No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

VICKIE BROOKS,

Petitioner,

v.

PHILADELPHIA INSURANCE COMPANIES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

PREFACE

Petitioner claims that the Tenth Circuit failed to follow stare decisis in the opinion appealed from and that the orderly process of justice will be impaired unless this Court exercises its superintending jurisdiction over all federal courts as a result.

QUESTIONS:

Did The Tenth Circuit Court fail to follow stare decisis by failing to follow its own ruling in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) and affirming the District Court's grant of Philadelphia Insurance Company's Motion for Summary Judgment.?

Does the Tenth Circuit's failure to follow stare decisis sufficiently endanger the principles requiring federal courts to follow state law in diversity of citizenship cases, as required by *Erie R.R. v. Thompkins*, 304 U.S. 64 (1938) to justify this Court exercising its superintending jurisdiction by correcting the Tenth Circuit's ruling?

PARTIES TO THE PROCEEDING

The named parties are the sole parties to this action.

LIST OF RELATED CASES

U.S. Circuit Court of Appeals for the Tenth Circuit
Case No. 21-6052, Request for Rehearing En Banc
Vickie Brooks v. Philadelphia Insurance Companies
Order: March 14, 2022

U.S. Circuit Court of Appeals for the Tenth Circuit
Case No. 21-6052, Appeal
Vickie Brooks v. Philadelphia Insurance Companies
Order and Judgement: February 10, 2022

U.S. District Court for the Western District of Oklahoma
Case No. 18-cv-603-G, Request to Amend Judgment
Vickie Brooks v. Philadelphia Indemnity Insurance Company
Order: March 29, 2021

U.S. District Court for the Western District of Oklahoma
Case No. 18-cv-603-G
Vickie Brooks v. Philadelphia Indemnity Insurance Company
Judgment, February 28, 2020

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions this court for a writ of certiorari to review the judgement of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

District Court Opinions: Case No. CIV-18-603G:

1. Opinion and Order sustaining Motion for Summary Judgment – February 28, 2020, WL 981722 (App.29a).

2. Order overruling Plaintiff's Motion to Alter or Amend Judgment – March 29, 2021, *Brooks v. Philadelphia Indem. Ins. Co.*, No. CIV-18-603-G, 2021 WL 1626485 (W.D. Okla. Mar. 29, 2021).

Tenth Circuit Court of Appeals:

1. Order and Judgment Affirming District Court – February 10, 2022, *Brooks v. Philadelphia Indem. Ins. Co.*, No. 21-6052, 2022 WL 402386 (10th Cir. Feb. 10, 2022).

2. Order denying Petition for Rehearing to the Court *en banc* – March 14, 2022 Not otherwise published (App.1a).

JURISDICTION

This Court has jurisdiction of this petition to review the judgment of United States Court of

Appeals for the Tenth Circuit pursuant to 28 U.S.C.A. § 1254(1) (West). The Tenth Circuit's Order and Judgment was filed 10 February, 2022, and Petitioners' Petition for Rehearing and Rehearing *En Banc* was denied on 14 March 2022.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner does not assert a constitutional issue.

STATEMENT OF THE CASE

Vicki Brooks, a driver for a private prison company, drove a van for a private prison company, which leased the van from a vehicle leasing company.

She was injured in a crash between an underinsured car and the van. She was badly injured and remains disabled to this day.

A low-level employee of the company, she had no knowledge of what coverages the van was insured for. She knew only that someone had gotten liability coverage on the van, as Oklahoma law required.

She was paid the at-fault motorist's liability coverage of $100,000 and her own vehicle's uninsured/underinsured motorist (UM) coverage of $50,000.

Then she hired her present lawyer who inquired of her employer whether there might be UM coverage on the van. It took two years for the

Philadelphia Insurance Company (the insurance company) to ascertain there was $1 million UM coverage on the van.

The insurance company denied her claim arguing *Porter v. MFA Mut. Ins. Co.*, 1982 OK 23, 643 P.2d 302 held Ms. Brooks' failure to know and notify the insurance company of her proposed settlement forfeited her UM coverage.

Fortunately, for Ms. Brooks, a Tenth Circuit decision directly in point saved her from this fate. *Phillips v. New Hampshire Ins. Co.*, 263 F.3d 1215 (10th Cir. 2001) avoided this fate. It held in a case virtually identical to her case, that *Porter* did not have this effect.

In *Phillips*, Ms. Phillips, like Ms. Brooks, drove an insured, company vehicle and settled with the at-fault motorist, which denied her claim. The District Court held *Porter* barred the claim.

The Tenth Circuit reversed *Porter* on two grounds (1) Ms. Phillips did not know the terms of the coverage, which required notice to the employer's insurance company and (2) the insurance company did not put forward any evidence that, if the insurance company had known of the proposed settlement, it could have actually recovered money from the underinsured tort-feasor. It did not, therefore, show actual prejudice from the settlement.

To Ms. Brooks complete surprise, the District Court sustained the insurance company's summary judgment, the Tenth Circuit panel affirmed and the *en*

banc Court refused to reverse. So we now have two conflicting decisions in the Tenth Circuit on the same facts, the very thing sought to be avoided by the doctrine of stare decisis.

Ms. Brooks moved under Fed. R. Civ. P. 59(e) to alter or amend its judgment – specifically, to reconsider its order dismissing the case – because it did not follow the Tenth Circuit Court's decision in *Phillips v. New Hampshire Ins. Co.*, 263 F.3d 1215 (10th Cir. 2001).

In *Phillips*, the Tenth Circuit Court held an insurer could not assert the Porter defense because forfeiture required the insured to intentionally destroy the insurance company's subrogation right. Brooks argued that since *Phillips* was directly analogous to the facts in this lawsuit, the trial court committed clear error in not following it. The District Court denied Ms. Brooks' Motion to Alter or Amend Judgment.

Petitioner appealed to the United States Court of Appeals for the 10th Circuit. The 10th Circuit sustained the District Court's ruling. She then filed a Petition for Rehearing En Banc on February 23, 2022. The 10th circuit denied the petition.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit Court failed to follow stare decisis by affirming the District Court's grant of Summary Judgment to the insurance company and Order denying Brooks' Fed. R. Civ. P. 59(e) Motion to Alter or Amend Judgment. In both of its orders, the

trial court stated that *Phillips v. New Hampshire Ins. Co.*, 263 F.3d 1215 (10th Cir. 2001) was not applicable to the facts of Brooks' case, despite being directly in point. The District Court's analysis of *Phillips* was flimsy, at best. Similar to the plaintiff in *Phillips*, Brooks did not know about her employer's UM policy with Philadelphia at the time of release and could not have known about its subrogation rights or intended to bar the insurance subrogation.

Nor did the insurance company in any way assert that it was prejudiced by the release; that is, that, had she not executed the release, the insurance company would have been able to actually recover from the tort-feasor. This was a part of the *Phillips* holding.

The District Court's order denying Brooks' Motion to Alter or Amend Judgment imposed a higher evidentiary standard at the summary judgment stage, one that has never been shown in *Porter* and *Phillips* (among other case law in this area). The court exclusively used the police collision report as proof that Brooks' interference was "knowing" under *Porter* and *Phillips*, despite the report only stating the name of Brooks' liability policy's and not that it provided UM coverage. The report did not include any other identifying information, such as whether there was UM coverage under the policy. Despite saying the report was the only evidentiary material in the record, the court's orders never accounted for the correspondence between Brooks' counsel and Philadelphia, which asked about these particulars. The court's order also seemed to imply that nothing short of an affidavit or deposition transcript is enough

for Brooks to claim she did not know about Philadelphia's subrogation rights. This strains credulity and creates an overly burdensome evidentiary standard. There was never any affidavit in *Phillips*.

Based on these factors, Ms. Brooks' Fed. R. Civ. P. 59(e) motion should have been granted, and the summary judgment in Philadelphia's favor should have been vacated. Because the trial court committed clear error in not doing so and upheld the judgment, it abused its discretion. Furthermore, because the Tenth Circuit Court failed to follow stare decisis, this Petition for Certiorari should be granted.

1. The Courts Review Denial of a Motion to Alter or Amend Judgment for Abuse of Discretion.

It is appropriate to grant a motion to alter or amend judgment under Fed. R. Civ. P. 59(e) "where the court has misapprehended the facts, a party's position, or the controlling law." See *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1153 (10th Cir. 2012). A District Court's denial of a Fed. R. Civ. P. 59(e) motion is reviewed under an abuse of discretion standard. See *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1331 (10th Cir. 1996).

Abuse of discretion is defined as "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." See *United States v. Hernandez-Herrera*, 952 F.2d 342, 343 (10th Cir. 1991). More specifically, "[a] district court abuses its discretion when it (1) fails

to exercise meaningful discretion, such as acting arbitrarily or not at all, (2) commits an error of law, such as applying an incorrect legal standard or misapplying the correct legal standard, or (3) relies on clearly erroneous factual findings." See *Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246, 1256 (10th Cir. 2015). The abuse of discretion standard "includes review to determine that the discretion was not guided by erroneous legal conclusions." See *Loughridge v. Chiles Power Supply Co.*, 431 F.3d 1268, 1275 (10th Cir. 2005).

2. The District Court Erred by Misapplying the Tenth Circuit's Controlling Law.

a. The Tenth Circuit's Holding in *Phillips* is Directly Analogous, in Contrast to the Trial Court's Interpretation.

In its order denying Brooks' Motion to Alter or Amend Judgment, the trial court states it "expressly relied on [*Phillips*] multiple times" in its Opinion and Order granting summary judgment to Philadelphia. It adds that its Opinion and Order "addressed facts specific to this lawsuit that distinguish this case from *Phillips* in ways that are material to the determination of whether Plaintiff 'voluntarily and knowingly' interfered with [Defendant's] contract rights." Neither of these are the case.

The District Court's statement, that its order "addressed facts specific to this lawsuit" and distinguished them from *Phillips* before granting

summary judgment to the insurance company, is simply not true. The order did not go into detail about the *Phillips*' holding or how *Phillips* was distinguishable. The court did not specifically compare *Phillips*' facts to Brooks' facts, when both were nearly identical. The District Court never expressly cited or relied on the standard in *Phillips* when it used the collision report as evidence that "no reasonable jury could find that Plaintiff's interference was not 'knowing.'" Instead, the Opinion and Order took that fact that a collision report listed liability insurance and used it exclusively in attempting to show that Brooks knowingly violated the insurance's subrogation rights, and that therefore, summary judgment was warranted.

The Tenth Circuit Court's decision in *Phillips* cited an Oklahoma Supreme Court case with a similar set of facts, *Robertson v. U.S. Fid. & Guar. Co.*, 1992 OK 113, 836 P.2d 1294. There, that court held a UM insurer waives its subrogation rights and cannot object to a settlement when the insurance company fails to properly offer and take a rejection of UM coverage so that the insured never saw the subrogation provision of the policy. The Tenth Circuit Court compared and contrasted *Phillips* and *Robertson*, leading to this conclusion:

> Neither insured in either case knew at the time the release was signed that he/she was impairing any prospective subrogation rights of his/her insurer. Thus, neither insured "voluntarily and knowingly" interfered with the insurer's

> contract rights as the insured in *Porter* had done.
>
> In sum, being legally able to exercise subrogation rights is not the *sine qua non* of an obligation to pay a UM/UIM claim. *Phillips*, 263 F.3d at 1222 (citations omitted).

The same holds true here. Even assuming Brooks knew of her employer's policy with the insurance company based solely on the collision report, the only information in the collision report linking the vehicle to the insurance company was the insurer's name and policy number. These, alone, simply cannot establish that Brooks knew of the particulars about the UM policy, coverage, or subrogation rights before she signed the release with the tort-feasor's insurer. Brooks did not procure or negotiate her policy, nor did she know the policy's details, including any limits or subrogation rights.

The trial court even cited a summary judgment standard (and one applicable to Brooks' case, for that matter) as persuasive in the first Order, only to dismiss it as not binding the next. In its original order granting summary judgment, the District Court cited *McFadden v. Arch Insurance Co.*, a case that actually denied summary judgment for an insurer who tried to assert the *Porter* defense but had "failed to establish that plaintiff 'was aware of the existence of the [insurance policy] at the time he released his claims.'" Curiously, the District Court's later Order denying Brooks' Motion to Alter or Amend Judgment stated that this summary judgment standard—again,

previously cited by the trial court before Brooks cited it in her Motion—was "pronounced by a fellow district court" and therefore "not binding upon this Court."

The Tenth Circuit Court has said:

> . . . [W]hen a panel of this Court has rendered a decision interpreting state law, that interpretation is binding on district courts in this circuit, and on subsequent panels of this Court, unless an intervening decision of the state's highest court has resolved the issue. *Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 866 (10th Cir. 2003).

Essentially, the District Court's original Opinion and Order granting Philadelphia's Motion for Summary Judgment interpreted *Phillips* and other case law like it in a way contrary to its holding. The Court should have granted Ms. Brooks' Motion to Alter or Amend Judgment to correct this error.

b. The Trial Court Imposed an Evidentiary Standard that *Phillips* Did Not Require, and Did Not Consider All of the Available Evidence.

When the District Court's original Opinion and Order referenced Brooks' initial claim that she did not know about the UM policy at the time she settled with State Farm (for the at-fault driver), it said this was "not supported by any affidavit or deposition testimony or any other evidentiary material permitted under Rule 56." It added that "[a]s the only

evidentiary material in the summary judgment record is consistent with a finding that Plaintiff knew of Defendant's insurance coverage…this unsupported argument is insufficient to show a genuine issue under Rule 56."

The subsequent Opinion and Order doubled down on this assertion, stating "Plaintiff had failed to point to specific evidence sufficient to create a genuine dispute as to whether her interference was 'knowing." The District Court's order granting Philadelphia summary judgment implies an affidavit or deposition testimony is required for Brooks to move past summary judgment. To the contrary, the Tenth Circuit Court's opinion in *Phillips* is silent on whether an affidavit or deposition testimony was cited, in stating that "[Phillips] did not know at the time whether her employer had a UM policy that covered her or who the carrier was." See *Phillips*, 263 F.3d at 1218. A careful search of *Phillips* does not contain the word "affidavit."

Indeed, the District Court failed to consider any other evidentiary material in the record in its decision, committing a clear error of law. The collision report was not "the only evidentiary material," as the District Court suggested in its Order. The insurance Company's correspondence with Brooks' counsel directly introduced a fact issue as to whether Ms. Brooks actually knew about the subrogation rights, yet this was not looked at in detail by the District Court. This should have also precluded summary judgment, but was never accounted for.

c. The *Phillips* Holding Had an Alternate, and Applicable, Ground for Reversing Summary Judgement, Which Brooks had Stated Before, But Philadelphia Had Never Addressed.

The District Court did not address whether Philadelphia had shown uncontroverted evidence that it was prejudiced by the liability settlement, which was a key alternative basis for the *Phillips* holding:

Porter stated that prejudice to the insurer was the ultimate inquiry when applying the waiver doctrine in cases in which a release has been knowingly given . . . . Actual, not just theoretical, prejudice is a necessary element of a *Porter* defense because only the insured's conduct that causes injury to the insurer can be unfair. Consequently, because [New Hampshire Insurance Company] did not allege any undisputed facts to establish that it was actually injured by Ms. Phillips' conduct, it failed to satisfy its summary judgment burden. See *Phillips*, 263 F.3d at 1222–23 (citations omitted).

The Tenth Circuit Court predicted, then, that the Oklahoma Supreme Court would hold there is no waiver arising from the release unless an insurer can show actual prejudice. Interestingly, the district court order alleges this argument is a new one, which could not have been raised under a Rule 59(e) motion. The District Court seems to take what Brooks stated in these new grounds as a sort of separate "collectability argument." This suggests a difference between alleged prejudice to Philadelphia resulting from a waiver of

its subrogation rights, and alleged prejudice based on estoppel. Yet, no such difference is articulated by *Phillips*, or for that matter, any other Oklahoma court precedent. Philadelphia still has to show, through uncontroverted evidence, that it was actually injured by Brooks' conduct, that is that the insurance company could have collected from the tort-feasor.

As the Tenth Circuit Court has said before, "[c]ertainly a motion under Rule 59(e) allows a party to reargue previously articulated positions to correct clear legal error." See *Hayes Fam. Tr. v. State Farm Fire & Cas. Co.*, 845 F.3d 997, 1005 (10th Cir. 2017). Because Brooks has done so here, the judgment should be reversed.

3. The Tenth Circuit Court Failed to Follow Stare Decisis by Failing to Follow Their Own Decision in *Phillips*.

The greatly respected rule of stare decisis is the idea that "today's Court should stand by yesterday's decisions." See *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463 (2015). This is the preferred course of action because "it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* In *Erie v. Thompkins*, this Court established that once a panel rules on an issue of state law, all federal courts in the circuit must follow that decision until either the state supreme court or the United States Supreme Court rules otherwise, saying, "the laws of the several States . . . shall be regarded as rules of

decision in trials at common law, in the courts of the United States, in cases where they apply." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71, 58 S. Ct. 817, 819, 82 L. Ed. 1188 (1938).

By failing to follow their own ruling in *Phillips*, the Tenth Circuit Court violated the rule of stare decisis. *Phillips*, a case that is factually analogous to the case at hand, established the scenarios where the *Porter* defense is inapplicable. The facts of this case are sufficient to establish that the *Porter* defense is inapplicable, however, contrary to their own ruling in *Phillips*, the Tenth Circuit Court ruled on the contrary. This is an inconsistent ruling by the 10th Circuit, and therefore violates the rule of stare decisis.

4. This Court Should Grant Certiorari to Protect the Integrity of the Federal Court System from the Confusion Imperiling the Rule of Stare Decisis

This Court is the highest Court in the United States' Judicial system. This case involves a tragedy for Ms. Brooks. She has been deprived of $1 million in coverage for which her employer paid good money and which she desperately needs. But there is much more at stake here.

The rules to be applied in federal courts serve a large function which is vital to the rule in diversity cases that Federal Courts should be careful to apply state law, as declared by State courts of last resort to diversity cases as required by *Erie*. Stare decisis plays an important role in our common law system.

This Court has " . . . ample authority to control the administration of justice in the federal courts," as opposed to State Court. See *Danforth v. Minnesota*, 552 U.S. 264, 286, 128 S. Ct. 1029, 1046, 169 L. Ed. 2d 859 (2008). This Court should use its supervisory powers in this case to aid the cause of justice!

CONCLUSION

The District Court abused its discretion in denying Brooks' Motion to Alter or Amend Judgment, and the Tenth Circuit Court failed to follow the rule of stare decisis. This petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

ORDER DENYING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT (MARCH 14, 2022)

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Filed United States Court of Appeals Tenth Circuit
March 14, 2022
Christopher M. Wolpert Clerk of Court

VICKIE BROOKS,

Plaintiff - Appellant,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant - Appellee.

No. 21-6052

Appeal from the United States District Court for the Western District of Oklahoma
(D.C. No. 5:18-CV-00603-G) (W.D. Okla.)

ORDER

Before: **TYMKOVICH**, Chief Judge, **MATHESON**, and **PHILLIPS**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

s/ CHRISTOPHER M. WOLPERT, Clerk

ORDER AND JUDGMENT ON APPEAL OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT (FEBRUARY 10, 2022)

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Filed United States Court of Appeals Tenth Circuit
February 10, 2022
Christopher M. Wolpert Clerk of Court

VICKIE BROOKS,

Plaintiff - Appellant,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant - Appellee.

No. 21-6052

Appeal from the United States District Court for the Western District of Oklahoma
(D.C. No. 5:18-CV-00603-G) (W.D. Okla.)

ORDER AND JUDGMENT*

Before: **TYMKOVICH**, Chief Judge, **MATHESON**, and **PHILLIPS**, Circuit Judges.

This appeal arises from the denial of a Rule 59 motion for reconsideration arising from the district court's entry of summary judgment on Philadelphia Indemnity's defense of non-coverage against an uninsured motorist claim. Vickie Brooks contends the court erred in applying Oklahoma and Tenth Circuit case law. We conclude that the district court correctly applied Oklahoma law. Ms. Brooks breached the Philadelphia policy by settling an automobile accident claim with two other insurance companies before notifying Philadelphia of personal injuries she suffered from the accident.

BACKGROUND

Ms. Brooks was driving a company vehicle when an underinsured motorist hit her.[1] The accident

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] The district court found that Ms. Brooks worked for Avalon Correctional Services, while Ms. Brooks states on appeal that her employer was First Enterprise Equipment. Because the parties agree on the relevant insurance contract, this is not a material fact.

allegedly caused both damage to the vehicle and personal injury to Ms. Brooks. At the scene of the accident, police created an accident collision report, which included the name of the insurer, Philadelphia, and Philadelphia's insurance policy number. There is no indication that anyone but Ms. Brooks could have provided this information to the police, and the collision report was accessible to her at any time after the accident. She did not report any personal injuries to police.

Ms. Brooks's employer then reported the accident to Philadelphia but did not claim any damages, either to the car or arising from Ms. Brooks's injuries. Thus, Philadelphia had no way of knowing that any investigation was needed. Ms. Brooks also reported the accident to the underinsured motorist's insurer, State Farm, and her personal insurer, AAA.

Ms. Brooks apparently then made a claim to AAA and State Farm for personal injuries. She subsequently settled with AAA for $25,000 and State Farm for $50,000. In doing so, she released all interested parties from liability. This included anyone that Ms. Brooks knew had an interest in the claim, not just the parties to the contract.[2]

Months later, Ms. Brooks's counsel sent a letter to Philadelphia asking for the policy, which included coverage for uninsured or underinsured motorists. When Ms. Brooks learned of the underinsured

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[2] Because we affirm for the same reasons as the district court, it is not necessary to consider whether Ms. Brooks's settlements separately destroyed Philadelphia's obligation to pay her claim.

motorist coverage, she submitted a claim. Philadelphia did not respond to the claim.

Ms. Brooks then sued Philadelphia in the district court. Philadelphia moved for summary judgment on the basis that, under Oklahoma law, Ms. Brooks's settlements with AAA and State Farm obviated Philadelphia's duty to pay her claims, arguing the settlements destroyed its ability to seek contribution from the other insurance companies.

The district court granted summary judgment for Philadelphia, relying on an Oklahoma case holding that if an insured settles a claim without notice to his or her insurer, coverage is forfeited under the insurance contract. *See Porter v. MFA Mut. Ins. Co.*, 643 P.2d 302, 305 (Okla. 1982). Because Ms. Brooks entered into two settlements without notice to Philadelphia, the district court found that she had forfeited any claims under the policy. Thus, Philadelphia was not liable for any of Ms. Brooks's damages.

Ms. Brooks filed a motion for reconsideration in light of a Tenth Circuit case interpreting *Porter*: *Phillips v. New Hampshire Ins. Co.*, 263 F.3d 1215, 1222 (10th Cir. 2001). In *Phillips*, we held that "even if the UM carrier is legally barred from exercising its subrogation rights against the tort-feasor, it must still pay its insured *unless* it would be unfair in light of the insured's knowing, affirmative, and prejudicial conduct." *Id.* If an insured's settlement is made without knowledge of a potential conflict with the insured's policy, the insured does not forfeit coverage under the insurance contract. *Id.* Ms. Brooks argued that she was not specifically aware that the Philadelphia policy included potentially applicable

underinsured motorist coverage since she had never seen the policy. The district court found that this was not sufficient to make her settlements unknowing or involuntary under Phillips, and it denied her motion for reconsideration.

ANALYSIS

Ms. Brooks argues that the district court erred by misinterpreting *Phillips*.[3] We agree with the district court in finding that *Phillips* does not apply to Ms. Brooks's case.

Under Oklahoma law,

> if an insured settles with and releases a wrongdoer from liability for a loss before payment of the loss has been made by the insurer, the insurer's right of subrogation against the wrongdoer is thereby destroyed. Also as a general rule an insured who deprives insurer, by settlement and release, of its right of subrogation against the wrongdoer thereby provides insurer with a complete defense to an action on the policy.

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[3] Ms. Brooks also argued that the district court improperly found that she had knowledge of the policy when she did not know the relevant policy provision. This argument simply reframes Ms. Brooks's argument under Phillips. Both turn on whether specific and actual notice is required. Because Ms. Brooks's Phillips argument fails, her argument that the district court improperly found an essential fact also fails.

Porter v. MFA Mut. Ins. Co., 643 P.2d 302, 305 (Okla. 1982) (footnotes omitted); *see also* Okla. Stat. tit. 36, § 3636(F)(1)-(2); *Brambl v. GEICO General Ins. Co.*, No. 10-CV-474-TCK-PJC, 2011 WL 5326076, at *2-3 (N.D. Okla. Nov. 4, 2011) ("[T]he insured's voluntary settlement with the tortfeasor destroys the UM carrier's subrogation rights and operates as a forfeiture of any UM Case coverage."). Thus, an insured who enters into a settlement with a tortfeasor, without notice to his own insurance company, forfeits any underinsured motorist coverage. By settling, the insured destroys the insurer's right of subrogation, or ability to sue in the shoes of the insured.[4] Under *Porter*, because Ms. Brooks entered into two settlements with the tortfeasor's insurers and did not give notice to Philadelphia, she forfeited her claims under the Philadelphia policy.

But in *Phillips v. New Hampshire Insurance Co.*, 263 F.3d 1215, 1222 (10th Cir. 2001), we

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[4] Ms. Brooks also contends there was no prejudice to Philadelphia due to the destruction of its subrogation rights. She cites *Phillips* for this argument. In *Phillips*, the tortfeasor was judgment-proof, so the court noted that even if the insured had given notice, there was no indication that the insurance company could have collected. But Oklahoma courts have presumed that a tortfeasor has some assets, unless that presumption is contested or rebutted. *See, e.g.*, *Porter v. MFA Mut. Ins. Co.*, 643 P.2d 302, 305 (Okla. 1982) (finding that barring the insurer "from exercising its lawful right of recourse" against the tortfeasor prejudices the insurer, without discussion of whether the tortfeasor had any assets). Here, there is no argument that the tortfeasor is judgment- proof. Thus, it was not error to find that Philadelphia was prejudiced by its inability to sue.

identified an exception to the *Porter* rule that settlement without notice voids an insurer's duty to pay. There, the insured did not know whether her employer had an insurance policy on the vehicle. Nonetheless, she requested production of any automobile insurance policies that the employer had. The employer did not respond to her interrogatories, and it failed to produce the insurance agreement until seven months after the insured had already entered into a settlement agreement.

In *Phillips*, we held that an insured who was not able to obtain information, despite her best efforts, about whether the vehicle was insured or which insurance company covered the vehicle was not bound by *Porter*. *Id.* (defining a "knowing" insured as one who "knew at the time the release was signed that he/she was impairing any prospective subrogation rights of his/her insurer"). Only after Phillips had already settled did her employer finally respond that the vehicle was insured. *Id.* ("Ms. Phillips executed the release before even obtaining NHIC's identity or a copy of the policy."). Because Phillips had no way of finding out whether the vehicle had insurance coverage, the *Phillips* court found that her settlement could not have been a knowing and voluntary breach of her notice obligation. Further, she had no way of providing the insurance company with notice of the settlement, as required by Oklahoma law. Thus, she did not forfeit her insurance coverage when she settled with the tortfeasor before she could have possibly known about the existence of the insurance policy.

Ms. Brooks entered into two settlement agreements without notice to Philadelphia. Under *Porter*, this negates Philadelphia's duty to pay her claim. 643 P.2d at 305. Ms. Brooks argues her

settlements fall under the *Phillips* exception, since she did not have actual notice of the underinsured motorist coverage. The district court found that Ms. Brooks was aware of the policy's existence: The Collision Report was generated from an investigation made at the scene and identified Philadelphia as the insurer of Ms. Brooks's work vehicle. She thus had actual notice of a potentially applicable insurance policy. Ms. Brooks, moreover, does not deny that she had actual knowledge of the identity of the insurer, Philadelphia, and the policy number. She argues instead that she was not aware of the "details." App. Br. at 9.

Ms. Brooks could have obtained the policy provisions by contacting Philadelphia—which her counsel eventually did. She claims her initial failure to obtain this information makes her settlements unknowing under the logic of *Phillips*. We disagree. In *Phillips*, the insured used her best efforts but was not able to obtain her policy in the face of recalcitrance by her employer. We emphasized that the insured "requested information about, and production of, any automobile insurance policies her employer had in force, but her employer did not respond [until after the settlement]." *Phillips*, 263 F.3d at 1218.

Here, Ms. Brooks knew of the policy but did not procure and read its provisions until after the settlements. Ms. Brooks could have obtained the specific information by reaching out to Philadelphia, as her counsel eventually did. Ms. Brooks, unlike Phillips, could have obtained all the necessary information with a modicum of due diligence. Thus, her settlement was knowing and voluntary as explained in *Phillips*. Ms. Brooks does not fall under

an exception to the general rule that her settlement voids Philadelphia's duty to pay.

For the reasons stated above, the district court correctly denied Ms. Brooks's motion to reconsider. Thus, we AFFIRM the decision of the district court.

Entered for the Court

Timothy M. Tymkovich
Chief Judge

21-6052, *Brooks v. Philadelphia Indemnity Insurance Company*

PHILLIPS, J. dissenting.

Philadelphia had two required showings to meet its summary-judgment burden: that Ms. Brooks "knowingly and voluntarily" destroyed Philadelphia's subrogation rights with a settlement and release, and (2) that the release "actually prejudiced" Philadelphia. On the first point, I note that Philadelphia hasn't maintained that Ms. Brooks knew that her employer's automobile policy contained underinsured-motorist ("UM") coverage for her. As the majority notes, "[w]hen Ms. Brooks learned of the underinsured motorist coverage, she submitted a claim." Maj. Op. at 3. By then, she had settled and issued general releases. On the second point, Philadelphia hasn't argued that it would have pursued the negligent driver or her insurer for subrogation—a minimum requirement to show actual (as opposed to theoretical) prejudice. For these reasons, as elaborated on below, I respectfully dissent.

I. "Knowing and Voluntary"

In *Porter v. MFA Mutual Insurance Co.*, 643 P.2d 302, 305 (Okla. 1982), the Oklahoma Supreme Court stated the "general rule" that "an insured who deprives [an] insurer, by settlement and release, of its right of subrogation against the wrongdoer thereby provides [the] insurer with a complete defense to an action on the policy." Because Mr. Porter settled and released "the responsible party" (the negligent driver who injured him) from further liability before notifying his insurer (which covered UM benefits), he prevented his insurer "from exercising its lawful right of recourse against the responsible party[.]" *Id.* So the

court held that Mr. Porter "was thereby precluded from bringing action on the uninsured motorist policies." *Id.* Importantly, Mr. Porter's knowledge of the UM coverage as contained in his policy was undisputed—he had earlier notified his insurer that he might make an UM claim on his policy. *Id.* at 303.

In *Phillips v. New Hampshire Insurance Co.*, 263 F.3d 1215 (10th Cir. 2001), we applied *Porter*'s general rule to the facts of *Phillips*—we didn't create an "exception" to *Porter*'s general rule as the majority says. *See* Maj. Op. at 5. Unlike in *Porter*, the claimant in *Phillips* didn't know whether her employer had an insurance policy that covered her for UM benefits. *Phillips*, 263 F.3d at 1218. Trying to find out, she filed suit and served interrogatories asking about any such insurance. *Id.* In response, her employer stalled for eighteen months before answering the interrogatory and providing the insurance policy. *See id.* By then, the claimant had settled with the tortfeasor and provided a release. *Id.* In this circumstance, we held that she had not "knowingly and voluntarily" destroyed the insurer's subrogation rights. *Id.* at 1223.

The majority relies on these two cases to support its holding that Ms. Brooks "knowingly and voluntarily" destroyed Philadelphia's subrogation rights despite her not knowing that the policy contained UM coverage. It does so by pointing to information that was available to her in the police report from the traffic accident. The report identified Philadelphia as the insurer of her employer's automobile and listed the insurance-policy number. But neither *Porter* nor *Phillips* treats constructive knowledge of an insurance policy as the equivalent of actual knowledge. How can a claimant who doesn't know whether a policy provides her UM coverage

knowingly and voluntarily destroy subrogation for UM-coverage payments?[1] Also noteworthy, to get to constructive knowledge, the majority speculates that "a modicum of due diligence" would have revealed to Ms. Brooks the presence of UM coverage. *See* Maj. Op. at 7. But we should remember that Philadelphia took months to produce the policy after the claimant asserted a claim for UM benefits. *See id*. And we should remember that on summary judgment, the non-movant gets the benefit of the doubt on disputed facts.

Further, the majority fails to acknowledge *Phillips*'s language saying that "in commercial/business policies that cover employees,

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[1]I also disagree with the district court's handling of Philadelphia's summary- judgment burden. The district court stated that "while Plaintiff's brief argues that Defendant's status as a UM carrier was not known to Plaintiff at the time she signed her release, this argument is not supported by affidavit or deposition testimony or any other evidentiary material permitted under Rule 56." But Rule 56 doesn't require Ms. Brooks to file such materials until Philadelphia had introduced admissible evidence that she knew about the UM coverage. It didn't do so. Under our precedent, the summary-judgment burden shifts to the non-movant only once the movant meets its initial burden of establishing no material disputes of fact. *See Reed v. Bennett*, 312 F.3d 1190, 1195 (10th Cir. 2002); *see also Big O Tire Dealers, Inc. v. Big O Warehouse, 741 F.2d 160, 163 (7th Cir. 1984)* ("Where the moving party fails to meet its strict burden of proof, summary judgment cannot be entered even if the opposing party fails to respond to the motion."). But here, Philadelphia failed to meet its burden of showing that Ms. Brooks had actual knowledge, so no affidavit from Ms. Brooks was needed.

the UM/UIM insurer may also have a concomitant duty to inform an injured employee-insured who may be ignorant of potential coverage and contract terms of its right to contractual or statutory subrogation if the insurer wishes to later elect to exercise that right." 263 F.3d at 1224 (citing *Sexton v. Cont'l Cas. Ins.*, 816 P.2d 1135, 1138 (Okla. 1991), which notes that an insurer has a duty to "aid its insured in the preservation of its subrogation rights"). [2] Here, Philadelphia knew that Ms. Brooks had been involved in an accident on an interstate highway in which another car had spun into the driver's side of her car and spun it too. The accident was serious, and clearly more than a parallel-parking mishap or some such. Yet Philadelphia made no attempt to inform Ms. Brooks of Philadelphia's UM coverage or any interest it might have in pursuing subrogation against the negligent driver.

Additionally, the majority fails to credit Oklahoma's stated public policy underlying its UM laws. As we noted in *Phillips*, "[b]ecause [the Oklahoma] UM statute is remedial and mandates the inclusion of UM coverage in motor vehicle insurance policies, it is to be liberally construed to accomplish the legislative purpose, that of providing coverage for injuries which would otherwise go uncompensated." 263 F.3d at 1224 (quoting *Forbes v. Shelter Mut. Ins. Co.*, 904 P.2d 159, 162 (Okla. Civ. App. 1995)). And as

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[2] The court next notes that "*[a]t the very least*, the insurer has a duty to promptly produce a policy on request to an injured employee with a colorable claim under the policy so that the employee may ascertain whether he is covered and what responsibilities he has under the contract." *Phillips*, 263 F.3d at 1224 (emphasis added).

further stated in *Phillips*, "[t]he central goal of [Okla. Stat. Ann. tit. 36 § 3636, Uninsured Motorist Coverage] is to protect victims injured by uninsured or underinsured motorists (or by insured motorists whose carriers become insolvent) by ensuring payment of damages." *Id.* (citing *Barnes v. Okla. Farm Bur. Mut. Ins. Co.*, 11 P.3d 162, 173 (Okla. 2000)). Those policies don't square with the majority's new constructive-knowledge rule.

II. "Actual Prejudice"

The district court committed another error requiring reversal of its summary- judgment order. Philadelphia didn't offer evidence that it was "actually prejudiced" by Ms. Brooks's releases. In *Phillips*, we predicted that "the Oklahoma Supreme Court would hold that [the UM insurer] may not rely on the *Porter* defense if it was not actually prejudiced by the signing of the release." 263 F.3d at 1222. We concluded that "[a]ctual, not just theoretical, prejudice is a necessary element of a *Porter* defense because only the insured's conduct that causes injury to the insurer can be unfair." *Id.* at 1223. And that "because [the UM insurer] did not allege any undisputed facts to establish that it was actually injured by Ms. Phillips' conduct, it failed to satisfy its summary judgment burden." *Id.*

At the least, to meet its summary-judgment burden on actual prejudice, Philadelphia needed to show that it would have pursued the tortfeasor (the negligent driver) for whatever UM benefits it

eventually decided to pay Ms. Brooks.[3] *See Porter*, 643 P.2d at 305 (tying loss of subrogation rights to the claimant's release of "a wrongdoer," "the responsible party," "the tortfeasor," and "Sheltman"—the named negligent driver in that case). As *Phillips* notes, "the only time taking such action [seeking subrogation from a tortfeasor] would be profitable to the UM/UIM carrier is when the tort-feasor has assets beyond the liability limits (or settlement offer) of his insurance policy that may be collected after judgment." *Id.* at 1225. Philadelphia made no showing on summary judgment that the negligent driver who injured Ms. Brooks had collectable assets worth its time and money to pursue.

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[3] *See also State Farm Mut. Auto. Ins. Co. v. Green*, 89 P.3d 97, 104 (Utah 2003) ("In order to show actual prejudice, it is not sufficient for an insurer to show that its right of subrogation has been extinguished. Rather, the insurer may deny coverage only if it would have had a realistic possibility of recovering from the tortfeasor had its subrogation right not been foreclosed by the insured's settlement with the tortfeasor. This requires an assessment of factors such as the assets held by the tortfeasor, the strength of the insurer's subrogation claim (i.e., the strength of the underlying tort claim), the expenses and risks of litigating the insured's cause of action, and the extent of the victim's damage."); *Hasper v. Center Mut. Ins. Co.*, 723 N.W.2d 409, 416 (N.D. 2006) (same); *Gibson v. State Farm Mut. Auto. Ins. Co.*, 704 N.E.2d 1, 6 (Ohio Ct. App. 1997) (relevant factors include "the amount of assets held by the tortfeasor, the likelihood of recovery via subrogation, and the expenses and risks of litigating the insured's cause of action"); *Kapadia v. Preferred Risk Mut. Ins. Co.*, 418 N.W.2d 848, 852 (Iowa 1988) (insurer must demonstrate actual prejudice by showing it could have collected from tortfeasor under subrogation clause).

Addressing the collectability piece of "actual prejudice," the majority recognizes that *Phillips* found a lack of actual prejudice to the insurer because the "tortfeasor was judgment-proof, so . . . even if the insured had given notice, there was no indication that the insurance company would have collected." Maj. Op. at 5 n.4. But then, in my view, the majority takes a wrong turn—it contends that "Oklahoma courts have presumed that a tortfeasor has some assets, unless that presumption is contested or rebutted," and concludes that Brooks failed to rebut this presumption. *Id.* But neither Philadelphia nor the majority offers support for this "presumption," and *Phillips* says otherwise. *See* 263 F.3d at 1223 (in discussing actual prejudice, the court stated that "because [the insurer] did not allege any undisputed facts *to establish* that it was actually injured by Ms. Phillips' conduct, *it failed to satisfy its summary judgment burden*." (emphases added)). Moreover, Philadelphia didn't avail itself of any such "presumption" in its summary- judgment motion or appellate briefing.

As mentioned, the "actual prejudice"-collectability question pertains to the tortfeasor, not the tortfeasor's insurance company that has already paid policy limits on the claim. *See* Op. Br. at 3 ("Ms. Brooks settled with the adverse driver's carrier, State Farm, for his $50,000 liability limits[.]"); *see also Chandler v. State Farm Auto. Ins. Co.*, 598 F.3d 1115, 1119 (9th Cir. 2010) ("The court then acknowledged that an insurer's obligation runs . . . only to the extent of the policy limits." (cleaned up)).

Nor is the majority correct to point to the collectability of any payments made to Ms. Brooks by her own insurer, AAA. Once more, the UM insurer's

subrogation right applies only against the tortfeasor. *See Porter*, 643 P.2d at 305 (subrogation rights only apply to the tortfeasor); *see also Chandler*, 598 F.3d at 1117 ("Subrogation is an equitable doctrine that permits an insurance company to assert the rights and remedies of an insured against a third party tortfeasor."); *Aviation & Gen. Ins. Co., Ltd. v. United States*, 882 F.3d 1088, 1102 (Fed. Cir. 2018) (Reyna, J., concurring) ("It is well established that subrogation is a common law doctrine based in equity that permits an insurer to take the place of the insured to pursue recovery from third-party tortfeasors responsible for the insured's loss."). And to show actual prejudice, Philadelphia must have shown that it would have pursued the tortfeasor had its subrogation rights not been compromised, which it simply didn't do here. *See State Farm*, 89 P.3d at 104 (actual prejudice requires more than subrogation being extinguished—"the insurer may deny coverage only if it would have had a realistic possibility of recovering from the tortfeasor had its subrogation right not been foreclosed by the insured's settlement with the tortfeasor.").

So as a second ground on which the district court should have denied summary judgment, I rely on Philadelphia's failure to meet its burden to show actual prejudice.

ORDER DENYING BROOK'S MOTION TO ALTER OR AMEND JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (MARCH 29, 2021)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(Case 5:18-cv-00603-G, Document 67, Filed 03/29/21)

VICKIE BROOKS,

Plaintiff,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant.

No. CIV-18-603-G

ORDER

Now before the Court is Plaintiff Vickie Brooks' Motion to Alter or Amend Judgment (Doc. No. 64). Defendant Philadelphia Indemnity Insurance Company has filed a Response (Doc. No. 65), to which Plaintiff has replied (Doc. No. 66).

I Background

The relevant facts are recited in the Court's Opinion and Order of February 28, 2020 (Doc. No. 61), 2020 WL 981722 (W.D. Okla. Feb. 28, 2020), and will be repeated herein only as necessary. Plaintiff filed this lawsuit seeking judgment against Defendant based on Defendant's failure to pay uninsured/underinsured ("UM") benefits allegedly owed to Plaintiff under a policy (the "Policy") issued by Defendant. *See* Pet. (Doc. No. 1-1).

Following discovery and briefing, Defendant moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure on two grounds. As relevant here, Defendant argued that Plaintiff is precluded from bringing an action on the Policy because Plaintiff knowingly and affirmatively interfered with Defendant's subrogation rights in a manner that actually prejudiced Defendant by destroying those subrogation rights. *See* Def.'s Mot. Summ. J. (Doc. No. 27) at 5-7 (citing *Porter v. MFA Mut. Ins.* Co., 643 P.2d 302 (Okla. 1982)). The Court, after summarizing the applicable standard of review under Rule 56 and discussing relevant Oklahoma and federal authorities, found that Plaintiffs signing of releases with other insurance companies, without notifying Defendant, would destroy Defendant's subrogation rights and preclude Plaintiff from recovering against Defendant. *See* Op. & Order at 9 (citing Okla. Stat. tit. 36, § 3636(F); *Porter,* 643 P.2d at 305; *Phillips v. NH Ins.* Co., 263 F.3d 1215, 1219 (10th Cir. 2001); *Brambl v. GEICO Gen. Ins.* Co., No. 10-CV-474-TCK-PJC, 2011 WL 5326076, at *4 (N.D. Okla. Nov. 4, 2011)).

The Court further addressed Plaintiffs assertions as to why summary judgment should not be granted. First, Plaintiff argued that there was a genuine dispute as to whether her interference with Defendant's subrogation rights was "knowing." *See id.;* Pl.'s Summ. J. Resp. (Doc. No. 35) at 7-8, 10-11. The Court disagreed, finding that the evidence in the record did not establish a genuine dispute as to this fact. *See* Op. & Order at 10-11. Second, Plaintiff argued that Defendant should be estopped from raising a *Porter* defense-i.e., that Defendant should not be permitted to rely on Plaintiffs signing of the two releases as a bar to the instant lawsuit-because Defendant had unreasonably delayed in investigating Plaintiffs claim for benefits. *See id.* at 11-12; Pl.'s Summ. J. Resp. at 7-10. The Court determined that application of estoppel principles was not appropriate because the record did not establish a genuine dispute as to whether Defendant "unreasonably delayed any investigation, had knowledge that 'the insured's damages exceed[ed] the liability coverage available under the tort-feasor's policy,' or failed 'to promptly produce a policy on request.'" Op. & Order at 12 (alteration in original) (quoting *Phillips,* 263 F.3d at 1224).

Accordingly, the Court held that Plaintiffs action on the Policy was precluded under Oklahoma law and that Defendant was entitled to summary judgment on that basis. *See id* at 13. Judgment for Defendant was entered that same date. *See* J. of Feb. 28, 2020 (Doc. No. 63).

II Plaintiff's Motion

Plaintiff now timely moves the Court to "alter or amend" its summary-judgment decision pursuant

to Federal Rule of Civil Procedure 59(e). "Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir. 2000). "[A] motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Id.* "[O]nce the district court enters judgment, the public gains a strong interest in protecting the finality" of that judgment. *Nelson v. City of Albuquerque,* 921 F.3d 925, 929 (10th Cir. 2019). Accordingly, "[a] motion for reconsideration under Rule 59(e) is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Christ Ctr. of Divine Phil., Inc. v. Elam,* 763 F. App'x 740, 743 (10th Cir. 2019) (internal quotation marks omitted).

Plaintiff's primary argument is premised on this Court's alleged misapprehension of "the controlling law"-specifically, the Tenth Circuit's 2001 decision in *Phillips v. New Hampshire Insurance Company*. In *Phillips,* the district court granted summary judgment on a claim for breach of contract to the insurer based upon the insurer's assertion of the *Porter* defense. The Tenth Circuit reversed, holding that under its predicted application of Oklahoma law, the *Porter* defense would not serve as a bar to the insured's lawsuit. *See id.* at 1219-23; *see also id.* at 1220 (rejecting the proposition that the *Porter* defense can be applied "absolutely" whenever the insured fails to give notice of settlement with the tortfeasor to the insurer). According to Plaintiff, *Phillips* is "directly on point," and so this Court committed "clear error" by

reaching a different outcome and granting summary judgment to Defendant. Pl.'s Reply at 2.

The Opinion and Order, recognizing the precedential authority of *Phillips,* expressly relied on that appellate decision multiple times. *See* Op. & Order at 8, 9, 12. More significantly, the Opinion and Order addressed facts specific to this lawsuit that distinguish this case from *Phillips* in ways that are material to the determination of whether Plaintiff "'voluntarily and knowingly' interfered with [Defendant's] contract rights." *Phillips,* 263 F.3d at 1222; *see* Op. & Order at 10.[1] Plaintiff shows no clear error here.

Plaintiff also appears to argue that the Court imposed an improper evidentiary burden on Plaintiff regarding the knowing-interference issue. *See* Pl.'s Mot. at 2-3 (citing *McFadden v. Arch Ins. Co.,* No. 12-CV-208-JHP, 2013 WL 105214, at *3 (E.D. Okla. Jan. 8, 2013) ("In order to prevail on its motion for summary judgment, [the insurer] must establish that [the insured] was aware of the existence of the [insurance policy] at the time he released his claims against [the tortfeasor]."). Plaintiffs cited formulation

[1] For example, the Tenth Circuit in *Phillips* noted as an accepted "fact[]" for summary- judgment purposes that the insured "did not know" when she settled her claim "whether her employer had [an applicable UM policy] or who the carrier was." *Phillips,* 263 F.3d at 1218; *accord id.* at 1222. As recited below, and in the Opinion and Order, the evidentiary material presented by the parties in their summary judgment briefing did not permit the Court to find likewise or to adopt Plaintiffs position that her knowledge "is genuinely disputed." Fed. R. Civ. P. 56(c)(l); *see* Op. & Order at 10-11.

of the summary-judgment standard was pronounced by a fellow district court and is not binding upon this Court. In any event, this Court in its Opinion and Order expressly found that Defendant had established the applicability of the *Porter* defense as a matter of law, including through "present[ation] ... [of] evidence to suggest that [Plaintiff] was aware of' the Policy. Op. & Order at 9-10; *see also Pelt v. Utah,* 539 F.3d 1271, 1280 (10th Cir. 2008) (noting that if the movant has the burden of proof it must establish all essential elements of the claim or defense before the nonmoving party is "obligated to bring forward any specific facts alleged" in rebuttal). The Court further found that Plaintiff had failed to point to specific evidence sufficient to create a genuine dispute as to whether her interference was "knowing." *See* Op. & Order at 11; *see also Self v. Crum,* 439 F.3d 1227, 1230 (10th Cir. 2006). Again, Plaintiff shows no clear error here.

Finally, Plaintiff asserts that, because Defendant failed to show that its subrogation "would have been collectible" even absent Plaintiffs signing of the two releases, Defendant failed to show it was actually prejudiced by Plaintiffs conduct and thus may not rely upon the *Porter* defense. Pl.'s Mot. at 5-6 (citing *Phillips,* 263 F.3d at 1222-23). Plaintiff did not raise this collectability argument at summary judgment, instead arguing that Defendant was estopped from raising the defense entirely due to its delay in handling Plaintiffs claim. *See* Pl.'s Summ. J. Resp. at 7-11. A Rule 59(e) motion "may not be used ... to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker,* 554 U.S. 471,485 n.5 (2008) (internal quotation marks omitted). Accordingly, Plaintiffs assertion of this new theory does not support relief under Rule 59(e).

CONCLUSION

Plaintiffs Motion to Alter or Amend Judgment (Doc. No. 64) is therefore DENIED.

IT IS SO ORDERED this 29th day of March, 2021.

s/CHARLES B. GOODWIN
United States District Judge

JUDGMENT IN FAVOR OF PHILADELPHIA INSURANCE COMPANY IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (FEBRUARY 28, 2020)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(Case 5:18-cv-00603-G, Document 63, Filed 02/28/20)

VICKIE BROOKS,

Plaintiff,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant.

No. CIV-18-603-G

JUDGMENT

In accordance with the Opinion and Order issued this same date,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Defendant Philadelphia Indemnity Insurance Company and against Plaintiff Vickie Brooks.

DATED this 28th day of February, 2020.

s/CHARLES B. GOODWIN
United States District Judge

OPINION AND ORDER IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (FEBRUARY 28, 2020)

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

(Case 5:18-cv-00603-G, Document 61, Filed 02/28/20)

VICKIE BROOKS,

Plaintiff,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Defendant.

No. CIV-18-603-G

OPINION AND ORDER

Now before the Court is Defendant Philadelphia Indemnity Insurance Company's Motion for Summary Judgment (Doc. No. 27). Plaintiff Vickie Brooks has responded (Doc. No. 35), Defendant has replied (Doc. No. 36), and the Motion is now at issue. After consideration of the parties' submissions, and for the reasons stated below, Defendant's Motion is granted.

I. Standard of Review

Summary judgment is a means of testing in advance of trial whether the available evidence would permit a reasonable jury to find in favor of the party asserting a claim. The Court must grant summary judgment when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A party that moves for summary judgment has the burden of showing that the undisputed material facts require judgment as a matter of law in its favor. *Celotex Corp. Catrett*, 477 U.S. 317, 322 (1986). To defeat summary judgment, the nonmovant need not convince the Court that it will prevail at trial, but it must cite sufficient evidence admissible at trial to allow a reasonable jury to find in the nonmovant's favor—i.e., to show that there is a question of material fact that must be resolved by the jury. *See Garrison v. Gambro, Inc.*, 428 F.3d 933, 935 (10th Cir. 2005). The Court must then determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

Parties may establish the existence or nonexistence of a material disputed fact by:

- citing to "depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials" in the record; or

- demonstrating "that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."

Fed. R. Civ. P. 56(c)(1)(A), (B). While the Court views the evidence and the inferences drawn from the record in the light most favorable to the nonmoving party, *see Pepsi-Cola Bottling Co. of Pittsburg, Inc. v. PepsiCo, Inc.*, 431 F.3d 1241, 1255 (10th Cir. 2005), "[t]he mere existence of a scintilla of evidence in support of the [nonmovant's] position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the [nonmovant]." *Liberty Lobby*, 477 U.S. at 252.

II. Relevant Facts[1]

In May 2014, Defendant issued auto-insurance Policy No. PHPK1177144 (the "Policy") to Avalon Correctional Services, Inc. ("Avalon"). *See* Policy (Doc. No. 27-1). The Policy contained an Oklahoma Uninsured Motorists Coverage Endorsement, which provided uninsured motorist ("UM") coverage with a $1,000,000.00 limit. *See id.* at 4-7. The Endorsement required that payment would be made for a vehicle accident eligible for such coverage if, as relevant here: (1) a tentative settlement has been made between an insured and an insurer of an underinsured motor vehicle; and (2)(a) Defendant "[has] been given prompt written notice of such tentative settlement," and (2)(b)

[1] Facts relied upon are uncontroverted or, where genuinely disputed, identified as such and viewed in the light most favorable to Plaintiff.

Defendant "[a]dvance[s] payment to the 'insured' in an amount equal to the tentative settlement within 30 days after receipt of notification." Endorsement §§ A(2)(b), F(3)(b); *see also id.* §§ E(2)(c), E(3). The Endorsement further prescribed that when a corporation is the named insured, anyone occupying a covered vehicle is an "insured." *Id.* § B(2)(a).

On March 4, 2015, Plaintiff was involved in a motor-vehicle accident (the "Accident") when her work vehicle was struck by another vehicle on I-35 in Oklahoma City, Oklahoma. Def.'s Mot. at 2; Pl.'s Resp. at 2; Official Oklahoma Traffic Collision Report ("Collision Report") (Doc. No. 27-2) at 1. At the time of the accident, Plaintiff was driving a vehicle owned by Avalon and insured under the Policy. Def.'s Mot. at 2; Pl.'s Resp. at 2.[2] Plaintiff was also personally insured by AAA Insurance ("AAA"). Def.'s Mot. at 2; Pl.'s Resp. at 2. The other driver was operating a vehicle insured by State Farm Insurance Company ("State Farm"). Def.'s Mot. at 2; Pl.'s Resp. at 2.

The March 4, 2015 Official Oklahoma Traffic Collision Report, completed by police while at the scene of the Accident and issued that same day, identified Defendant "PHILADELPHIA INDEMNITY" as the insurer of the vehicle driven by Plaintiff and also noted the Policy number PHPK1177144 and Defendant's telephone number. Collision R. at 1.

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[2] The parties do not dispute that Plaintiff is the "insured" for purposes of title 36, section 3636 of the Oklahoma Statutes and *Porter v. MFA Mut. Ins. Co.*, 643 P.2d 302 (Okla. 1982).

On or about April 27, 2015, Plaintiff made claims to State Farm and to AAA for damages arising out of the Accident. Def.'s Mot. at 2; Pl.'s Resp. at 3.

On June 24, 2015, Avalon faxed Defendant an Incident Report describing the circumstances of the Accident. Avalon Incident R. (Doc. No. 35-5) at 1; Pl.'s Resp. at 5. The next day, Defendant sent Avalon a Loss Acknowledgment Letter, noting a claim number and identifying "[t]he examiner assigned to handle this loss." PIIC Loss Ltr. (Doc. No. 35-6) at 1; Pl.'s Resp. at 5.

On February 10, 2017, in consideration for $25,000.00, Plaintiff released and discharged AAA for damages allegedly suffered as a result of the Accident. AAA Release (Doc. No. 27-3) at 1-2; Def.'s Mot. at 2; Pl.'s Resp. at 3.

On February 10, 2017, in consideration for $50,000.00, Plaintiff signed a release with State Farm thereby releasing and discharging the owner of the other vehicle, the driver of the other vehicle, and "all other persons, firms or corporations liable or, who might be claimed to be liable," "from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, . . . which have resulted or may in the future develop" from the Accident. State Farm Release (Doc. No. 27-4) at 1; Def.'s Mot. at 2-3; Pl.'s Resp. at 3.

Prior to February 10, 2017, Plaintiff did not notify Defendant of her potential settlements with AAA or State Farm. Nor did Plaintiff prior to that date file a claim for UM benefits, or any other claim directly seeking benefits, against Defendant. Def.'s Mot. at 3;

Pl.'s Resp. at 4; *see also* Auto. Loss Notice of Aug. 17, 2017 (Doc. No. 27-5) at 1 (initiating a "UM claim" for Plaintiff through her counsel), 2 (underwriter/agent for Defendant stating, "No claim was ever reported to the agent for this incident.").

On July 6, 2017, Plaintiff (through counsel) sent a letter to Defendant requesting information on UM coverage on the vehicle Plaintiff had been driving in the Accident. Pl.'s Ltr. (Doc. No. 35-8) at 1. On August 17, 2017, Plaintiff submitted an Automobile Loss Notice to Defendant, initiating a UM claim related to the Accident and notifying Defendant of the prior settlements with State Farm and AAA. Auto. Loss Notice of Aug. 17, 2017, at 1-2; Def.'s Mot. at 3; Pl.'s Resp. at 4.

Plaintiff filed this lawsuit on May 18, 2018, seeking judgment against Defendant under Oklahoma law in the sum of $1 million based upon Defendant's failure to pay benefits owed to Plaintiff for the Accident under the Policy. *See* Pet. (Doc. No. 1-1). *See generally Watson v. Farmers Ins. Co., Inc.*, 23 F. Supp. 3d 1342, 1350 (N.D. Okla. 2014) ("Courts applying Oklahoma law have generally held that an insurer's liability for breach of a UM insurance

contract is limited to the amount of the UM policy coverage.").[3]

III. Defendant's Motion

Defendant asserts that it is entitled to summary judgment on Plaintiff's claim for two reasons. First, Defendant argues that Plaintiff is precluded from bringing an action on the Policy because Plaintiff knowingly and affirmatively interfered with Defendant's subrogation rights in a manner that actually prejudiced Defendant by destroying those subrogation rights. *See* Def.'s Mot. at 5-7 (citing *Porter v. MFA Mut. Ins. Co.*, 643 P.2d 302 (Okla. 1982)). Second, Defendant argues that Plaintiff's execution of a release agreement with State Farm also served to release Defendant from Plaintiff's claim for liability for damages arising from the Accident. *See id.* at 8-10.

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[3] The Petition does not allege that Defendant has actually denied Plaintiff's UM claim for benefits, and the record does not reflect any such denial. If there has been no denial, then Defendant would be entitled to summary judgment on Plaintiff's claim on that basis. *See Brock v. Prudential Ins. Co. of Am.*, No. 14-CV-16-JED-TLW, 2017 WL 1147771, at *3 & n.4 (N.D. Okla. Mar. 27, 2017) (finding that insurer was entitled to summary judgment on breach-of-contract claim under Oklahoma law where plaintiff "failed to show that [insurer] denied his claim for benefits at any time" and noting the absence of any law demonstrating that a delay in payment constitutes a breach of contract).

A. Relevant Oklahoma Law

In *Brambl v. GEICO General Insurance Co.*, the district court thoroughly outlined the statutory scheme applicable here:

> By Oklahoma statute, any insurance company entering into a contract with an insured to provide motor vehicle liability coverage must also offer UM coverage. *See* Okla. Stat. tit. 36, § 3636(A). . . . .
>
> UM coverage "does not insure uninsured motorists, (third parties); nor does it insure vehicles; rather, uninsured motorist coverage affords first-party coverage to person(s) for whom the insurance contract is being written." *Silver v. Slusher,* 770 P.2d 878, 885 (Okla.1988) (Silver, J., dissenting). . . . .
>
> The statutory definition of "uninsured motor vehicle," as used in § 3636(B), extends to "an insured motor vehicle, the liability limits of which are less than the amount of the claim of the person or persons making such claim, regardless of the amount of coverage of either of the parties in relation to each other." Okla. Stat. tit. 36, § 3636(C). This type of "uninsured motor vehicle" is often referred to as "underinsured motor vehicle," and such coverage is often referred to as UIM coverage. Consistent with the statute, the Court uses the term UM coverage as an inclusive term encompassing UIM coverage.

> When the UM carrier's insured sustains injury by a negligently operated *under* insured motor vehicle, there are necessarily two insurance policies in play (injured party's UM coverage and tortfeasor's liability coverage). . . . .

Brambl, No. 10-CV-474-TCK-PJC, 2011 WL 5326076, at *2-3 (N.D. Okla. Nov. 4, 2011) (citation omitted).

The *Brambl* court also explained subrogation and the *Porter* defense:

> Following is the subrogation provision of the UM statute:
>
> F. *In the event of payment* [by UM carrier] to any person under the coverage required by this section [insured] and subject to the terms and conditions of such coverage, *the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person [insured] against any person or organization legally responsible for the bodily injury [tortfeasor]* for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer Provided further, that any payment made by the insured tort-feasor shall not reduce or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage.

Okla. Stat. tit. 36, § 3636(F) ("§ 3636(F)") (emphasis added). The UM carrier's statutory "right to be subrogated is derived from, and limited to, the tort claim of the insured." *Frey v. Independence Fire and Cas. Co.*, 698 P.2d 17, 21 (Okla. 1985).

Therefore, "[i]f the insured releases the wrongdoer from liability, the insurer's subrogation rights may be viewed . . . as having been destroyed . . . because the insured no longer has a tort claim against the wrongdoer to which subrogation may be effected." [Johnny C. Parker,] *Uninsured Motorist Law in Oklahoma*, 34 Okla. City U. L. Rev. [363, 408 (2009)]; *see Porter v. MFA Mut. Ins. Co.*, 643 P.2d 302, 305 (Okla. 1982) ("[I]f an insured settles with and releases a wrongdoer from liability for a loss before payment of the loss has been made by the insurer, the insurer's right of subrogation against the wrongdoer is thereby destroyed."). Although such a release extinguishes the UM carrier's subrogation rights, such a release also provides the UM carrier with a defense to an action to recover UM proceeds. *See Porter,* 643 P.2d at 305 (known in Oklahoma as a *Porter* defense).

Because the insured's voluntary settlement with the tortfeasor destroys the UM carrier's subrogation rights and operates as a forfeiture of any UM coverage, the Oklahoma Legislature

> "created a mechanism by which an insured could receive the equivalent of a settlement offer from the tortfeasor, while at the same time protecting the [UM] carrier's subrogation rights against the wrongdoer." *Uninsured Motorist Law in Oklahoma*, 34 Okla. City U. L. Rev. at 406. Specifically, the UM subrogation statute requires that an insured: (1) notify her UM carrier of any "tentative agreement to settle for liability limits with an insured tortfeasor," and (2) submit written documentation to her UM carrier of any pecuniary losses incurred, including copies of all medical bills. *See* Okla. Stat. tit. 36, § 3636(F)(1), (2). Once notified, a UM carrier may, at its election, "substitute its payment to the insured for the tentative settlement amount." *Id.* § 3636(F)(2). If the UM carrier substitutes its own payment for the liability insurer's settlement offer, the UM carrier is "entitled to the insured's right of recovery to the extent of such [liability settlement] payment and any settlement under the [UM] coverage." *Id.* If it does not elect to substitute, the UM carrier "has no right to the proceeds of any settlement or judgment . . . for any amount paid under the uninsured motorist coverage." *Id.*

Id. at *4 (most alterations in original) (omission and footnote omitted).

"[B]eing legally able to exercise subrogation rights," however, "is not the *sine qua non* of an

obligation to pay a UM/UIM claim." *Phillips v. N.H. Ins. Co.*, 263 F.3d 1215, 1222 (10th Cir. 2001). The Oklahoma Supreme Court has previously held that "even if the UM carrier is legally barred from exercising its subrogation rights against the tort-feasor, it must still pay its insured *unless* it would be unfair in light of the insured's knowing, affirmative, and prejudicial conduct." *Id.*; *accord Brambl*, 2011 WL 5326076, at *4 n.3 ("In order for the [*Porter*] defense to apply, the insured must, at the time of executing the release of the tortfeasor, be voluntarily and knowingly interfering with its UM carrier's subrogation rights.").

B. Discussion

Defendant argues that because Plaintiff voluntarily and knowingly interfered with Defendant's subrogation rights, by signing the State Farm and AAA releases in February 2017, her present claim is barred by the *Porter* defense. The facts as outlined above do reflect that Plaintiff signed these releases regarding a vehicle covered under Defendant's Policy, without notifying Defendant of any "tentative agreement[s]" as contemplated by Oklahoma Statute and the Policy. Okla. Stat. tit. 36, § 3636(F); *see supra*. The law outlined above supports the proposition that such conduct would destroy Defendant's subrogation rights and preclude Plaintiff's instant legal claim under *Porter*, such that Defendant generally would be entitled to judgment as a matter of law. *See* Okla. Stat. tit. 36, § 3636(F); *Porter*, 643 P.2d at 305; *Phillips*, 263 F.3d at 1219; *Brambl*, 2011 WL 5326076, at *4; *cf. Phillips*, 263 F.3d at 1224 (finding that insurer could not rely upon *Porter* defense where it denied the existence of UM coverage).

Plaintiff nevertheless objects that summary judgment should not be entered because significant factual disputes remain. *See* Fed. R. Civ. P. 56(a), (c).

1. Plaintiff's Knowing Interference

Plaintiff first argues that there is a genuine dispute as to whether her interference with Defendant's subrogation rights was "knowing." Pl.'s Resp. at 7-8, 10-11; *see Phillips*, 263 F.3d at 1222; *see also McFadden v. Arch Ins. Co.*, No. 12-CV-208-JHP, 2013 WL 105214, at *3 (E.D. Okla. Jan. 8, 2013) (denying summary judgment for insurer who had asserted the *Porter* defense where insurer failed to establish that plaintiff "was aware of the existence of the [insurance policy] at the time he released his claims").

The written Policy schedule of coverage in the record before the Court sets forth a number code ("02") of covered vehicles rather than identifying the particular vehicles subject to UM coverage. *See* Policy at 3. Plaintiff does not now dispute that her work vehicle was one of the covered vehicles but highlights the fact that the Policy schedule did not identify her specific work vehicle as evidence that she "had no way of unambiguously knowing" that the vehicle was covered under the Policy. Pl.'s Resp. at 2.

This assertion is insufficient to show a genuine issue for trial. The Policy's UM- coverage Endorsement prescribes the insured's obligation to notify Defendant of any tentative settlement with an insurer of an underinsured vehicle. *See* Policy at 3; Endorsement §§ A(2)(b), E(2)(c); *see also Strong v. Hanover Ins. Co.*, 106 P.3d 604, 609 (Okla. Civ. App. 2004) (finding that where the policy language of this

obligation tracked the requirements laid out in section 3636(F) the insured "was charged with notice of this statutorily imposed obligation"). And, despite the lack of express identification of Plaintiff's work vehicle in the Policy, the Collision Report—which was generated from the results of an investigation "[m]ade at [the s]cene" of the March 4, 2015 Accident where Plaintiff was present and issued that same day—clearly identifies "PHILADELPHIA INDEMNITY," along with the policy number and a telephone number, as the insurer of Plaintiff's work vehicle. Collision R. at 1.[4] In light of these facts, no reasonable jury could find that Plaintiff's interference was not "knowing." *See Liberty Lobby*, 477 U.S. at 252; *cf. McFadden*, 2013 WL 105214, at *3 (denying summary judgment on *Porter* defense where insurer presented no evidence to suggest that plaintiff was aware of policy at time he released his claims).

Additionally, while Plaintiff's brief argues that Defendant's status as a UM carrier was not known to Plaintiff at the time she signed her releases, this argument is not supported by any affidavit or deposition testimony or any other evidentiary material permitted under Rule 56. As the only evidentiary material in the summary judgment record is consistent with a finding that Plaintiff knew of Defendant's insurance coverage (on a Policy that included UM coverage and outlined the insured's responsibilities with respect to settlement of claims against tortfeasors), this unsupported argument is insufficient to show a genuine issue under Rule 56.

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[4] Indeed, it is this Collision Report that Plaintiff argues her counsel relied upon to eventually determine with whom to file an insurance claim. *See* Pl.'s Resp. at 5.

"Factual statements contained in [the party's] brief attributable to counsel . . . do not constitute summary judgment evidence[.]" *Mosier v. Maynard*, 937 F.2d 1521, 1525 (10th Cir. 1991); *see also* Fed. R. Civ. P. 56(e)(2) ("If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion[.]").

2. Whether Defendant Is Estopped to Assert a Porter *Defense*

"The *Porter* defense is . . . subject to several exceptions, including where the insurer's surrounding conduct gives rise to breach of contract, waiver, or estoppel." *Brambl*, 2011 WL 5326076, at *4 n.3. Plaintiff argues that Defendant should be estopped from asserting a *Porter* defense because Defendant knew about the accident in June 2015 but then "took over 800 days to begin investigating the circumstances behind the claim." Pl.'s Resp. at 7-10 (arguing that Defendant could not have been unduly prejudiced because it delayed its investigation).

The summary judgment record does not support application of estoppel principles. As outlined above, no "claim"—i.e., a "demand for payment" or other benefits under the Policy, *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1107 (Okla. 1991)—was transmitted to Defendant until August 2017. *See* Auto. Loss Notice of Aug. 17, 2017, at 1-2. Defendant likewise was not aware of Plaintiff's February 2017 settlements until this August 2017 claim was submitted. *See* Def.'s Mot. at 3; Pl.'s Resp. at 4. Even construing the record in the light most favorable to Plaintiff, all that Defendant had prior to August 2017 was notification that there had been a traffic accident

involving a vehicle owned by Avalon (which did not request payment) and the July 2017 letter asking for insurance- coverage details. *See* Avalon Incident R. at 1; Pl.'s Ltr. at 1. Stated differently, the record does not show that Defendant unreasonably delayed any investigation, had knowledge that "the insured's damages exceed[ed] the liability coverage available under the tort-feasor's policy," or failed "to promptly produce a policy on request." *Phillips*, 263 F.3d at 1224. *Compare* Avalon Incident R., *and* Pl.'s Ltr., *with Buzzard*, 824 P.2d at 1114 (finding insurer was estopped from relying on *Porter* when it (i) unreasonably delayed payment after a "demand" had been made and (ii) encouraged the insurer to pursue another remedy "and then refused payment based on this settlement"), *and Strong*, 106 P.3d at 605-10 (finding a genuine issue as to whether insurer should be estopped from relying on *Porter* where insurer had notice of plaintiff's lawsuit against tortfeasor and plaintiff provided evidence that he had notified insurer of the prospect of settlement with tortfeasor).

"[A]n insured who deprives insurer, by settlement and release, of its right of subrogation against the wrongdoer thereby provides insurer with a complete defense to an action on the policy." *Porter*, 643 P.2d at 305. Plaintiff, "by voluntarily and knowingly making settlement with and giving a general release" to the responsible party, "barred [Defendant] from exercising its lawful right of recourse against [that] party," and her action on the Policy is therefore precluded under Oklahoma law. *Id.* Because Defendant is entitled to summary judgment on this basis, the Court need not address Defendant's remaining argument.

CONCLUSION

As outlined herein, Defendant's Motion for Summary Judgment (Doc. No. 27) is GRANTED. Judgment in favor of Defendant shall be entered.

IT IS SO ORDERED this 28th day of February, 2020.

s/CHARLES B. GOODWIN
United States District Judge

36 O.S. 3636 - OKLAHOMA STATUTES CITATIONIZED, TITLE 36. INSURANCE, CHAPTER 1 - INSURANCE CODE, ARTICLE 36 - INSURANCE CONTRACTS, SECTION 3636 - UNINSURED MOTORIST COVERAGE

A. No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection B of this section.

B. The policy referred to in subsection A of this section shall provide coverage therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom. Coverage shall be not less than the amounts or limits prescribed for bodily injury or death for a policy meeting the requirements of Section 7-204 of Title 47 of the Oklahoma Statutes, as the same may be hereafter amended; provided, however, that increased limits of liability shall be offered and purchased if desired, not to exceed the limits provided in the policy of bodily injury liability of the insured. Policies issued, renewed or reinstated after November 1, 2014, shall not be subject to stacking or aggregation of limits unless expressly provided for by an insurance carrier. The uninsured motorist coverage shall be upon a form approved by the Insurance Commissioner as otherwise provided in the Insurance Code and may provide that the parties to the contract shall, upon

demand of either, submit their differences to arbitration; provided, that if agreement by arbitration is not reached within three (3) months from date of demand, the insured may sue the tort-feasor.

C. For the purposes of this coverage the term "uninsured motor vehicle" shall include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency. For the purposes of this coverage the term "uninsured motor vehicle" shall also include an insured motor vehicle, the liability limits of which are less than the amount of the claim of the person or persons making such claim, regardless of the amount of coverage of either of the parties in relation to each other.

D. An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within one (1) year after such an accident. Nothing herein contained shall be construed to prevent any insurer from according insolvency protection under terms and conditions more favorable to its insured than is provided hereunder.

E. For purposes of this section, there is no coverage for any insured while occupying a motor vehicle owned by, or furnished or available for the regular use of the named insured, a resident spouse of the named insured, or a resident relative of the named insured, if such motor vehicle is not insured by a motor vehicle insurance policy.

F. In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer. Provided, however, with respect to payments made by reason of the coverage described in subsection C of this section, the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor. Provided further, that any payment made by the insured tort-feasor shall not reduce or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage. Provided further, that if a tentative agreement to settle for liability limits has been reached with an insured tort-feasor, written notice shall be given by certified mail to the uninsured motorist coverage insurer by its insured. Such written notice shall include:

1. Written documentation of pecuniary losses incurred, including copies of all medical bills; and

2. Written authorization or a court order to obtain reports from all employers and medical providers. Within sixty (60) days of receipt of this written notice, the uninsured motorist coverage insurer may substitute its payment to the insured for the tentative settlement amount. The uninsured motorist coverage insurer shall then be entitled to the insured's right of recovery to the extent of such payment and any

settlement under the uninsured motorist coverage. If the uninsured motorist coverage insurer fails to pay the insured the amount of the tentative tort settlement within sixty (60) days, the uninsured motorist coverage insurer has no right to the proceeds of any settlement or judgment, as provided herein, for any amount paid under the uninsured motorist coverage.

G. A named insured or applicant shall have the right to reject uninsured motorist coverage in writing. The form signed by the insured or applicant which initially rejects coverage or selects lower limits shall remain valid for the life of the policy and the completion of a new selection form shall not be required when a renewal, reinstatement, substitute, replacement, or amended policy is issued to the same-named insured by the same insurer or any of its affiliates. Any changes to an existing policy, regardless of whether these changes create new coverage, do not create a new policy and do not require the completion of a new form.

After selection of limits, rejection, or exercise of the option not to purchase uninsured motorist coverage by a named insured or applicant for insurance, the insurer shall not be required to notify any insured in any renewal, reinstatement, substitute, amended or replacement policy as to the availability of such uninsured motorist coverage or such optional limits. Such selection, rejection, or exercise of the option not to purchase uninsured motorist coverage by a named insured or an applicant shall be valid for all insureds under the policy and shall continue until a named insured requests in writing that the uninsured motorist coverage be added to an existing or future policy of insurance.

H. The following are effective on forms required on or after April 1, 2005. The offer of the coverage required by subsection B of this section shall be in the following form which shall be filed with and approved by the Insurance Commissioner. The form shall be provided to the proposed insured in writing separately from the application and shall read substantially as follows:

OKLAHOMA UNINSURED MOTORIST
COVERAGE LAW

Oklahoma law gives you the right to buy Uninsured Motorist coverage in the same amount as your bodily injury liability coverage. THE LAW REQUIRES US TO ADVISE YOU OF THIS VALUABLE RIGHT FOR THE PROTECTION OF YOU, MEMBERS OF YOUR FAMILY, AND OTHER PEOPLE WHO MAY BE HURT WHILE RIDING IN YOUR INSURED VEHICLE. YOU SHOULD SERIOUSLY CONSIDER BUYING THIS COVERAGE IN THE SAME AMOUNT AS YOUR LIABILITY INSURANCE COVERAGE LIMIT.

Uninsured Motorist coverage, unless otherwise provided in your policy, pays for bodily injury damages to you, members of your family who live with you, and other people riding in your car who are injured by: (1) an uninsured motorist, (2) a hit-and-run motorist, or (3) an insured motorist who does not have enough liability insurance to pay for bodily injury damages to any insured person. Uninsured Motorist coverage, unless otherwise provided in your policy, protects you and family members who live with you while riding in any vehicle or while a pedestrian. THE COST OF THIS COVERAGE IS SMALL COMPARED WITH THE BENEFITS!

You may make one of four choices about Uninsured Motorist Coverage by indicating below what Uninsured Motorist coverage you want:

____ I want the same amount of Uninsured Motorist coverage as my bodily injury liability coverage.

____ I want minimum Uninsured Motorist coverage $25,000.00 per person/$50,000.00 per occurrence.

____ I want Uninsured Motorist coverage in the following amount:

$_____ per person/$_____ per occurrence.

____ I want to reject Uninsured Motorist coverage.

_____

Proposed Insured

THIS FORM IS NOT A PART OF YOUR POLICY AND DOES NOT PROVIDE COVERAGE.

I. The Insurance Commissioner shall approve a deviation from the form described in subsection H of this section if the form includes substantially the same information.

J. A change in the bodily injury liability coverage due to a change in the amount or limits prescribed for bodily injury or death by a policy meeting the requirements of Section 7-204 of Title 47 of the Oklahoma Statutes shall not be considered an amendment of the bodily injury liability coverage and shall not require the completion of a new form.

K. On the first renewal on or after April 1, 2005, the insurer shall change the Uninsured Motorist coverage limits to $25,000.00 per person/$50,000.00 per occurrence and charge the corresponding premium for existing policyholders who have selected Uninsured Motorist coverage limits less than $25,000.00 per person/$50,000.00 per occurrence. At the first renewal on or after April 1, 2005, the insurer shall provide existing policyholders who have selected Uninsured Motorist coverage limits less than $25,000.00 per person/$50,000.00 per occurrence a notice of the change of their Uninsured Motorist coverage limits and that notice shall state how such policyholders may reject Uninsured Motorist coverage limits or select Uninsured Motorist coverage with limits higher than $25,000.00 per person/$50,000.00 per occurrence. No notice shall be required to existing policyholders who have rejected Uninsured Motorist coverage or have selected Uninsured Motorist coverage limits equal to or greater than $25,000.00 per person/$50,000.00 per occurrence. For purposes of this subsection an existing policyholder is a policyholder who purchased a policy from the insurer before April 1, 2005, and such policy renews on or after April 1, 2005.

Historical Data

Laws 1968, HB 802, c. 106, § 2, emerg. eff. July 1, 1968; Amended by Laws 1976, HB 1189, c. 28, § 1, emerg. eff. March 16, 1976; Amended by Laws 1979, SB 297, c. 178, § 1, emerg. eff. May 16, 1979; Amended by Laws 1989, SB 182, c. 98, § 1, eff. November 1, 1989; Amended by Laws 1990, HB 2052, c. 297, § 4, eff. September 1, 1990; Amended by Laws 1994, SB 772, c. 294, § 5, eff. September 1, 1994; Amended by Laws 2001, HB 1801, c. 209, § 1, eff. November 1, 2001; Amended by Laws 2001, HB 1341, c. 363, § 18,

emerg. eff. July 1, 2001 (superseded document available); Amended by Laws 2004, HB 2470, c. 519, § 25, eff. November 1, 2004 (superseded document available); Amended by Laws 2009, SB 533, c. 7, § 1, eff. November 1, 2009; Amended by Laws 2009, SB 1022, c. 176, § 31, eff. November 1, 2009 (superseded document available); Amended by Laws 2014, SB 991, c. 307, § 1, eff. November 1, 2014 (superseded document available).