qualified immunity, and therefore the action against him should be dismissed.

ARGUMENT

I. The Sixth Circuit’s Ruling Establishes That the Wrongs Attributed to Thomas Did Not Violate Clearly Established Statutory or Constitutional Rights.

As noted by the Court of Appeals, Koubriti’s complaint alleges that defendants Convertino, Smith¹ and Thomas violated his Fifth Amendment Rights by “maliciously and intentionally withholding exculpatory evidence and fabricating evidence.” *Koubriti*, 593 F.3d at 464. In addressing the issue of “qualified immunity” regarding Convertino’s actions in the investigation of plaintiff, the Court of Appeals held that “Convertino’s behavior, were it to be ruled as a constitutional violation, was not clearly established as a violation at the time Convertino acted. Convertino’s qualified immunity, then, would still be sufficient to shield Convertino from this claim, even when characterized in the way the district court and Koubriti suggest.” *Id.* at 472.

Having failed in his attempt to frame a Constitutional violation against Convertino for a *Brady* violation by withholding information that he received or should have received from Thomas, plaintiff now pursues Thomas for failing to turn evidence over to Convertino. However, the legal ruling by the Court of Appeals that Convertino’s alleged failures do not involve to a violation of a clearly established constitutional right equally applies when the same acts are attributed to Thomas. Defendant has provided no

¹ For reasons which have never been explained, plaintiff has dismissed his claims against defendant Smith. *See* Docket Entry 33. As result, Defendant Thomas who is the only defendant not to have been criminally charged in connection with the prosecution of plaintiff is the only remaining defendant regarding plaintiff’s claims.

principled reason why as a party to the Convertino appeal, where plaintiff was able to fully litigate these issues, he should not now be bound by the Court of Appeals' holding regarding qualified immunity. *See Cobbins v. Tenn. Dep't of Transp.*, 566 F.3d 582, 589 (6th Cir. 2009) (“Issue preclusion, or collateral estoppel, bars subsequent relitigation of a fact or issue where that fact or issue was necessarily adjudicated in a prior cause of action and the same fact or issue is presented in a subsequent suit.”)

Moreover, the Court of Appeals decision also establishes that legally, the sort of *Brady* violations that plaintiff alleges in this lawsuit are not sufficient to defeat the qualified immunity granted to federal law enforcement officials such as Thomas. Plaintiff's opposition brief scarcely argues the *Brady* issue at all.

For these reasons, plaintiff's claims against Thomas should be dismissed as legally insufficient to defeat Thomas's immunity as an FBI Agent.

II. There is No Evidence that Thomas Violated Plaintiff's Clearly Established Statutory or Constitutional Rights.

To withstand summary judgment, the non-movant must present sufficient evidence to create a genuine issue of material fact. *Klepper v. First Am. Bank*, 916 F.2d 337, 342 (6th Cir. 1990). A mere scintilla of evidence is insufficient; “there must be evidence on which the jury could reasonably find for the [non-movant].” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Entry of summary judgment is appropriate “against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at

trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Qualified immunity is an affirmative defense that shields government officials “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted). Therefore, in order to withstand a motion for summary judgment based on the defense of qualified immunity, the plaintiff must produce evidence that the government official “violated a clearly established statutory or constitutional right.” *Id.*

Here, plaintiff alleges that Thomas violated his constitutional rights by fabricating and withholding evidence. However, plaintiff has proffered not even scintilla of evidence to support these allegations. To the contrary, the undisputed evidence establishes that Thomas did not do any of the things that of which plaintiff now accuses him.

In his amended complaint, at paragraph 29, plaintiff has alleges that Agent Thomas violated his constitutional rights by willfully and intentionally withholding exculpatory evidence or fabricating evidence in the following manner:

- A. “By failing to turn over photographs he received of the Queen Alia Hospital to Defendant Convertino.”
- B. “Failing to disclose e-mails to Defendant Convertino.”
- C. “Failing to disclose to Defendant Convertino that Nassa Ahmad told him his mentally unstable brother might have been doodling in the day planner in question.”
- D. “Failing to disclose to Defendant Convertino that Air Force OS1 SA

Goodnight stated that the alleged sketch of the Incirlik Air Base was not accurate.”

- E. “Failing to disclose the names of witnesses who could testify that the sketches did not represent the Incirlik Air Base.”
- F. “Failing to disclose a 9/11/2007 e-mail where Defendant Thomas admitted that there was difficulty transcribing the audio portions of the videotape due to among other things, the Tuniusei or Algeria dialect speech.”
- G. “Failing to record by way 302, the contents of the ten interviews with Yousif Hnimssa.”
- H. “Failing to disclose to Defendant Convertino that Yousif Hnimssa made many different statements.”

Those items (A) through (H) are *allegations* only. Allegations in a plaintiff’s complaint – standing alone – are not evidence that can defeat summary judgment. The Sixth Circuit, in *Alexander v. CareSource*, 576 F.3d 551(6th Cir. 2009), recently reiterated the well-known requirements for opposing a motion for summary judgment:

- “Rule 56(e)(2) leaves no doubt about the *obligation* of a summary judgment opponent to make [his] case with *a showing of facts* that can be established by evidence that will be admissible at trial.”
- “When a motion for summary judgment is properly made and supported, an *opposing party may not rely merely on allegations or denials in its own pleading*; rather, its response must - by affidavits or as otherwise provided in this rule - set out specific facts showing a genuine issue for trial.”

[Fed.R.Civ.P. 56(e)(2)]

- “The *failure to present any evidence* to counter a well-supported motion for summary judgment alone is grounds for granting the motion.” []

Alexander, 576 F.3d at 558 (emphasis added), *citing Everson v. Leis*, 556 F.3d 484, 496 (6th Cir. 2009) (*citing Skousen v. Brighton High School*, 305 F.3d 520, 528 (6th Cir. 2002)). “[The court] must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial.” *Sowards v. Loudon County*, 203 F.3d 426, 431 (6th Cir. 2000).

Plaintiff Koubriti’s opposition brief supplies no evidence at all. Defendant, however, has developed evidence establishing:

- (1) Agent Thomas did not withhold any information pertinent to the investigation of Plaintiff from prosecutor Convertino, including any emails concerning sketches of the area around the Queen Alia Hospital. DX 1 (Declaration of Michael J. Thomas) at ¶ 3.
- (2) Agent Thomas did not withhold any information regarding the possibility that Nassa Ahmad’s mentally unstable brother may have been doodling in the day planner that was seized as evidence, because Ahmad never relayed any such information to Agent Thomas. *Id.* at ¶ 4.
- (3) Agent Thomas also did not withhold any statement by Air Force OSI SA Goodnight or any other witnesses that the sketch of the Incirlik Air Base was inaccurate, because to the best of SA Thomas’s knowledge, SA

Goodnight made no such statement. *Id.* at ¶ 5-6.

- (4) Prosecutor Convertino and Agent Thomas visited the Incirlik Air Base together, and both believed the sketch, which was very rough, was an accurate depiction of what they saw. *Id.* at ¶ 6.
- (5) Agent Thomas similarly did not engage in any conduct that violated Plaintiff's constitutional rights with respect to the interviews of Yousef Hmimssa. Agent Thomas did not record the contents of the interviews because it was prosecutor Convertino, not Agent Thomas, who was conducting the interviews, and Convertino instructed Agent Thomas not to take notes because the interviews were considered trial preparation. *Id.* at ¶ 7. And, in any case, prosecutor Convertino was fully aware of any inconsistent statements Hmimssa may have made during his interviews because Convertino was present for and conducted the interviews. *Id.* at ¶ 9.
- (6) Agent Thomas did not withhold from prosecutor Convertino a 9/11/2007 email wherein Agent Thomas indicated that there were difficulties transcribing audio portions of the videotape due to Tuniusei or Algeria dialect speech. AUSA Convertino was aware of this problem. *Id.* at ¶ 8.

In *La Grasso Bros. Inc. v. American Foodservice, L.L.C.*, 2011 WL 891221 (E.D. Mich. 2011), this Court recently made clear that where, as here, the undisputed evidence proffered by the moving party establishes that there is no dispute of fact

warranting a trial, the non-moving party “must set out specific facts showing a genuine issue for trial,” [citing Fed. R. Civ. P. 56(c)(1)] and that “there must be evidence on which the jury could reasonably find for the non-moving party”[citing *Hopson v. Daimler Chrysler Corp.*, 306 F.3d 427, 432 (6th Cir. 2002)].

Plaintiff has not, and cannot, present even a scintilla of evidence to dispute Agent Thomas’ declaration. As such, the court should determine as a matter of law that Thomas is shielded by qualified immunity and that Plaintiff’s complaint should therefore be dismissed as a matter of law.

CONCLUSION

For all of the reasons set forth in this Motion and Brief, Plaintiff’s Complaint and action should be dismissed.

Respectfully submitted,

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Date: April 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2011, I presented the foregoing Defendant Michael Thomas' Reply to Plaintiff's Opposition to His Motion to Dismiss Or, Alternatively, for Summary Judgment and this Certificate of Service to the Clerk of the Court for filing and uploading to the ECF system which will send notification of such filing to the following:

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