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* The Thomases respectfully attach two Orders from the district court which are relevant to contentions made in Williams’ brief in opposition. See pp. 1-2, *supra*.

APPENDIX Q

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. 4:14-CV-2711.

BARBARA THOMAS, et al, Plaintiffs, v. J.J.
WILLIAMS, et al, Defendants.

United States District Court, S.D. Texas, Houston
Division.

November 10, 2015.

ORDER

FRANCES H. STACY, United States Magistrate
Judge.

Before the Magistrate Judge upon referral from the District Judge are three motions by Plaintiff to Strike or Exclude Defendant Williams' Summary Judgment Evidence (Document Nos. 71, 72 and 73). In those motions, Plaintiffs seek Orders striking the report of Ted Wilson, the affidavit of Lt. Waterwall, and the affidavit of Defendant J.J. Williams, all of which were submitted by Defendant Williams in response to Plaintiff's Motion for Summary Judgment and in support of his own Motion for Summary Judgment. Having considered the motions, the responses, the additional briefing, the opinions and

averments of L.E. Wilson, Lt. Waterwall and J.J. Williams in their respective sworn reports and/or affidavits, and the applicable law, the Magistrate Judge ORDERS, for the reasons set forth more fully below, that Plaintiff's Motion to Strike or Exclude the Report and Affidavit L.E. Wilson (Document No. 71) is GRANTED, Plaintiff's Motion to Strike or Exclude the Report and Affidavit of Lt. Waterwall (Document No. 72) is GRANTED, and Plaintiff's Motion to Strike or Exclude the Affidavit of Defendant Williams (Document No. 73) is GRANTED IN PART.

This is a Fourth Amendment civil rights case arising out of a search of Plaintiff's residence. Plaintiff alleges that her Fourth Amendment rights were violated when Defendant Officer J.J. Williams entered her residence with a search warrant for a different address, searched her residence knowing that it was not the address on the search warrant, and seized and/or detained Plaintiff for an unreasonable amount of time. There are two motions for summary judgment pending, one by Plaintiff for Partial Summary Judgment on the liability aspect of her Fourth Amendment claim (Document No. 48) and the other by Defendant J.J. Williams on his affirmative defense of qualified immunity (Document No. 52). With the three foregoing motions to strike, Plaintiff seeks Orders striking the expert report of L.E. Wilson (Document No. 52-1), the expert report and affidavit of Lt. Michael Waterwall (Document No. 52-2), and the affidavit of Defendant J.J. Williams (Document No. 52-3). With respect to the expert report of L.E. Wilson, Plaintiff argues that the opinions in Wilson's

report should be stricken because: (1) they are impermissible legal conclusions; (2) they are an improper attempt to bolster Defendant Williams' credibility; (3) they are based on unreliable and unsupported factual conclusions, subjective and unsubstantiated beliefs, and either mis-statements or misunderstanding of the law; and (4) they are not reliable. Plaintiff also maintains that Wilson is not qualified to offer the opinions contained in the report, Wilson's report is itself inadmissible hearsay, and Defendant did not properly disclose Wilson as an expert under FED. R. CIV. P. 26(a). As for the affidavits of Lt. Waterwall and Defendant Williams, Plaintiff argues that they should both be stricken because they both contain improper legal conclusions as to the reasonableness of Defendant Williams' conduct, they both seek to bolster Defendant Williams' credibility, they both contain hearsay, and certain aspects of both are not based on either affiant's personal knowledge.

Report of L.E. Wilson

Plaintiff lodges a litany of objections to the report of L.E. Wilson, a sworn copy of which was allowed by Order filed on November 9, 2015 (Document No. 94). The contents of the report, on pages 1-2, establish that L.E. Wilson is qualified to offer the opinions contained therein. As for the remainder of Plaintiff's objections and complaints to Wilson's report, the most direct and straightforward of those complaints relates to Wilson's legal opinions

and conclusions about: (1) whether Defendant Williams made a "materially" false statement in the affidavit he filed to obtain the search warrant; (2) whether the search warrant was "valid"; (3) whether Williams remained in Plaintiffs residence for an "unreasonable" amount of time following his determination that the address on the search warrant was incorrect; and (4) whether Williams acted "reasonably." Such legal opinions, because they relate to *Williams'* reasonableness *in this case*, the validity of the search warrant *at issue in this case*, the accuracy and materiality of the statements in the affidavit submitted by Williams in support of the search warrant *at issue in this case*, and Defendant Williams' state of mind in seeking and executing the search warrant *at issue in this case*, are not admissible. See *Boston v. Harris County*, No. H-11-1566, 2014 WL 1275921 *14 (S.D. Tex. March 26, 2014) ("Rule 704 abolished the *per se* rule against testimony regarding ultimate issue of fact, but it does not allow an expert witness to express legal conclusions or tell a jury what result in should reach."); *McBroom v. Payne*, 478 F. App'x 196, *3 (5th Cir. 2012) (Rule 704 "does not permit experts to offer legal conclusions, and whether an officer's use of his firearm was unreasonable for purposes of the Fourth Amendment is a legal conclusion"); *United States v. Williams*, 343 F.3d 423, 435 (5th Cir.) ("Reasonableness under the Fourth Amendment or Due Process Clause is a legal conclusion."), *cert. denied*, 540 U.S. 1093 (2003); *Marlin v. Moody Nat'l Bank*, NA., 248 F. App'x 534, 540-41 (5th Cir. 2007)

(expert opinions about a defendant's state of mind or his culpability are not admissible). In addition, as objected to by Plaintiffs, the statements of Wilson in his report about the law governing Fourth Amendment claims and qualified immunity defenses are neither helpful nor necessary. It is for the Court at the summary judgment stage to both determine the applicable law, apply that law to the uncontested and undisputed facts in the case. The report of L.E. Wilson attempts to undertake that province from the Court and dictate how the claims and defenses should be decided at this summary judgment stage. That is not proper, nor is it admissible summary judgment evidence that could raise a genuine issue of material fact. Accordingly, the statements and opinions of L.E. Wilson in his sworn report as to: (1) whether Defendant Williams made a "materially" false statement in the affidavit he filed to obtain the search warrant; (2) whether the search warrant was "valid"; (3) whether Williams remained in Plaintiff's residence for an "unreasonable" amount of time following his determination that the address on the search warrant was incorrect; and (4) whether Williams acted "reasonably" are not admissible, and L.E. Wilson's report must be excluded on that basis. Plaintiff's Motion to Strike or Exclude (Document No. 71) is GRANTED.

Affidavit of Lt. Waterwall

Plaintiff also seeks to strike, for various reasons, the entirety of Lt. Waterwall's affidavit,

including Waterwall's recitation of the "facts" on pages 3-9 of his affidavit, and Waterwall's legal opinions on the reasonableness of Defendant Williams' conduct and his state of mind, on pages 9-10 of his affidavit. Plaintiff's motion is well taken.

Lt. Waterwall was not involved in any of the events giving rise to this case. Indeed, Waterwall states in this affidavit that the statements and opinions in his affidavit are based on his "review" of documents, materials and information provided to him. See Affidavit (Document No. 52-2) at 3. Waterwall therefore, as argued by Plaintiff, has no personal knowledge of any of the "facts" on pages 3-9 of his affidavit. In addition, the legal opinions of Waterwall as to the validity of the search warrant in this case, the materiality of Defendant Williams' statements in support of the affidavit, Defendant Williams' state of mind, and the reasonableness of Defendant Williams' conduct in securing and executing the warrant at issue herein are inadmissible for the same reasons set forth above in connection with the similar opinions of L.E. Wilson. When those inadmissible portions are excluded, all that is left of Waterwall's affidavit are his introductory paragraphs and his opinions in the last paragraph on page 9 as to what a "reasonable officer" would have done under the same or similar circumstances. But, even if Waterwall's opinions as to what a "reasonable officer" would and would not have done under the same or similar circumstance were admissible, see *Peters v. Woodbury County*, Iowa, 979 F.Supp.2d 901, 923-24 (N.D. Ia. 2013)

(distinguishing between hypothetical questions or opinions of an expert and opinions as to the reasonableness of an officer's actions in the case at issue), *aff'd*, 786 F.3d 1095 (8th Cir. 2015), Waterwall's affidavit does not establish that he is qualified to provide such expert opinions. Waterwall states in his affidavit that he is a lieutenant in the narcotics division of the Houston Police Department, he has been a police officer for 30 years, and he has received substantial training in "Proactive State and Federal Investigations, Narcotics Survival School, Warrant Development and Execution, and Basic Narcotics Investigations." No detail is provided on any of that training in either the affidavit or any of the attachments thereto, and as such it cannot be determined whether Waterwall has the specialized knowledge needed to support the expert opinions contained in his affidavit. As such, Waterwall's affidavit and the opinions contained therein must be excluded and Plaintiff's Motion to Strike or Exclude (Document No. 72) is GRANTED.

Affidavit of Defendant Williams

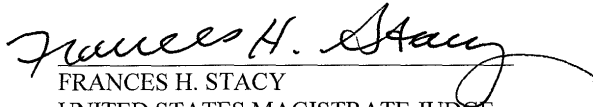
Plaintiff seeks to strike and/or exclude the affidavit of Defendant Williams on the basis that it contains legal conclusions and lay opinion testimony as to the reasonableness of Defendant Williams' conduct. In addition, Plaintiff objects to the hearsay contained in Defendant Williams' affidavit, objects to certain statements that are not within Defendant Williams' personal knowledge,

and objects to statements that attempt to bolster Defendant Williams' credibility.

In his affidavit, Defendant Williams provided a detailed account of the facts at issue in this case, including the information he relied upon in seeking the search warrant, and his interactions with Plaintiff during and after the search. Plaintiffs hearsay, lack of personal knowledge, and improper bolstering objections are all **OVERRULED**. In particular, the information complained of by Plaintiff as hearsay was not offered for the truth of the matter asserted, but to establish a basis for Defendant Williams' actions and show his state of mind. In addition, the information complained of by Plaintiff as not being within Defendant Williams' personal knowledge was not presented by Williams as being based on his personal knowledge, but instead was included to provide a basis for Williams' pursuit and execution of the search warrant at issue.

With regard to Plaintiffs complaints about Defendant Williams' legal conclusions and his lay opinion testimony as to the reasonableness of his conduct, those objections are **SUSTAINED** for the same reasons set forth above. However, such legal conclusions and lay opinions make up a very small part of Defendant Williams' affidavit, and are found almost entirely on page 12 of his affidavit. As such, it is only the first two paragraphs on page 12 of Defendant Williams' affidavit that must be excluded, and Plaintiffs Motion to Strike or Exclude (Document No. 73) is **GRANTED IN PART**, only as to the first two paragraphs on page 12 of Defendant Williams' affidavit.

Signed at Houston, Texas, this 9th
day of November, 2015.


FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE

APPENDIX R

UNITED STATES DISTRICT COURT SOUTHERN
DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. 4:14-CV-2711.

BARBARA THOMAS, et al, Plaintiffs, v. J.J.
WILLIAMS, et al, Defendants.

United States District Court, S.D. Texas, Houston
Division.

June 28, 2016.

ORDER AND OPINION

MELINDA HARMON, *District Judge*.

Before the Court are Defendants' Objections and Motion for Reconsideration and Modification of the Magistrate's Order of November 9, 2015 (Document No. 101), and Plaintiff's Response thereto (Document No. 104). Having considered these filings, the facts in the record, and the applicable law, the Court concludes that Defendants' Motion is DENIED and their objections are OVERRULED.

Background

Defendants object to the Magistrate Judge's Order, which struck the report of Ted Wilson, the affidavit of Lt. Waterwall, and portions of Defendant Williams' affidavit. (Document No. 96 at 1). As explained in the Order, "this is a Fourth Amendment civil rights case arising out of a search of Plaintiff's residence. Plaintiff alleges that her Fourth Amendment rights were violated when Defendant Officer J.J. Williams entered her residence with a search warrant for a different address, searched her residence knowing that it was not the address on the search warrant, and seized and/or detained Plaintiff for an unreasonable amount of time." *Id.* at 2.

On March 31, 2016 this Court granted Defendant Williams' Motion for Summary Judgment, finding that he is entitled to qualified immunity on Plaintiffs' claims. (Document No. 125). However, claims against the other Defendants are still pending.

Defendants style their Motion as a motion for reconsideration, however, in their "Standard of Review" section, Defendants only refer to objections to the Magistrate Judge's Order, and do not mention a motion for reconsideration or the applicable standard of review. Therefore the Court will consider Defendants' arguments as objections.

Standard of Review

Rule 72(a) states that:

When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 14 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

Fed. R. Civ. P. 72. *See also* 28 U.S.C. § 636(b)(1)(A) (“A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.”). Therefore this Court will apply a “clearly erroneous” standard when reviewing the Magistrate Judge’s Order. *Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995).

Discussion

Wilson Report

The Court agrees that Wilson’s Report should be stricken from the record in its entirety. Wilson’s

report contains his “legal opinions and conclusions about: (1) whether Defendant Williams made a ‘materially’ false statement in the affidavit he filed to obtain the search warrant; (2) whether the search warrant was ‘valid’; (3) whether Williams remained in Plaintiff’s residence for an ‘unreasonable’ amount of time following his determination that the address on the search warrant was incorrect; and whether Williams acted ‘reasonably.’” (Document No. 96 at 3). The Court agrees with the Magistrate Judge that these opinions are not admissible, because they offer a legal conclusion on each of the above matters *in this case*, essentially telling the jury which result to reach. *Id.* (citing cases). The Court also agrees that Wilson’s statements describing Fourth Amendment law are not helpful, and that “it is for the Court at the summary judgment stage to both determine the applicable law, [and] apply that law to the uncontested and undisputed facts in the case.” *Id.* at 4.

Waterwall Affidavit

The Court agrees that Waterwall’s affidavit should be stricken from the record in its entirety. As explained by the Magistrate Judge, Waterwall was not involved in this case, and therefore does not have the requisite personal knowledge to summarize the facts. *Id.* at 4-5. Furthermore, his opinions on key legal issues in the case are inadmissible for the same reason that Wilson’s opinions are inadmissible. *Id.* Finally, Waterwall’s affidavit provides no evidence that he is qualified to provide expert opinions

regarding the reasonableness of a hypothetical officer's actions. *Id.*

Williams Affidavit

The Magistrate Judge also excluded a small portion of Williams' affidavit, which contained "legal conclusions and his lay opinion testimony as to the reasonableness of his conduct," which are inadmissible for the same reasons as described above. The Court also agrees with this ruling.

Conclusion

Defendants' objections to the Magistrate Judge's Order are **OVERRULED** and their Motion (Document No. 101) is **DENIED**.

SIGNED at Houston, Texas, this 24th day of June, 2016.



MELINDA HARMON

UNITED STATES DISTRICT JUDGE