THE LAW SOCIETY OF MANITOBA

IN THE MATTER OF:

LAWRENCE BREMNER CHERRETT

-and-

IN THE MATTER OF:

THE LEGAL PROFESSION ACT

REASONS FOR DECISION

APPEARANCES: Ms. Darcia Senft for The Law Society of Manitoba

Mr. Lawrence Bremner Cherrett on his own behalf

PANEL: Jacob P. Janzen, Chair

David N. Gray

Marston Grindey (PR)

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REASONS FOR DECISION

Introduction

1. By citation dated January 14, 2014 (entered at the hearing as ex#1), Lawrence Bremner Cherrett (hereinafter "Cherrett") was charged with two counts of professional misconduct. Count #1 alleged that, while acting for his client J.F., the executor of the estates of B.J.F. and I.W.F., he misappropriated from those estates the sum of $20,000.00. Count #2 alleged that after withdrawing from practice in June 2009, he represented to J.F. that he was holding $20,000.00

on behalf of the said estates in trust and that he was in a position to issue a trust cheque in relation to the funds when he returned to practice, when in fact such was not the case.

2. Cherrett denied the allegations and the matter was heard by this panel on January 21 and 22, 2015.

Decision

3. This panel is unanimous in finding Cherrett guilty of professional misconduct in respect of both counts.

Evidence

4. The evidence consisted of two witnesses called by the Law Society of Manitoba (hereinafter "LSM"), being Ms. Leah Kosokowsky (a lawyer at the LSM) and J.F., of Cherrett's testimony given on his own behalf, and of 51 documents tendered and entered as exhibits.

5. The material facts in this matter were for the most part not in dispute. Any material disputes will be noted. All exhibits were entered with no objections.

Background Facts as to Estates of B.J.F. and I.W.F.

6. Cherrett was called to the Bar of the province of Manitoba in June 1979. He withdrew from practice on or about June 20, 2009. He practiced as a sole practitioner from about August, 2000 to the time of his withdrawal from practice. He is not the member of any other law society.

7. Both Cherrett and J.F. described themselves as "friends" for the time period relevant to the matters before this panel. Their acquaintance dated back to the 1970s.

8. J.F.'s mother, B.J.F., passed away testate on or about January 17, 2004. Her will named his father, I.W.F., as executor. J.F.'s father, I.W.F., passed away also testate on or about May 11,

2004. His father's will named J.F. as executor. J.F.'s mother's estate remained unadministered at the time of his father's passing.

9. The net effect was that there were two estates that needed administering, and two equal beneficiaries of those two estates. One beneficiary was J.F. and the other was his brother, who was a resident of British Columbia. Further, J.F.'s mother's estate required an administration with will annexed.

10. In late May or early June 2004, J.F. retained Cherrett to act in connection with both his parents' estates.

11. By order made on May 18, 2005, J.F. was granted probate of his father's estate (ex#38). By order made on June 3, 2005, J.F. was granted administration with will annexed of his mother's estate (ex#39).

12. Administration of both estates was substantially complete by the summer of 2007. There remained only the need for Clearance Certificates from Revenue Canada, a reconciliation of taxes paid for the estates by J.F. personally, payment of the accountant's fees, and the discharge of an administrative bond.

13. As of August 8, 2007, Cherrett was holding $616,306.35 in trust for the estates (Cherrett's trust ledger, ex#4). His trust ledger showed that on August 8, 2007, $5,455.57 thereof was paid to Cherrett on account of fees and disbursements, that on August 9, 2007, $295,425.39 thereof was paid to the brother, and that on August 9, 2007, $295,425.40 thereof was paid to J.F. This left $20,000.00 in trust.

14. By letter dated August 9, 2007 (ex#42), Cherrett reported to J.F. That report included: "Enclosed please find my trust cheque in the sum of $295,425.40 representing your distributive share of the Estate to date. I have, in accordance with your authorization, paid my account of $5,455.57. I have also held back the sum of $20,000.00 rather than $15,000.00 as suggested by Mr. Pollon [the Estate accountant], to take into account the payments made towards taxes this past spring for which your brother is one half liable."

15. By letter dated August 9, 2007 (ex#43), copied to J.F., Cherrett reported to the brother. That report included: "[Enclosed]: my trust cheque in the amount of $295,425.39 representing payment of your one-half of the estate less the $5,455.57 represented by my account of July 9, 2007 and the sum of $20,000.00 which is being held pursuant to an estimate from the accountant who is finalizing the last tax return for the estate for the interest earned, and which will involve an equalization of the tax payment that occurred in the spring when your brother [i.e., J.F.] caused the taxes to be paid, and also less any accounting costs."

16. The said $20,000.00, the holdback funds, remained in Cherrett's trust account until April 17, 2009.

Background Facts as to Cherrett's Health and Practice

17. Cherrett has faced health challenges. He testified that he was diagnosed with prostate cancer in 2002, and with type II diabetes in 2005. Four medical reports were filed as exhibits. The reports were all prepared by Dr. Craig Hildahl (now deceased). A report dated June 19, 2009 (ex#44) stated that Cherrett was totally disabled from work as of June 22, 2009. It diagnosed his disabling condition as "Acute adjustment reaction Type II diabetes Sleep Apnea. Paroxysmal atrial tachycardia". A report dated December 9, 2009 (ex#45) stated that Cherrett remained "completely disabled from work as a result of medical illness" and described his diagnosis as "acute adjustment reaction, stress reaction, extreme fatigue, sleep apnea, type II diabetes, prostate cancer, past history of pulmonary embolism and osteoarthritis of both knees." The report of March 22, 2010 (ex#46) opined that Cherrett remained completely disabled from work and recited the same medical conditions.

18. By April 2009, Cherrett's law practice was in serious difficulty. The Complaints Investigation Committee of the LSM had authorized charges of professional misconduct against him. His conduct in connection with a number of other matters was under investigation. On April 16, 2009, the then CEO of the LSM, Mr. Allan Fineblit, called him to suggest a meeting. They met on April 17, 2009. Mr. Fineblit suggested to Cherrett that he "retire with dignity."

19. In the result, on April 22, 2009, Cherrett gave a written undertaking to the LSM (ex#2). He, inter alia, undertook to withdraw from the practice of law effective June 20, 2009 for a minimum

period of one calendar year, and undertook to co-operate with Mr. Robert Fabbri, the LSM's custodian, for the orderly transfer of open files to new counsel. In exchange for the undertakings given, and subject to Cherrett's compliance with them, the LSM agreed to suspend the prosecution of the outstanding charges and the then current investigations.

20. That undertaking was followed by a further undertaking dated July 3, 2009 given by Cherrett to the LSM (ex#37). This further undertaking was substantially the same as the first one, except that it included the express statement that Cherrett's doctor "has determined that I [i.e., Cherrett] am disabled due to illness and recommended that I take time away from practice for treatment." It also more expressly particularized his obligations in the winding down of his practice. The withdrawal from practice deadline of June 20, 2009 was unchanged.

21. In cross examination, Cherrett confirmed that he had never advised Dr. Hildahl, the author of the medical reports, that he was at the material times prohibited from practicing law by reason of the undertakings he had given the LSM.

Facts as to the Alleged Misappropriation

22. By cheque dated April 11, 2009, Cherrett wrote a trust cheque in the amount of $20,000.00 drawn on the said Estates trust account (ex#15). The cheque was made payable to the Bank of Nova Scotia. The funds were on April 17, 2009 withdrawn from the trust account and deposited to an account at Scotiabank, Polo Park (ex#15). In cross-examination, Cherrett said that he had personally delivered the cheque to Scotiabank. The date of the withdrawal and deposit to an account at Bank of Nova Scotia coincides with the date on which Cherrett met with Mr. Fineblit.

23. The account at Scotiabank into which the funds were deposited was an account in the name of 3493734 Manitoba Ltd. (ex#24). Cherrett was the sole director of this corporation. He had sole signing authority on this account (ex#24).

24. On the same date, April 17, 2009, Cherrett obtained a Scotiabank bank draft in the amount of $10,000.00 made payable to Royal Bank of Canada. The bank draft was paid out of the said Scotiabank corporate account.

25. On April 20, 2009, Cherrett attended at a Royal Bank branch on Corydon Avenue and deposited the $10,000.00 bank draft to the credit of a personal account in the name of himself and his spouse (ex#34).

26. On June 20, 2009, Cherrett obtained another Scotiabank bank draft in the amount of $10,000.00 paid out of the same Scotiabank corporate account (ex#34). The bank draft was made payable to Royal Bank of Canada.

27. On June 22, 2009, Cherrett attended at the same Royal Bank branch and deposited the bank draft of $10,000.00 to the credit of the same personal account at the Royal Bank in the name of Mr. Cherrett and his spouse (ex#34).

28. The corporate account at Scotiabank was closed on November 18, 2009 (ex#34). Apart from service charge related fees, the only activity in the said corporate account for the period March 2009 through to account closing was the $20,000.00 deposit and the two $10,000.00 withdrawals (ex#34).

29. In August, 2009, Cherrett provided to the LSM custodian, Mr. Robert Fabbri, a seven page hand-written summary of the status of some 25 files (ex#48). No mention is made in this document of the estates of B.J.F. and I.W.F. or of J.F. Cherrett testified that no mention is made because, at the time, he thought these estate matters were closed.

30. The transfer of funds from trust to the Scotiabank corporate account, and the transfers from the corporate account to Cherrett's personal account at Royal Bank took place without any communication to J.F. and without his knowledge, consent, or authorization.

Subsequent Events

31. A Clearance Certificate in respect of the estate of B.J.F. issued to J.F. on March 2, 2010 (ex#29). A Clearance Certificate in respect of the estate of I.W.F. issued to J.F. on October 18, 2010 (ex#30).

32. J.F. testified that, having received the Clearance Certificates, he sometime in 2011 contacted Cherrett with a view to finalizing the estate matters and provided copies of the Clearance Certificates to him. There was the $20,000.00 holdback, the accountant's bill, the discharge of an administration bond, and a final tax reconciliation with his brother (J.F. had claimed some estate income personally as he was in a lower tax bracket than his brother.) He knew that Cherrett was having some health issues and so he anticipated some further delay in matters being concluded, but he believed that Cherrett was still practicing law.

33. By early 2012, J.F.'s brother, however, was expressing impatience at the delay. His brother left a phone message for J.F. advising that he had made inquiries at the LSM and been advised that Cherrett was not practicing. J.F. contacted Cherrett. Cherrett confirmed that he did not have a licence to practice. He advised, however, that he anticipated getting his licence back in the near future and he would then be able to access the $20,000.00.

34. J.F. and Cherrett had a meeting. There is some uncertainty as to the date. It will have been in late winter or early spring, 2012. At this meeting, J.F. advised Cherrett that he wanted to pay his brother out and not wait for all matters to be finalized. Cherrett prepared a detailed calculation of the amount owing to J.F. by his brother (ex#6). Cherrett prepared a letter that J.F. could send his brother (see para. #42 below). The calculation proved to be in error. J.F. chose not to use the Cherrett prepared letter. Instead, J.F. corrected the calculation, and by his own letter of May 12, 2012 to his brother (ex#7), provided his brother with a final accounting and with a bank draft representing his brother's full and final estate entitlement. As this letter explains, "Rather than wait for Larry [Cherrett] to regain his licence and finish things up I am paying your share of the twenty thousand held back out of my pocket and I will receive the residue when everything is wrapped up. I believe the hold back is held in a trust account with a law firm on Pembina Highway near the Cambridge Hotel where Larry last practised law."

35. Nothing further happened. In May, 2013, J.F. contacted the LSM to inquire about the status of Cherrett's return to practice. He spoke with Ms. Leah Kosokowsky on May 8, 2013.

The LSM's Investigation

36. Ms. Leah Kosokowsky conducted a review of the estate file. On it she found a copy of the trust ledger (ex#4). The final entry on it showed a balance remaining of $20,000.00. On it she also found a copy of a letter addressed to J.F. from Cherrett dated April 11, 2009 (ex#5). The letter stated in full: "Enclosed please find my trust cheque in the sum of $20,000.00 representing the holdback pending receipt of the clearance certificates. I understand that they have still not been received. Please contact me once they are received." In his evidence, J.F. said that he had not received this letter. In his evidence, Cherrett said that he had not in fact sent this letter and acknowledged that its being on the file gave the appearance that it had in fact been sent.

37. By letter dated May 8, 2013 (ex#8), the LSM wrote to Cherrett asking him for a copy of the final trust ledger and for a copy of the cheque to J.F. (the cheque referenced in ex#5).

38. Cherrett responded by letter dated May 16, 2013 (ex#11). The response enclosed a copy of the trust account ledger. It showed a final entry as a $20,000.00 withdrawal on April 11, 2009 with the notation "Scotiabank for [F.]". The letter promised a further response once the bank statement and cancelled cheques were located which "should be next week."

39. In due course, the LSM learned from Cherrett (his letter to the LSM of July 19, 2013, ex#25) that the corporate account at Scotiabank was an account in the name of 3493734 Manitoba Ltd., which he described as a "holding company for a Family Trust of which I am a Trustee". Otherwise, what the LSM learned as to the nature of the activity in the corporate account at Scotiabank and as to the identity of the holders of the account at Royal Bank into which the $20,000.00 found its way it learned from those financial institutions, not from Cherrett.

40. By his letter to the LSM of June 13, 2013 (ex#17), Cherrett stated the following:

> "By spring of 2009, I was still waiting as was [J.] for the tax information and those clearance certificates. My health had declined dramatically and I believe I decided to just give the money to [J.] to be held by him. Two years of holding the funds was enough. That is why I drafted the letter of April 11, 2009 [ex#5].
>
> I note that the cheque was recorded as issued to Scotiabank for [J.F.]. It was written on April 11, 2009. I believe that as I was writing the cheque I realized that there had been a written commitment (arguably) to [J.]'s brother to hold the money pending the tax

clearances and then distribute to the 2 beneficiaries. To that end I believe I decided to purchase a bank draft to be held. I am uncertain as I wasn't thinking clearly."

The letter goes on to explain that he was the signing officer on some accounts for a Family Trust which had significant financial activity in the spring of 2009. The letter concludes by saying "Mr. [J.] is entitled to his money, being $20,000 less the accountant's bill. It is my responsibility to give it to him... I will make arrangements to do so."

41. The LSM sent a number of letters to Cherrett requesting information and explanations. By his letter to the LSM of October 23, 2013 (ex#31), Cherrett explained his delay in responding to LSM inquiries, described in some detail medical treatments he was undergoing in late 2010 and early 2011, and referred to the letter he had drafted in the spring of 2012 for J.F. to send to J.F.'s brother (cf. para 34 above). He also advised that he would need "another week" to answer questions relating to the whereabouts of the still missing $20,000.00.

42. By his note to the LSM of October 31, 2013 (ex#32), Cherrett provided a copy of the letter he had drafted for J.F. for J.F. to send to his brother. That letter is addressed to J.F.'s brother and is dated March 23, 2012. The letter refers to the $20,000.00 as "amount held back" and as the "holdback". The letter refers to delays occasioned by the accountant. There is no reference in the letter to delays occasioned, directly or indirectly, by Cherrett, by Cherrett's health, or by Cherrett's practicing status, nor is there any reference to the whereabouts of the $20,000.00.

43. Cherrett did not provide further explanations to the LSM, not within "another week" nor at all. At the time of the hearing, J.F. had not received the $20,000.00, either in whole or in part.

Cherrett's Viva Voce Evidence

44. Cherrett described his health problems in some detail. By 2008, he said he had no energy left and was seeing a cardiologist, an urologist, an endocrinologist, and his GP. By 2009, he was "getting overwhelmed". He had, he said, 8-10 hours of work to do, but could only do 2-3. Specific examples that he gave of his state of mind were (i) one morning in court forgetting how to address a woman judge, (ii) meeting an old acquaintance in a parking lot, and not remembering his name, and (iii) in the middle of an argument in court, forgetting what he had

just said or argued. He had 66 treatments from October 2010 to the end of 2010, he needed a knee replacement, he had a tentative skin cancer diagnosis in August 2011. In early 2012 he took a course called "Coping with Brain Fog". He was dysfunctional, he said, and "by dysfunctional, I don't mean dysfunctional as a lawyer, I mean dysfunctional as a person". He did have a spotty recollection of his conduct relating to the transfer of the estate trust funds, but said he had not acted "intentionally".

45. In cross-examination, Cherrett acknowledged inter alia that he had been able to do what his undertakings to the LSM required, that he was able to give direction to and take direction from Mr. Fabbri (the LSM custodian), that he had participated in reconciling his trust accounts during his practice wind down in 2009, that he had not advised his primary physician Dr. Hildahl that he was in 2009 facing LSM charges, that he gave instructions to counsel to file a statement of claim on his behalf relating to his disability insurance coverage (a claim apparently settled sometime in 2012), that he had at no time told J.F. that the holdback funds were no longer in trust, that he had at no time told J.F. that the holdback funds were gone, that he had at no time advised J.F. that he was prohibited from practicing law, that J.F. had no reason to believe anything other than that the holdback funds were in trust, that he had personally attended to Scotiabank and Royal Bank to arrange for the withdrawal and deposit of funds.

Submissions

46. Ms. Senft, on behalf of the LSM, argued that the panel ought not to accept Cherrett's medical based explanation of his conduct. She argued that his conduct in moving the holdback funds showed clarity of purpose. She argued that his conduct subsequently evidenced an attempt to obfuscate and conceal the true nature of the money transfers. She argued that this was confirmed further by Cherrett's failure to be forthcoming in connection with the LSM investigation. The conduct was not, she submitted, that of a distracted man. In any event, and in the alternative, she submitted that the case against Cherrett would be made out on a showing that he ought to have known that trust funds had been transferred for his personal gain and benefit without the authorization and consent of the client. This, she submitted, the LSM had clearly demonstrated. As to count #2, she argued that even if there was no express oral or written representation after June 20, 2009 by Cherrett to J.F. that the $20,000.00 continued to be held in trust, such a representation can be made by other words and deeds, and that

Cherrett had by such other words and deeds made the representations to J.F. which constitute the second count.

47. Cherrett submitted that the test was whether he had acted intentionally, that the allegations of professional misconduct required an intentional act, and that he had not acted intentionally. For health reasons, he was not, he submitted, functioning at the material times. He argued that he had not intentionally misappropriated the funds and that he had not intentionally misled J.F. In response to questions put to him by the panel, Cherrett conceded that in some circumstances a lawyer would be duty-bound to correct a misunderstanding or misperception on the part of a client where the lawyer was responsible for the misunderstanding or misperception, but he submitted that such a duty was diminished for a non-practicing lawyer.

Analysis as to Count #1

48. A lawyer is enjoined to discharge with integrity all duties owed to clients, the court, and other members of the profession and the public. Illustrations of conduct that may infringe the enjoinder include falsifying a document even without fraudulent intent, making untrue representations or concealing material facts from a client with dishonest or improper motives, taking improper advantage of a client, misappropriating or dealing dishonestly with a client's monies, or receiving monies from a client for a specific purpose and failing to pay them over for that purpose.

49. As to the first count in the citation, this panel is satisfied that Cherrett misappropriated the $20,000.00 as alleged and is, moreover, satisfied that he did so purposefully. The hypothesis that Cherrett was at all material times in a "cognitive fog" (so to speak) so as to relieve him of responsibility is quite simply inconsistent with the evidence.

50. There was, first of all, no convincing evidence that Cherrett at any material time was in fact in a "cognitive fog" at all. The medical reports do not substantiate it. The mental lapses he suffered which he gave as illustrations are of a relatively minor and commonplace a nature. They fall far short of explaining the kind of systematic conduct which constituted the misappropriation. This is not to discount or diminish the very real health issues that the panel accepts Cherrett

struggled with. Those health issues were undoubtedly genuine and undoubtedly took a heavy emotional and psychological toll on Cherrett. They do not, however, amount to an explanation for the impugned conduct.

51. There was, secondly, convincing evidence that Cherrett was during the material time, notwithstanding his health issues, quite capable of sustained cognitive effort. More or less concurrently with the fund transfers, he met with Mr. Fineblit. He entered into two substantive agreements with the LSM. He provided Mr. Fabbri with detailed information and trust accounting in connection with the files Mr. Fabbri took over from Cherrett. He engaged in litigation extending over a number of years with his disability insurer.

52. Thirdly, the manner in which the funds transferred from Cherrett's trust account into his personal account is a model of deliberate and considered conduct. The method was complex and a number of its steps appeared designed to obscure the ultimate destination of the funds. This included the letter left on the file (ex#5), the cheque made payable to a financial institution, and bank drafts made payable to a financial institution.

53. Fourthly, and finally, Cherrett's phlegmatic responses to the LSM's inquiries were inconsistent with those of a person who had a genuine interest in finding out what had become of the estate funds. Under Cherrett's "cognitive fog" hypothesis, he should have been as eager as the LSM, perhaps even more eager, to get to the bottom of the matter. He showed no such eagerness. His responses were more consistent with those of a person who would rather that no one discover what had occurred.

Analysis as to Count #2

54. As to the second count in the citation, this panel is satisfied that Cherrett after his withdrawal from practice represented to J.F. that he was holding $20,000.00 on behalf of J.F.'s parents' estates in trust, and that he was in a position to issue a trust cheque when he returned to practice.

55. The panel has reached this conclusion notwithstanding that, based on the evidence before it, it is likely that Cherrett did not in fact at any time after June 20, 2009 state expressly and explicitly to J.F. that the holdback funds were in a lawyer's trust account. J.F., in his evidence, initially testified that Cherrett, in their discussions in the March-May 2012 period, told him that the funds were in his trust account. He then, however, reflected and said that perhaps he had just assumed that they were in Cherrett's trust account.

56. The issue for this panel becomes largely one, then, of assessing whether and how, if at all, Cherrett was responsible for J.F. making the assumption which he did. That is, while not making an explicit statement after June 20, 2009 that he was holding the funds in trust, did Cherrett engage in conduct which, in the circumstances of the case, caused or was calculated to cause J.F. to believe that Cherrett had the funds in trust, and could, in due course, access them for J.F.?

57. Cherrett received the estate funds in trust and properly placed them in his trust account. When Cherrett reported out to J.F. and J.F.'s brother in August 2007, he expressly represented to them that the holdback funds were in trust. Having received the funds into trust and having expressly represented to J.F. that the holdback funds remained in trust, he was under a strict obligation to advise J.F. expressly in the event of the holdback funds being paid out of trust. Hence, from August 2007 onward, J.F. had a legitimate expectation, one for which Cherrett was properly responsible, that, unless he was otherwise advised by Cherrett, the holdback funds were indeed in Cherrett's trust account.

58. Sometime in 2011, J.F. provided the Clearance Certificates to Cherrett and Cherrett accepted them. Receipt of the Clearance Certificates was the primary impediment to finalizing the estates. At this point Cherrett could and should have advised J.F. that he was no longer practicing and that he no longer had the funds in trust. His acceptance of the Certificates cannot but be construed as a representation by him to J.F. that he continued to act in the estate matter and, by extension, that he continued to hold the holdback funds in trust, and that those funds could, in due course, be paid out.

59. What is decisive in the panel's view, however, was Cherrett's conduct in the March-May 2012 time period. He actively assisted J.F. in concluding all estate matters ---as they related to the brother. The idea was that J.F. would out of his own pocket pay to the brother the brother's full and final estate entitlement. It is not clear from the evidence whether the idea originated with J.F. or with Cherrett. In any event, to "aid" J.F., Cherrett prepared a final tax reconciliation calculation. Cherrett prepared a letter for J.F.'s use to send to the brother (a letter J.F. ultimately decided not to use). The entire project, of course, made sense only on the underlying assumption and premise that the holdback funds were not then available to Cherrett to pay out to J.F. due to Cherrett's non-practicing status, and that the funds would be available on Cherrett's return to practice, only practicing lawyers having access to trust funds. Cherrett not only failed to disabuse J.F. of this underlying assumption. He actively participated in giving effect to the idea that was based on it. In the panel's view, Cherrett's active participation constituted an overt representation by Cherrett to J.F. that the funds were in trust, and could be paid out by Cherrett to J.F. on his return to lawyering.

60. The representation was a sham, of course, to Cherrett's knowledge. Nonetheless, the representation caused J.F. to wait yet another year, to May 2013, to investigate further. Thus another year passed during which Cherrett personally had undisturbed use and benefit of holdback funds that rightfully belonged to J.F. That J.F. in the event proved a particularly trusting and credulous client makes the misconduct the more conspicuous. We reject altogether the proposition that a lawyer might in this manner mislead a client yet escape censure on the grounds that he was at the time non-practicing rather than practicing.

Conclusion

61. Given this panel's decision, a date should be set for the parties to speak to disposition.

Dated this 26 day of February, 2015

Jacob P. Janzen (Chair) _____

David N. Gray _____

Marston Grindey (PR) _____