

APPEAL NUMBER 10-6105

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VICKI KOCH a/k/a VICKI BUTRICK

Plaintiff/Appellant

v.

CITY OF DEL CITY and JOHN BEECH

Defendants/Appellees.

APPEAL FROM THE WESTERN DISTRICT OF OKLAHOMA
THE HONORABLE TIMOTHY D. DEGIUSTI

APPELLANT'S OPENING BRIEF

Valerie Williford, OBA#18493
625 N.W. 13th Street
Oklahoma City, Oklahoma 73103
(405) 226-8585

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

I.	JURISDICTION	1
II.	STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
III.	STATEMENT OF THE CASE	2
IV.	STATEMENT OF FACTS	4
V.	SUMMARY OF THE ARGUMENT	10
VI.	ARGUMENT	11
	A. JOHN BEECH ARRESTED PLAINTIFF WITHOUT PROBABLE CAUSE IN VIOLATION OF HER DUE PROCESS RIGHTS.	11
	B. JOHN BEECH IS NOT ENTITLED TO QUALIFIED IMMUNITY.	17
	C. JOHN BEECH USED EXCESSIVE FORCE WHEN HE ARRESTED VICKI BUTRICK.	19
	D. VICKI BUTRICK HAS A MALICIOUS PROSECUTION CLAIM AGAINST JOHN BEECH.	20
	E. THE DISTRICT COURT SHOULD EXERCISE SUPPLEMENTAL JURISDICTION OVER VICKI BUTRICK’S STATE LAW CLAIM.	23
	F. VICKI BUTRICK’S REQUEST FOR A CONTINUANCE SHOULD HAVE BEEN GRANTED.	24
VII.	REQUEST FOR RELIEF	24
VIII.	CERTIFICATE OF COMPLIANCE	25
IX.	ORAL ARGUMENT STATEMENT	25
X.	CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 119 S. Ct. 977, 143 L.Ed.2d 130 (1999)	12
Anthony v. Baker, 767 F.2d 657 (10 th Cir. 1985)	21
Becker v. Kroll, 494 F.3d 904 (10 th Cir. 2007)	21
Boutwell v. Keating, 399 F.3d 1203 (10 th Cir. 2005)	12
Cortez v. McCauley, 438 F.3d 989 (10 th Cir. 2006)	14, 15, 16
Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197 (10 th Cir. 2006)	17, 18
Gold v. Local 7 United Food and Commercial Workers Union, 159 F.3d 1307 (10 th Cir. 1998)	23
Graves v. Thomas, 450 F.3d 1215 (10 th Cir. 2006)	11, 18
Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982)	12
Lusby v. T.G.& Y. Stores, Inc., 749 F.2d 1423 (10 th Cir. 1984)	12, 18, 21
Markley v. Cody, 45 F.3d 440 (10 th Cir. 1993)	24
Meade v. Grubbs, 841 F.2d 1512 (10 th Cir. 1988)	19
Olsen v. Layton Hills Mall, 312 F.3d 1304 (10 th Cir. 2002)	18
Pierce v. Gilchrist, 359 F.3d 1279 (10 th Cir. 2004)	20
Shaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)	12
Tanberg v. Sholtis, 401 F.3d 1151 (10 th Cir. 2005)	13

Taylor v. Meacham, 82 F.3d 1556 (10 th Cir. 1996)	22
Tenn. v. Garner, 417 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)	18
Thomas v. City of Snyder, Okl., 103 F.3d 145 (10 th Cir. 1993)	13, 22
Yanaki v. Iomed, Inc., 415 F.3d 1204 (10 th Cir. 2005)	12
28 U.S.C. §1331	1
42 U.S.C. §1983	1
28 U.S.C. §1367	1
21 O.S. §540	15
22 O.S. §196(1)	13
30 O.S. §115D	6
Okla. Stat. tit. 43A, §10-101 to §10-111	14

Related and Prior Related Appeals

Tenth Circuit appeal number 08-6117, Koch v. City of Del City, et all

Tenth Circuit appeal number 08-6154 In re Koch

I. JURISDICTION.

The Western District of Oklahoma had jurisdiction over Appellant's claims under 28 U.S.C. §1331 as the claims were brought pursuant to 42 U.S.C. §1983 and is therefore a case arising under the Constitution and laws of the United States. The district court had supplemental jurisdiction over Vicki Butrick's state law claims pursuant to 28 U.S.C. §1367. This Court has jurisdiction because Appellant appeals from a final decision from the district court of the Western District of Oklahoma which was entered on March 29, 2010. The order granted summary judgment in favor of Appellee on all federal questions and remanded Appellant's state law claims back to Oklahoma County district court. The order disposed of all claims and is therefore a final order. Appellant timely filed her Notice Of Appeal with this Court on April 28, 2010.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

Appellant asks the Court to resolve the following issues:

- a. John Beech arrested Plaintiff without probable cause in violation of her due process rights
- b. John Beech is not entitled to qualified immunity.
- c. John Beech used excessive force when he arrested Vicki Butrick.
- d. Vicki Butrick has a malicious prosecution claim against John Beech.

e. The district court should exercise supplemental jurisdiction over Vicki Butrick's state law claim.

f. Vicki Butrick's request for a continuance should have been granted.

III. STATEMENT OF THE CASE.

Gladys Lance was an elderly woman alleged to be 101 years of age at the time of Vicki Butrick's arrest. Vicki Butrick's father, Hugh Butrick, had acted as a pastor, church elder, and trusted friend of Ms. Lance for several years. In August of 2003 Gladys Lance signed a nomination of guardian requesting that Hugh Butrick be her guardian and Vicki Butrick alternate guardian. In January of 2004 Gladys Lance signed a durable power of attorney nominating Hugh and Lucille Butrick and Vicki Butrick as her attorneys in fact. Vicki Butrick and her parents acted as caregivers for Ms. Lance. Ms. Butrick provided most of the day-to-day care since her parents did not reside in Oklahoma. Ms. Lance's niece, Pat Loar, had been granted power of attorney over Gladys Lance, but that power was revoked in January 2004, because Ms. Lance did not like Ms. Loar and Ms. Loar resided in Kansas and paid little attention to her aunt.

On September 8, 2005, Pat Loar obtained an emergency guardianship over Gladys Lance without any notice to Vicki Butrick or her parents. At that time, Gladys Lance's home had been placed for sale and Vicki Butrick's parents had put

Ms. Lance in a nursing home.

On September 13, 2005, Officer John Beech, who was employed with the Del City police department, was told by his shift supervisor during lineup that a pick-up order was in place for Gladys Lance and that he should check Vicki Butrick's address for Ms. Lance's whereabouts. Officer Beech went to Ms. Butrick's house and arrived as she was standing outside about to enter her home. Ms. Butrick told Officer Beech she only knew that Ms. Lance was in a nursing home in Choctaw or Harrah and requested that he speak with her attorney who lived nearby, Joyce Good. Officer Beech told her he had a pick-up order for Ms. Lance and if she did not tell him where Ms. Lance was he would arrest her for obstruction. Vicki Butrick then turned and attempted to enter her residence. Officer Beech grabbed her by the arms and forced her to the ground, placing her under arrest. Charges were filed against Ms. Butrick for obstructing an officer and assault and battery on an officer. The charges were later dismissed in the interest of justice. Gladys Lance was located in a nursing home in Harrah shortly after Vicki Butrick's arrest, and she spent her remaining days with Pat Loar in Kansas.

Vicki Butrick brought her claims against City of Del City and John Beech in Oklahoma County District Court March 8, 2007. Appellees removed the action to the Western District of Oklahoma March 29, 2007. Many motions and pleadings

were filed with the trial court, as well as two attempted appeals. Ultimately, the trial court granted Appellees' motion for summary judgment, except as to Appellant's state law claim of false arrest against City of Del City. That claim was remanded to state district court.

IV. STATEMENT OF FACTS.

1. On January 5, 2004, Gladys Lance revoked power of attorney from her niece, Pat Loar. Aplt. App. 189.

2. On January 19, 2004, Gladys Lance signed a Durable Power Of Attorney And Designation Of Conservator Or Guardian, nominating Hugh, Lucille, and Vicki Butrick to serve as her attorneys in fact. Aplt. App. 105-112.

3. Vicki Butrick acted as Ms. Lance's caregiver and had done so for years. Aplt. App. 131, 212.

4. Ms. Lance signed a Nomination Of Guardian By Adult pursuant to the Oklahoma Guardianship And Conservatorship Act July 29, 2005, nominating Hugh Butrick to serve as her guardian and Vicki Butrick and Lucille Butrick to serve as successor guardians in the event she became incapacitated. Aplt. App. 179. Guardianship was never established in court, but Gladys Lance believed Hugh Butrick to be her main guardian and Vicki Butrick to be her alternate guardian. Aplt. App. 263.

5. On or about August 23, 2005, Hugh Butrick received notice from his counsel, Donald K. Groom that Mr. Groom had been in touch with Nancy Byers of Department of Human Services. He advised that Nancy Byers believed Ms. Lance needed more continuous care, and notified him of an Advantage Program that would make trips to the home to care for Ms. Lance's hygiene. He stated Ms Byers advised that no further action was contemplated by DHS at that time. Aplt. App. 177.

6. On August 30, 2005, Gladys Lance was forced to sign a paper for DHS after she was threatened that police would be called. She was not allowed to read what she signed. Aplt. App. 181. Apparently it gave them permission to access her bank accounts. Aplt. App. 116. Gladys Lance's residence was sold by Hugh Butrick September 1, 2005, with closing taking place September 9, 2005. Aplt. App. 116.

7. Ms. Lance was happy with the care she received from the Butricks and did not want interference from DHS. Aplt. App. 183-184. Nancy Byers at DHS told Vicki Butrick's attorney, Joyce Good, in August 2005 that they believed Vicki was doing a really good job taking care of Ms. Lance. Aplt. App. 115.

8. Appellee John Beech maliciously and falsely alleges a report was made against Vicki Butrick to Oklahoma Department of Human Services that she was abusing Gladys Lance in his Motion For Summary Judgment. Such information is

intentionally false and contained nowhere in the record. Aplt. App. 219. The report was actually of self-neglect, which again is not part of the record.

9. On September 8, 2005, Oklahoma County Special Judge Brian H. Upp signed an Order Appointing Special Guardian, which granted Pat Loar emergency guardianship over Gladys Lance. It stated that Vicki Butrick must immediately tell DHS and Pat Loar the whereabouts of Gladys Lance and authorized Pat Loar to obtain law enforcement assistance. It was granted without notice to Vicki Butrick or her parents. Aplt. App. 242.

10. On September 9 a paper was left at Vicki Butrick's doorstep, but she is unsure what it was. Aplt. App. 253. She did not tell Pat Loar's counsel where Gladys Lance was at that time, because she was unsure what was happening with Ms. Lance. Aplt. App. 260. The order had been entered ex parte and she had not yet had an opportunity to be heard on the matter, as hearing for a General Guardian was set for October 5, 2005. Aplt. App. 92. The order reflects it was to be served in accordance with 30 O.S. §115D. Vicki Butrick was not entitled to notice of the order under 30 O.S. §115D. When Vicki Butrick spoke with Julia Wilson, she was told there was a glitch in the system and no guardian documents could be found. Aplt. App. 118.

11. As of September 9, Gladys Lance had been placed in a nursing home by Vicki

Butrick's parents, and Ms. Butrick was no longer acting as her caregiver. Aplt. App. 254-255.

12. On September 13, Officer John Beech was advised while he was in lineup that a pick-up order was in place looking for Gladys Lance, and to check the area periodically of an address in Del City. Beech does not recall which shift officer made the statement. He was told to check the area and see if anyone returned to the residence, and to make contact with them for purposes of checking on the welfare of the elderly female that was supposed to be at the residence. Aplt. App. 65. The only information Officer Beech ever knew was what was told to him during lineup. Aplt. App. 68. Neither supervisor on duty remembers making the statements during lineup. Aplt. App. 365-366 and 370. Officer Beech does not know if the alleged order specifically said to take Gladys Lance into custody because he never had a copy of it. Aplt. App. 75.

13. Officer Beech had no conversations with anyone from Oklahoma Department of Human Services Adult Protective Services. He had no conversations with Pat Loar's attorney, Julia Wilson. Aplt. App. 70. Beech admits the Order Appointing Special Guardian is not a pick-up order. Aplt. App. 73. Officer Beech lied in saying he had attached a pick-up order to his police report. Aplt. App. 74.

14. Officer Beech went to Vicki Butrick's residence that evening and asked her if

she knew the whereabouts of Gladys Lance. Aplt. App. 295.

15. Officer Beech did not have a copy of any order when he made contact with Vicki Butrick. Aplt. App. 68. He admits there is nothing in the Order Appointing Special Guardian that tells him to pick up Gladys Lance. Aplt. App. 75.

16. Ms. Butrick told him he should talk to her attorney. Aplt. App. 71.

17. Officer Beech then falsely told Vicki Butrick he had an emergency pickup order for Ms. Lance and that if Ms. Butrick did not give the whereabouts of Ms. Lance she could be arrested for obstruction. Officer Beech has never seen any emergency pickup order. Aplt. App. 72. He could not possibly have seen one, as it does not exist.

18. Officer Beech admits at the time of arrest he did not know if Vicki Butrick knew where Gladys Lance was. Aplt. App. 76. All Vicki Butrick knew was that Gladys Lance was in a nursing home in Choctaw or Harrah. Aplt. App. 255. She told Officer Beech that Gladys was in a nursing home in Choctaw or Harrah. Aplt. App. 265-266.

19. When Officer Beech told Ms. Butrick he would arrest her for obstruction she told him to leave her property. She tried to enter her residence and he grabbed her arm. Aplt. App. 77.

20. Officer Beech grabbed both arms and forced Ms. Butrick to the ground,

placing his knee in her back, while he placed her in handcuffs. Aplt. App. 78, 210.

21. Corporal Sterling searched inside Vicki Butrick's home that evening without a search warrant while Officer Beech looked inside. Aplt. App. 88.

22. Officer Beech was later told by Corporal Sterling that Gladys Lance was located in a nursing home in Choctaw. Aplt. App. 85.

23. Vicki Butrick suffered numerous injuries as a result of her attack by Officer Beech that evening. Aplt. App. 139-172. Vicki Butrick offered to tell Officer Beech where Gladys Lance was when he attacked her but he would not stop because he wanted to her her. Aplt. App. 201.

24. Officer Beech submitted a false affidavit of probable cause to the Oklahoma County District Court stating he was advised Adult Protective Services had a protective order signed by a judge to take her into protective custody. Aplt. App. 91.

25. Officer Beech was not and could not have been told Adult Protective Services had a protective order signed by a judge to take Gladys Lance into protective custody. No such order was ever obtained in this case and furthermore, Oklahoma Department Of Human Services has no authority to obtain such orders under the facts of the case.

26. Officer Beech falsely stated in his police report that Adult Protective Services

advised the caretaker, Vicki Koch was hiding her (Gladys Lance) from relatives and APS to collect her monthly check. Aplt. App. 94.

27. Charges against Vicki Butrick were later dismissed in the interest of justice. Aplt. App. 137.

28. Vicki Butrick brought her Petition against City of Del City and John Beech March 8, 2007. Aplt. App. 284.

29. In his order granting Appellees summary judgment, Judge Timothy D. DeGiusti alleges Officer Beech was advised there was an APS pickup order. Aplt. App. 377. He even says that issue is undisputed. Aplt. App. 382. That is not true. No APS pickup order ever existed. Officer Beech does not allege he was told about an APS pickup order in his deposition. APS did not have any authority to obtain a pickup order for Gladys Lance, and never attempted to do so. Judge DeGiusti also states Officer Beech reasonably believed that Vicki Butrick knew where Gladys Lance was located. Aplt. App. 385. That is untrue.

V. SUMMARY OF THE ARGUMENT.

Appellant's brief argues that her due process rights were violated when she was arrested without probable cause. Officer Beech did not have any APS pick-up order and did not know if Gladys Lance was at Ms. Butrick's residence when he arrested her. He was supposed to stop by Ms. Butrick's residence merely to check

on the welfare of Gladys Lance, not to assault and arrest her. John Beech is not entitled to qualified immunity as the law is well established that he cannot make a warrantless arrest without probable cause.

John Beech used excessive force against Vicki Butrick when he grabbed her by both arms and forced her to the ground. He had Ms. Butrick by both arms when she turned her back to him to walk inside her home. It was unnecessary for him to wring her hands and push her to the ground.

Vicki Butrick has a malicious prosecution claims against John Beech for his affidavit of probable cause and report submitted to the Oklahoma County court and prosecutors which contained false statements regarding an APS pick-up order, alleging that she tried to run from him, and that she hit him.

VI. ARGUMENT.

A. JOHN BEECH ARRESTED PLAINTIFF WITHOUT PROBABLE CAUSE IN VIOLATION OF HER DUE PROCESS RIGHTS.

A district court's granting of summary judgment is reviewed de novo. *Graves v. Thomas*, 450 F.3d 1215, 1217 (10th Cir. 2006). To state a claim under §1983, a plaintiff must allege she was deprived of a right secured by the Constitution and laws of the United States and that the deprivation was committed under color of state law. *Yanaki v. Iomed, Inc.*, 415 F.3d 1204, 1207 (10th Cir.

2005), *citing Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50, 119 S. Ct. 977, 143 L.Ed.2d 130 (1999). Color of state law means the deprivation is caused by some right or by a person for whom the state is responsible and privilege created by the State or by a rule of conduct imposed by the state and that person is considered a state actor because he is a state official, because he acted together with or obtained significant aid from the state, or because his conduct is otherwise chargeable to the state. *Id.*, at 1208, *citing Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). When an individual is possessed of state authority purports to act under that authority, his action is state action. *Lusby v. T.G. & Y Stores, Inc.*, 749 F.2d 1423, 1429 (10th Cir. 1984).

The Due Process Clause of the Fourteenth Amendment states that no State shall deprive any person of life, liberty, or property without due process of law. *Shaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 194, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In order to show a violation of procedural due process, a plaintiff must show he was deprived of a constitutionally-protected liberty or property interest. *Boutwell v. Keating*, 399 F.3d 1203, 1211 (10th Cir. 2005). A false arrest involves a deprivation of a liberty interest, for which no post-deprivation process can be adequate. *Lusby*, 749 F.2d at 1434. In Oklahoma, an officer is authorized to make a warrantless arrest when a

misdemeanor is committed in his presence. 22 O.S. §196(1). An officer has probable cause to believe a misdemeanor is occurring in his presence when the facts and circumstances observed by the officer through the officer's senses are sufficient to warrant an officer of reasonable caution to believe an offense is occurring. *Tanberg v. Sholtis*, 401 F.3d 1151, 1157 (10th Cir. 2005). Probable cause exists if the facts and circumstances within the arresting officer's knowledge of which he has reasonably trustworthy information are sufficient to lead a prudent persona to believe the arrestee has committed or is committing an offense. *Thomas v. City of Snyder, Okl.*, 103 F.3d 145 (10th Cir. 1993).

On September 13, 2005, when Officer Beech first arrived at Vicki Butrick's property and asked her where Gladys Lance was, it appears he was engaging in a consensual encounter with Butrick. Officer Beech had no reason to believe Ms. Butrick had committed a crime, nor has he ever suggested he believed she may have committed a crime when he went to her residence. He was merely told during lineup to go by Ms. Butrick's house and check on the welfare of Gladys Lance in response to a pick-up order. Aplt. App. 65, 68. No criminal conduct by Vicki Butrick was ever suggested to him. Butrick alleges she gave him what information she knew at the time, which was that Gladys Lance was in a nursing home in Choctaw or Harrah. Gladys Lance was not found at Vicki Butrick's residence and

had never resided at Vicki Butrick's residence. Officer Beech had no reason to believe Ms. Lance was at Ms. Butrick's residence September 13, 2005. Aplt. App. 76. The trial court wrongfully asserted in its order granting summary judgment that John Beech had reason to believe Gladys Lance was at the residence. That fact is disputed and should not have been relied upon by the court. The trial court also relies heavily upon the fact John Beech was told an APS pick-up order was in place. That too is a disputed fact. Beech's deposition disputes that fact. Also, no one has established what an APS pick-up order is or whether police would execute one in the manner allegedly attempted by John Beech. Nothing contained in the Protective Services for Vulnerable Adults Act, Okla. Stat. tit. 43A, §10-101 to §10-111, which is cited by the trial court, suggests APS has the authority to obtain a pick-up order.

A consensual encounter is not a seizure under the Fourth Amendment and need not be supported by suspicion of criminal wrongdoing. *Cortez v. McCauley*, 438 F.3d 980, 989 (10th Cir. 2006). Officer Beech was well within the limits of a consensual encounter when he first approached Ms. Butrick. However, their encounter quickly turned to an unlawful detention when he yelled at her that if she did not tell him where Gladys Lance was he would arrest her for obstruction. Aplt. App. 76. Assuming it had not reached the level of arrest at that point, it was at

least an investigative detention. An officer had the right to briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts for suspecting the particular person detained of criminal activity.

Id. 21 O.S. §540 states:

Any person who willfully delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office, is guilty of a misdemeanor.

Officer Beech had never seen any order directing him to pick up or even locate Gladys Lance. In relying solely on statements made to him by the unidentified shift supervisor that day, he had no reasonable suspicion to believe Ms. Butrick was willfully obstructing him in the discharge of his duties. He admits he did not know if Ms. Butrick knew where Gladys Lance was at that time, and in fact she did not know. She told him she was in a nursing home in Choctaw or Harrah. Ms. Butrick was acting within her rights to enter her home at that time, because Officer Beech had no reason to detain her. The standard rose to probable cause when he arrested her for attempting to enter her home. Probable cause to arrest occurs when the facts and circumstances within the officer's knowledge, and of which they have reasonably trustworthy information, are sufficient to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Cortez*, 438 F.3d at 989. The law was clearly established and

unambiguous at the time regarding probable cause. Probable cause under the Fourth Amendment requires an officer to interview witnesses available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed before invoking the power of warrantless arrest and detention. *Cortez*, 438 F.3d at 990.

Officer Beech never had reason to believe a crime had been or was being committed. All he had been told was to go by Ms. Butrick's residence to check on the welfare of Gladys Lance because a pick-up order was in place. He was not told to take Gladys Lance into custody. He was not told she had been kidnapped. He was merely instructed to check on her welfare. Aplt. App. 65. Gladys Lance was not at Ms. Butrick's home that evening, had never resided with her, and Officer Beech had no reason to suspect Ms. Butrick knew where Gladys Lance was. He had done nothing to investigate whether any criminal activity was occurring prior to attacking Ms. Butrick. The alleged statements made to Officer Beech by his shift supervisor at line-up alleged no wrongdoing by Vicki Butrick whatsoever. *Cortez*, 438 F.3d at 992. Even if Gladys Lance had been at Ms. Butrick's home that evening, he could not have forced her into custody without some order to do so, and he could not have entered Vicki Butrick's residence without a warrant to forcefully take Gladys Lance.

In his motion, Beech alleges Butrick caused a delay in his investigation. Aplt. App. 229. Beech was not involved in any investigation of a crime. He was told to go to Butrick's residence to check on the welfare of Gladys Lance. Butrick did not know where Gladys Lance was. She told him what she did know, that Lance was in a nursing home in Choctaw or Harrah. Aplt. App. 197. Officer Beech could not have reasonably believed Vicki Butrick was obstructing his duties. He was not informed of his duties that evening other than to check on Gladys Lance's welfare, which he had done. He never bothered to look at any alleged court order and he had no knowledge that Vicki Butrick knew Gladys Lance's location, which she did not. His affidavit alleges no underlying criminal violation upon which to base his claim of obstruction. Officer Beech was not acting in the performance of his duties. Demanding that Ms. Butrick tell him where Gladys Lance was when she did not know and he had no reason to believe she knew was not acting in the performance of his duties and a reasonable officer would not have believed her conduct was obstruction.

B. JOHN BEECH IS NOT ENTITLED TO QUALIFIED IMMUNITY.

A district court's ruling on qualified immunity is reviewed de novo.

Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197, 1202 (10th Cir. 2006).

Qualified immunity shields government officials performing discretionary functions from liability if their conduct does not violate clearly established rights which a reasonable official would have known. *Graves, supra*, at 1218. It was well established on September 13, 2005, that a police officer violates an arrestee's clearly established right to be free of unreasonable seizure if the officer makes a warrantless arrest without probable cause. *Fuerschbach*, 439 F.3d at 1205. *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1312 (10th Cir. 2002), *citing Tenn. v. Garner*, 417 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1434 (10th Cir. 1984). The arrest must be justified at its inception. *Fuerschbach*, 439 F.3d at 1206. The main concern in determining whether a reasonable officer would have believed probable cause existed to arrest based on the information possessed by the arresting officer. *Olsen*, 312 F.3d at 1312. A court may not grant summary judgment based on qualified immunity when there are unresolved questions of fact as to whether the officer had probable cause and what information he possessed. *Id.*

No reasonable officer would have believed he had the right to arrest Vicki Butrick on September 13, 2005, for an obstruction charge based on her failure to tell him where Gladys Lance was. A reasonable officer would not have arrested when he had seen no order upon which to base an arrest and no reliable

information that Vicki Lance knew the location of Gladys Lance.

C. JOHN BEECH USED EXCESSIVE FORCE WHEN HE ARRESTED VICKI BUTRICK.

The use of excessive force against an arrestee is actionable under Sec. 1983 as a deprivation of life or liberty without due process of law under the Fourteenth Amendment. *Meade v. Grubbs*, 841 F.2d 1512, 1527 (10th Cir. 1988). It also falls under the Fourth Amendment reasonableness standard. *Tanberg*, 401 F. 3d at 1168. He may use such force as is reasonably necessary under the circumstances. *Id.* The Fourth Amendment right to be free from excessive force during an arrest is violated if the arresting officer's actions were not objectively reasonable in light of the facts and circumstances confronting him. *Olsen*, 312 F.3d at 1314.

Reasonableness is analyzed based on the crime's severity, the degree of threat posed to the officer's safety and the safety of others, and the suspect's efforts to resist or evade arrest. *Id.* Beech argues Butrick attempted to flee into her home when Beech demanded that she tell him the location of Gladys Lance. Butrick argues she merely turned around and attempted to walk into her home when Beech forcefully grabbed her by the arms and threw her to the ground, sticking his knee into her back. Butrick had every right to walk into her home, as no probable cause to arrest existed at the time. Beech did not tell her he she was under arrest. He told

her he was going to arrest her if Butrick did not tell him where Gladys Lance was. Butrick tried to tell him she was in a nursing home in Choctaw or Harrah and he grabbed her and started wringing her hands. Aplt. App. 200. She already had her back to him, as she had turned to go into the door. Officer Beech could have easily grabbed Butrick's hands and placed them in handcuffs. He had no need to push her onto the ground and dig his knee into her back. Butrick told him he did not have to hurt her to make her tell him where Gladys Lance was, but Officer Beech wanted to physically hurt her. Aplt. App. 201. Beech had no reason to believe Butrick knew Gladys Lance's location at the time, and his actions in physically attacking her were objectively unreasonable.

D. VICKI BUTRICK HAS A MALICIOUS PROSECUTION CLAIM AGAINST JOHN BEECH.

To state a claim for malicious prosecution, a plaintiff must show I) the bringing of the action by the defendant, ii) its successful termination in favor of the plaintiff, iii) want of probable cause to bring the action, iv) malice, and v) damages. *Pierce v. Gilchrist*, 359 F.3d 1279, 1286 (10th Cir. 2004). An officer who conceals and misrepresents facts to the district attorney is not insulated from a §1983 claim based on the independent actions of the prosecutor. *Id.*, at 1292. When the misuse of legal procedures is egregious it can violate due process rights

under the Fourteenth Amendment. *Lusby*, 749 F.2d at 1429. The relevant constitutional issue for a claim of malicious prosecution is normally the Fourth Amendment's right to be free from unreasonable seizures. *Becker v. Kroll*, 494 F.3d 904, 914 (10th Cir. 2007). Officers are liable under section 1983 when they procure groundless charges based on fabricated evidence or false, distorted, perjurious testimony presented to official bodies in order to maliciously cause a citizen's trial or conviction. *Anthony v. Baker*, 767 F.2d 657, 662 (10th Cir. 1985).

On September 13, 2005, Officer Beech signed an affidavit of probable cause stating falsely he had been advised Adult Protective Services had a protective order signed by a judge to take Gladys Lance into protective custody. He stated he advised Vicki Koch he had a court order to place Lance into protective custody. This is also false. He never saw a court order prior to arresting Ms. Butrick, nor did he ever attempt to obtain the court order once he had taken Ms. Butrick to the police station. He falsely states she tried to run inside her residence. She was standing there attempting to unlock the door. There was no attempt to run. He falsely stated she struck him in the chest. Aplt. App. 91. Officer Beech falsely stated in his police report Adult Protective Services had advised him Vicki Koch was hiding Gladys Lance to collect her monthly check. He states he obtained a copy of the protective custody order signed by Judge Upps. Aplt. App. 94. The

only order signed by Judge Upp was the Order Appointing Special Guardian.

It is a violation of the Fourth Amendment for an arrest warrant affiant to knowingly, or with reckless disregard for the truth, include false statements in the affidavit, or to knowingly or recklessly omit from the affidavit information which would have vitiated probable cause. *Taylor v. Meacham*, 82 F.3d 1556, 1562 (10th Cir. 1996). An officer who purposefully conceals and misrepresents material facts which may have influenced the decision to prosecute is not insulated from liability, because the prosecutor's actions are dependent on the police officer's wrongful conduct. *Thomas v. City of Snyder, Okl.*, 103 F.3d 145 (10th Cir. 1993).

If we remove the portions of Beech's affidavit stating he was advised APS had a protective order signed by a judge to take Gladys Lance into protective custody and that Vicki Butrick struck him in the chest, and include the omitted facts that he went to Vicki Butrick's home to check on the welfare of Gladys Lance due to an Order Appointing Special Guardian and that Vicki Butrick had told him Gladys Lance was located in a nursing home in Choctaw or Harrah, which was in fact true, a court would not have made a finding of probable cause. Officer Beech should have obtained a copy of this alleged pick-up order directing him to take Gladys Lance into protective custody. His failure to do so prior to arresting Vicki Butrick and at the very least reviewing it before preparing his

affidavit of probable cause, and to continue with the prosecution of Ms. Butrick based on false statements submitted to authorities, is egregious.

E. THE DISTRICT COURT SHOULD EXERCISE SUPPLEMENTAL JURISDICTION OVER VICKI BUTRICK'S STATE LAW CLAIM.

The trial court has supplemental over a plaintiff's state law claim if it derives from a common nucleus of operative fact such that the relationship between the federal claim and the state law claim permits the conclusion that the entire action before the court comprises just one constitutional case. *Gold v. Local 7 United Food and Commercial Workers Union*, 159 F.3d 1307, 1310 (10th Cir. 1998). In deciding whether to exercise supplemental jurisdiction, the federal court should consider the values of judicial economy, convenience, fairness, and comity. *Id.*

In its Order, the trial court found that City Of Del City was not entitled to summary judgment on Vicki Butrick's false arrest state law claim. Aplt. App. 393. The case was remanded back to Oklahoma County to best serve the principles of economy, convenience, fairness, and comity. Vicki Butrick has shown John Beech was not entitled to summary judgment on her federal constitutional claims. Both her federal claims against John Beech and the state law claim for false arrest against City of Del City should be remanded back to the Western District of

Oklahoma. They are based on the same facts and both will be determined based on the same actions of John Beech.

F. VICKI BUTRICK'S REQUEST FOR A CONTINUANCE SHOULD HAVE BEEN GRANTED.

Denial of a request for continuance is reviewed for abuse of discretion. *Markley v. Cody*, 45 F.3d 440 (10th Cir. 1993). Factors to be considered are the diligence of the party requesting the continuance, inconvenience to others resulting from the continuance, the need asserted for the continuance, and the harm the requesting party may suffer if the request is denied.

Vicki Butrick's case had been pending approximately nine months when she requested her continuance. Only one other continuance had been previously requested, which was joint, and had been granted by the court. John Beech and City of Del City would have suffered no inconvenience if the continuance had been granted. Ms. Butrick requested the continuance because she was still receiving medical treatment. Her medical treatment is an important aspect of damages in this case. If she is not allowed to finish her medical treatment, it will be difficult for her to show all her medical damages with reasonable certainty to a jury. Therefore, the trial court abused its discretion in denying the continuance.

VII. REQUEST FOR RELIEF.

Vicki Butrick requests that the orders granting summary judgment, and denying her a continuance, and remanding her state law claims to the state trial court be reversed and remanded back to the trial court.

VIII. CERTIFICATE OF COMPLIANCE.

This brief complies with the type-volume limitation requirement in that it contains approximately 5,793 words.

IX. ORAL ARGUMENT STATEMENT.

Appellant requests oral argument so that the parties may fully explain the disputed facts and issues before this Court.

s/Valerie Williford
Valerie Williford, OBA#18493
625 N.W. 13th Street
Oklahoma City, OK 73103
Phone: (405) 226-8585
Fax: (405) 525-2250
vawlaw@gmail.com
Attorney For Appellant
Vicki Butrick

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2010, I electronically transmitted the foregoing Appellant's Opening Brief to the Clerk of the Tenth Circuit Court of Appeals using the ECF system for electronic filing and that a notice of electronic filing was transmitted to Robert S. Lafferrandre, Randall J. Wood, Pierce Couch Hendrickson Baysinger & Green, L.L.P., 119 North Francis, Oklahoma City, Oklahoma 73126, and that a copy of Appellant's Brief and Appellant's Appendix were personally delivered September 22, 2010, to Robert S. Lafferandre and Randall J. Wood.

s/Valerie Williford