In the Matter of the Application of LEE KELLER KING, Applicant.
Arizona Supreme Court No. SB-03-0152-PR

Supreme Court of Arizona.

[FN4] [FN5]petition for review on April 19, 2004, effectively denying King's application. ¶ **7** King re-applied for admission six months later and another hearing was held on April 21, 2005. The landscape of this hearing differed from that of the prior hearing. Specifically, membership in the Committee had changed, King had secured legal representation, and King presented more extensive evidence concerning his character and fitness to practice law. By a vote of eight to three, the Committee recommended King's admission to the bar and notified the court of its decision by letter four days later. The Committee offered no explanation for its decision. [FN6] ¶ **8** Pursuant to Rule 33(a), this court, on its own motion, continued consideration of King's application and has since considered the record of all Committee proceedings as well as the written and oral arguments presented in this court by King and the State Bar of Arizona, which appeared as amicus curiae in opposition to the application. Although we seriously consider the Committee's recommendation, we independently decide whether King possesses the requisite character and fitness to gain admission to practice law in Arizona. Hamm, 211 Ariz. at 462, ¶ 15, 123 P.3d at 656. **ANALYSIS I.** ¶ **9** King bears the burden of proving by a preponderance of the evidence that he possesses the requisite character and fitness qualifying him for admission to the Arizona bar. Rule 36(a)(3), (f)(5). [FN7] To satisfy this burden, King must prove, among other things, that he presently possesses good moral character. Rule 34(c)(1)(B); Hamm, 211 Ariz. at 462, 463, ¶ ¶ 12, 17, 123 P.3d at 656, 657. As we explained in Hamm, although an applicant's conviction for a serious crime does not constitute a per se disqualification to practice law, [FN8] it adds weight to the applicant's burden of proving present good moral character. 211 Ariz. at 462, 463-64, ¶ ¶ 16, 21, 123 P.3d at 656, 657-58. Specifically, because past serious misconduct may indicate flaws in an applicant's present moral character, the applicant must initially demonstrate complete rehabilitation before we consider other evidence of present good moral character. Id. at 463-64, ¶ ¶ 17, 21, 123 P.3d at 657-58 (citations omitted). ¶ **10** In summary, when an applicant convicted of a serious crime applies to practice law in Arizona, we conduct a conditional, two-part inquiry. We first consider whether the applicant has satisfied the burden of proving complete rehabilitation from the character deficits that led to the commission of the crime. If not, our inquiry ends and we will deny the application. If the applicant proves complete rehabilitation, we then decide whether the applicant has otherwise demonstrated present good moral character. With these principles in mind, we turn to King's application. **II.** ¶ **11** The weight of the added burden of demonstrating complete rehabilitation is determined by the gravity of the past criminal conduct. Id. at 464, ¶ 22, 123 P.3d at 658. The more serious the unlawful act, the greater the burden. Id. "[I]n the case of extremely damning past misconduct," such as first-degree murder or, in the circumstances here, attempted murder, "a showing of rehabilitation may be virtually impossible to make." Id. (quoting *In re Matthews*, 462 A.2d 165, 176 (N.J.1983)). Undoubtedly, King's act in shooting two unarmed men at close range multiple times without apparent verbal warning constitutes the type of "extremely damning" misconduct that mandates an extraordinary showing of rehabilitation. Although neither victim died, King inflicted serious injuries upon them while holding a position of public trust as a peace officer. [FN9] *See* Barlow v. Blackburn, 165 Ariz. 351, 357, 798 P.2d 1360, 1366 (App.1990

*The Honorable W. Scott Bales recused himself; pursuant to Article VI, Section 3 of the Arizona Constitution, the court designated the Honorable Ann A. Scott Timmer, Judge of the Arizona Court of Appeals, Division One, to sit in this matter. **H U R W I T Z**, Justice, dissenting ¶ **30** The State Bar of Arizona has repeatedly urged us to disqualify from the practice of law all applicants with records of serious past misconduct. Such a bright-line rule would hardly be irrational. Felony convictions

disqualify applicants from participation in a number of other professions, including law enforcement, Ariz.Rev.Stat. ("A.R.S."

[FN17]211 Ariz. 458, 462 ¶ 16, 123 P.3d 652, 656 (2005). I concurred in that holding, which is entirely consistent with our willingness to consider the readmission of attorneys disbarred after felony convictions upon proof of rehabilitation. *See In re Arrotta*, 208 Ariz. 509, 96 P.3d 213 (2004) (involving reinstatement application of attorney convicted of mail fraud and bribery). I also concurred in the Court's conclusion that despite his admirable post-conviction record, Mr. Hamm had not discharged his difficult burden of demonstrating current good moral character. Hamm, 211 Ariz. at 468 ¶ 40, 123 P.3d at 662.

OPINION
IV
II.
APPLICATION DENIED

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T I M M E R, Judge

¶ 1 This court recently denied the application to practice law submitted by an individual previously convicted of first-degree murder. *In re* Hamm, 211 Ariz. 458, 123 P.3d 652 (2005). In the wake of Hamm, we review the recommendation of this court's Committee on Character and Fitness to admit Lee Keller King, who was previously convicted of attempted murder. Because King has failed to satisfy his burden to demonstrate his character and fitness to practice law in Arizona, we reject the Committee's recommendation and deny King's application.

BACKGROUND

¶ 2 In 1977, twenty-four-year-old Lee Keller King was a certified peace officer, employed as a reserve deputy constable in Harris County, Texas. In that capacity, King served civil court papers, performed patrol duties with full-time officers, and attended numerous hours of basic training. King was authorized to carry a handgun while in uniform and, when dressed in civilian clothes, was permitted to keep the weapon in the glove compartment of his car.

¶ 3 On December 30, 1977, King was upset because he had been "passed over" for a full-time deputy constable position. While off duty [FN1] and out of uniform, King went to a neighborhood bar, became highly intoxicated, and argued with two male acquaintances who King knew to be convicted felons. Although reports about what occurred next conflict somewhat, [FN2] it is undisputed that King left the bar in the early morning hours of December 31, and the two men soon followed. King then used his semi-automatic service weapon to shoot each man several times at close range, emptying his fully loaded weapon and firing some bullets through the bar door. Neither King nor any other witness reported that King warned the victims to stay back before shooting them. One man was shot in the upper thigh and back, with an exit wound through the neck, leaving him in a critical condition that required surgery. The other man was shot in the abdomen and upper leg, splintering the bones and causing serious damage. Both victims were unarmed. Despite sustaining serious

wounds, both victims survived.

¶ **4** After the State of Texas indicted King on two counts of attempted murder, King entered a guilty plea to one count of attempted murder pursuant to a plea agreement. In September 1978, King was sentenced to a seven-year prison term. After an unsuccessful appeal on bases King cannot recall, he began serving his sentence in June 1979 before the court suspended his sentence and placed him on probation four months later. [FN3] During his term of probation, King underwent mental health counseling and group therapy. In February 1985, a court set aside King's conviction.

¶ **5** After King left the criminal justice system, his life took an admirable turn. He graduated from college and law school and passed the Texas bar examination. The Texas Board of Law Examiners concluded that King possessed the requisite good moral character to practice law in Texas, and he was admitted to practice in 1994. Thereafter, King practiced law in Texas without incurring any disciplinary charges, he married, adopted his wife's child, and the couple had two additional children.

¶ **6** In 2003, King moved to Arizona to work in his law firm's Phoenix-area office. He passed the Arizona bar examination and submitted his Character and Fitness Report to the Committee on Character and Fitness [FN4] as required by Arizona Supreme Court Rule 34(a), 17A Ariz.Rev.Stat. [FN5] After conducting an evidentiary hearing on October 14, 2003, the Committee recommended that this court deny King's application for admission, finding that he had failed to prove his good character and fitness to practice law in Arizona. The Committee concluded that although King had presented strong evidence of rehabilitation and positive social contributions since the shootings, the Committee was unable to overlook the seriousness of his crime. This court declined King's subsequently filed

[FN9](recognizing society demands much from law enforcement officers as state "entrusts them with power to enforce the laws upon which society depends"); *Seide v. Comm. of Bar Exam'rs of the State Bar of Cal.*, 782 P.2d 602, 604 (Cal.1989) (finding applicant's criminal history "all the more reprehensible [because] committed by a former law enforcement officer and law school graduate").

¶ **12** The extraordinary showing required of King affects the quantum of evidence required to satisfy the preponderance-of-the-evidence standard rather than the burden itself. Phrased differently, King's misconduct tips the scales against admission at the outset, thereby requiring him to produce an extraordinary amount or quality of evidence to meet his burden of proof.

¶ **13** To prove complete rehabilitation, King must establish that he has both (1

accepted responsibility for his past criminal conduct, *Hamm*, 211 Ariz. at 464, ¶ 23, 123 P.3d at 658, and (2) identified and overcome the weakness that led to the unlawful conduct, *In re Arrota*, 208 Ariz. 509, 513, ¶ 17, 96 P.3d 213, 217 (2004). We "weigh those factors tending to show rehabilitation against those tending to show a lack thereof" to decide whether King has met his burden. Hamm, 211 Ariz. at 465, ¶ 25, 123 P.3d at 659.

A.

¶ **14** Evidence in the record both supports and negates King's contention that he has accepted responsibility for the 1977 shootings. [FN10] King demonstrated his acceptance by informing judges, lawyers, law professors, former employers, and a host of friends, acquaintances, and colleagues of his crime over an extended period of time, impressing upon many of them heartfelt feelings of remorse. [FN11] And in both hearings before the Committee, King admitted shooting the victims and expressed remorse, calling the shootings "a mistake I made that I will carry with me for the rest of my life."

¶ **15** Conversely, in his written applications for admission to law school and to the Arizona bar, both created years after his conviction had been set aside, King minimized his personal responsibility for the shootings. In his application for law

school submitted in the early 1990s, King described the circumstances of the shooting and explained that in light of these facts, the lack of any witnesses on his part, his strained emotional state, and anti-police sentiment of the day, it was in his best interests to plead guilty to one charge and "throw [himself] on the mercy of the Court rather than to attempt to clear [himself] in a jury trial." Although King appropriately stated that he was "stricken with remorse" immediately after the shootings, we are nevertheless left with the impression that King intended his readers to infer that he had a defense to the shootings but chose to plead guilty to one charge after weighing his chances for success. His suggestion that only circumstances beyond his control prevented him from mounting a successful defense is inconsistent with the notion of acceptance of responsibility.

¶ **16** In his application to this court, King provided a shorter account of the shootings, noting his intoxication and fear of the victims, whom he knew to be convicted felons aware of his peace-officer status. He explained that he pled guilty to one charge "rather than attempt to fight [the charges] at trial at a time of major anti-police sentiment in Houston that was caused by the then recent death of a prisoner who had been mistreated by the Houston Police Department." King expressed no remorse, and we are left with the sense that King wanted the Committee and this court to believe he pled guilty only because of prevailing anti-police sentiment rather than as an acknowledgement of actual guilt.

¶ **17** Finally, King's statements to the Committee suggest he has not candidly assessed his actions on the morning of the shootings. Specifically, although he related details of the crime that support his assertion that he shot the victims in a drunken panic when they approached him, he repeatedly cited a failed memory when asked about facts that dispute that version of events. For example, because King claimed no memory of these events, the Committee could not meaningfully question King about witness statements that he threatened to shoot O'Brien and acted as the aggressor by returning to the bar door with his gun. The Committee was also prevented from probing the basis for King's fear of the victims because he could not remember why he argued with them or why he felt threatened by them. King's memory of details that only favor his version of the events compels us to discount his claim that he does not remember salient facts about the shootings.

¶ **18** In light of the above-described evidence, King has failed to make an extraordinary showing that he has accepted responsibility for the shootings. Id. at 464, ¶ 22, 123 P.3d at 658. Because we weigh all factors tending to show rehabilitation, however, we must examine other evidence concerning King's rehabilitation before deciding whether he has satisfied his burden of proof. Id. at 465, ¶ 25, 123 P.3d at 659.

B.

¶ **19** To prove complete rehabilitation, King must also identify the weakness that caused him to engage in criminal misconduct and then demonstrate that he has overcome that weakness. *Arrota*, 208 Ariz. at 513, ¶ 17, 96 P.3d at 217. [FN12] King has not proven either factor.

¶ **20** While before the Committee, King did not explicitly identify the weakness that caused his criminal misconduct. Although he stated that at the time of the shootings he was intoxicated, depressed, and stressed, he never plainly said that this combination of factors caused him to engage in such extreme criminal misconduct. Indeed, he expressed that he was "not sure anything can adequately explain" what occurred the morning of the shootings.

¶ **21** At oral argument before this court, King argued that a mix of stress and alcohol abuse caused the misconduct. The record before us, however, does not reflect that King identified the character flaw that led him to fail to appropriately cope with stress and/or to abuse alcohol.

¶ **22** King offered no evidence identifying the weakness that prevented him from appropriately coping with the stress he was experiencing in late 1977. For example, King did not introduce any evidence from a mental health professional identifying

emotional problems King was suffering in 1977 that would explain his inability to appropriately respond to stress or his resort to alcohol abuse. *See* Arrota, 208 Ariz. at 514, ¶ 22, 96 P.3d at 218 (recognizing that in many instances a counselor can assist a person to understand reasons for misconduct). And even though King participated in counseling while on probation, he cannot recall any diagnoses, although he believes he was counseled for depression and "probably" low self-esteem. But many people have low self-esteem, experience employment disappointments, and suffer financial strain without unleashing their emotions in the violent manner chosen by King on the morning of the shootings. King provides no clues as to why seemingly routine stressors caused him to engage in such extreme misconduct.

¶ **23** In short, nothing illuminates *why* King lacked appropriate skills to cope with stress or abused alcohol during the pertinent period of his life. Without such knowledge, we cannot be assured that King has appropriately addressed and overcome the weakness leading to his criminal misconduct. *See id.* at 513, ¶ 18, 96 P.3d at 217 (applicant for reinstatement failed to show he understood or even identified cause of misconduct).

¶ **24** King has similarly failed to persuade us that he has overcome the weakness that led to his misconduct. We credit the fact that King has not engaged in serious misconduct or had an alcohol-related incident since the 1977 shootings. This circumstance is particularly significant as King has encountered many stressors since the shootings, including incarceration, probation, schooling, practicing law in Texas, [FN13] taking on family responsibilities, and experiencing financial difficulties that led to bankruptcy. We disagree with the dissent, however, that the manner in which King has led his life since the shootings, however admirable, compels a conclusion that he has overcome the weakness that led to the shootings. *See infra* ¶ 52. The mere passage of time without incident is insufficient standing alone to evidence King's triumph over the weakness that caused his misconduct. Arrota, 208 Ariz. at 515, ¶ 29, 96 P.3d at 219 ("Merely showing that [an individual] is now living and doing those things he ... should have done throughout life, although necessary to prove rehabilitation, is not sufficient to meet the applicant's burden."

[FN13](citation omitted); *Matter of Robbins*, 172 Ariz. 255, 256, 836 P.2d 965, 966 (1992) (to same effect). Rather, to ensure King's complete rehabilitation before entrusting him with the responsibility of practicing law in Arizona, he must persuade us that he has directly addressed and overcome the weakness that led to the shootings. Arrota, 208 Ariz. at 515, ¶ 29, 96 P.3d at 219.

¶ **25** We give weight to King's testimony that he participated in counseling while in the Texas justice system and during college and law school. According to King, as part of his probation, he underwent weekly individual, and eventually group, counseling sessions, which were designed in part to address his alcohol abuse. He also attended "some meetings of Alcoholics Anonymous," and worked through a twelve-step program designed to overcome addiction. [FN14] While in college, he again attended individual and group counseling sessions to help him cope with the stress of being a student. King also attended weekly meetings of Adult Children of Alcoholics during law school. Finally, during his last year of law school and for two years thereafter, he attended weekly counseling sessions with a "master's social work psychological counselor." According to King, this treatment, along with his religious beliefs, increased his sense of self-worth, helped him take responsibility for his actions, and taught him coping mechanisms to deal with stress that do not involve "going out and getting drunk and getting in trouble."

¶ **26** Other factors discount the positive effects of King's treatment. King provided limited detail about the type or focus of his counseling while on probation and how it assisted him in gaining coping skills or overcoming alcohol abuse. Similarly, King stated that he received "counseling or treatment" at meetings for Adult Children of Alcoholics, but failed to describe that treatment or whether he completed any programs. This lack of detail hinders our ability to assess whether King has directly addressed and overcome the reasons for his misconduct.

¶ **27** King also provided contradictory testimony regarding his alcohol abuse. Although he reported that he worked through Alcoholics Anonymous' twelve-step program to help with "addiction," which required him to admit he was powerless over alcohol, [FN15] he continues to drink alcohol occasionally and denies that he is or was an alcoholic. King's continued, albeit moderate, use of alcohol indicates either he has not overcome the weakness leading to his alcohol abuse or does not believe that alcohol abuse caused the emotional turmoil that led to the shootings. And again, King fails to provide any evidence from a substance abuse specialist or counselor that would enable us to assess whether King has an ongoing addiction so that even social drinking might compromise his ability to practice law. *See In re Beers,* 118 P.3d 784, 788, 791 (Or.2005

[FN15](admitting applicant with criminal record stemming from drug and alcohol abuse based in part on psychologist's testimony that applicant did not suffer addiction). Without this or equivalent evidence, King has not shown that he has truly conquered the weakness that led to his misconduct. Consequently, although the lengthy passage of time without incident and King's participation in counseling provide some evidence that he has overcome the weakness causing his misconduct, the impact of this evidence is compromised by other evidence.

C.

¶ **28** In weighing all the factors concerning King's rehabilitation, we conclude that King's demonstration falls short of the "virtually impossible" showing needed to erase the stain of his serious criminal misconduct. Although significant and commendable evidence shows rehabilitation, contrary evidence dilutes its strength. For this reason, we deny King's application for admission to the bar. In light of our decision, we need not consider whether King has otherwise proven his present good moral character. [FN16] Hamm, 211 Ariz. at 465, ¶ 25, 123 P.3d at 659.

¶ **29** By our decision today, we do not effectively exclude all applicants guilty of serious past misconduct from practicing law in Arizona, as the dissent suggests. *See infra* ¶ 32. Nor do we lightly view the choice of applicants such as King to live as good citizens after paying for past misdeeds, as the dissent implies. Indeed, it is out of respect for and belief in rehabilitation that this court has refrained from mimicking other professions by drawing a bright-line rule to disqualify convicted felons from practicing law in Arizona. *See infra* ¶ 30. Such applicants, however, must overcome the additional burden born from their past misdeeds as reflected in our two-part inquiry. King has not done so.

Ann A. Scott Timmer, Judge*

CONCURRING:

Ruth V. McGregor, Chief Justice

Rebecca White Berch, Vice Chief Justice

Michael D. Ryan, Justice

§ 13-904(F) (2001), certified public accounting, A.R.S. § 32-741(A)(1) (2002), nursing, A.R.S. § 32-1632(2) (Supp.2005), private investigation, A.R.S. § 32-2422(A)(3) (2002), and security, A.R.S. § 32-2612(A)(3) (2002).

¶ **31** Our opinions, however, have twice expressly rejected the Bar's suggested per se approach. [FN17] In *In re Hamm,* we stated that "the rules and standards governing admission to the practice of law in Arizona include no *per se* disqualifications" and that we therefore "consider each case on its own merits."

¶ **32** The majority purports again to reject a per se rule today, stating that, notwithstanding serious past misconduct, an applicant can prove the current good moral character required by Arizona Supreme Court Rule 36 [FN18] for admission to the Bar. Op. ¶ 9 & n.8. In practice, however, the Court has adopted the very

bright-line rule it purports to abjure. If Mr. King has not demonstrated rehabilitation and current good moral character, it is difficult for me to conclude that any applicant previously convicted of a serious felony ever can.

I.

¶ 33 The majority accurately recites the background facts of this case, Op. ¶ ¶ 2-7, and I need not recount them here. But several uncontested facts not emphasized in the majority opinion deserve particular focus.

¶ 34 Mr. King comes to us with an extraordinary item on his resume - he is a long-standing member of the Texas Bar. King graduated from law school, took and passed the Texas Bar examination in 1994, and was admitted to practice after a formal hearing before the Texas Board of Law Examiners. Under Texas law, his admission necessarily involved a finding that he was then of good moral character. *See* Tex. Rules Governing Admission to the Bar, Rule

(f)(2

(West, Westlaw through 2006) (requiring that an applicant with a felony conviction demonstrate current good moral character as a prerequisite to admission).

¶ 35 While we are of course not bound by another state's determination that an applicant possesses good moral character, neither should we simply disregard such a finding. [FN19] More importantly, the years since 1994 strongly bear out the wisdom of Texas's conclusion. Mr. King worked for several firms in Texas from 1994 to 2003, specializing in personal injury law. He is in good standing with the Texas Bar and has never been the subject of a disciplinary grievance or sanction. King belongs to an Inn of Court, an organization emphasizing professionalism and ethics among lawyers. He has worked as a **paralegal** since coming to Arizona and receives high praise from his employers.

¶ 36 Nor is there a single blemish on King's personal record. King has had no serious difficulties with the law since 1977. Indeed, he appears to have been a model citizen in the almost thirty years following his crime. He is a devoted family man, happily married and successfully raising three children. He is active in his children's Boy Scout groups and the Chandler Christian Church, where he is involved with a number of leadership groups and charitable programs. He was similarly active in his church in Texas for an extended period of time.

¶ 37 King's application is supported by some fifty letters of recommendation, each of which praises King's good moral character and good works. These letters come from peers, colleagues, supervisors, friends, clients, professors, clergymen judges, and lawyers. [FN20] The letters of recommendation are uniformly supportive of King's application, some in glowing terms. No one appeared before the Committee or submitted a letter opposing King's admission. King also presented compelling character testimony at the Committee hearings. Peter William Murphy, a professor at the South Texas College of Law, defense counsel for the International Criminal Tribunal, former trustee for the American Inns of Court, and former teacher and moot court coach to King, testified that King's rehabilitation from his past crime was like nothing he had ever seen. Professor Murphy unreservedly recommended King to the practice of law, explaining that he believed King to possess the requisite good moral character and fitness.

¶ 38 Perhaps most telling is that, after considering all of this evidence at a formal hearing, our Committee on Character and Fitness ("Committee" [FN21]

recommended King in April 2005 for admission to the State Bar. The Committee did so after hearing from King personally on two occasions; its recommendation is therefore obviously based on a determination that King was credible and had established his rehabilitation. "[W]e give serious consideration to the facts as found by and the recommendations of the Committee." Hamm, 211 Ariz. at 462 ¶ 15, 123 P.3d at 656. [FN21]

¶ **39** Notwithstanding this compelling and extraordinary record, the Court nonetheless concludes that Mr. King is not fit to practice law in Arizona. It does so not because it concludes that he currently lacks good moral character, but rather because it believes that King has not sufficiently demonstrated rehabilitation from his 1977 crime. I respectfully disagree.

A.

¶ **40** The majority denies Mr. King admission to the Bar because he has fallen "short of the 'virtually impossible' showing needed to erase the stain of his serious criminal conduct." Op. ¶ 28. By making the required showing of rehabilitation "virtually impossible," the majority pre-ordains the result. I do not believe, however, that our rules and case law support the application of the "virtually impossible" standard in this case.

¶ **41** We have long held that an applicant has the burden of establishing his qualifications to practice law. *See, e.g.*, *In re Greenberg*, 126 Ariz. 290, 292, 614 P.2d 832, 834 (1980). Rule 36(a)(2)(A

provides that prior unlawful misconduct is relevant to the issue of the applicant's current good moral character. Rule 36(a)(3) provides that in determining that character, various factors relating to prior misconduct, including its "recency," "seriousness," and "evidence of rehabilitation," should be taken into account. Our rule is thus properly read as requiring more convincing proof of rehabilitation the more serious the prior misconduct: "The added burden becomes greater as past unlawful conduct becomes more serious." Hamm, 211 Ariz. at 464 ¶ 22, 123 P.3d at 658. But nothing in the language of the rule suggests that such a showing is, as the Court holds today, "virtually impossible" for *all* serious prior misconduct.

¶ **42** The "virtually impossible" language appears for the first time in our case law in Hamm. We correctly noted there that an applicant "who is attempting to overcome the negative implications of a serious felony on his current moral character ... must overcome a greater burden for more serious crimes." Id. We then agreed with a statement made by the New Jersey Supreme Court that "in the case of extremely damning past misconduct, a showing of rehabilitation may be virtually impossible to make." Id. (quoting *In re Matthews*, 462 A.2d 165, 176 (N.J.1983)).

¶ **43** It is important, however, to note that the applicant in Hamm had been convicted of the most serious crime recognized under Arizona law – first degree murder – the paradigm of "extremely damning past misconduct." Because Hamm's crime was the most serious our law recognizes, his burden of establishing good moral character was appropriately very difficult. Mr. King, however, was not convicted of first degree murder, but rather of attempted murder. Mr. Hamm killed two people; Mr. King injured two. [FN22] Our legislature has expressly recognized that attempted murder, while a serious offense, is much less "damning" misconduct than first degree murder. *See* A.R.S. § 13-1105(D

[FN22](Supp.2005) (classifying first degree murder as a class one felony punishable by death or life imprisonment); A.R.S. § 13-1001(C)(1) (2001) (classifying attempted murder as a class two felony); A.R.S. § 13-702(A) (Supp.2005) (punishing a class two felony with four to ten years imprisonment). The laws of Texas, under which King was convicted, are similar. Conviction for the Texas equivalent of first degree murder results in either a death sentence or life imprisonment, Tex. Penal Code Ann. § 12.31(a) (West, Westlaw though 2005); attempted murder is normally punished by at least two years imprisonment, Tex. Penal Code Ann. § 12.33(a) (West, Westlaw through 2005), but can lead, as it did in Mr. King's case, to probation after a brief period of shock incarceration, Tex.Code Crim. Proc. Ann. art. 42.12, § 3(a) (West, Westlaw through 2005).

¶ **44** The majority ignores these substantial distinctions between Mr. Hamm's and Mr. King's past misconduct, simply equating first degree murder with attempted murder as "extremely damning prior misconduct." Op. ¶ 11. I do not believe that the "virtually impossible" test, which is in practice outcome-determinative, should be applied to all prior serious misconduct. Indeed, were that the case, we would

not have considered the application for reinstatement in *Arrotta* from an applicant who had committed mail fraud and bribery. *See* 208 Ariz. at 512 ¶ 12, 96 P.3d at 216. Rather, I believe, as I thought the Court held in Hamm, that the quality of proof of rehabilitation should increase as the seriousness of prior misconduct increases. In Mr. King's case, the appropriate burden, in light of his serious crimes, is not "virtual impossibility" but rather "an extraordinary showing of rehabilitation and present good moral character." Hamm, 211 Ariz. at 468 ¶ 40, 123 P.3d at 662.

B.

¶ 45 Although Mr. King faced a difficult burden in establishing rehabilitation and good moral character, I conclude that he has discharged it. Rehabilitation, like good moral character, is not a concept susceptible to easy objective measurement. But surely the most compelling evidence of rehabilitation is the way that King has led his life since his criminal conduct and the first-hand observations of those with whom he has interacted during that period. Over the course of almost three decades, Mr. King has lived his life in an exemplary fashion on both a personal and professional level, and this is attested to by scores of those with detailed knowledge of his actions. The record contains no evidence to the contrary.

1.

¶ 46 In concluding that Mr. King has failed to demonstrate rehabilitation, the Court first suggests that he has failed to take responsibility for his misconduct. I find no such evidence in this record. As the majority acknowledges, in the Committee hearings, "King admitted shooting the victims and expressed remorse, calling the shootings 'a mistake I made that I will carry with me for the rest of my life.' " Op. ¶ 14. The Committee, which had the opportunity to observe and question Mr. King, obviously believed the sincerity of that statement.

¶ 47 The majority, however, discounts the Committee's conclusion on several grounds, none of which I find persuasive. First, the majority suggests that in explaining, in a law school application in the early 1990's1990s, why he pleaded guilty to one count of attempted murder, Mr. King somehow attempted to minimize his culpability for the crimes. Op. ¶ 15. Read in context, however, the statement in the application was simply a factual explication of the factors that went into a guilty plea – the lack of witnesses, his impaired memory of the event, the likely hostility of jurors to his actions, and the fact that the plea involved dismissal of one count of attempted murder. The application did not call for expressions of remorse, and I would not penalize Mr. King for not gratuitously offering them. Nothing in his explanation in the application, nor in subsequent descriptions Mr. King has given about his actions and the subsequent criminal justice proceedings, suggests to me that Mr. King is denying responsibility for his actions. He began to do so by admitting his guilt to the Texas court, [FN23] and has continued to do so repeatedly throughout his career since, most recently in his appearance before the Committee. Rather than parse a section of a law school application filed fifteen years ago for evidence of lack of remorse, I would rely on the Committee's first-hand observations of the applicant within the last year.

¶ 48 Nor can I conclude that Mr. King's impaired memory of the events of the fateful evening demonstrate either lack of candor or failure to accept responsibility. The arrest report makes clear that when apprehended, Mr. King was intoxicated to the point of incapacitation; he was so incoherent that the police officers were unable to read King his *Miranda* rights. Under these circumstances, his failure to recall every detail of the events is more a demonstration of honesty than evasion. The majority's suggestion that Mr. King has "selective memory" is again in stark contrast to the conclusions of the Committee members who had the face-to-face opportunity to consider his credibility.

2.

¶ 49 The Court also concludes that Mr. King has failed to identify the weaknesses that caused his misconduct or address those weaknesses. Again, I am unable to agree.

¶ 50 Mr. King has consistently recognized that his misconduct was caused by a combination of alcohol abuse and job-related stress. The majority acknowledges this, but speculates that there was also a deeper "character flaw that led [King] to fail to appropriately cope with stress and/or to abuse alcohol" to which King has failed to admit. Op. ¶ 21. The majority condemns King for not submitting evidence from a mental health expert diagnosing this supposed character flaw and attesting to King's triumph over it. Op. ¶ 22.

¶ 51 The record, however, indicates that King has undergone counseling, during both his probation and in the years since his absolute discharge, including personal, psychological and alcohol-related sessions. He has never been diagnosed as an alcoholic or as having a mental health condition requiring further treatment. I therefore find no warrant for concluding that Mr. King has hidden some character flaw or disease from us or the Committee.

¶ 52 More importantly, Mr. King's life since 1977 has conclusively demonstrated that he has triumphed over whatever demons led him to commit his crime. What better evidence can there be to prove an applicant has overcome a weakness than twenty-nine years of consistent, incident-free conduct in stressful situations? If Mr. King had a continuing problem with alcohol, surely there would have been some indication of this in the almost thirty years since his crime. If Mr. King had a continuing problem dealing with stress, surely there would have been some indication of this in his more than ten years of practicing personal injury law, a pursuit hardly free from stress.

III.

¶ 53 Our goal in ensuring that members of the Bar possess good moral character is to protect the public. See Matter of Shannon, 179 Ariz. 52, 77, 876 P.2d 548, 573 (1994). In this case, King's spotless record as a practicing attorney, together with the glowing recommendations of his clients, colleagues, adversaries and judges before whom he has appeared, adequately assures us that the citizens of Arizona would be safe with King practicing law.

¶ 54 I therefore respectfully dissent from today's opinion. I would accept the Committee's recommendation and admit King to the practice of law. Although the Court today suggests that some hypothetical future candidate with a record of serious past misconduct might someday qualify for admission to the Bar, Op. ¶ 29, I wonder whether the public and future applicants would be better served by adopting the per se approach the majority opinion purportedly rejects. If Mr. King's application cannot meet our "non per se" standards, I doubt that any ever will.

Andrew D. Hurwitz, Justice

FN1. Police reports indicate that King was suspended from his duties at the time of the shootings. King contends the Constable's office altered records to misrepresent this fact. He cannot recall the reason given for his purported suspension, and the record does not enlighten us on this point.

FN2. Barry O'Brien, a security guard who witnessed the shootings, told police he drove up to the scene and saw King outside the bar. When King saw O'Brien, whom he knew as a fellow reserve officer, King pulled a gun from his belt and threatened to shoot O'Brien. At that moment, the two victims left the bar, said something to King, and King shot them. King then got into his car before O'Brien ran over, ordered him out at gunpoint, and told King he was under arrest. While still seated in the car, King attempted to shoot himself, but the gun chamber was empty so it did not fire, and King threw it from the car. He next pulled out a knife and inflicted superficial cuts on his leg and throat before throwing the knife from the car. King then left the car and was handcuffed.
A bar employee told police that King was upset about a work-related issue. After one victim told King to stop bothering him, King left the bar but soon returned and pounded on the door, which had been locked after his exit. When one victim and another man looked outside, they reported that King was at the door with a gun. The victims and possibly another man then walked outside to

take the gun from King, who shot the victims.
One victim interviewed at the hospital on the morning of the shootings told police that the incident started with name- calling, that neither he nor the other victim was armed, and that the shootings were "unprovoked." According to King, he left the bar with the intention of going home. When the two men soon followed, King felt threatened, pulled his gun from the glove compartment, and shot the men in a panic as they approached. Although he does not recall attempting to shoot himself, he remembers cutting himself with the knife in an act of self-hatred for his deed. King does not recall seeing O'Brien before the shootings, does not recall events as described by O'Brien or the bar employee, and does not recall why he argued with the victims or felt threatened by them.

FN3. Under Texas law in 1979, a court could suspend execution of sentence after a qualified defendant had served a short portion of a prison term. *Cross v. Metcalfe*, 582 S.W.2d 156, 157 n.1 (Tex.Crim.App.1979) (Roberts, J., dissenting). The purpose of such "shock probation" programs was to "stun the probationer with the harsh realities of imprisonment, then release the probationer into society with a strong impression of the consequences of crime." Shaun B. Spencer, *Does Crime Pay Can Probation Stop Katherine Ann Power from Selling her Story?*, 35 B.C. L.Rev. 1203, 1214 n.123 (1994) (citing Arthur W. Campbell, Law of Sentencing 100, 112 (2d ed.1991)).

FN4. The Committee on Character and Fitness, which consists of both lawyers and **nonlawyers**, screens applicants who have passed the Arizona bar examination to determine whether they possess the requisite character and fitness to practice law in Arizona. Ariz. R. Sup.Ct. 33(a), 34, 36. Based on its findings, the Committee then recommends to this court whether applicants should be admitted, conditionally admitted, or denied admission. Id. 36(a)(4).

FN5. Effective December 1, 2005, the court amended Rules 34 through 37, which delineate the requirements for admission to the Arizona bar. Hamm, 211 Ariz. at 461 n.3, ¶ 12, 123 P.3d at 655 n.3. Because King filed his second application for admission before that date, we evaluate that application under the version of the Rules in effect before the amendment. Id.

FN6. The Committee is required to make findings of fact only if it recommends against admission or recommends admission with conditions. Rule 36(f)(7). If the Committee recommends admission, it is merely required to place its decision "in writing," as it did by letter in this case. Id. Because the Committee had fully explained its recommendation against admission in 2003 through findings of fact, however, an explanation of its reversal of position would have been helpful.

FN7. Rule 36(f)(2)(E) currently requires an applicant to prove character and fitness by clear and convincing evidence. Order Amending Rules 32-40, 46, 62, 64 and 65, Rules of the Supreme Court, Ariz. Sup.Ct. No. R-04-0032 (June 9, 2005).

FN8. The State Bar argues strenuously for a per se rule of disqualification for applicants who previously engaged in serious criminal misconduct. As we stated in Hamm, however, the court has never imposed such a bright-line rule, and we continue to adhere to the principle that each case deserves scrutiny on its own merits. 211 Ariz. at 462, ¶ 16, 123 P.3d at 656.

FN9. Our dissenting colleague takes issue with our characterization of King's conduct as the type of "extremely damning" misconduct that required the applicant in *Hamm* to make an extraordinary showing of rehabilitation. The dissent essentially contends that such a rigorous showing should be borne exclusively by applicants convicted of first-degree murder. *See infra* ¶ ¶ 43-44. We decline to rigidly tie the weight of an applicant's burden to the classification of the applicant's crime. Instead, we elect to examine the

unique circumstances of each case to decide the weight of the burden an applicant must overcome. In this case, the fact that King's victims did not die appears the result of good fortune rather than King's design. For this reason, and because King committed his crime while occupying a position of public trust, it is appropriate to charge him with the same extraordinary burden borne by the applicant in Hamm.

FN10. We decline King's request to view his purported suicide attempt and guilty plea as acknowledgments of responsibility for the shootings. According to O'Brien, King hurt himself only after he had retreated to his car and O'Brien subsequently ordered him from it at gunpoint, thereby suggesting that King was as remorseful about being caught as for shooting the victims. Additionally, although King pled guilty to one charge rather than proceed to trial, he admitted to the Committee that he did so because he feared convictions on both charges.

FN11. It is difficult to determine from the letters of support whether King informed all writers of the shootings or shared details of the shootings with others. Some letters do not allude to the shootings while others minimize the seriousness of the acts by referring to them, for example, as an "unfortunate event with the law," "past transgressions," and an "infraction of the law." Additionally, King's employer in 2005 answered "no" when the Committee asked in a mailed form whether the employer was aware of any unlawful conduct by King.

FN12. *Arrota* involved a disbarred lawyer's application for reinstatement, 208 Ariz. at 510, ¶ 1, 96 P.3d at 214, but we do not discern any reason a new applicant required to demonstrate rehabilitation should be relieved from showing that he or she has identified and overcome the weakness leading to the misconduct. We did not reach this issue in Hamm because the holding in that case rested on the applicant's failure to demonstrate present good moral character, independent of rehabilitation. 211 Ariz. at 465, ¶ 26, 123 P.3d at 659.

FN13. The dissent contends that we fail to give appropriate weight to evidence that in 1994 the Texas Board of Law Examiners determined that King possessed present good moral character to practice law in that state. *See infra* ¶ ¶ 34-35. In fact, we do not disregard that fact, but we have no need to address it further as it has no bearing on rehabilitation, which is the basis for our decision. Assuming Texas' current admission rule was substantially in place in 1994, convicted felons were not required to demonstrate rehabilitation, as we mandate in Arizona. *See* Tex. Rules Governing Admission to the Bar, Rule IV(f) (West, Westlaw through 2006) (requiring such applicants to prove that (1) the best interest of the public, the legal profession, and justice would be served by admission, (2) the applicant is of present good moral character and fitness, and (3) during the immediately preceding five years the applicant led an exemplary life). Moreover, King did not provide the Committee or this court with any information that the Texas board considered rehabilitation as a component of present good moral character. Therefore, although the Texas Board's determination might have some bearing on the second prong of our conditional inquiry, it has no bearing on the first.

FN14. Alcoholics Anonymous provides "a program of total abstinence" from alcohol achieved through attendance at group meetings and by working through twelve suggested steps for recovery from alcoholism. A.A. at a Glance, *http://www.aa.org/en_information_aa.cfm?PageID=10* (last visited June 19, 2006).

FN15. *See* A.A.'s Twelve Steps, *http://www.aa.org/en_information_aa.cfm?PageID=17SubPage=68* (last visited June 19, 2006).

FN16. We acknowledge and appreciate the support from King's colleagues, friends, and acquaintances detailing King's laudable activities in his church

and the community at large. Because this evidence concerns the second prong of our conditional inquiry, however, which we do not reach due to King's failure to prove complete rehabilitation, we do not consider this evidence in denying King's application. *See supra* ¶ 10.

FN17. We also rejected a per se approach in 2005 when we amended the Rules governing admission. Order Amending Rules 32-40, 46, 62, 64 & 65, Rules of Supreme Ct., Ariz. Sup.Ct. No. R-04-0032 (June 9, 2005).

FN18. This dissent, like the Court's opinion, refers to the version of the rules in effect at the time King filed his application for admission. Rules of the Supreme Court are cited as "Rule--."

FN19. The Court discounts the Texas admission, arguing that it "has no bearing on rehabilitation," but rather only on the issue of King's good moral character. Op. ¶ 24 n.13. Rule 36(a), however, makes plain that rehabilitation from past misconduct is a *necessary component* of present good moral character. Hamm is to the same effect, noting that "[r]ehabilitation is a necessary but not sufficient, ingredient of good moral character." 211 Ariz. at 465 ¶ 26, 123 P.3d at 659. Thus, whatever the differences between Texas and Arizona law, the Texas finding of present good moral character at the very least suggests rehabilitation from past misconduct.

FN20. *See* *Kwasnik v. State Bar*, 791 P.2d 319, 323 (Cal.1990) ("Traditionally we have accorded significant weight to testimonials submitted by attorneys and judges regarding an applicant's moral fitness, on the assumption that such persons possess a keen sense of responsibility for the integrity of the legal profession.").

FN21. The Committee had recommended denial of a previous application by King in 2003. The Court correctly does not rely on this previous denial today. King represented himself before the Committee on that prior occasion, and presented far less evidence than he did in 2005. Even on that lesser showing, the Committee seems to have concluded in 2003 that King had discharged his burden of demonstrating rehabilitation, finding "strong evidence of the Applicant's rehabilitation." Rather, the 2003 denial seems to have been based on the "seriousness of the crimes" committed by King, an approach that is at odds with this Court's rejection of a per se exclusionary rule in Hamm.

FN22. When questioned by police, one of the victims said he was unsure if he wanted to press charges. The victim's views do not excuse King's criminal conduct, but do suggest that his offense was less serious than first degree murder.

FN23. Indeed, the record suggests that Mr. King understood his responsibility for what he had done, at least in a fundamental manner, well before court proceedings began. After the shooting, King retreated to his car and tried to kill himself by putting the gun to his chin. After the gun failed to discharge, King took out a knife and proceeded to cut himself.

--- P.3d ----, 2006 WL 1751144 (Ariz.)

END OF DOCUMENT

Briefs and Other Related Documents

Only the Westlaw citation is currently available.

District Court of Appeal of Florida,
Third District.
PRINCE LOBEL GLOVSKY & TYE, LLP, Appellant,
v.
Charles N. ZALIS, individually, Charles N. Zalis, in his capacity as General Partner of the Charles N. Zalis Family Limited Partnership, a Virginia limited partnership, and North America Underwriting Managers, Inc., a dissolved Florida corporation, Appellees.
No. 3D05-950.

June 28, 2006.

An Appeal from a Non-Final order from the Circuit Court for Miami-Dade County, Victoria Platzer, Judge.

Josephs, Jack & Miranda and Susan S. Lerner, for appellant.

Bales & Sommers and Richard M. Bales, Jr.; Martin L. Nathan, for appellees.

Before LEVY and SHEPHERD, JJ., and SCHWARTZ, Senior Judge.

PER CURIAM.

***1** Affirmed. See § 48.193(1)(b), Fla. Stat. (2005); *Ramos v. Preferred Med. Plan, Inc.*, 842 So.2d 1006 (Fla. 3d DCA 2003); *Waxoyl, A.G. v. Taylor, Brion, Buker & Greene*, 711 So.2d 1251 (Fla. 3d DCA 1998); *Windels, Marx, Davies & Ives v. Solitron Devices, Inc.*, 510 So.2d 1177 (Fla. 4th DCA 1987).

LEVY, J., and SCHWARTZ, Senior Judge, concur.

SHEPHERD, J., dissenting.

I respectfully dissent.

This is an appeal by a Massachusetts law firm, Prince Lobel Glovsky & Tye, LLP., from a nonfinal order denying its motion to dismiss for lack of personal jurisdiction [FN1] in a legal malpractice action brought against it and a former Of Counsel, Richard Heidlage, Esq., arising out of an action in the United States District Court for the Southern District of Florida, in which Heidlage appeared and represented Appellee Charles N. Zalis and related entities. Whether personal jurisdiction exists turns on whether Heidlage was an agent of the firm during the course of the alleged negligent representation. Zalis concedes the firm did not imbue Heidlage with actual authority to act on its behalf in the representation. The sole question presented in this appeal, then, is whether the Of Counsel relationship between Heidlage and Prince Lobel created an apparent agency relationship between the two of them. I would conclude that it did not and reverse the order of the trial court.

FN1. The firm does not have an office in Florida or engage in business here. Accordingly, appellees seek personal jurisdiction over the law firm under

> section 48.193(1)(b) of our long arm statute, § 48.193, Fla. Stat., which allows our courts to hale in nonresidents who "[c]ommit a tortious act within this state."

In the underlying federal case, Heidlage, a member of the Massachusetts Bar, appeared pro hac vice, to assist Florida counsel [FN2] in the representation of Zalis, the Zalis Family Limited Partnership, and a wholly owned entity of the partnership, North American Underwriting Managers, Inc., in an action brought by Florida counsel arising out of a failed business relationship between Zalis and Allen Gersten, a resident of Needham, Massachussetts. During the course of the representation, Zalis was first Of Counsel to the appellant, Prince Lobel, and then Of Counsel to Kotin Crabtree & Strong, LLP, both Massachusetts-based law firms. Of these two law firms, Zalis seeks to proceed only against Prince Lobel in this case.

> FN2. This action was filed by Florida counsel in January 2001 and concluded in August 2002 via settlement, which Zalis now considers to have been inadequate. The record reflects Heidlage appeared in the case as pro hac vice in July 2002. Florida counsel changed at least three times during the twenty months the action pended in the Southern District of Florida. Various of the Florida counsel and their firms also have been named defendants in the instant action at one time or another during its course.

Heidlage's appearance as co-counsel in the federal case was inspired by the fact that Zalis previously had hired him to represent the Zalis entities in a suit filed by Gersten in Massachusetts just days prior to the initiation of the federal action. Zalis testified he sought out Heidlage because the business acquaintance who recommended Heidlage described him as a "tenacious bulldog," and based upon prior litigation experience, that was the type of lawyer Zalis needed. He also testified he "relied on the fact that [Heidlage] was with a big firm (Prince Lobel) which would have the necessary resources to handle the case."

However, these facts alone are not sufficient to support a conclusion that Heidlage was the apparent agent of Prince Lobel. Apparent agency exists *only* if *each* of the following three elements is present: 1) a representation by the purported principal; 2) reliance on that representation by a third party; and 3) a change in position by the third party in reliance on the representation. *Mobil Oil Corp. v. Bransford*, 648 So.2d 119, 121 (Fla.1995). "Apparent authority does not arise from the subjective understanding of the person dealing with the purported agent, nor from appearances created by the purported agent himself; instead, apparent authority exits only where the *principal* creates the appearance of an agency relationship." *Izquierdo v. Hialeah Hosp. Inc.*, 709 So.2d 187, 188 (Fla. 3d DCA 1998)(internal quotations omitted) (citing *Spence, Payne, Masington & Grossman, P.A. v. Philip M. Gerson, P.A.*, 483 So.2d 775, 777 (Fla. 3d DCA), *rev. denied*, 492 So.2d 1334 (Fla.1986)).

***2** Here, there is no evidence that the purported principal, Prince Lobel, made **any** representation to Zalis, the purported third party. Zalis does not urge otherwise. Rather, Zalis urges that: because Heidlage had an office at Prince Lobel; he met with Heidlage there; he received correspondence from Heidlage on Prince Lobel stationery; all of the pleadings filed by Heidlage while he was with Prince Lobel indicated Heidlage was with Prince Lobel; when he called he went through a Prince Lobel switchboard; it appeared Heidlage's secretary was a Prince Lobel secretary and that some Prince Lobel lawyers and **paralegals** worked on the Florida litigation from their offices in Boston, Heidlage was the apparent agent of Prince Lobel. I disagree.

Instead, the outcome of this case is controlled by the decision of the Florida Supreme Court in *Mobil Oil*. Although involving a different business, *Mobil Oil* is legally indistinguishable from our case. In *Mobil Oil*, the plaintiff, Jeremy Bransford, entered a Mobil Mini Mart gas station in Broward County, owned by Mobil Oil but leased to Alan Berman. *Mobil Oil*, 648 So.2d at 120. While on the premises, Berman was attacked and beaten by one of Berman's employees, who allegedly had a history of assaulting customers. *Id.* Bransford sued Mobil Oil on the theory it effectively had established an apparent agency relationship with the leaseholder,

Berman. *Id.*

As grounds, Bransford noted the facts that Mobil owned the property; Mobil products were sold in the station; Mobil trademarks and logos were used throughout the premises; and, the franchise agreement with Mobil required the use of Mobil symbols and the selling of Mobil products. Moreover, Mobil allegedly sent its representatives to the station to provide various routine franchise support services to the lessee. *Id.* The Florida Supreme Court held that Bransford's allegations were insufficient to plead a case against Mobil:

> In today's world, it is well understood that the mere use of franchise logos and related advertisements does not necessarily indicate that the franchisor has actual or apparent control over any substantial aspect of the franchisee's business or employment decisions. Nor does the provision of routine contractual support services refute this conclusion.
> ...
> Franchisors may well enter into an agency relationship with a franchisee if, by contract or action or representation, the franchisor has directly or apparently participated in some substantial way in directing or managing acts of the franchisee, beyond the mere fact of providing contractual franchise support activities.
> ...
> The factual allegations in the complaint below clearly fail to allege even the minimum level of 'representation' necessary to create an apparent agency relationship. The plaintiff below alleged no genuine factual representation by Mobil, but merely **assumed** that such a representation is implicit in the prominent use of Mobil symbols and products throughout the station and in the provision of support activities.

***3** *Mobil Oil*, 648 So.2d at 120-21 (emphasis added). This analysis applies in many contexts, including prominently medical malpractice cases involving hospitals. *See, e.g.*, *Izquierdo*, 709 So.2d at 188 (holding that hospital was neither vicariously liable nor liable on the basis of apparent agency for alleged negligence of physician who provided care for patient in hospital pursuant to contract between health care provider and hospital where "there was no evidence that [hospital] partook in any activities to create the appearance of an agency relationship").

Similarly here, it is undisputed that Prince Lobel partook in no activities to create the appearance of an agency relationship. Zalis simply "assumed" Heidlage was an agent of the law firm. In fact, Heidlage was not the agent of the law firm. The law firm did not control or supervise him. As illustrated by his professional relationship with Zalis, Heidlage took in his own clients, made his own retention and compensation arrangements with those clients, [FN3] and received all fees billed by him on his client matters. Pursuant to an agreement with the law firm, he rented an office from the firm and reimbursed the firm for expenses incurred by him at the firm, including the use of a half-time secretary. His name was separately shown as "Of Counsel" on firm letterhead, and the signature block on all pleadings signed and filed by him expressly stated he was "Of Counsel" to the law firm. If he did work on a firm matter, he received eighty percent of the fee collected and conversely, if a firm professional assisted him on one of his matters, the firm received eighty percent of the fee.

FN3. His arrangement with Zalis was a verbal arrangement.

It cannot be gainsaid that Heidlage was affiliated with Prince Lobel. However, he was not a member, shareholder, or associate of the firm. *Black's Law Dictionary* 352 (8th ed.2004)(defining Of Counsel to include "[a] lawyer who is affiliated with a law firm, though not as a member, partner, or associate"). When the existence of personal jurisdiction is contested by a defendant, it is the proponent of jurisdiction who must demonstrate its existence. *Venetian Salami v. Parthenais*, 554 So.2d 499, 501 (Fla.1989). I do not believe the Zalis entities met that burden here. Zalis's subjective belief, based upon his observations of the relationship between Heidlage and Prince Lobel, is insufficient. *See* *Izquierdo*, 709 So.2d at 188.

Finally, I briefly must note the cases cited by the majority for affirmance are

inapposite. In *Ramos v. Preferred Medical Plan, Inc.*, 842 So.2d 1006 (Fla. 3d DCA 2003), we reversed a summary judgment granted to a health maintenance organization sued by a member on the ground that disputed issues of material fact remained on the issue of apparent agency. However, *Ramos* is inapposite for at least three reasons: (1) unlike our case, in *Ramos* there existed a direct contractual relationship between the claimant and the defendant health maintenance organization; (2) unlike our case, the defendant health maintenance organization selected the professional who performed the allegedly negligent service and supplied him to the Ramos'; and (3), most notably unlike our case, the defendant health maintenance organization in *Ramos* **had** made representations to the Ramos' from which we concluded a reasonable jury could find an apparent agency relationship to exist.

***4** Likewise, the remaining two cases cited in the majority--*Waxoyl, A.G. v. Taylor Brion, Buker & Greene*, 711 So.2d 1251 (Fla. 3d DCA 1998), and *Windels, Marx, Davies and Ives v. Solitron*, 510 So.2d 1177 (Fla. 4th DCA 1987)--are of no assistance to the majority decision, for two reasons: (1) in both of these cases, the question was whether or not the nonresident defendant had **itself** engaged in sufficient business activity in Florida for purposes, respectively, of §§ 48.161(1) and 48.193(1)(a) of the Florida Statutes; and (2) there was no apparent agency issue in either case. In both of these cases, long arm jurisdiction was found to exist on the basis that each nonresident defendant had engaged in substantial business activity in this state. *See* *Waxoyl A.G.*, 711 So.2d at 1253; *Windels, Marx*, 510 So.2d at 1179. That is not the question in our case. *See supra* note 1.

For these reasons, I would reverse the trial court's decision in this case and direct that Prince Lobel be dismissed from the proceeding below.

--- So.2d ----, 2006 WL 1751858 (Fla.App. 3 Dist.)

Briefs and Other Related Documents **(Back to top)**

- 3D05-950 (Docket) (Apr. 28, 2005)

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Not Officially Published
(Cal. Rules of Court, Rules 976, 977)
(Publication page references are not available for this document.)

Briefs and Other Related Documents

PAULETTA JAMES, Plaintiff and Appellant,
v.
ROBERT SHAPIRO et al., Defendants and Respondents.
B179194

Court of Appeal, Second District, California.

Filed 6/28/06

(Los Angeles County Super. Ct. No. BC306470)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Maureen Duffy-Lewis, Judge. As to Shapiro, affirmed. As to Christensen, reversed and remanded. Law Offices of James K. Autrey, James K. Autrey; Law Offices of Michael F. Baltaxe and Michael F. Baltaxe for Plaintiff and Appellant.

Kirtland & Packard, Mark E. Goldsmith, Robert K. Friedl and Holly M. Brett for Defendants and Respondents.

_____, Acting P.J. DOI TODD

_____, J. CHAVEZ

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

_____, J.

At issue in this appeal is whether a legal secretary may sue her former law firm for wrongful termination in violation of public policy after she reported that a partner was defrauding clients by submitting inflated legal bills. Because obtaining money through fraudulent legal bills violates Penal Code section 484, and because that statute inures to the benefit of the public and represents a substantial and fundamental public policy, we hold that she may sue.

Pauletta James (James) appeals the summary judgment entered in favor of respondents Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro (Christensen) and Robert Shapiro (Shapiro) on her causes of action for wrongful termination in violation of public policy and intentional infliction of emotional distress. We conclude that the trial court erred when it ruled that (1) James could not identify a public policy sufficient to support her cause of action for wrongful termination in violation of public policy, and (2) the intentional infliction of emotional distress cause of action is barred by the exclusivity provision of the workers' compensation scheme. However, James failed to show that the trial court erred when it ruled that Shapiro was not her employer.

We affirm the summary judgment entered in favor of Shapiro. We reverse the summary judgment entered in favor of Christensen and remand for further proceedings. On remand, the trial court shall consider Christensen's motion for summary adjudication regarding punitive damages.

FACTS

The complaint

James alleged: Christensen and Shapiro's "actions ... in terminating [James's] employment in retaliation for her refusal to send fraudulent billing statements to clients violates California's whistle-blower statute which prohibits employers from terminating employees who threaten to expose a violation of the law." Their egregious and malicious conduct constituted wrongful termination in violation of public policy and intentional infliction of emotional distress.

The motion for summary judgment or adjudication

Christensen and Shapiro moved for summary judgment or, in the alternative, summary adjudication of the causes of action for wrongful termination in violation of public policy and intentional infliction of emotional distress, and also the prayer for punitive damages.

In their motion, Christensen and Shapiro argued: James did not identify a violation of a public policy sufficient to support a claim for wrongful termination. She was terminated for legitimate, nonretaliatory reasons and cannot produce evidence that would indicate that the stated reasons for the termination of her employment were a sham or that retaliation was the motivation. Last, the evidence shows that Christensen was James's employer, not Shapiro. As a result, Shapiro cannot be held liable for any damage flowing from the termination.

The evidence in support of the motion portrayed James as a problem employee who was dismissed because no one wanted to work with her.

Shapiro declared that James worked as a legal secretary for Sara Caplan (Caplan) and him from March 2002 until January 2003. He explained that there were periods during which he was displeased with James's performance because she "continued to be away from her desk and to spend too much time talking to other employees[,] [which caused] many telephone calls to unnecessarily go to voice mail." In January 2003, he averred, their "ability to communicate effectively in person had deteriorated." After he assigned James the task of updating information in his personal directory and left her a voicemail to keep track of her time and work on nothing else until she completed her task, she told him: "I got your message. I will do one but not the other. I will complete the work but I will not keep track of time. I'm not on a plantation." Following that incident, Shapiro communicated with James only via e-mail. During the last week of her employment, it became impossible to work with her under such difficult circumstances. He was informed by Caplan that James gave incorrect information to a court clerk that could have jeopardized a case for one of his clients. After repeated conversations with Ed Getz (Getz), Christensen's executive director and chief financial officer, and Emily Meisler (Meisler), the human resources administrator, Shapiro told them that he no longer wished to have James as his legal secretary.

Caplan declared that she did not utilize James much because she "appeared to be too busy working on Shapiro's assignments and when Caplan did utilize James, she was generally rude and abrupt." By August 2002, Caplan expressed her dissatisfaction with James's performance to Meisler, noting that James ignored phone calls while she was speaking to friends at her desk, and she created conflict by constantly screaming at the **paralegal**. In January 2003, James had a trial preparation assignment for over a month and did not complete it. Then, according to Caplan: "I overhead James speaking on the telephone with a client of mine and Shapiro's. During this conversation I heard James indicating to our client how our client could report us to the State Bar of California for [m]alpractice. I relayed this conversation to both Shapiro and Meisler." When Caplan asked James to telephone a court and put a client's case on calendar, as previously arranged with a prosecutor, James failed to do so. Caplan went on to aver: "I ... also instructed James to advise the federal court clerk one week before this hearing that neither Shapiro nor

I would be representing the client in [an] Arizona proceeding[ ] and that she would be requesting a federal public defender to represent her in Arizona at the upcoming hearing (as I had also discussed with the prosecutor). I ultimately determined that not only did James fail to schedule the hearing or notify the clerk of the client's need for a public defender in the upcoming court proceedings, but that James telephoned the federal court clerk with the client on the line and gave both the court and the client erroneous information which she had no authority to communicate and which was the exact opposite of my specific instructions to her. This incident could have caused great prejudice to our client, could have caused the federal court in Arizona to issue sanctions against Shapiro and [me], and [caused] our office much embarrassment. Fortunately, Shapiro was able to remedy the matter."

In her declaration, Meisler explained that in August 2002 she learned of Shapiro's and Caplan's dissatisfaction. By the end of January 2003, Meisler spoke with James and Shapiro to determine if they could continue working together. Shapiro said he did not want to work with James. Meisler inquired as to whether other attorneys at Christensen would accept James as their legal secretary, but they declined. Because no other placement could be found, Meisler and Getz informed James that her employment was terminated effective January 28, 2003.

Beyond echoing some of the same details provided by Shapiro, Caplan and Meisler, Getz declared that he received numerous complaints from James about her work relationship with Shapiro, including that Shapiro was discriminating against her because of her race.

The opposition

To identify a fundamental and substantial public policy to support her first cause of action, James relied on Penal Code sections 484 and 532, both of which make it a crime to obtain money by false pretenses.

The opposition points and authorities argued that there were triable issues because: James witnessed Shapiro and Caplan fabricating fictitious legal bills which were forwarded to clients. James also witnessed other improper activity. After she brought the improper activity to the attention of management on January 28, 2003, she was immediately terminated. Because she performed personal tasks for Shapiro, and because some of the clients belonged to him and not Christensen, Shapiro was James's employer.

James declared that not only did she work for Shapiro and Caplan as their legal secretary, she assisted Shapiro with billing clients. He frequently hired outside attorneys, such as Robert J. Waters (Waters), to do work on files, and then those attorneys would submit bills consisting of their hours and work. James maintained "a written ledger reflecting the amount Shapiro's clients were billed and paid on their matters" and "assisted Shapiro in drafting and processing bills and past due statements for clients." Prior to blowing the whistle on Shapiro, she received "excellent performance reviews by both Shapiro and Caplan in mid May 2002." Because Shapiro was so high on her work, he frequently sent her to expensive lunches.

It was in August 2002, James explained, that she first became aware of Shapiro's illegal billing practices. Shapiro called her into his office to discuss the bills for a client named Mogens Amdi Petersen (Petersen). Waters was doing some work on Petersen's case. "On that day," James declares, "Shapiro specifically instructed me not to show [Waters's] actual submitted hours to the accounting department at Christensen. In addition, Shapiro told me to white out the actual hours worked by Waters which appeared on [Waters's] invoices. [Shapiro] also specifically told me to not let [Getz] ... see the actual bill from Waters or the actual hours worked by Waters." Later, James heard Shapiro "tell Getz to make up a certain number of hours for [Waters's] work and to include that on the bill which was to be sent to ... Petersen. The hours for attorney Waters that Shapiro wanted included on

[Petersen's] bill was not the number of hours that Waters submitted. Subsequently a draft bill for Petersen came across my desk. The hours in that bill being charged for [Waters's] time were dramatically inflated from the time entries on the original bill from [Waters] to us. [Shapiro] then approved the bill with the fraudulently inflated hours. I also saw the final bill to [Petersen] which contained these fraudulent and inflated hours. I saw this occur on 3-5 occasions. On several occasions I personally hand delivered these fraudulent bills to Petersen's representative."

Continuing on, James declared that when Shapiro was in a fee dispute with Dr. Ahmed but had no timesheets to back up his claimed fees, Shapiro and Caplan instructed James "to make up and create times sheets for Shapiro based on Caplan's work and time sheets." James explained: "As ordered, I took Caplan's time sheets, and based on those, created out of whole cloth time sheets for Shapiro. I provided these fictional time records to Shapiro for his review and approval. Shapiro then added additional hours to the time sheet and gave them back to me for revision. I sent the fraudulent bills to the attorney" who represented Shapiro in the fee dispute. James was instructed to do the same thing regarding a fee dispute with Gordan Jones (Jones).

A fee dispute arose on January 14, 2003, between Shapiro and another client, Chris Kacher (Kacher). In her declaration, James averred: "I prepared a bail receipt which showed the amount the client owed to Shapiro[.] I presented this bail receipt to Shapiro in his office in front of the client. Shapiro became upset and asked me to step outside the office and go back to my desk. He told me that the amount on the receipt was wrong, and less than the amount he had just quoted the client. He was very upset. I explained to him that I had maintained a separate ledger reflecting all bills and payments relating to the client.... Shapiro asked me why I was maintaining these records and told me I was not supposed to do that. He was furious. This is when my relationship with Shapiro began to change."

In James's version of events, Shapiro became critical of her work after January 14, 2003. She complained to Getz on January 23, 2003 via e-mail. That same day, she overheard Shapiro tell Amanda Bossingham (Bossingham) to lie to the Federal Court in Arizona about the amount of money she previously paid to Shapiro in legal fees. James met with Getz on January 28, 2003, to discuss why her relationship with Shapiro had deteriorated. When she revealed his illegal billing practices, and that he told Bossingham to lie, Getz said that he would talk to Shapiro. After doing so, Getz said that Shapiro did not think that the relationship could be salvaged. James asked to be reassigned but was told that there were no other available positions and was asked to leave. By James's account, the criticisms of her work were all a pretext because she did not spend too much time away from her desk or too much time talking to people. She claimed that she always dealt with office personnel in a courteous and professional manner. Finally, she denied ever telling a client to sue Christensen for malpractice, and she denied failing to calendar a hearing for the Arizona proceeding involving Bossingham.

The hearing and the trial court's initial ruling

The parties convened for a hearing on September 22, 2004.

The trial court granted summary judgment for Shapiro but denied the motion as to Christensen. According to the trial court, James identified a sufficient public policy for her claim against Christensen when she alleged that she was terminated for reporting the violation of a statute. In general, the trial court noted, claims for intentional infliction of emotional distress are barred by the exclusivity provisions of the workers' compensation scheme. It concluded, however, that James's emotional distress claim was outside the compensation bargain because it was premised on her termination in violation of public policy. As well, the trial court found a triable issue regarding punitive damages.

The trial court's reconsideration of its ruling

The court clerk notified the parties that on its own motion, the trial court was reconsidering the motion. [FN1] The trial court took the matter under submission and then granted summary judgment. On the first cause of action it ruled: "As to Shapiro, there was no employer/employee relationship--It is undisputed that [James] was hired by [Christensen] (Fact 1). There exists no triable issue of fact regarding whether there was an employer/employee relationship between [James] and Shapiro." The trial court found that James could not establish a public policy, noting: "In this regard, [Christensen] is engaging in private enterprise solely. Public policy must affect the public interest. Policies are not public when they are derived from statutes that regulate conduct between private individuals." Finally, the trial court ruled that the intentional infliction of emotional distress cause of action was barred by the exclusivity provision in the workers' compensation scheme.

> FN1. There is no minute order or written document in the record reflecting the notice given by the court clerk. Christensen and Shapiro represent: "On September 24, 2004, the court's clerk notified the parties that the [motion for summary judgment] was being reconsidered and had been taken under submission." James informs us: "Strangely, the Court then, on its own motion, vacated its ruling and took the matter under submission without further argument."

Judgment was entered and this appeal followed.

STANDARD OF REVIEW

When a party appeals from the entry of summary judgment, appellate review is de novo. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) In considering whether to affirm or reverse the trial court, we examine the motion papers and follow a three-step analysis in an effort to identify triable issues that were missed. "We first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, we determine whether the opposition demonstrates the existence of a triable, material factual issue. [Citation.]" (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836.) The moving and opposing parties get a different benefit of doubt. "[W]e construe the moving party's affidavits strictly, construe the opponent's affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it." (*Szadolci v. Hollywood Park Operating Co.* (1993) 14 Cal.App.4th 16, 19.)

DISCUSSION

1. *Shapiro.*

The first argument in James's appeal is that there are triable issues as to whether Shapiro was her employer. Indeed, this is a pivotal battle for her regarding her wrongful termination claim against Shapiro because "only an employer can be liable for the tort of wrongful discharge in violation of public policy." (*Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal.App.4th 32, 53.) Similarly, if he was not her employer, then she cannot sue him for intentional infliction of emotional distress based on her alleged retaliatory termination.

The entirety of her opening brief argument is the following:

"This issue could not be determined at the summary judgment stage for several reasons. First, Shapiro admits that [James] was asked to perform many task which were personal in nature, not related to the practice of the law, and not for the

benefit of [Christensen], but for Shapiro personally and exclusively.... Secondly, some of Shapiro's clients were his alone, and not clients of the firm.... Third, Shapiro often sent out bills to these clients which did not go through the firm accounting system.... [¶] Lastly, [James] confirmed these facts with the deposition of Shapiro. [James] introduced this testimony to the [trial] court in a Supplemental Opposition.... [James] also informed the [trial] court in its opposition that said testimony would be presented to the [trial] court once Shapiro's deposition was completed and that [the] motion could not be granted for this additional reason."

This argument is not legally sufficient to carry the day. Regarding her employment, all we know is that James did not dispute in her opposing separate statement that she was hired by Christensen to work for Shapiro and Caplan. James did not offer conflicting evidence suggesting that she was hired by both Christensen and Shapiro. Moreover, James neglected to cite evidence establishing how Christensen was organized during the relevant time, i.e., whether it was a partnership, a limited liability company, or a corporation. We have been given no information regarding the legal relationship between Shapiro and Christensen. Beyond these deficiencies, James did not cite any law explaining how Shapiro can be legally categorized as her employer if she was hired by Christensen.

James waived her bid to obtain a reversal of the summary judgment entered in Shapiro's favor. It is axiomatic that it "is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.) Appellate courts can and will deem arguments waived if they are not supported by analysis or argument in the appellate briefs. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2 ["Moreover, ABC fails to provide any analysis or argument in support of the assertion, which, for this additional reason, is not properly raised"].) Additionally, the following rules are pertinent. An appellate court presumes that the judgment appealed from is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) We adopt all intendments and inferences to affirm the judgment unless the record expressly contradicts them. (See *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583.) Appellants have the burden of overcoming the presumption of correctness, even when the appellate court is required to conduct a de novo review. Finally, apropos to this case, it has been said that "[a]lthough our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in [an appellant's] brief." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

2. *Wrongful termination in violation of public policy.*

Correctly, we find, James assigns error to the trial court's public policy analysis. Christensen attempts to render the issue moot by attacking other elements of James's first cause of action, namely the existence of a retaliatory motive and the reasonableness of her suspicion of illegal activity. Because the evidence is in conflict, however, those elements must be decided by a finder of fact. Last, Christensen tries to besmirch James with her past and subsequent employment record. It argues that this evidence offers it a complete defense under the after-acquired evidence doctrine. But the elements of the doctrine have not been met.

a. *The applicable law.*

An at-will employee can be terminated from employment without good cause, but if the reason for the termination violates public policy, then the employee can sue her employer in tort. (See *Holmes v. General Dynamics Corp.* (1993) 17 Cal.App.4th 1418, 1426 (*Holmes*).) "To recover in tort for wrongful discharge in violation of public policy, the plaintiff must show the employer violated a public policy affecting 'society at large rather than a purely personal or proprietary interest of the plaintiff or employer.' [Citations.] In addition, the policy at issue must be

substantial, fundamental, and grounded in a statutory or constitutional provision. [Citations.] Consistent with these principles, courts have recognized tortious wrongful discharge claims where an employee establishes he was 'terminated in retaliation for reporting to his or her employer reasonably suspected illegal conduct ... that harms the public as well as the employer.' [Citations.]" (*Id.* at p. 1426.)

Our Supreme Court instructs that "public policy cases fall into one of four categories: the employee (1) refused to violate a statute; (2) performed a statutory obligation; (3) exercised a constitutional or statutory right or privilege; or (4) reported a statutory violation for the public's benefit. [Citation.]" (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76 (*Green*).)

b. *Fundamental public policy.*

James relies on *Haney v. Aramark Uniform Services, Inc.* (2004) 121 Cal.App.4th 623 (*Haney*) to support the contention that public policy is violated when a private employer terminates an employee for reporting fraudulent and illegal billing practices. According to James, *Haney* is on point. In rejoinder, Christensen argues that *Haney* is neither apposite nor binding.

While working as a salesman for a rental company, Haney complained to management that the company was using techniques that resulted in its customers paying for products or services they did not receive. He was terminated. He sued, alleging that he was terminated for complaining about the company's fraudulent practice and refusing to follow that practice. (*Haney, supra,* 121 Cal.App.4th at pp. 630–631.) The *Haney* court noted that the Supreme Court, in *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 178 (*Tameny*), stated that " 'an employer's obligation to refrain from discharging an employee who refuses to commit a criminal act ... reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes....' [Citation.]" (*Haney, supra,* 121 Cal.App.4th at p. 643.) This observation led the *Haney* court to state that because "theft through fraudulent representation or pretense has long been defined as a crime by statute in California, we conclude that when an employer discharges an employee who refuses to defraud a customer, the employer has violated a fundamental public policy and may be liable in tort for wrongful discharge." (*Id.* at p. 643.) Two paragraphs later, it stated that "Haney's allegations that he was terminated for complaining about and refusing to engage in fraudulent billing practices are sufficient to state a claim for retaliatory discharge in violation of a public policy." (*Ibid.*) The footnote to this antecedent sentence was: "This opinion does not hold, and should not be read to imply, that an employee who is discharged for complaining about breaches of contract committed by the employer is able to state a wrongful discharge claim based on a violation of a substantial and fundamental public policy." (*Ibid.*)

To find a public policy, *Haney* relied in part, if not whole, on Penal Code section 484, subdivision (a), which provides: "Every person ... who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money ... is guilty of theft."

We dismiss Christensen's notion that *Haney* is distinguishable. It is true that Haney refused to commit fraud and James merely reported fraud, but that is not a relevant distinction. Christensen forgets that a claim can be stated under *Green* when an employee is terminated for reporting a statutory violation for the benefit of the public. Thus, the salient point is whether Penal Code section 484, subdivision (a) embodies a fundamental public policy. *Haney* held that it does. Therefore, we must decide whether to follow *Haney,* a Fifth District case. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 934, p. 971.) Though we owe no particular allegiance to case law from other appellate districts or divisions, we tend to adhere to decisions that already resolved an issue. (*Id.* at pp. 971–973.)

Haney is consistent with cases such as *Holmes* and *Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1121 (*Collier*).

For example, in *Holmes,* the court held that public policy was violated when an employee was terminated for disclosing to management that his company was violating the False Statements Act, title 18 of the United States Code section 1001, because it was violating its defense contracts and generating excessive billing to the government. (*Holmes, supra,* 17 Cal.App.4th at pp. 1423–1425.)

In *Collier,* the petitioner reported the criminal conduct of other employees. This implicated the public interest, not just the employer's interest. The court stated: "The petitioner in this case reported his suspicion that other employees were currently engaged in illegal conduct at the job, specifically conduct which may have violated laws against bribery and kickbacks [citation]; embezzlement [citation]; tax evasion [citations]; and possibly even drug trafficking and money laundering. It is also inferable from the pleading that the suspect conduct amounted to differential pricing, a form of price discrimination that violates federal antitrust laws [citations]. Petitioner's report served not only the interests of his employer, but also the public interest in deterring crime and, as we next discuss, the interests of innocent persons who stood to suffer specific harm from the suspected illegal conduct. His report, then, was a disclosure of 'illegal, unethical or unsafe practices' which has been recognized in California as supporting a tort action for wrongful discharge in violation of public policy. [Citation.]" (*Collier, supra,* 228 Cal.App.3d at pp. 1122–1123.)

In our view, *Haney* should be followed. If an employee at a law firm reports that a partner is defrauding clients out of money by issuing inflated legal bills, then that report inures to the benefit of the public as well as to the law firm. Such a report deters crime and serves the interests of innocent clients who stand to be victimized by fraudulent legal bills when they overpay for legal services. Undeniably, such a report is a protected disclosure of illegal or unethical practices.

According to Christensen, if an employee reports fraudulent billing, that fits within the rubric of complaints about breaches of contract by an employer and therefore comes within the footnote in *Haney* that was segregated from the holding. We disagree. When a breach of contract is also a violation of Penal Code section 484, it is more than just a breach of contract. It is also a crime.

c. *Retaliation.*

The parties dispute whether there are triable issues regarding the lawfulness of Christensen's motivation for terminating James. In our view, triable issues exist.

Colarossi v. Coty U.S. Inc. (2002) 97 Cal.App.4th 1142, 1152 (*Colarossi*) explained the framework for a retaliation case: " 'To establish a prima facie case of retaliation, the plaintiff must show (1) he or she engaged in a protected activity; (2) the employer subjected the employee to an adverse employment action; and (3) there exists a causal link between the protected activity and the employer's action. [Citations.] Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. [Citation.] If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation "drops out of the picture," and the burden shifts back to the employee to prove intentional retaliation. [Citation.]' [Citation.]"

"Both direct and circumstantial evidence can be used to show an employer's intent to retaliate. 'Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive. [Citation.]' [Citation.]

Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers. [Citations.]" (*Colarossi, supra,* 97 Cal.App.4th at p. 1153.)

In its separate statement and supporting declarations, Christensen established a legitimate, nonretaliatory reason for terminating James. According to Shapiro and Caplan, they could not work with James because she was difficult, loud, rude and did not follow instructions. Meisler declared that she was unable to place James with another attorney. This shifted the burden to James to produce evidence that the stated reasons for her termination were a pretext.

By declaring that she was asked to prepare and deliver fraudulent legal bills for Shapiro and Caplan, that Shapiro became critical of her only when he learned that she was keeping a record of his billing, and that she was terminated the same day that she reported this activity to Getz, James met her burden and created a triable issue as to whether she was retaliated against. Liberally construing James's declaration as we must, the proximity of the report and termination create a reasonably deducible inference that there is a nexus between them. There is no direct evidence of retaliatory animus, but it is not required; as *Colarossi* explains, an improper motive can be demonstrated with circumstantial evidence. Moreover, there is an inference that Shapiro's criticism was a sham and was, in reality, motivated by the revelation that James was documenting his improper billing.

Christensen labels James's evidence as insufficient and points out that she ignores her history of problems with Shapiro. It adverts to the following: On August 20, 2002, there was an e-mail to Meisler from James stating that she was afraid for her job because she asked Shapiro not to speak to her in a disrespectful manner and he told her "well, this is the way I speak to people, and if you don't like it, maybe this isn't the job for you." Meisler learned in August 2002 that both Shapiro and Caplan were having difficulty with James. On January 23, 2002, James sent another e-mail and once again complained that Shapiro was being verbally abusive and that a particular incident caused her "to become asthmatic, nervous and afraid of what [Shapiro] might say or do next." She complained that he "does not have a problem ... intimidating me with threats of being removed from my job."

This evidence, Christensen claims, belies James's contention that her relationship with Shapiro suddenly changed on January 14, 2003, after she told him that she was maintaining accounting ledgers. We see the evidence differently. The fact that, from James's point of view in August 2002, Shapiro was a rude, difficult boss on some occasions is not inconsistent with her declaration that it was only after January 14, 2003, that he was critical of her work.

In counterpoint, we note that James adverts to her job performance evaluations in July 2002, in which she was told she met or exceeded expectations in every category. At the bottom of one of those evaluations, inferably written by Caplan, is this handwritten note: "[James] has been a godsend to [Shapiro] and me. She is extremely competent, capable, helpful, pleasant and reliable. She is great with our clients, and helps us stay organized. She is fantastic!" This directly contradicts Caplan's declaration that "when I did utilize James, she was generally rude and abrupt with me." This bolsters our finding of a triable issue.

d. *Reasonably based suspicions of illegal activity.*

Christensen contends that even if we follow *Haney,* and even if it terminated James for reporting Shapiro for fraudulently billing his clients, it is still entitled to summary judgment because she did not have reasonably based suspicions of illegal activity. (See *Green, supra,* 19 Cal.4th at p. 87 ["an employee need not prove an actual violation of law; it suffices if the employer fired him for reporting his 'reasonably based suspicions' of illegal activity"].)

This contention falls short.

We are provided the following excerpts from James's deposition. She testified that Shapiro told her to alter Waters's legal bills by whiting out and increasing his time and that Shapiro would then charge a client named Kacher $7,000 to $10,000 for Waters's work when Waters only charged Shapiro $2,000 or $3,000. She did not know whether the client had an attorney-client relationship with Waters. Shapiro wanted to hide what was being done from Getz. He told her to alter the legal bills for the Petersen case. When Shapiro sued Dr. Ahmed to recover legal fees, Shapiro told James to go through the file and construct a timesheet to justify the legal bills because no timesheets existed. James did not know if Shapiro kept handwritten notes of the hours that he spent on cases. Caplan said that she, too, had a problem with how Shapiro billed clients. James could not say whether a bill from January 2, 2003, was ever sent to Kacher. She could not recall ever refusing to send Kacher a bill. Though the accounting department sent out Shapiro and Christensen's bills, James saw them because they would come back across her desk. James sent out the bills that were for Shapiro's separate work.

Christensen adverts to a few other items.

Shapiro declared that he was never told that James took exception to his billing practice. James admitted, in her opposing separate statement, that she did not know that the fee arrangements between Shapiro and his clients were, in all matters relevant, on a flat fee basis. She also admitted that she did not recall the hourly rate charged by Waters or Shapiro.

In an attempt to close the debate on this issue, Christensen states that "James would like the court to believe that Shapiro never spent a minute on his client's cases--never considering the merits of the case, never formulating a defense, never conferring with his clients, experts, or other attorneys on matters, never appearing before the court or investigating his cases outside the confines of his office. James would have the court believe that because Shapiro allegedly did not keep consistent time records, that he is not entitled to payment for services rendered and for which he was retained by his clients-- an argument that is particularly fallacious given that Shapiro has mostly flat fee cases."

The problem for Christensen is that while it tries to rehabilitate Shapiro and focus on the gaps in James's knowledge, it ignores the proverbial elephant in the room. James declared and testified that Shapiro told her to alter legal bills and inflate hours spent on legal tasks. Whether he had flat fee cases is irrelevant because that was unknown to James and does not factor into the reasonableness of her suspicions. Based on her evidence of the inflation of hours, Shapiro's desire to hide his activities from Getz, his anger at her for keeping ledgers, the instructions from Shapiro and Caplan to make up timesheets so that they would match the amount billed to Dr. Ahmed and Jones, and the discrepancy between James's ledger and Shapiro's bail receipt for Kacher, there is a triable issue as to whether James had a reasonable suspicion of illegal conduct. (See *Levine v. Weis* (2001) 90 Cal.App.4th 201, 210 ["Plaintiff need not show that a false claim was actually made; he need only show that he had reasonably based suspicions of a false claim"].)

e. *The after-acquired evidence doctrine.*

Finally, Christensen cites *Camp v. Jeffer, Mangels, Butler & Marmaro* (1995) 35 Cal.App.4th 620 (*Camp*) in its last attempt to vanquish this cause of action. As stated in *Camp,* "the after-acquired-evidence doctrine shields an employer from liability or limits available relief where, after a termination, the employer learns for the first time about employee wrongdoing that would have led to the discharge in any event. Employee wrongdoing in after-acquired-evidence cases generally falls into one of two categories: (1) misrepresentations on a resume or job application;

or (2) posthire, on-the-job misconduct." (*Id.* at p. 632.)

Christensen claims that *Camp* supports summary judgment based on James's employment disputes with two law firms she worked with previously. A history of those disputes is set forth in Christensen's brief. "[Christensen] has learned through after-acquired evidence ... that James's skills as a legal secretary are deficient and that she has been unable to co-exist with her fellow co-workers in the office place without creating 'drama.' " At Zimmerman, Rosenfeld, James had a bumping incident with a female who called her a psychopath. James had a wage dispute with Zimmerman, Rosenfeld and made a claim to the State Labor Commissioner claiming discrimination and retaliation because she reported an unsafe and unhealthy work environment during a renovation. The records from Kaye, Scholer, Fierman, Hays & Handler indicate that James signed an agreement and general release in 1997 covering her termination. She was paid $1,675. James's May 1997 review was not favorable, and she was criticized for her inability to be detail-oriented, for spending too much time talking, for punctuality and other things. Christensen notes that James would not have been hired had it known her history. Indeed, Meisler's declaration below supports Christensen's contention.

Continuing on, Christensen attempts to elucidate James's deficiencies once more by stating: "Moreover, [James's] employment has twice been terminated since she was terminated from [Christensen] and she also voluntarily terminated an employment with a third law firm."

Simply put, *Camp* is inapposite. There is no evidence that James misrepresented anything on her resume or in her job application, nor is there evidence that some time after January 28, 2003, Christensen discovered evidence that James was guilty of on-the-job misconduct. Christensen makes no attempt to apply *Camp* to the facts, which indicates the weakness of its position.

3. *Intentional Infliction of Emotional Distress.*

Based on a slate of favorable precedents, James argues that the trial court erred when it ruled that her second cause of action is barred by the exclusivity provisions in the workers' compensation scheme. We agree.

Actions arising from termination from employment are barred by the workers' compensation scheme if the conduct falls within the expected scope of the compensation bargain. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 18.) However, "[w]here [an] injury is a result of conduct, whether in the form of discharge or otherwise, not seen as reasonably coming within the compensation bargain, a separate civil action may lie." (*Id.* at p. 20.) "[A] plaintiff's emotional distress claims against [her] employer would not be preempted if the 'defendants' misconduct exceeded the normal risks of the employment relationship.' [Citation.]" (*Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1492.)

A cause of action for intentional infliction of emotional distress premised on wrongful termination in violation of public policy has been widely recognized. (See *Leibert v. Transworld Systems, Inc.* (1995) 32 Cal.App.4th 1693, 1706 (*Liebert*) ["Appellant's emotional distress claim is premised upon the same alleged actions of his employer that support his *Tameny* claim [--termination based on sexual orientation]. As explained above, these alleged actions constitute discrimination in violation of a fundamental public policy of this state. Such misconduct lies outside of the exclusive remedy provisions of the Labor Code"]; *Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 577 (*Phillips*) ["a plaintiff *can* recover for infliction of emotional distress if he or she has a tort cause of action for wrongful termination in violation of public policy or wrongful termination in violation of an express statute because then, emotional distress damages are simply a component of compensatory damages"]; *Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256, 1261, 1277 (*Kovatch*) [constructive termination

based on sexual orientation gave rise to a intentional infliction of emotional distress claim that was not barred by the exclusivity provisions of the workers' compensation scheme], disapproved on other grounds in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854; *Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, 112-113 (*Cabesuela*) ["[W]hen an employer's decision to discharge an employee results from an animus that violates the fundamental policy, such misconduct cannot be considered a normal part of the employment relationship. Thus, where, as here, a plaintiff's emotional distress claim is premised upon his employer's violation of a fundamental public policy of this state, such misconduct lies outside of the exclusive remedy provisions of the Labor Code"].) Based on these cases, reversal is required.

Christensen argues that this cause of action is factually deficient as a matter of law. It relies on *Pitman v. City of Oakland* (1988) 197 Cal.App.3d 1037, 1041, but its reliance is misplaced. In *Pitman,* a police communications dispatcher was terminated after his employer learned that he had been arrested. A demurrer to his cause of action for intentional infliction of emotional distress was sustained without leave to amend. The court stated: "Being dismissed from a job is not an uncommon occurrence in modern society. The allegation that plaintiff suffered shame, humiliation and embarrassment without further factual explanation does not meet the requirement of specificity called for in *Bogard [v. Employers Casualty Co.* (1985) 164 Cal.App.3d 602, 617]. Moreover, whatever shame, humiliation and embarrassment plaintiff may have suffered was the product of his own unlawful conduct." (*Pitman, supra,* 197 Cal.App.3d at pp. 1047-1048.) *Pitman* is distinguishable. It did not involve a cause of action for wrongful termination in violation of public policy, and it does not contradict *Liebert, Phillips, Kovatch,* and *Cabesuela.* While being dismissed from a job is common, it is uncommon and outside the exclusive remedy provisions of the Labor Code to be dismissed from a job for reasons that violate fundamental public policy.

DISPOSITION

The summary judgment entered in favor of Shapiro is affirmed. As to Christensen, summary judgment is reversed and remanded. On remand, the trial court shall consider Christensen's motion for summary adjudication regarding James's prayer for punitive damages. James is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

ASHMANN-GERST

We concur:

Not Reported in Cal.Rptr.3d, 2006 WL 1752532 (Cal.App. 2 Dist.) Not Officially Published, (Cal. Rules of Court, Rules 976, 977)

Briefs and Other Related Documents **(Back to top)**

• 2005 WL 3741662 (Appellate Brief) Respondents' Brief (Dec. 12, 2005)Original Image of this Document (PDF)

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Only the Westlaw citation is currently available.

United States Court of Appeals for Veterans Claims.
Rafael G. RIOS, Appellant,
and
Johnnie Collins, Appellant,
v.
R. James NICHOLSON, Secretary of Veterans Affairs, Appellee.
Nos. 04-0354, 04-1840.

Argued June 16, 2005.
Decided June 27, 2006.

Kathy A. Lieberman, of Washington, D.C., and Shelley I. Stiles, of Brentwood, Tennessee, for the appellants.

Thomas A. McLaughlin, with whom Tim McClain, General Counsel; R. Randall Campbell, Assistant General Counsel; and Gabrielle L. Clemons (non-attorney practitioner), were on the brief, all of Washington, D.C., for the appellee.

Robert V. Chisholm, of Providence, Rhode Island, was on the brief for the National Organization of Veterans' Advocates as amicus curiae.

Before GREENE, Chief Judge, and KASOLD, HAGEL, MOORMAN, LANCE, DAVIS, and SCHOELEN, Judges.

On Appeal from the Board of Veterans' Appeals

GREENE, Chief Judge:

***1** Before the Court is the question whether, under 38 U.S.C. § 7266(c) Rafael G. Rios and Johnnie Collins timely filed Notices of Appeal (NOAs). The Court received briefs from the parties and amicus curiae, and a panel of three judges of the Court heard oral argument in these cases on June 16, 2005. Pursuant to the Court's Internal Operating Procedures at V(b)(5), there was a call for full-Court consideration and on November 17, 2005, the matters were referred to the full Court. Because Mr. Rios' and Mr. Collins' NOAs were not timely received by the Court, we dismiss their appeals.

I. BACKGROUND

A. Mr. Rios' Appeal

On March 4, 2004, the Court received from veteran Rafael Rios a letter dated February 25, 2004, and postmarked March 1, 2004. Mr. Rios wrote that he had submitted to the Court on November 6, 2003, a self-styled Notice of Disagreement (NOD) as to an October 16, 2003, decision of the Board of Veterans' Appeals (Board), but that he had not yet received any response from the Court. The Court, having no record of receiving the November 6 document, construed Mr. Rios' February 25, 2004, letter to be an NOA from the October 2003 Board decision; the letter was deemed received by the Court on March 1, 2004, the date of the postmark on the envelope in which the letter was contained. The deadline for filing an NOA to the October 16, 2003, Board decision was February 13, 2004. *See* 38 U.S.C. § 7266(c). Because Mr. Rios' letter was received and filed by the Court after the deadline, more than 120 days after the Board mailed its decision to Mr. Rios, the Court ordered Mr. Rios to show cause why his appeal should not be dismissed.

In response to the show-cause order and two subsequent Court orders granting him time to submit additional information, Mr. Rios submitted a copy of the November 6,

2003, document, a copy of a "Page of Registry of Sent Correspondence," maintained by the Puerto Rico Public Advocate for Veterans Affairs (PRPAVA), and two affidavits from Mrs. Santa Virgen Cruz Carrion, an employee of the PRPAVA who is responsible for logging and handling the mail for PRPAVA. There is no dispute that the November 6, 2003, document, the self-styled "NOD," meets all of the substantive requirements of an NOA. Mrs. Cruz Carrion attests that she personally mailed the document by placing it in the U.S. Mail on November 6, 2003. She further states that the mailing was recorded on the "Page of Registry of Sent Correspondence," which contains a notation of a mailing to the Court on behalf of Mr. Rios. In addition to sending a copy of the NOA to the Court, Mr. Rios states that a copy of the November 6, 2003, document also was sent to the VA Office of General Counsel, which also is noted on the registry.

B. Mr. Collins' Appeal

On October 6, 2004, the Court received Mr. Collins' NOA from a January 5, 2004, Board decision. The deadline for filing an NOA to the January 5, 2004, Board decision was May 4, 2004. Because Mr. Collins' NOA was received more than 120 days after the date of the Board decision, he was ordered to show cause why his appeal should not be dismissed. Mr. Collins replied, through counsel, that on April 30, 2004, an NOA from the January 5, 2004, Board decision was placed in the U.S. Mail at the Brentwood, Tennessee, Post Office and that he had only discovered that the Court did not have his April 30 NOA when counsel filed a notice of appearance on September 24, 2004. Mr. Collins submitted an affidavit to this effect by his counsel's **legal assistant** and also submitted a copy of a sales receipt from the Brentwood Post Office indicating that on April 30, 2004, mail was sent by First Class Mail to "Washington, DC 20004."

II. CONTENTIONS OF THE PARTIES

***2** Mr. Collins, Mr. Rios, and amicus curiae generally argue that the NOAs were timely filed under any one of three theories. First, the parties argue that they have both demonstrated that their NOAs were placed in the U.S. Mail and that, under the common law mailbox rule, the NOAs should be presumed to have been delivered to and received by the Court in regular time, and that this presumption has not been rebutted. [FN1] Second, the parties argue that extrinsic evidence can be used to show that a postmark indicating the timely date of mailing was affixed on the envelope containing the NOA and, therefore, the NOA should be considered timely under the statutory postmark rule, 38 U.S.C. § 7266(c)(2). Third, the parties argue that they are entitled to equitable tolling of the filing period. *See* *Bailey (Harold) v. West*, 160 F.3d 1360 (Fed.Cir.1998) (en banc). The Secretary contends that 38 U.S.C. § 7266(c)(2) is the sole exception to the requirement that an NOA be actually received by the Court for it to be timely, and that, therefore, the common law mailbox rule is not applicable.

> FN1. In *Rosenthal v. Walker*, the U.S. Supreme Court stated that, under the common law mailbox rule, "if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed." 111 U.S. 185, 193 (1884).

III. ANALYSIS

In order to obtain review by the Court of a final Board decision, an appellant must timely file an NOA with the Court. *See* 38 U.S.C. § 7266(a); *Marsh v. West*, 11 Vet.App. 468, 469 (1998) (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988)). To be timely under Rule 4 of the Court's Rules of Practice and Procedure (Rules) and precedents construing 38 U.S.C. § 7266(a), an NOA must generally be filed with the Court within 120 days after notice of the Board decision is mailed to an appellant. 38 U.S.C. § 7266(a); *see* *Cintron v. West*, 13 Vet.App. 251, 254 (1999); *Leonard v. West*, 12 Vet.App. 554, 555 (1999) (per curiam order). Under section 7266(c), however, an NOA will be considered received by the Court (1) "[o]n the date of receipt by the Court, if the notice is delivered," or (2) "[o]n the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is

mailed." 38 U.S.C. § 7266(c).

The Court has never applied the common law mailbox rule to section 7266. Under the common law mailbox rule "if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed." *Rosenthal v. Walker*, 111 U.S. 185, 193 (1884); *see also Hagner v. United States*, 285 U.S. 427, 430 (1932); *Lewis v. United States*, 144 F.3d 1220, 1222 (9th Cir.1998); *Estate of Wood v. Comm'r*, 909 F.2d 1155, 1161 (8th Cir.1990). Thus, applying this rule, an NOA would be considered received and filed by the Court once placed with the U.S. Postal Service even though not actually received by the Court, provided that the NOA was mailed within the 120-day filing period and with sufficient time to be received by the Court within the 120-day filing period.

A. Section 7266 and the Common Law Mailbox Rule

1. Applicability

***3** Under Article I of the U.S. Constitution, Congress established this Court to have exclusive jurisdiction to review decisions of the Board. Veterans Judicial Review Act of 1988 (VJRA), Pub.L. 100-687, Title III, Sec. 301, 102 Stat. 4113 (codified as amended at 38 U.S.C. § 7251 (formerly § 4051)); *see also* 38 U.S.C. § 7252. Additionally, section 4066 of title 38, U.S.Code, provided:

> (a) In order to obtain review by the [Court] of a final decision of the [Board], a person adversely affected by that action must file a[n NOA] with the Court. Any such notice must be filed within 120 days after the date on which notice of the decision is mailed pursuant to section 4004(e) of this title.

38 U.S.C. § 4066, *renumbered* § 7266 and *amended by* the Department of Veterans Affairs Health-Care Personnel Act of May 7, 1991, Pub.L. 102-40, § 402(b)(1), (d)(1), 105 Stat. 238, 239. Congress also authorized the Court to prescribe its own rules of practice and procedure. *See* 38 U.S.C. § 4064 (now § 7264); *see also* H.R.Rep. No. 100-963, at 33 (1988) (stating that petitioner would file "formal appeal with the [Court] in accordance with the rules prescribed by the Court").

Neither section 4066, nor its legislative history, provides a definition of "must be filed"; however, in 1990, the Court offered clarification of section 4066 in *Torres v. Derwinski*, 1 Vet.App. 15 (1990). In that case, the appellant, in July 1989, notified a VA regional office (RO) that he disagreed with a Board decision. *Id.* at 16. The RO responded on October 2, 1989, stating that "[t]here is as yet no mailing address for the Court ..., and rules of practice to govern procedural matters have not been issued." *Id.* The appellant sent a letter to the RO requesting (1) "full reconsideration by the Judicial Court" and (2) that the RO forward his NOA to the Court. *Id.* The RO did not do so and only notified the appellant of the Court's address on the expiration date of a legislative extension for filing NOAs. *Id.* Immediately after receiving the RO's notification letter, the appellant mailed his NOA to the Court, but it arrived five days after the extended time for filing an NOA. *Id.* In deciding whether to accept the NOA as timely, the Court determined that section 4066 "alone controls." *Id.* at 17. The Court compared section 4066, which required that an "[NOA] must be filed with the Court within 120 days," with Rules 3 and 4 of the Federal Rules of Appellate Procedure (FRAP), which required that an "[NOA] must be filed with the clerk of the district court within 60 days if the United States or an officer or agency thereof is a party." *Id.*; *see* 38 U.S.C. § 4066; Fed. R.App. P. 3, 4. The Court held that "where the address of the Court was not available, a written expression of dissatisfaction with the [Board's] decision and a desire for judicial review delivered to [VA] for forwarding to the Court is efficacious if delivered to the [VA] within the time prescribed for filing a [n NOA]." *Torres*, 1 Vet.App. at 17. However, the Court also announced: "[S]ince December 18, 1989, '[t]o be timely filed, the [NOA] must be *received* by the Clerk' of the Court within 120 days after the date on which notice of the [Board's] decision was mailed. [U.S. Vet.App.] R. 4 [(interim)] (emphasis added)." *Id.*

***4** Although Congress had designated the FRAP as the interim rules for the Court unless the Court established its own, Congress provided specifically that in the case of conflict between the FRAP and chapter 72 of title 38, U.S.Code, the statute

would control. *See* Pub.L. No. 101-94, § 203 (designating FRAP as interim rules of Court unless otherwise provided for in statute). Thus, the Court held that section 4066 alone governed the filing of NOAs because the FRAP and section 4066 were inconsistent. *Torres*, 1 Vet.App. at 17. Nevertheless, the Court, in accepting the appellant's NOA as timely filed, relied upon a U.S. Supreme Court decision and an advisory committee note, both of which interpreted the FRAP. *Id.*; *see* *Houston v. Lack*, 487 U.S. 266 (1988) (noting FRAP's general rule of actual receipt but holding that prisoner's pro se effort to effectuate NOA outside traditional court facilities was sufficient to begin appeal process); Fed. R.App. P. 3 advisory committee's note ("Literal compliance [with filing requirements is not required] in cases in which it cannot fairly be exacted.").

In *Torres*, the Court relied upon its Interim General Rules and emphasized that the Court must actually receive an appellant's NOA before it can be filed. On April 4, 1991, the Court issued Miscellaneous Order No. 4-91, entitled "In Re: Rules of Practice and Procedure," which set forth and adopted the Court's Rules of Practice and Procedure, which became effective May 1, 1991. The order stated that the Court had "benefitted from experience since December 18, 1989, under [the] Interim General Rules which followed, with appropriate modification, the framework of the [FRAP]." Misc. No. 4-91, 1Vet.App. XXIX (1991) (en banc order). The earliest version of Rule 4 of the Court's Rules of Practice and Procedure provided:

> To obtain review by the Court of a Board decision, a person adversely affected by that decision must file a[n NOA] within 120 days after the date on which notice of the decision was mailed by the Board to the last known address of the appellant and the appellant's authorized representative, if any. The [NOA], including one filed by facsimile or other printed electronic transmission, *must be received* by the Clerk within this time limit.

U.S. Vet.App. R. 4 (1991) (amended 1994) (emphasis added).

The Court further interpreted section 7266 (formerly section 4066) in *DiDonato v. Derwinski*, 2 Vet.App. 42 (1991) (consolidated with *Elegado v. Derwinski*). In that case, appellant DiDonato's NOA was mailed to the Court from Philadelphia, Pennsylvania, and the envelope was postmarked on the 117th day after the Board decision was mailed; it did not arrive at the Court until six days after the 120-day appeal period had elapsed. *DiDonato*, 2 Vet.App. at 43. Similarly, appellant Elegado's NOA was mailed from the Philippines and postmarked on the 117th day after the mailing of the Board decision; it was not received by the Court until five days after the 120-day appeal period. *Id.* In deciding whether to accept the appellants' NOAs as timely, the Court stated that pursuant to section 7266(a), "an NOA must generally be *actually received* by, not mailed to, the Court within 120 days after the Board ... decision is mailed to an appellant." *Id.* (citing *Elsevier v. Derwinski*, 1 Vet.App. 150, 152 (1991) ("[W]e regard it as an ineluctable conclusion that to be properly filed the NOA must be physically received by this Court")). The word "generally" was inserted to account for the doctrines of equitable tolling and equitable estoppel; however, the Court determined that neither doctrine applied in that case. *Id.* at 43-44; *see* *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Bailey*, *supra*, (holding that equitable tolling of 120-day filing period may be warranted where VA misled or induced claimant into missing filing deadline). The Court held that neither appellant's NOA was timely filed because their NOAs had not been received by the Court within the 120-day-appeal period. *DiDonato*, 2 Vet.App. at 44. Judge Steinberg concurred with the decision with "great reluctance" but urged the Court to accept a postmark rule to ease the inequities caused by delays of the U.S. and foreign postal services. *Id.* (Steinberg, J., concurring).

***5** In response to *DiDonato* and its progeny, Congress amended section 4066 to establish not only filing of an NOA on the date of its actual receipt, but also recognizing the date of the postmark on the envelope containing the NOA as the date an NOA was received by the Court. *See* S.Rep. No. 103-232, at 5 (1994). The U.S. Senate Committee on Veterans' Affairs stated in its Committee report that the Court's "adoption of Rule 4 [requiring actual receipt of an NOA] was clearly proper and within the scope of the Court's authority." *Id.* at 6. The Committee, however, expressed its concern for veterans who lived far from Washington, D.C., particularly

considering the periodic delay of the U.S. Postal Service. *Id.* at 5-6. On October 25, 1993, the chairman of that committee asked the then-Chief Judge of the Court, Chief Judge Nebeker, for the Court's views on adopting a postmark rule. *Id.* at 9. Chief Judge Nebeker expressed the Court's disapproval of the proposed postmark rule. *Id.* at 9-10. The committee report also contained a July 1992 letter from Chief Judge Nebeker, which included a memorandum prepared by the legal counsel to the Clerk of the Court that expressed that the "Court's physical delivery rule is preferable to the proposed postmark rule." *Id.* at 11-17. In reaching this conclusion the memorandum discussed the other Article I courts and the FRAP and explained:

> Congress provided the veteran with a four-month period to get his [or her NOA] to the Court. This 120-day period gives the veteran, at minimum, 60 more days to file an appeal with this Court than the average citizen has when appealing a federal district court decision. Moreover, the [Board], at the time it sends notice of its decision, is required to advise the veteran of his [or her] appellate rights and the Court's mailing address. So the veteran simultaneously receives the [Board] decision and information about the Court, its location, and his [or her] right to judicial review.
>
> The Court, in turn, through its rules, decisional law, and provision of information and materials to veterans, has established a *bright-line standard* for the timely filing of a[n NOA]. It is clear and easy for pro se veterans to understand. Facsimile and other means of electronic filing are permitted. In addition, the Court has liberally construed Rule 3 concerning what constitutes a[n NOA] with a view toward ensuring timely filing. Thus, when a pro se veteran timely files papers which clearly evince his [or her] intent to appeal, the Court has found substantial compliance with the [NOA] requirements and exercised jurisdiction over the appeal.
>
> A mail box rule has the potential to confuse the veteran to the extent it requires the use of certain types of mail like registered or certified mail with a return receipt requested. *A good example of how perplexing a mail box [sic] rule can be is 26 U.S.C[.] § 7502, the Internal Revenue Code provision which applies to the Tax Court.* Although advocated by Senator Cranston, mail box rules, with their various requirements, are not easily understood or complied with. In the event of an untimely received [NOA] with an illegible postmark, for example, or one not sent through the U.S. Postal Service, the Court would be in the position of seeking affidavits and other evidence to resolve the jurisdictional question. Unless carefully and simply drafted, veterans can be frustrated by such a rule, and this Court can be stymied by it as it attempts to get beyond jurisdiction and proceed to the merits.
>
> ***6** Again, *what we have now is simple, explicit, and easily complied with.* The veteran has ample time to get his [or her NOA] to the Court, and rules that he [or she] can understand and follow. Further, *as a national federal appellate court, the Court ... has adopted a rule for filing appeals that is similar to those adopted by a majority of the federal circuit courts.*
>
> *Id.* at 16-17 (emphasis added). (It appears from the Chairman's request and the substance of the memorandum that the abovementioned references to the "mailbox" rule are in fact intended to refer to the "postmark" rule.)

The resulting amendment to section 7266 did not reject the Court's actual-receipt rule; instead, the existing provisions of that statute were preserved and incorporated in paragraph (a)(1). *See* Veterans Benefits Improvements Act of 1994 (VBIA), Pub.L. No. 103-446, § 511(a), 108 Stat. 4645, 4670; *see also Johnson v. First Nat'l Bank of Montevideo*, 719 F.2d 270, 277 (8th Cir.1983) (stating that Congress acts with knowledge of existing law, and that "absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction"). The amendment also added the following provisions:

> (2) An appellant shall file a[n NOA] under this section by delivering or mailing the notice to the Court.
>
> (3) A[n NOA] shall be deemed to be received by the Court as follows:
>
> (A) On the date of receipt by the Court, if the notice is delivered.
>
> (B) On the date of the [U.S.] Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed.

Pub.L. No. 103-446, § 511(a). In addition to liberalizing the Court's actual-receipt rule, the amendment restricted the Court's ability to deem an NOA as received:

> (4) For a notice of appeal mailed to the Court to be deemed to be received under paragraph (3)(B) on a particular date, the [U.S.] Postal Service postmark on the cover in which the notice is posted must be legible. The Court shall determine the legibility of any such postmark and the Court's determination as to legibility shall be final and not subject to review by any other Court.

Id. This subsection of 7266 contemplates that an NOA, if mailed, must be received by the Court to allow for an inspection of the "cover in which the notice is posted."

Thus, the plain meaning of the language in section 7266 explains that, regardless of the means chosen by an appellant to submit an NOA, the Court must actually receive that NOA. *See* 38 U.S.C. § 7266. Neither this amendment, as the sole exception to the actual receipt rule, nor its legislative history suggests that the Court must accept for filing an NOA under section 7266 that is never actually received by the Court. *See, e.g.*, *Cook v. Principi*, 318 F.3d 1334, 1339 (Fed.Cir.2002) ("Applying the familiar canon of expressio unius est exclusio alterius ['the expression of one thing is the exclusion of another'], we conclude that Congress did not intend to allow exceptions to the rule of finality in addition to the two that it expressly created."); *BMW Mfg. Corp. v. United States*, 241 F.3d 1357, 1361 (Fed.Cir.2001) ("It thus appears that Congress expressly provided for the exemption of certain merchandise from the [Harbor Maintenance Tax]. Where it did not so provide, it is reasonable to conclude that it did not so intend.").

***7** Recently, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) rejected an argument that the Court should treat as timely received an NOA that was deposited with "the Postal Service or a private courier service." *Mapu v. Nicholson*, 397 F .3d 1375, 1378 (Fed.Cir.2005). The Federal Circuit discussed in general terms section 7266 and its legislative history and concluded that "it is clear that Congress required *actual receipt* of the [NOA] and *specifically limited* the exception created by the postmark rule to [NOAs] sent through the Postal Service." *Id.* at 1381 (emphasis added). The Federal Circuit held that "for an appeal to be timely, the [Court] must receive the [NOA] within 120 days of the Board's decision, or the notice must be deemed received within 120 days of the Board's decision pursuant to the postmark rule of sections 7266(c) and (d)." *Id.* at 1378. Although *Mapu* involved the mailing of an NOA through a commercial delivery service, and not with the U.S. Postal Service, its holding is equally applicable to the facts presented in these appeals. The Federal Circuit provided a general discussion of section 7266, announced its holding, and then applied the law to the specific facts in *Mapu* to find that the appellant had not satisfied the timeliness requirement of section 7266. *Id.* at 1378. The Federal Circuit did not limit its discussion of section 7266 to NOAs delivered through commercial delivery services. Instead the Federal Circuit stated:

> Congress added subsections (c) and (d) in an effort to liberalize the time requirement for filing a[n NOA]. *That legislation would have been unnecessary if sections 7266(a) and (b) already treated filing as complete when the [NOA] was deposited with the Postal Service or a private courier service.* Given the structure of section 7266 and its legislative history, we decline to interpret subsections (a) and (b) in a way that would read subsections (c) and (d) out of the statute.

Id. (emphasis added).

The *Mapu* holding made even more clear that the date of filing of an NOA can only be (1) the date of actual delivery or (2) the date of a legible U.S. Postal Service postmark stamped on the received envelope containing the NOA. Thus, section 7266, its legislative history, and now the Federal Circuit's decision in *Mapu* make clear that, absent actual receipt by the Court within the appeal period, only the postmark stamped on the NOA's cover may be introduced as evidence of time of receipt of an NOA. *See, e.g., Cook, supra.* Indeed, applying the common law mailbox rule to section 7266 would do exactly what the Federal Circuit sought to avoid in *Mapu*--read subsections (c) and (d) out of that statute. That we will not do. There is no room

for broad construction here, thus the Court must give effect to the clearly expressed intent of the legislative authority. *See* *Weddel v. Sec'y of Health and Human Servs.*, 100 F.3d 929, 932 (Fed.Cir.1996). The generous spirit that suffuses the law generally, such as the rule espoused by the dissent, cannot override the clear meaning of section 7266.

2. The 26 U.S.C. § 7502 Tax Cases

***8** In response to the parties' argument that, under the common law mailbox rule, their NOAs should be presumed to have been delivered to and timely received by the Court, the Secretary would have us adopt the approach taken by the U.S. Courts of Appeals for the Second and Sixth Circuits in addressing 26 U.S.C. § 7502, a statute similar to section 7266. Section 7502 sets forth two statutory exceptions to the physical delivery rule for documents mailed to the Internal Revenue Service (IRS) and provides a rebuttable presumption of receipt to those taxpayers who can provide a timely postmark or registered or certified mail receipt. The Second Circuit held that the legislative history of section 7502 indicated that the statute only applied if the petition was actually delivered to the tax court. *See* *Deutsch v. Comm'r*, 599 F.2d 44, 46 (2nd Cir.1979). Similarly, the Sixth Circuit construed section 7502 as creating two separate exceptions to the requirement of physical delivery, and held that section 7502(a), "both by its terms and as revealed in the legislative history, applies only in cases where the document is actually received by the I.R.S. after the statutory period." *See* *Miller v. United States*, 784 F.2d 728, 730 (6th Cir.1986). The U.S. Courts of Appeals for the Eighth, Ninth, and Tenth Circuits, however, have rejected the holdings of the Second and Sixth Circuits. Those circuits have concluded that creation of a Statutory Postmark rule in section 7502 did not abrogate the applicability of the common law mailbox rule because there was no evidence of congressional intent to do so. *See* *Anderson v. United States*, 966 F.2d 487 (9th Cir.1992) (timeliness of tax return filed with IRS); *Sorrentino v. IRS*, 383 F.3d 1187 (10th Cir.2004) (same); *Estate of Wood, supra* (timeliness of estate's special use election to IRS).

Section 7502, however, does not exclusively govern the filing of NOAs with the U.S. Tax Court or any other federal court; instead, it provides for the timely filing of "any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws." 26 U.S.C. § 7502(a)(1). Thus, it is no surprise that various federal circuit courts have arrived at differing conclusions when interpreting a statute that affects the filings of such a broad array of documents and payments. *See Anderson, Sorrentino, Estate of Wood, Deutsch,* and *Miller,* all *supra.* Indeed, in his statement to the Senate Committee on Veterans' Affairs, Chief Judge Nebeker declared that 26 U.S.C. § 7502 was "perplexing." *See* S.Rep. No. 103-232, at 16. Conversely, section 7266 addresses only NOAs filed with this Court and, as discussed below, provides clear instruction regarding the filing of NOAs that have been mailed to the Court.

Although it is conceivable that the plain language of 26 U.S.C. § 7502 does not require the actual receipt of any documents or payments mailed under the provisions of the internal revenue laws, the plain language of that statute also does not indicate that receipt by an agency of the actual postmark is necessary to deem as received a document, filing, or payment. *See* 26 U.S.C. § 7502 (stating that "the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.") Conversely, section 7266 retains its original language that requires the actual receipt of NOAs within the 120-day judicial appeal period. 38 U.S.C. § 7266(a). Moreover, section 7266 contains explicit instructions that (1) an NOA that is mailed through the U.S. Postal Service must contain a legible postmark and (2) a determination regarding the legibility of a postmark can only be made by this Court. 38 U.S.C. § 7266(d). Contrary to our dissenting colleagues' beliefs, these explicit instructions manifest an implicit, if not explicit, intent by Congress to preclude the application of the common law mailbox rule to this statute. *See generally* *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110-11 (1991) (concluding that statute contravened common law after finding that application of common law would render statute

useless); *Isbrandtsen Co. v. Johnson*, 343 U .S. 779, 788-89 (1952) (concluding that Congress implicitly limited deductions and set-offs to those listed in statute). Indeed, if the confines of sections 7266(c) and (d) do not allow us to divine the date of an illegible postmark that the Court actually receives, it is inconceivable that we should do so for an NOA that never arrives.

***9** Finally, 26 U.S.C. § 7502 specifically excludes the application of its postmark rule to "the filing of a document in, or the making of a payment to, any court other than the Tax Court." 26 U.S.C. § 7502(d)(1). This provision prevents a conflict between 26 U.S.C. § 7502 and 28 U.S.C. § 2107. Section 2107 of title 28, U.S.Code, which governs timeliness of appeals for the U.S. courts of appeals, provides that "no appeal shall bring any judgment, order, or decree in an action, suit[,] or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order[,] or decree." 28 U.S.C. § 2107; *see* Fed. R.App. P. 3 and 4 (requiring NOA to be filed with district clerk within statutory filing period). Neither 28 U.S.C. § 2107 nor the FRAP contains a postmark rule; instead, many federal courts have held that an NOA must be *received* by the district court before it may be filed. *See Houston, supra; see also Ward v. Atlantic Coast Line R.R.*, 265 F.2d 75, 80 (5th Cir.1959) (rev'd on other grounds) ("[W]e do not depart from the well-established principle that the jurisdictional requirement that notice be filed within thirty days is not met by deposit of notice in the mail in time for it to reach the clerk's office in the usual course of mail delivery within the time allowed."). Thus, although 26 U.S.C. § 7502 and section 7266 are alike in that they both contain a postmark rule, the language, purpose, and application of section 7266 is more analogous to the FRAP than to 26 U.S.C. § 7502.

3. Summary

As discussed above, applying the common law mailbox rule to the NOA requirements of section 7266 creates an inconsistency with the requirement that an NOA must be received or "deemed to be received" by the Court within the 120-day filing period. To avoid such inconsistency, we hold that subparagraphs (c) and (d) of section 7266 preclude the Court from applying the common law mailbox rule in order to deem timely an NOA that was either never received by the Court or was received late with an illegible postmark.

B. Statutory Postmark Rule and Extrinsic Evidence

The parties argue that extrinsic evidence can be used to show that a timely postmark indicating the date of mailing was affixed on the envelope containing the NOA and, therefore, that their NOAs should be considered timely under the statutory postmark rule, 38 U.S.C. § 7266(c)(2). As discussed above, section 7266 does permit, as an exception to the actual delivery rule, an NOA that was mailed through the U.S. Postal Service to be deemed delivered and received on the date of the postmark. *See* 38 U.S.C. § 7266(c). It does not, however, permit the use of extrinsic evidence to establish the date of the postmark. When amending section 7266, Congress considered the Court's reluctance to accept extrinsic evidence to determine the date of mailing of an NOA and balanced these concerns against its desire to liberalize the rules for filing an NOA with the Court. As a result, the Senate Committee report stated that the proposed amendment to section 7266 would require that an NOA be deemed received by the Court on the date it is postmarked and that "*[o]nly* legible [U.S.] Postal Service postmarks would be sufficient" in making a deemed-received determination. S.Rep. No. 103-232 at 6; 140 Cong. Rec. 28,849 (1994) (Joint Explanatory Statement explaining that the postmark rule would not be broadly applicable, but applicable only to documents bearing "legible United States Postal Service postmarks"); *see* 140 Cong. Rec. at 28,840 (containing Senator Rockefeller's summary of the major provisions of H.R. 4386).

***10** Morever, the plain language of section 7266 indicates that, regardless of the means chosen by an appellant to send to the Court an NOA, the Court must actually receive that NOA. Not only is the use of extrinsic evidence not provided for by statute, this Court specifically cautioned against a rule that would require "seeking affidavits and other evidence to resolve the jurisdictional question ." S.Rep. No. 103-232, at 16-17. Indeed, if Congress had intended for the introduction

of extrinsic evidence to establish the date of mailing, section 7266 would have reflected that intent. *Cf.* 26 U.S.C. 7502(c) (providing that a certified or registered mail receipt is prima facie evidence that a document that was mailed was delivered, and that the date of certification or registration is deemed to be the postmark date).

In *Evans (Janet) v. Principi,* this Court found an NOA to be timely received under section 7266. Evans, 17 Vet.App. 41, 47-48 (2003). In *Evans,* the Court received the appellant's NOA through the U.S. Postal Service five days after the 120-day judicial-appeal period. *Id.* at 46. After the Court received the appellant's NOA, the Court inadvertently discarded the envelope in which it was mailed. *Id.* Although the envelope bearing a legible U.S. Postal Service postmark was no longer available, the Court held that under the circumstances "a postmark-stamped certified-mail receipt satisfies the statutory requirement of a 'postmark stamped on the cover in which the notice is posted' " and that, therefore, the appellant's NOA was received on the date of the postmark on that receipt which was the same date that was on the cover. *Id.* at 47-48 (quoting 38 U.S.C. § 7266(c)(2)). The Court relied on the fact that "the appellant ... proffered a postmark stamp on a certified-mail receipt that, according to well-established [U.S. Postal Service] mailing and postmarking practices, was part of the envelope containing the NOA at the time the NOA was posted." *Id.* at 47. Thus, the Court did not consider extrinsic evidence, but rather, determined that, because the certified mail receipt was in fact part of the NOA cover, it therefore could, in accordance with section 7266(c), be considered to establish the date of receipt. No such evidence is present in these cases. A first class mail receipt is not the same type of receipt considered in *Evans,* nor certainly is an organization's postal registry log.

Nothing in *Evans, supra,* can be construed as an intent by this Court to expand section 7266(c) to allow an appellant to introduce extrinsic evidence to establish the date of mailing as a substitute for the Court's actual receipt of the NOA; rather, the Court's holding in *Evans* reenforces the plain language of section 7266, its legislative history, and the Federal Circuit's decision in *Mapu, supra,* that, absent actual delivery of the NOA to the Court, only the postmark on the envelope containing the NOA may be introduced as evidence to establish when the NOA was mailed. Again, as with application of the common law mailbox rule, to allow the introduction of extrinsic evidence to establish the date of mailing would do exactly what the Federal Circuit sought to avoid in *Mapu*--read subsections (c) and (d) out of the statute and defeat the purpose of the rules regarding timely mailing and filing.

C. Applicability of Equitable Tolling

***11** Finally, Mr. Rios and Mr. Collins argue that, because they actively pursued their appeals by attempting to timely file their NOAs, the 120-day period should be equitably tolled. Under certain circumstances, equitable tolling of the judicial-appeal period may be appropriate, *see Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 96 (1990); *Bailey, supra* (discussing equitable tolling in veterans benefits context); *Evans (Billy) v. West,* 12 Vet.App. 396, 399 (1999), but it is the appellant who has the obligation "to produce any evidence supporting his claim for equitable tolling," *McCreary v. Nicholson,* 19 Vet.App. 324, 332 (2005). In *Irwin,* the U.S. Supreme Court identified two situations not involving appeals to this Court where equitable tolling has been recognized-first, where the claimant has "actively pursued his judicial remedies by filing a defective pleading during the statutory period," and second, "where the claimant has been induced or tricked" by the opposing party's misconduct. *Irwin,* 498 U.S. at 96. Courts, however, "have generally been much less forgiving in receiving late filings where the [appellant] failed to exercise due diligence in preserving his legal rights." *Id.*

In *Bailey, supra,* the Federal Circuit applying *Irwin* to NOAs to this Court held that equitable tolling applies to the 120-day judicial-appeal period in 38 U.S.C. § 7266(a). In *Bailey,* the appellant's reliance on a VA employee's statement that the appellant's judicial appeal would be processed was a sufficient basis for equitable tolling of the judicial-appeal period when it was discovered that the VA employee failed to file the appeal with the Court. *Bailey,* 160 F.3d. at 1361. Applying the

second prong of *Irwin*, the Federal Circuit held that, "[g]iven the particular relationship between veterans and the government," equitable tolling could apply where, "[a]lthough there is no suggestion of misconduct," VA's conduct misled a claimant "into allowing the filing deadline to pass." *Id.* at 1365; *see* *Cintron*, 13 Vet.App. at 257 ("cause and effect" relationship must exist, i.e, appellant relied to his own detriment on action that VA took, or should have taken but did not, and equitable tolling is not invoked if "the appellant's reliance on VA was not the cause of the late filing").

The Federal Circuit has also recognized that equitable tolling of the 120-day appeal period applied to an appellant who filed his NOA at a location other than the Court. *See* *Brandenburg v. Principi*, 371 F.3d 1362, 1364 (Fed.Cir.2004) (appellant misfiled the NOA with the Board rather than the Court); *Santana-Venegas v. Principi*, 314 F.3d 1293, 1296-98 (Fed.Cir.2002) (appellant misfiled NOA with RO rather than Court); *Jaquay v. Principi*, 304 F.3d 1276, 1289 (Fed.Cir.2002) (en banc) (appellant misfiled motion for Board reconsideration with RO rather than Board). Moreover, the Federal Circuit has held that ill health under certain circumstances may be a basis for tolling the judicial-appeal period. *See* *Arbas v. Nicholson*, 403 F.3d 1379, 1381-82 (Fed.Cir.2005) (remanding to determine whether appellant's ill physical health prevented timely filing of NOA); *Barrett v. Principi*, 363 F.3d 1316, 1318-21 (Fed.Cir.2004) (remanding to determine whether appellant's untimely filing of NOA was "direct result" of mental incapacitation). However, the Federal Circuit noted in *Mapu* that, in applying the doctrine of equitable tolling, "we have rejected the approach of looking to whether a particular case falls within the facts specifically identified in *Irwin* [, *supra*,] or one of our prior cases." *Mapu*, 397 F.3d at 1380; *see also* *Arbas*, 403 F .3d at 1381.

***12** Additionally, this Court recently held that extraordinary circumstances can warrant the equitable tolling of the 120-day judicial-appeal period. *McCreary*, 19 Vet.App. at 330. In *McCreary*, the following test was established to determine equitable tolling based on extraordinary circumstances:

> First, the extraordinary circumstance must be beyond the appellant's control. Second, the appellant must demonstrate that the untimely filing was a direct result of the extraordinary circumstances. Third, the appellant must exercise "due diligence" in preserving his appellate rights, meaning that a reasonably diligent appellant, under the same circumstances, would not have filed his appeal within the 120-day judicial-appeal period.

Id. at 332 (citations omitted). The appellant, Mr. McCreary, asserted that the damage to his house by Hurricane Ivan caused him to misplace his VA paperwork. *Id.* at 326. The Court agreed that "a hurricane is a type of extraordinary circumstance that is beyond the appellant's control," but held that he had "failed to demonstrate that his untimely appeal was a direct result of Hurricane Ivan ... [or] that he exercised due diligence in pursuing his appeal." *Id.* at 332. We reasoned, however, that the appellant had established only "that his untimely appeal was an *indirect* result of the hurricane--that is, in an effort to settle hurricane-related damage claims, he misplaced his paperwork to this appeal" and that "[a] person exercising due diligence would not have filed his NOA late simply because he 'misplaced' his paperwork." *Id.* at 332-33.

The matters before us do not pass the first element of the extraordinary circumstance test-i.e., lost mail is not, on its face, an extraordinary circumstance beyond one's control. *Cf.* *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532, 542 (1867) (closing of courts in the South during the Civil War was an extraordinary circumstance warranting equitable tolling of the statute of limitations); *Seattle Audubon Soc. v. Robertson*, 931 F.2d 590, 595-96 (1991) (district court's erroneous interpretation of the statute prevented the plaintiffs from raising certain claims, which had, by that point, become time barred, and the court therefore equitably tolled the statute of limitations); *Alvarez-Machain v. United States*, 107 F.3d 696, 701 (9th Cir.1996) (equitable tolling warranted when plaintiff had been abducted, incarcerated, and tried in a foreign country). Indeed, no evidence has been presented showing any cause for the failure of delivery to the Court of any mail containing the appellants' NOAs. To be sure, the NOAs may have failed to reach their destination because of a U.S. Postal Service error. However, it is just as possible

that the failure was due to matters within Mr. Rios' and Mr. Collins' control--such as failing to accurately address or stamp envelopes. In any event, whether or not there exists here an extraordinary circumstance beyond their control that prevented their NOAs from reaching the Court is not dispositive of the issue at hand. For the reasons that follow, we find that neither appellant has demonstrated that his untimely appeal was a direct result of an act beyond his control.

***13** Nothing in Mr. Rios' or Mr. Collins' submissions satisfies the burden of establishing that their untimely received NOAs were a direct result of extraordinary circumstances. *See McCreary, 19 Vet.App. at 332-33* (holding equitable tolling not warranted where appellant failed to produce evidence "*directly* attributing his untimely appeal to the hurricane"); *Claiborne v. Nicholson, 19 Vet.App. 181, 186 (2005)* (holding that equitable tolling is not appropriate because appellant failed to establish that his failure to file a timely NOA was a "direct result" of his mental illness). Although Mr. Collins offers evidence showing that he mailed something to "Washington, DC 20004" during the judicial-appeal period, and Mr. Rios submitted evidence and affidavits stating that his NOA was mailed to the Court during the judicial-appeal period, neither party offers evidence directly attributing his untimely appeal to an extraordinary circumstance beyond his control that prevented delivery. Absent such evidence, the Court will not equitably toll the 120-day judicial-appeal period. Although the Court is sympathetic to the circumstances, the evidence presented does not support either parties' claim for equitable tolling. *See Reed v. Principi, 17 Vet.App. 380, 383 (2003)* (per curiam order) (rejecting appellant's argument that anthrax scare delayed Court's receipt of NOA because Court declined to speculate as to "how any anthrax-related mail-processing delay ... may have affected when the appellant's NOA may have been delivered to the Court"); *see also McCreary, supra.* Furthermore, there is nothing otherwise in this appeal to suggest that tolling of the 120-day appeal period would be appropriate, *see Bailey, supra.*

IV. CONCLUSION

Based upon the foregoing analysis, the Court holds that, under section 7266, Mr. Rios' and Mr. Collins' NOAs are untimely and thus, their appeals are dismissed.

LANCE, Judge, filed a concurring opinion.

KASOLD, Judge, filed an opinion concurring in part and dissenting in part, in which HAGEL, Judge, joined.

LANCE, Judge, concurring:

I fully concur with the conclusion reached by the majority that the appellants' appeals must be dismissed because their respective NOAs were not timely received by the Court, and in the reasoning supporting its holding that the common law mailbox rule does not apply to 38 U.S.C. § 7266. However, I write separately because I do not believe that equitable tolling of the judicial-appeal period is permissible under these facts. To do so would overstep our role as a Court and violate the recognized separation of legislative and judicial power.

Under certain circumstances, equitable tolling of the 120-day judicial appeal period in 38 U.S.C. § 7266(a) may be appropriate. *See Arbas, 403 F.3d. at 1381* (holding that equitable tolling of 120-day filing period may be justified if veteran shows that failure to file timely was direct result of physical illness); *Barrett, 363 F.3d at 1321* (holding that equitable tolling of 120- day filing period may be justified if veteran shows that failure to file timely was direct result of mental illness); *Bailey, 160 F.3d at 1364* (holding that equitable tolling of 120-day filing period may be warranted where VA misled or induced claimant into missing filing deadline); *McCreary, 19 Vet.App. at 330* (holding that extraordinary circumstances can trigger consideration of the principles of equitable tolling). However, I believe Congress has expressly considered and rejected application of the common law mailbox rule to the filing of NOAs with the Court and, therefore, we cannot exercise our equitable powers to overrule an intentional decision of Congress. To that end, I note that the Supreme Court in *Irwin,* stated, in pertinent part:

> ***14** A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. Mitchell*, 445 U.S. 535, 538, 63 L.Ed.2d 607, 100 S.Ct. 1349 (1980) (quoting *United States v. King*, 395 U.S. 1, 4, 23 L.Ed.2d 52, 89 S.Ct. 1501 (1969)). Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver. *Such a principle is likely to be a realistic assessment of legislative intent* as well as a practically useful principle of interpretation. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. *Congress, of course, may provide otherwise if it wishes to do so.*
>
> 498 U.S. at 95-96 (emphasis added).

In short, the U.S. Supreme Court recognized in *Irwin* that equitable tolling would not apply in the face of contrary Congressional intent. In other words, the equitable powers of the Court may be used to address all of the unique and unforeseeable fact patterns that the legislature could not possibly take the time to contemplate when writing legislation. However, in this case we have concluded that Congress has explicitly considered and consciously chosen a postmark rule for this Court. Hence, it would be inappropriate to apply principles of equitable tolling to subvert Congressional choice and intent. For this reason, I believe that the appellants' equitable tolling argument must be rejected on the grounds that it would amount to a reversal of an intentional decision of Congress, which *Irwin* recognizes as inappropriate.

KASOLD, Judge, with whom HAGEL, Judge, joins, concurring in part and dissenting in part:

The issue before the Court is whether veterans Rios and Collins complied with section 38 U.S.C. § 7266(c) such that their appeals may be heard by the Court. I believe that they have fully complied with the statute and that the common law mailbox rule serves to permit the proper exercise of our review authority over these appeals. Accordingly, I respectfully dissent from the Court's holding today that the common law mailbox rule does not apply to NOAs filed with the Court. [FN2]

> FN2. I concur with the majority that the circumstances of these cases do not warrant application of the statutory mailbox rule or equitable tolling for extraordinary circumstances.

I. SECTION 7266

Congress promulgated the predecessor to section 7266, then 38 U.S .C. § 4066, in 1988. *See* Act of Nov. 18, 1988, Pub.L. 100-687, § 301(a), 102 Stat. 4116, § 4066, renumbered and amended at Act of May 7, 1991, Pub.L. 102- 40, § 402(b)(1), (d)(1), 105 Stat. 238, 239. Under the original section 4066, an NOA had to be "filed" within 120 days after the date on which the notice of the Board decision was mailed. 38 U.S.C. § 4066(a) (1988). In response to the Court's harsh interpretation of the rule in *DiDonato v. Derwinski*, 2 Vet .App. 42 (1991), Congress amended section 7266 (formerly section 4066), which, as relevant to this case, is as it currently stands.

***15** Pursuant to section 7266, an "appellant *shall file* a notice of appeal under this section *by delivering or mailing* the notice to the Court." 38 U.S.C. § 7266(a), (b) (emphasis added); *see also* Veterans Benefits Improvements Act of 1994, Pub.L. 103-446, § 511(a), 108 Stat. 4670 (1994). Thus, under the plain wording of the current statute, an appellant has two options with regard to filing an NOA: delivering it or mailing it. The use of the term "or" indicates these are independent actions. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (stating that "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise").

Thus, an appellant who mails his NOA has undertaken the second option and is not delivering it to the Court in the sense of personal delivery or use of a commercial delivery service. *See Mapu v. Nicholson*, 397 F.3d 1375, 1381 (Fed.Cir.2005) (stating that "[i]t is clear that Congress wanted the postmark rule to apply only to a notice of appeal that was mailed using the Postal Service."); *see also* 140 Cong. Rec.

28,849 (1994) (stating that the postmark rule would not be broadly applicable, but that only "legible United States Postal Service postmarks would be sufficient" and that "if a [notice of appeal] is delivered to the Court (for example, by private courier or delivery service), it would be considered timely filed if it is received by the Court within the 120-day limit established by Congress."). If the NOA is delivered, i.e., not mailed, the date of delivery is the date of filing. *See* 38 U.S.C. § 7266(c)(1). On the other hand, if the NOA is mailed, it is deemed filed on the date of the United States Postal Service (USPS) postmark, provided that the postmark is legible. *See* 38 U.S.C. § 7266(c)(2).

The clear intent of Congress was to provide appellants the full benefit of the 120-day filing period if they mailed their NOA, provided the postmark was legible. *See* 38 U.S.C. § 7266. Although the statute does not address what happens when a mailed NOA has an illegible postmark or is lost by the USPS, this lack of explicit attention does not evince intent to deny claimants in these situations a hearing on their appeal. Congress does not write upon a clean slate, and is "understood to legislate against a background of common-law ... principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 110-11 (1991); *see also Johnson v. First Nat'l Bank of Montevideo*, 719 F.2d 270, 277 (8th Cir.1983) (stating that Congress acts with knowledge of existing law, and that "absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law and its judicial construction").

II. THE COMMON LAW MAILBOX RULE

The common law mailbox rule has been in existence for well over a century, *see Howard v. Daly*, 61 N.Y. 362 (1875); *Huntley v. Whittier*, 105 Mass. 391 (1870); *Tanner v. Hughes*, 53 Penn. St. 289 (1867); *Callan v. Gaylord*, 3 Watts. 321 (1834), and was given full judicial imprimatur by the U.S. Supreme Court over 120 years ago, in *Rosenthal v. Walker*, 111 U.S. 185 (1884). Under the common law mailbox rule, "if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed." *Rosenthal*, 111 U.S. at 193; *see also Hagner v. United States*, 285 U.S. 427, 430 (1932); *Lewis v. United States*, 144 F.3d 1220, 1222 (9th Cir.1998); *Wood v. Comm'r*, 909 F.2d 1155, 1161 (8th Cir.1990). This mailbox rule is based on the presumption that the officers of the government will do their duty in the normal course of business. *See Rosenthal, supra; see also United States v. Armstrong*, 517 U.S. 456, 464 (1996) (" '[I]n the absence of clear evidence to the contrary, courts presume that [Government agents] have properly discharged their official duties.' "); *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties").

III. APPLICABILITY OF THE COMMON LAW MAILBOX RULE

***16** The Court has never considered the application of the common law mailbox rule until now, and therefore has never excluded the applicability of the common law mailbox rule. The majority's reliance on the fact that the "Court has never applied the common-law mailbox rule" as an underlying basis for rejecting its application in these cases is misplaced. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (holding that an issue not "raised in briefs or argument nor discussed in the opinion of the Court" cannot be taken as "a binding precedent on this point"); *Webster v. Fall*, 266 U.S. 507 (1925) (stating that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been so decided as to constitute precedents.").

Inasmuch as this is an issue of first impression for the Court, the proper analysis begins with the presumption that the common law mailbox rule is applicable, absent some evident statutory abrogation thereof. *See Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *see also Astoria, supra.* Contrary to the majority's discussion, there is absolutely no congressional intent to abrogate the common law rule as it applies to the filing of NOAs with the Court. There is certainly no explicit abrogation of the common law mailbox rule, *see Midlantic Nat'l Bank v. N.J. Dep't of*

Envtl. Prot., 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

Moreover, absent evident abrogation, the common law mailbox rule would be abrogated only if application of the statute would render application of the common law mailbox rule useless, *see* *Astoria*, 501 U.S. at 108, 112-13 (stating that when a common law principle is well established it may be taken as a given that "Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident" and finding by implication, statute contravened common law after finding that application of the common law would render useless the statute at issue), or there is statutory purpose to the contrary, *see* *Isbrandtsen*, 343 U.S. at 783, 788-89 ("statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident" and finding Congress implicitly limited deductions and set-offs to those listed in statute); *see also* *United States v. Texas*, 507 U.S. 529, 534 (1993) (stating that in order to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law); *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981) (same). Neither situation applies here.

The section 7266 statutory mailbox rule, which deems an NOA as filed on the date it is mailed if the USPS postmark is legible, does not render application of the common law mailbox rule useless or evidence an intent to exclude application of the common law mailbox rule. To the contrary, the common law mailbox rule dovetails with section 7266 and addresses the situation where mail is lost or mishandled such that it reaches its destination outside the normal course of business--the very situations not covered by the section 7266 statutory mailbox rule. Under the common law mailbox rule, mail that arrives at the Court with an illegible postmark or is otherwise reported as not received by the Court, can be shown to have been placed in the USPS within sufficient time to be received by the Court within the 120-day filing period and is presumed received absent clear evidence to the contrary, and therefore filed, on the date of regular business delivery. *See* *Sorrentino v. IRS*, 383 F.3d 1187, 1194 (10th Cir.2004) (applying the common law mailbox rule to allow for timely filing); *Anderson v. United States*, 966 F.2d 487, 492 (9th Cir.1992) (same); *Wood*, *supra* (same); *see also* *Lewis v. United States*, 144 F.3d 1220,1221-22 (9th Cir.1998) (finding that when a postmarked envelope was not preserved by the IRS, a taxpayer may use the common law mailbox rule to prove timely receipt).

***17** Moreover, application of the common law mailbox rule not only dovetails with the statutory mailbox rule in section 7266, it is wholly consistent with Congress' express requirement that an NOA be filed by delivering it to the Court or mailing it to the Court. It would be ironic indeed, if Congress on the one hand explicitly authorized use of the USPS but intended that a claimant who mailed his NOA in more than sufficient time for it to be received by the Court, should be denied an appeal because the USPS, a government agency, lost it. *See* *Baker v. Runyon*, 114 F.3d 668 (7th Cir.1997) (stating that the USPS is a government agency). The irony of such an intent is heightened when one considers the fact that the presumption of regularity underpins the statutory start of the 120-filing period on the date the Board decision is mailed, as opposed to the date it is received by the claimant. *See* *Ashley v. Derwinski*, 2 Vet.App. 307, 308-09 (1992) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)) (stating that there is a presumption of regularity under which it is presumed that government officials "have properly discharged their official duties"); *see* *Crain v. Principi*, 17 Vet.App. 182, 190 (2003) (noting that the Court has routinely applied this presumption of regularity and its caselaw regarding the mailing requirements under 38 U.S.C. § 7104(e) to RO mailings to VA claimants); *Woods v. Gober*, 14 Vet.App. 214, 220 (2000) ("The Court has held that there is a presumption of regularity that the Secretary properly discharged his official duties by mailing a copy of a VA decision to the last known address of the appellant...."). [FN3] I cannot ascribe an intent to Congress that the Government be permitted the benefit of the presumption of regularity with regard to its mailings, but our Nation's veterans and others eligible for VA benefits be denied its equivalent application in the form of the common law mailbox rule. *See*

Brown v. Gardner, 513 U.S. 115, 118 (1994) ("interpretive doubt is to be resolved in the veteran's favor"); *Boyer v. West*, 210 F.3d 1351, 1355 (Fed.Cir.2000); *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed.Cir.1997).

> FN3. Although the common law mailbox rule is not addressed in any of the cases cited in association with this footnote, it is apparent that it underlies the presumption of regularity attached to the mailing of the Board decision.

IV. OTHER CONCLUSIONS

The majority's conclusion that the Federal Circuit's decision in *Mapu v. Nicholson*, 397 F.3d 1375 (Fed.Cir.2005), forecloses the application of the common law mailbox rule is also misplaced. Although the Federal Circuit stated in *Mapu* that an NOA must be received or "deemed to be received" by the Court within the 120-day filing period, this holding cannot be taken out of context of the facts and analysis of that case, which did not involve the common law mailbox rule or the USPS and therefore cannot serve to foreclose application of the common law mailbox rule. *See Grantham v. Brown*, 114 F.3d 1156, 1158 (Fed.Cir.1997) ("It is axiomatic that the language in [the present case] must be read in light of the facts and issues that were before the court when the language was written"); *see also L.A. Tucker Truck Lines, Inc.* and *Webster*, both *supra*. Moreover, unlike the situation in *Mapu*, where an application of the statutory mailbox rule in section 7222 to a Federal Express delivery would be in direct conflict with the statute, which explicitly refers to the USPS, application of the common law mailbox rule presents no conflict, as discussed above.

***18** Although I disagree with the majority's conclusion that our filing statute cannot be favorably compared to the Tax Court's filing statute, which also has a statutory mailbox rule, that is not the point. At least five Courts of Appeal have examined 26 U.S.C. § 7502, the Tax Court's filing statute. Although the first two Circuits to do so held that its statutory mailbox rule is exclusive of the common law mailbox rule, *see Deutsch v. Comm'r*, 599 F.2d 44 (2nd Cir.1979) (holding that the legislative history of section 7502 indicated that the statute only applied if the petition was actually delivered to the tax court); *Miller v. United States*, 784 F.2d 728 (6th Cir.1986) (holding that section 7502(a), "both by its terms and as revealed in the legislative history, applies only in cases where the document is actually received by the I.R.S. after the statutory period), neither case considered the longstanding judicial principle that "statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen*, 343 U.S. at 783; *see also Astoria*, 501 U.S. at 108. In contrast, three of the Circuits considered this principle and determined that the statutory mailbox rule was not exclusive of, and did not abrogate, the common law rule. *See Sorrentino*, 383 F.3d at 1187 (finding that the production of a registered, certified, or electronic mail receipt was not the only means by which a taxpayer could establish timely delivery but declined to endorse the common law mailbox rule based solely upon a taxpayer's uncorroborated self-serving testimony of mailing); *Anderson*, 966 F.2d at 492 ("the language of [section] 7502 does not set forth an exclusive limitation on admissible evidence to prove timely mailing and does not preclude application of the common law mailbox rule"); *Wood*, 909 F.2d at 1160 (noting that Congress is presumed to have known of the common law presumption of delivery and further stating: "When interpreting a statute, we must consider the statute in light of judicial concepts existing before it ... was enacted. 'The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.' " (quoting *Midlantic Nat'l Bank*, 474 U.S. at 501). [FN4]

> FN4. The Federal Circuit has not yet addressed in a precedential opinion the applicability of the common law mailbox rule to the Tax Court's filing statute. *See Davis v. United States*, 230 F.3d 1383 (Fed.Cir.2000).

Finally, to the extent the majority compares section 7266 with the Federal Rules of Appellate Procedure (FRAP), to which some courts have held that the mailbox rule does not apply, this comparison is misplaced. The specific language used in section

7266 directs an appellant to file an NOA by "delivering or mailing the notice to the Court" (38 U.S.C. § 7266(b)), while the language of the FRAP merely states "an appeal ... may be taken only by filing a notice of appeal with the district clerk" within the specified time limits. *See* Fed. R.App. P. 3, 4. The FRAP give no guidance as to how an appellant may file an NOA, while section 7266 specifically allows for only two types of filing, and one of them is by mail. Moreover, while the Circuit Courts that employ the FRAP do not seem to permit application of the common law mailbox rule as such, many Circuits have found that failure by the USPS to properly deliver the mail in due course constitutes either good cause or excusable neglect to permit an extension in the filing of an NOA. *See, e.g.*, *Scarpa v. Murphy*, 782 F.2d 300 (1st Cir.1986) (finding "inexcusable neglect of the Post Office to take more than five days ... to transmit an adequately addressed letter three miles"); *Sanchez v. Board of Regents of Texas S. Univ.*, 625 F.2d 521 (5th Cir.1980) (finding that "reliance on the normal course of delivery of mail is reasonable and may be the basis for a court to excuse otherwise untimely filing").

V. APPLICATION TO THE FACTS IN THIS CASE

A. Rios

***19** In order to establish that he timely mailed his NOA, Mr. Rios presents to the Court a copy of his November 6 NOA, a copy of a "Page of Registry of Sent Correspondence" from PRPAVA, and two affidavits from Mrs. Santa Virgen Cruz Carrion attesting to the mailing procedures at PRPAVA. In the affidavit, she describes the normal mailing procedure of PRPAVA and asserts that on the afternoon of November 6, 2003, she followed the normal mailing procedures to mail Mr. Rios' NOA to the Court and to the General Counsel. Mrs. Cruz Carrion attests that she personally mailed Mr. Rios' NOA by placing it in a U.S. mailbox on November 6, 2003. She further states that she logged the mailing of this document on the Page of Registry of Sent Correspondence, and the Court notes that there is a log of a mailing to the Court on behalf of Mr. Rios on the submitted registry. In addition to sending a copy to the Court, Mrs. Cruz Carrion states that a copy was also sent to the VA Office of General Counsel; this too is noted on the registry. The mailing address on the copy of the November 6 NOA is the correct address for this Court. In addition to the evidence of mailing submitted by Mr. Rios, he timely followed up his mailing with an inquiry in February 2004 regarding the status of his NOA.

Taken collectively, the evidence in this case, which includes affidavits of both Mr. Rios and a third party, contemporaneous business records, and a timely follow up regarding the status of the NOA, passes the high standard of proof of mailing necessary to invoke the common law mailbox rule presumption of delivery and thus shifts the burden of proving non-receipt to the Secretary. *See Sorrentino, supra; see also Knickerbocker Life Ins. v. Pendleton*, 115 U.S. 339, 347 (1885) (adopting the rule which "allows usage and the course of business to be shown for the purpose of raising a prima facie presumption of fact in aid of collateral testimony"), *Anderson, supra; Wood, supra; Village of Kiryas Joel Dev. Corp. v. Ins. Co. of N. Am.*, 996 F.2d 1390, 1394 (2d Cir.1993) (finding sufficient to create presumption an employee's statement of customary office procedure plus record indicating that employee mailed letter); *Godfrey v. United States*, 997 F.3d 335, 338 (7th Cir.1993) (finding that to invoke the presumption of delivery, a party may "either present evidence of actual mailing such as an affidavit from the employee who mailed the [return] or present proof of procedures followed in the regular course of operations which give rise to a strong inference that the [return] was properly addressed and mailed."); *Myers v. Moore-Kile*, 279 F. 233, 235 (5th Cir.1922) (using evidence that a document was mailed in the regular course of business as proof that it was actually mailed). Under the "known course of business in" the USPS, *see Rosenthal*, 111 U.S. at 193, the November 6, 2003, NOA would have been received by the Court on November 10, 2003, well before the end of the 120-day filing period, which was February 13, 2004. *See* United States Postal Service, *at* http//www.usps.com (last visited Sept. 20, 2005).

***20** The only evidence the Secretary offers to rebut the presumption of delivery is the fact that the NOA was never logged in by the Court. During oral argument, the Secretary also contended that PRPAVA has mailed documents to the wrong address in the past. *See Santana-Venegas v. Principi*, 314 F.3d 1293 (Fed.Cir.2002). That type

of evidence is insufficient to rebut the presumption of delivery under the common law mailbox rule. *See* *Barnett v. Okeechobee Hosp.*, 283 F.3d 1232, 1241 (11th Cir.2002) (stating that "a party's failure to uncover an item, which it was presumed to have received, does not mean that it never received the item and does not rebut the presumption of delivery"), *Arnold v. Wood*, 238 F.3d 992, 995 (8th Cir.2001) (stating that the presumption of accuracy in favor of docket entries may be rebutted only by a stronger presumption such as the mailbox rule"); *In re Nimz Transp., Inc.*, 505 F.2d 177, 179 (7th Cir.1974) (holding, in a case where petitioners alleged that they mailed wage claims to the clerk of the district court, that "the fact that the clerk's files did not contain the proof of claims" was "by itself insufficient to rebut the presumption of receipt"); *Jones v. United States*, 226 F.2d 24, 27 (9th Cir.1955) ("The showing that a search of the pertinent files in the [addressee's] office revealed no record of the [relevant documents] having been filed is a purely negative circumstance, insufficient ... to rebut the presumption of delivery."); *see also* *Tavares v. Principi*, 18 Vet.App. 131, 141 n. 1 (Kasold, J., dissenting) ("Documents get lost in the mail and even lost at this Court." (citing *Evans v. Principi*, 17 Vet.App. 41, 42 (2003)).

B. Collins

To establish that he mailed his April 30, 2004, NOA, Mr. Collins submitted to the Court an affidavit signed by Ms. Vicki L. Colvin, Mr. Collins' counsel's **legal assistant**, that describes the actions she took on April 30, 2004, to mail Mr. Collins' NOA to the Court. She states that on April 30, 2004, she mailed Mr. Collins' NOA to the Court from the Brentwood, Tennessee, Post Office via First Class Mail. She further states that she retained a copy of the sales receipt issued for that transaction. A copy of the sales receipt issued by the Brentwood, Tennessee, Post Office is attached to her affidavit and reflects that on April 30, 2004, mail was sent from that office via First Class mail (paid postage of forty-nine cents) to "Washington DC, 20004." Mr. Collins filed a notice of appearance on September 24, 2004, lending credence to an earlier filing of an NOA. Given the totality of the evidence in this case, which includes a third party affidavit, a copy of a sales receipt from the mailing on April 30, 2004, and a timely filing of a notice of appearance, the evidence is sufficient to give rise to the high standard of proof to raise the presumption of delivery under the common law mailbox rule and to shift the burden of proving non-receipt to the Secretary. *See Sorrentino, Anderson,* and *Wood,* all *supra.* Under the "known course of business in" the USPS, *see* *Rosenthal*, 111 U.S. at 193, the April 30, 2004, NOA would have been received by the Court on May 4, 2004, which was the last day of the 120-day filing period. *See* United States Postal Service, *at* http//www.usps.com (last visited June 6, 2006).

***21** As with Mr. Rios, the only evidence the Secretary offers to rebut the presumption of delivery is the fact that the NOA was never logged in by the Court. This evidence is insufficient to rebut the presumption of delivery under the common law mailbox rule. *See Barnett, Arnold, In re Nimz Transp., Inc.,* and *Jones,* all *supra.*

VI. CONCLUSION

Both Mr. Rios and Mr. Collins complied with section 7222 and filed their NOAs by mailing them with the USPS such that the NOAs should have been received by the Court in the normal course of business well within the 120-day filing period. The common law mailbox rule creates a presumption that these NOAs were so received, and that rule was not expressly or impliedly abrogated by statute, and the presumption of delivery was not rebutted. Accordingly, I would find that the NOAs in these cases were timely filed, and proceed to exercise the Court's jurisdiction to review the appeals.

--- Vet.App. ----, 2006 WL 1737579 (Vet.App.)

END OF DOCUMENT

Briefs and Other Related Documents

Only the Westlaw citation is currently available.

Court of Appeal, Second District,
Division 8.
Agneta KARLSSON et al., Plaintiffs and Respondents,
v.
FORD MOTOR COMPANY, Defendant and Appellant.
No. B173022.

June 27, 2006.

APPEAL from the judgment of the Superior Court of Los Angeles County. Howard J. Schwab, Judge. Affirmed.

Shook, Hardy & Bacon and Frank P. Kelly, III; Lewis, Brisbois, Bisgaard & Smith and Steven R. Lewis; Gibson, Dunn & Crutcher, Theodore J. Boutrous, Jr., William E. Thomson and J. Christopher Jennings for Defendant and Appellant.

Martin N. Buchanan; Esner & Chang and Stuart B. Esner; Girardi & Keese, Thomas V. Girardi, Howard B. Miller, and David R. Lira; Law Offices of Marvin Kay and Marvin Kay for Plaintiffs and Respondents.

RUBIN, J.

***1** Defendant Ford Motor Company (Ford) appeals from the judgment entered after a jury verdict in this product liability action awarded plaintiff Johan Karlsson more than $30 million in compensatory and punitive damages. We hold that evidence and issue preclusion sanctions that were ordered against Ford for various discovery violations were properly imposed before trial. We also hold that those sanctions were, for the most part, properly applied during the trial in the form of jury instructions, evidentiary rulings, and plaintiff's jury arguments, and that any errors by the court were harmless. We also conclude that, because the court imposed discovery sanctions after it had summarily adjudicated plaintiff's punitive damages claims in Ford's favor, the court was entitled to reconsider and vacate its summary adjudication order. The court also did not err when it imposed lesser sanctions against plaintiff for failing to preserve certain evidence. We next hold the court correctly denied Ford's new trial motion based on allegations of juror misconduct. Finally, plaintiff's claims were not preempted by federal seat belt regulations because Ford waived the issue. We therefore affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On November 22, 1996, five-year-old Johan Karlsson (Johan) had his spine broken and became a paraplegic when the 1996 Ford Windstar minivan in which he was riding struck a 15-ton steel coil that fell off the back of a tractor trailer and into the middle of Interstate 5. The accident happened when the driver of that tractor trailer dozed off and rear-ended a truck in front of him. Also in the van with Johan were his mother, uncle, and four siblings (the Karlssons). The Karlssons and Johan sued the somnolent truck driver and his employer, TransContinental Transport (TCT).

The Windstar van had three rows of seating, and provided combination lap belt and shoulder harnesses for all of the seats but one--the center seat of the rear, third row bench, where Johan was seated. Instead of the so-called three point harness worn by the others, Johan was provided only a lap belt. While everyone else in the van was also injured, their injuries were less severe and all six of them made full

recoveries. Johan's spinal injuries were consistent with something physicians call seat belt syndrome, when a passenger restrained by only a lap belt jackknifes over at the waist due to the force of the collision. Had Johan been wearing a three-point restraint, his injuries would have been no more severe than the other occupants of the Windstar. Johan's mother testified that she adjusted Johan's lap belt for him before starting their trip, making sure it fit snugly and rested low on his hips.

TCT cross-complained against Ford for indemnity, alleging that the van had been negligently designed, thereby contributing to Johan's injuries. The Karlssons and Johan eventually added Ford as a defendant to their action on two product liability theories--that the van had a design defect and that Ford failed to warn of known dangers associated with the use of the lap belt.

***2** Johan and the Karlssons settled with TCT in exchange for $10 million and TCT's assistance in litigating the case against Ford. When the case eventually went to trial seven years later in September 2003, Johan was the only plaintiff and Ford was the only defendant. A jury found for Johan on both of his product liability theories and awarded him $10.45 million in economic damages, $20 million for pain and suffering, and $15 million in punitive damages. The parties stipulated to reduce the total verdict to $30,341,636.50 based on findings of comparative fault by TCT and the amount of the earlier TCT settlement. (Code Civ. Proc., § 877; Civ.Code, § 1431.2.)

The issues on appeal concern numerous rulings by the court before, during, and after the trial. Before trial, Ford was the subject of several discovery motions filed by Johan and TCT. As a result of the fifth such motion, the trial court imposed issue and evidence preclusion sanctions against Ford on the issues of warnings and the technical feasibility of a safer, alternative seat belt design, as well as on an attempt by Ford to conceal certain evidence during discovery. These sanctions were presented to the jury by way of jury instructions, formed the basis for some of Johan's witness examinations and jury arguments, and were used to limit the evidence Ford could present on its behalf. As a result of the sanctions ruling, the trial court also vacated its earlier summary adjudication order striking Johan's punitive damages claim, allowing the jury to reach the issue at trial. Ford in turn sought evidence sanctions against Johan, claiming he had lost a key piece of evidence: the rear bench seat of the Karlsson's Windstar. Ford was allowed to present evidence and make argument on that issue, and a general instruction on concealing evidence was given to the jury. During jury deliberations, one juror made comments to the others about having seen a new model Windstar that did not correct the absence of a three point belt in the center rear seat, and about having seen such belts in the mid-bench seat of another Ford vehicle. Those statements prompted an unsuccessful new trial motion based on juror misconduct.

On appeal, Ford contends that the discovery sanctions were not warranted and were excessive, and that the scope of those sanctions was improperly expanded during trial by virtue of comments by the court, the argument of Johan's counsel, various evidentiary rulings, and certain related jury instructions. Ford also contends that the trial court erred by: reinstating Johan's punitive damages claim based on the discovery sanctions; allowing Johan to argue that Ford's discovery abuses were grounds for awarding punitive damages; failing to sanction Johan because he did not preserve the rear bench seat of his parents' minivan; and by failing to order a new trial for jury misconduct. Ford also contends, for the first time on appeal, that Johan's claims are preempted by federal seat belt regulations.

BACKGROUND OF THE DISCOVERY SANCTIONS

1. *Product Liability Theories Applicable at Trial*

***3** Under California law, there are three ways to hold a manufacturer strictly liable for injuries caused by its product: (1) if the product is defectively manufactured; (2) if it is defectively designed; or (3) if it is distributed without sufficient warnings or instructions about its potential for harm. (*Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 715, 110 Cal.Rptr.2d 722 (*Arnold*).) A product is defectively *manufactured* if it contains some unintended flaw. (*In re*

Coordinated Latex Glove Litigation (2002) 99 Cal.App.4th 594, 606, 121 Cal.Rptr.2d 301.) There are two tests for establishing a *design defect:* (1) under the consumer expectations test, if the plaintiff shows that the product failed to perform as safely as an ordinary consumer would expect when using the product in an intended or reasonably foreseeable manner; and (2) under the risk-benefit test, where the trier of fact is asked to balance the risk of danger inherent in the challenged design versus the feasibility of a safer design, the gravity of the danger, and the adverse consequences to the product of a safer design. (*Arnold*, at p. 715, 110 Cal.Rptr.2d 722.) A determination of the risk-benefit issue involves "technical issues of feasibility, cost, practicality, risk, and benefit [citation] which are 'impossible' to avoid [citation]." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567, 34 Cal.Rptr.2d 607, 882 P.2d 298 (*Soule*).) In *failure to warn* cases, a flawlessly designed or manufactured product becomes defective if the manufacturer fails to warn of the product's dangerous propensities. (*Finn v. G.D. Searle & Co.* (1984) 35 Cal.3d 691, 699-700, 200 Cal.Rptr. 870, 677 P.2d 1147.)

The jury in this case was instructed on the theories of: (1) design defect under the risk-benefit approach; and (2) failure to warn. Under the design defect theory, Johan argued to the jury that Ford could have and should have installed a seat belt in the rear bench center seat that included some type of shoulder harness. Under the failure to warn theory, Johan argued to the jury that Ford did not adequately warn of the need to wear the lap belt properly, or of the magnitude of the harm that might follow as a result. Ford's primary defense was that the collision was a severe one and that Johan's seat belt was not properly adjusted. Ford also contended that at the time it manufactured the Karlsson's Windstar, it was not feasible to install a three-point restraint system in the rear bench center seat.

2. *The Discovery Sanctions*

Early on in the case, retired Judge Thomas F. Nuss was appointed as the discovery referee. He issued several reports concerning discovery disputes among the parties, which were then adopted by the trial court, albeit with some modifications. At issue here are several sanctions imposed by the court as a result of Judge Nuss's fifth interim report. [FN1]

The fifth report was issued in April 2003 in response to a motion for discovery sanctions brought by TCT because Ford had supposedly given discovery responses that were both deceptive and dilatory. Because the referee's findings are not disputed, we will set forth those findings in lieu of summarizing the parties' moving and opposition briefs:

***4** (1) The referee found that after being ordered to meet and confer regarding three-point restraint prototypes, Ford agreed in July 2001 to produce documents, photos, and prototypes. Instead of doing so, Ford produced a witness who stated that he believed all prototypes had been destroyed. Because the agreement was reached as part of a court-ordered meet and confer session, the referee concluded that Ford had violated a court order.

(2) Following another meet and confer session, Ford promised to produce for deposition its person most knowledgeable (PMK) to "talk about warnings," including a PMK on the issue of why booster seat warnings were included in the owner's manual of 1996 Ford *Aerostar* minivans, but not in the manual for the 1996 Windstar. [FN2] Despite Ford's promise, it produced several witnesses who were unable to answer fully TCT's deposition questions. Even though TCT sought this information for more than two years, it was "thwarted by the inaction and actions of Ford."

(3) As far back as 2000, Ford stated that all the documents requested by TCT were contained in Ford's rear belt reading room in Dearborn, Michigan. Just four months before trial, however, a **paralegal** working for TCT discovered numerous responsive documents in Ford's nearby *passive restraint* reading room while working on another case. The referee noted that Ford did not contest the allegation or submit any evidence in opposition, leading him to conclude that Ford admitted the charge. Referring to his earlier, second report concerning Ford's discovery responses, the

referee said that Ford continued to provide responses that were neither straightforward nor unambiguous.

(4) At no time during any of the ongoing discovery disputes did Ford provide a declaration identifying what documents were located in the rear seat belt or passive restraint reading rooms. Some 20 months after being ordered to produce documents as they were kept in the ordinary course of business, Ford had failed to do so, contributing to TCT's requests for numerous witnesses. The referee found that Ford's failure was either intentional or the result of providing insufficient resources to get the job done. Regardless of the reason, the result was the same--continual delay until Ford announced it would produce no more documents or witnesses, at a time when no more discovery motions could be brought and trial was imminent. According to the referee, "[t]his pattern of discovery abuse has previously been condemned by the Courts and relief granted through appropriate evidentiary orders." [FN3]

(5) Ford had evaded discovery by providing TCT with too many documents, and without proper itemization, in order to overwhelm TCT with written material.

(6) Only in the previous six months had Ford disclosed the name of the employee who could have truly served as the PMK on the warnings issue. That person no longer worked for Ford, and it was unclear whether TCT could have located him and obtained an out-of-state commission for his deposition. However, his identity should have been disclosed much sooner. Instead, TCT continued to depose Ford's other warnings witnesses. Ford also delayed for 12 months before disclosing the identity of another witness on pertinent warnings. That delay was not explained. The referee found that "these actions and inactions by Ford or its counsel all pertain to important issues in the case, and violated the Court's previous Order to provide timely discovery and are a misuse of the discovery process. The referee finds Ford or its counsel failed to act in good faith in producing the appropriate witness or witnesses on the warnings issue (which Ford had agreed to produce) and that Ford or its counsel with reasonable diligence could have produced the witnesses or made their identity known so TCT would have the opportunity to utilize the appropriate statutes to obtain the depositions."

***5** (7) Despite having agreed to produce three-point belt system prototypes, and related photos and documents, Ford instead produced a witness who said that the prototypes had probably been destroyed by Ford's outside prototype supplier, that any documents would have been with the supplier as well, and that any documents in Ford's possession would have been destroyed long before discovery requests were made in this case. Because Ford did not provide accurate information until after discovery had closed, TCT was unable to obtain the documents or prototypes from the supplier. The referee found that Ford failed to act with reasonable diligence, and did not act in good faith, disobeying both previous discovery orders and its meet and confer agreement with opposing counsel.

(8) When one Ford employee took ill during her deposition, TCT agreed to depose another witness, but did not cancel the deposition of the first witness and asked for proof that the latter was too ill to conclude her deposition. Ford never provided such documentation. Ford also delayed in providing TCT's counsel with a federal transportation safety report that TCT needed for the depositions until it was too late for TCT to complete its examination. The referee found that this incident was not willful.

Based on these findings, the referee recommended that the trial court impose the following eight sanctions:

"1. That Ford shall not be able to present any evidence that Ford warned Plaintiff that the center rear two-point seatbelt was or was not a dangerous condition;

"2. That Plaintiff and TCT are entitled to a jury instruction that the center rear two-point seatbelt did not provide adequate protection to Plaintiff and Ford failed to warn Plaintiff of this dangerous condition;

"3. That Ford is not allowed to provide evidence that Ford's management was not aware of this failure to warn;

"4. That Ford shall not be able to present any evidence that it was not technically feasible for Ford to develop an integrated three-point belt system in the 1996 Windstar;

"5. That Plaintiff and TCT are entitled to a jury instruction that Ford could have equipped the 1996 Windstar with a three-point belt system compatible with a booster seat;

"6. That Ford shall not be allowed to provide any evidence that Ford's management was not aware that a three-point belt system was technically feasible for the rear center seat in a 1996 Windstar;

"7. That Ford shall not be able to object to any documents, films, test reports, or any other evidence that was obtained by Plaintiffs or TCT from the Rear Belt Reading Room and the Passive Restraint Reading Room from being allowed into evidence at trial;

"8. That Ford shall not be allowed to provide any evidence that Ford's management was not aware of this documentation."

In April 2003, after considering Ford's written objections to these findings, the trial court adopted them and imposed the sanctions the referee had recommended. Ford then brought a petition for writ relief to this court, contending that the sanctions were not supported by the evidence, that Ford had violated no court orders, which it asserted was a prerequisite to imposing sanctions, and that even if sanctions were warranted, those imposed by the court were out of proportion to the discovery abuses.

***6** On July 31, 2003, we issued a *Palma* [FN4] notice, indicating that we believed sanctions 4 and 5 relating to evidence and instructions on the technical feasibility issue appeared to be excessive. We also stated that the other sanctions, while severe, appeared appropriate in terms of the findings on Ford's discovery misconduct. We said we intended to issue a peremptory writ in the first instance unless the trial court vacated sanctions 4 and 5, but indicated that the trial court was free to fashion lesser sanctions. On August 1, 2003, the trial court vacated sanctions 4 and 5 and set a hearing for August 15 to address the issue of lesser sanctions. We therefore deemed the matter moot and denied the petition. At the August 15 hearing, the court decided to replace sanctions 4 and 5 with Special Instruction No. 1, which told the jury: "The Court has found that Ford Motor Company attempted to conceal evidence in order to prevent its being used in this trial. You may consider that fact in determining what inferences to draw from the evidence in this case concerning the issue of the technical feasibility of Ford Motor Company in developing and equipping the 1996 Windstar with various three point belt systems."

3. *The Scope of the Discovery Sanctions*

When the discovery sanctions were first imposed in April 2003, the court appeared unsure about their effect on the issues to be tried. Asked by Ford's lawyer whether the sanctions precluded any possible defenses to the claims, the court replied that it expected to see a motion for a directed verdict, but was unsure how it would rule and agreed to resolve it sometime in August 2003 after the issue was briefed by the parties. At the August 15, 2003, hearing where the lesser sanction on technical feasibility was imposed, the court set a hearing for August 25 on various motions in limine, including one to determine what issues were left for the jury to decide in light of the discovery sanctions. On August 26, 2003, after a hearing on the issues, the court determined that its discovery sanctions left the following issues for the jury's consideration: (1) under the design defect theory, whether a three-point shoulder harness restraint was technically feasible; (2) under both the design defect and failure to warn theories, whether the lap belt caused or increased the extent of Johan's injuries; (3) the nature and extent of damages; (4) the negligence

of third parties and the apportionment of fault; (5) whether Ford's conduct merited an award of punitive damages; and (6) if so, the amount of punitive damages.

Pursuant to the revised, lesser sanction that the trial court substituted for original sanction numbers 4 and 5, the court gave Special Instruction No. 1, which told the jury that Ford had tried to conceal evidence and allowed the jury to consider that fact when drawing inferences from the evidence on the technical feasibility issue. Pursuant to discovery sanction number 2, the jury was given Special Instruction No. 4, which said: "It has been determined that the center rear two-point seatbelt as it existed in the 1996 Ford Windstar did not provide adequate protection to Plaintiff ... and [Ford] failed to warn Plaintiff of this dangerous condition."

DISCUSSION

1. *The Discovery Sanctions Were Properly Imposed Pre-Trial and Properly Applied at Trial*

A. *Violation of a Discovery Order Was Not a Prerequisite to the Impositions of Sanctions*

***7** Misuse of the discovery process may result in the imposition of a variety of sanctions. These include payment of costs, sanctions barring the introduction of certain evidence, sanctions deeming that certain issues are determined against the offending party, and sanctions terminating an action in favor of the aggrieved party. (Code Civ. Proc., § § 2023.020, 2023.030.) Misuse of the discovery process includes failing to respond or submit to authorized discovery, providing evasive discovery responses, disobeying a court order to provide discovery, unsuccessfully making or opposing discovery motions without substantial justification, and failing to meet and confer in good faith to resolve a discovery dispute when required by statute to do so. (Code Civ. Proc., § 2023.010, subds. (d)-(i).) The court may impose sanctions "[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title...." (Code Civ. Proc., § 2023.030.)

The discovery sanctions at issue here were imposed in connection with deposition notices and document production requests. Pursuant to the statutes governing both methods of discovery, evidence and issue preclusion sanctions may be imposed only after a motion to compel is made and granted, and the party to be sanctioned has failed to comply with that order. (Code Civ. Proc., § § 2025.480, subds. (f), (g); 2031.310, subds. (d), (e).) Ford contends that the first three sanctions were based on its failure to properly and timely designate for deposition a PMK on the warnings issue as it related to the need for and use of booster seats. Because Ford's agreement concerning the designation of a PMK on the booster seat issue arose from a court-ordered meet and confer session, but was not the result of an order following a motion to compel, Ford contends the first three sanctions should not have been imposed.

Ford is wrong for two reasons: First, by contending that sanctions 1, 2, and 3 were based solely on the warnings PMK; and second, by ignoring in its opening brief that the referee's report and the trial court's sanctions order were based on a pattern of discovery abuse that effectively led to the loss of various items of evidence. Decisions such as *Vallbona v. Springer* (1996) 43 Cal.App.4th 1525, 1544-1549, 51 Cal.Rptr.2d 311 (*Vallbona*), and *Do It* *Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35, 9 Cal.Rptr.2d 396 (*Do It Urself*) have held that violation of a discovery order is not a prerequisite to issue and evidentiary sanctions when the offending party has engaged in a pattern of willful discovery abuse that causes the unavailability of evidence. (See also *Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1399, 115 Cal.Rptr.2d 137.) [FN5]

TCT's discovery motion argued that the first three sanctions were warranted not just because of Ford's failure to designate a proper warnings PMK, but because of several other discovery abuses as well, including Ford's failure to produce drawings and prototypes of three-point belt systems, its concealment of relevant documents in

the passive restraint reading room, its concealment of an existing four-point belt system, and its failure to produce a Ford employee to conclude her deposition. The referee's fifth report noted and discussed those arguments in collective fashion. The referee found that Ford's conduct amounted to a "pattern of discovery abuse," and that Ford had both violated court orders and had misused the discovery process. Although factually dissimilar to *Vallbona* and *Do It Urself*, the result of Ford's conduct was the same. Because the discovery cut off had passed, and because trial was imminent, TCT and Johan lost the opportunity to explore fully any leads obtained from discovery that should have been produced. This included discovery that might have been prompted by the four documents in the passive restraint reading room. Evidence, thus, was not available to those parties. Lesser sanctions would have been futile because Ford no longer had the legal capability to correct its earlier abuses.

***8** Based on the entirety of his findings, the referee recommended the eight original sanctions. Nowhere did his fifth report differentiate between the several grounds raised by TCT or otherwise indicate that sanctions 1, 2, and 3 were based solely on the failure to designate a proper warnings PMK. At the hearing where the trial court considered Ford's objections to the referee's report and adopted the referee's findings, the court rejected Ford's contention that sanctions were improper because Ford had not violated a discovery order. Expressly citing to *Do It Urself, supra,* 7 Cal.App.4th 27, 9 Cal.Rptr.2d 396, the court found that the meet and confer violation over the warnings PMK was "part and parcel of a whole history of stonewalling, wild goose chases, too little, too late...." Noting that Ford had violated some discovery orders, the trial court found that the warnings PMK incident "was the last straw in a series of violations that kept on continuing and continuing and continuing...." It is apparent the trial court found that Ford's discovery violations went far beyond the PMK warnings.

Ford's opening brief does not address these matters. Instead, as noted above, Ford contends that sanctions 1, 2 and 3 were based solely on the warnings PMK issue and makes no mention of the trial court's reference to the *Do It Urself* case or its findings that sanctions were warranted based on a pattern of discovery abuse. Only after Johan pointed this out in his respondent's brief did Ford acknowledge the issue, contending in its reply that the pattern of discovery abuse issue was not raised in TCT's original moving papers and was therefore waived. We disagree. As discussed above, the issue was, at a minimum, implied in TCT's moving papers, which lumped together the warnings PMK issue with several other discovery abuses and violations of court orders by Ford. Ford's opposition memorandum raised the issue, arguing that it had violated no court orders. The referee's report considered together the collective discovery abuses and violations of court orders raised by TCT. Even though the referee believed Ford violated a court order on the warnings PMK issue because Ford's misconduct arose from a court-ordered meet and confer session, the referee's sanctions recommendations were based on findings that Ford both violated court orders and committed widespread, recurring discovery abuse. Finally, the trial court expressly based its findings and order on the pattern of abuse theory, citing the *Do It Urself* case as authority. At no time did Ford object that a new issue had been raised, and instead continued to defend itself on the merits at the hearing. On this record, we hold that the issue was properly raised below, and that the trial court reasonably exercised its discretion in imposing sanctions for an abusive discovery pattern that resulted in the loss of evidence.

Ford's opening brief raised the factual issue whether the sanctions were based only on the booster seat lap belt warnings PMK issue (as opposed to the issue of lap belt warnings generally). However, Ford did not raise as part of its argument any substantial evidence challenges to any of the referee's other findings concerning the historical facts, the effect of Ford's discovery conduct, or any of the other circumstances relied upon when recommending sanctions. For the first time in its reply brief, Ford tried to do so. Because it waited until then to raise those issues, we deem them waived. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453, 13 Cal.Rptr.2d 432.)

B. *The First Three Sanctions Were Not Excessive*

***9** Discovery sanctions must be tailored in order to remedy the offending party's discovery abuse, should not give the aggrieved party more than what it is entitled to, and should not be used to punish the offending party. We review the trial court's order under the deferential abuse of discretion standard. (*Do It Urself, supra,* 7 Cal.App.4th at p. 35, 9 Cal.Rptr.2d 396.) [FN6] Ford contends that sanctions 1, 2, and 3 were based solely on its failure to supply for deposition an appropriate PMK on the issue of warnings as to seat belt use for booster seats. Because the booster seat issue was eliminated before trial, and because it was undisputed that the Windstar owner's manual included some lap belt use warnings other than for booster seat use, Ford argues that sanctions 1, 2, and 3 were excessive and went beyond remedying its discovery abuse. [FN7]

The first three sanctions precluded Ford from introducing evidence that Ford warned Johan that the two-point lap belt was or was not a dangerous condition and that Ford was unaware of its failure to warn, and stated that Johan was entitled to an instruction that the lap belt did not provide adequate protection and Ford failed to warn of that dangerous condition. As discussed above, these sanctions were based not only on the PMK issue, but on a pattern of misconduct by Ford that led the referee and the court to find a persistent pattern of discovery abuse. Even if the record is not as clear on this point as we believe it to be, it is, at a minimum, silent on that point. Ford bears the burden of affirmatively demonstrating error. Under well established rules of appellate procedure, we presume the court's order is correct and indulge all presumptions and intendments in its favor on matters as to which the record is silent. (*Do It Urself, supra,* 7 Cal.App.4th at p. 35, 9 Cal.Rptr.2d 396.) Because Ford has not acknowledged or addressed that the sanctions were based on its history of misconduct, we deem it waived. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700, 46 Cal.Rptr.2d 119 (*Landry*).)

We alternatively affirm on the merits. Despite Ford's claim that its discovery violations concerned no more than the designation of a PMK for deposition on the booster seat warnings issue, the record contains evidence to the contrary. Although the referee's fifth report states that Ford had thwarted TCT's two-year effort to depose a PMK on the issue of booster seat warnings, nowhere else in the report does the referee limit his discussion to the booster seat issue. Instead, the report refers to Ford's failure to produce a PMK "on seatbelt restraint warnings; warnings contained in Windstar and similar vehicle User Guides," and to Ford's promise to produce witnesses " 'to talk about warnings.' " When discussing Ford's obligations to produce a PMK witness on warnings, the referee cited to three pages from the transcript of the court-ordered meet and confer session where the parties hammered out the scope of TCT's deposition notice on that issue. Those pages of the transcript show Ford's counsel agreeing to produce somebody to talk about "warnings on the Windstar, the warnings that are contained therein, the warnings that are ... in the owner's guide and would be generally familiar with warnings on the Aerostar, another vehicle that was mentioned in this discussion."

***10** After that meet and confer session ended, TCT sent out a notice for the deposition of Ford's PMK concerning records, reports, photos, and all other documents "related to Ford Windstar and similar vehicle belt restraints, child seat and seating, and similar device warnings, including but not limited to owner manuals, brochures, dealership materials, notices, vehicle placards," and other items. Ford objected to that notice, but only because the parties had not agreed to mutually convenient dates for the depositions. In a February 7, 2002, letter from Ford's lawyer to TCT's lawyer, the Ford lawyer confirmed that an agreement had been reached for the deposition date, at which time Ford "will produce someone on the topic of manuals." Finally, the record shows that the several warnings witnesses Ford did produce--who were later deemed to be insufficient--testified to matters such as the existence of alternative restraint systems. Taken as a whole, this evidence does not show that the warnings PMK issue was limited exclusively to the booster seat issue, and instead encompassed the issue of warnings in general. At a minimum, it raises a strong inference to that effect. The referee's report suggested that Ford's unexplained delay in identifying the true warnings PMK prevented TCT from utilizing the proper discovery methods to obtain that person's deposition

testimony.

As we have already observed, the argument portions of Ford's opening brief did not contest these findings or their factual underpinnings, meaning that their validity has been deemed conceded. [FN8] Given the referee's and trial court's findings, the court did not abuse its discretion in imposing the sanctions ordered. In essence, the referee and the trial court found, among other things, a failure by Ford to produce for deposition the person or persons best suited to testify about the issue of what seat belt warnings were given to Windstar buyers such as the Karlssons, including Ford's knowledge of the need for warnings, and why only certain warnings were given. The referee found that Ford's conduct in this regard was not in good faith. The referee also found that Ford did not act in good faith when it provided inadequate and incomplete information regarding the issue of three-point restraint system prototypes, and failed to disclose the existence of documents in its passive restraint reading room. Because the persistent refusal to comply with discovery requests is equated with an admission that the disobedient party has no meritorious claim in regard to that issue, the appropriate sanction for such conduct is preclusion of that evidence from trial, even if that proves determinative in terminating the offending party's case. (*Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 390, 97 Cal.Rptr.2d 12 [plaintiff in sex molestation civil action refused to answer discovery concerning facts, evidence, and witnesses to support his claim]; *Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 989, 10 Cal.Rptr.2d 773 (*Kuhns*) [state was sued for injuries caused by dangerous road condition; state's failure to produce information relevant to plaintiff's claim of the dangerous condition of the property, including state's notice of that fact, justified issue sanction deeming it admitted that the roadway was a dangerous condition of which the state had prior knowledge.)

***11** Finally, Ford contends that the first three sanctions were excessive because the Windstar's owner's manual did include warnings about seat belt use and the increased risks to children from improper adjustment of the lap belt. [FN9] According to Ford, the effect of the sanctions, particularly number 2, which told the jury that no warnings had been given, was to forbid the jury from considering the propriety of the warnings contained in the owner's manual. This argument has surface appeal. After all, if the owner's manual included some warnings about proper seat belt use and the risks involved from their improper use, it seems unfair to instruct the jury that, as a matter of law, no warnings were given. Given the nature of Ford's discovery violations, however, we believe the sanctions were still warranted despite the warnings in the owner's manual. In *Kuhns, supra,* 8 Cal.App.4th 982, 10 Cal.Rptr.2d 773, the plaintiff was injured when a truck tipped over on a curving highway transition road. The state's failure to produce evidence concerning its knowledge that a certain road condition was hazardous led to an issue preclusion sanction deeming it admitted that the roadway was dangerous and that the state knew about that fact. The state was also precluded from defending itself on the theory that it gave a reasonable warning of the hazard by its placement of a road sign with the number 30 on it, which also depicted a truck tipping over. On appeal, the court held that the defense was so interwoven with the discovery violations that it too was precluded: "As the trial court pointed out in denying [the state's] motion for new trial, [state's] failure to produce [certain] studies interfered with [plaintiff's] ability to prove what [state] knew, and for how long, about the comfortable safe speed." [FN10] (*Id.* at p. 991, 10 Cal.Rptr.2d 773.) Because Ford prevented TCT from conducting discovery about the warnings issue, no one will ever know what other documents or information Ford had in its possession concerning its knowledge that the lap belts were dangerous or that different warnings apart from those in the owner's manual were required. (See *Estate of Ivy* (1994) 22 Cal.App.4th 873, 878-879, 28 Cal.Rptr.2d 16 [beneficiary of testamentary trust filed objections to trustee's accounting and tried to justify late raising of claim on grounds of extrinsic fraud because she had no notice of the proceedings; failure to produce documents concerning beneficiary's dealings with the executor were relevant on that issue and the failure to do so meant the trustee would never know what documents in beneficiary's possession would show notice of the proceedings].) Accordingly, the first three sanctions were proper, even though there was evidence available that was factually inconsistent with the sanctions. [FN11]

C. *Sanction Number Two Was Properly Used at Trial*

Pursuant to sanction number 2, the court instructed the jury with Special Instruction No. 2 that the Windstar's lap belt "did not provide [Johan] adequate protection" and that Ford did not warn Johan "of this dangerous condition." On its face, this instruction does not implicate Johan's design defect cause of action and is limited only to Ford's alleged failure to warn. Ford contends, however, that the sanction was improperly expanded at trial into the equivalent of a directed verdict on the design defect theory. Through a combination of improper comments by the court and opposing counsel, limitations on the evidence Ford was permitted to introduce, and improper closing argument by Johan's lawyer, Ford contends the jury was told that the instruction amounted to a finding that the Windstar was defectively designed, thereby removing from the jury's consideration the technical feasibility component of a design defect claim.

***12** Ford complains about the following comments:

(1) During plaintiff's opening statement, in reference to whether or not the Windstar provided Johan with adequate crash protection, his lawyer read the instruction to the jury and said, "That's it. It's over with in terms of that issue. So I indicated before that the evidence in this case would show that under the law, we're entitled to ... win. We start with this and that's going to come from the court.";

(2) When Johan's counsel was cross-examining Ford's expert witness, counsel asked whether it was true that the lap belt had already been found to be defective, prompting an objection from Ford's lawyer. The trial court said, "Let's be more precise," then read for the jury the exact language of the instruction, which states only that the lap belt did not provide adequate protection and that Ford did not warn of that dangerous condition; and

(3) After denying Ford's mistrial motion, the court said--outside the jury's presence--that it saw little difference between a dangerous condition and a defect and would allow Johan to argue to the jury that the instruction was the equivalent of a finding that the lap belt was a defect. As a result, Johan's lawyer made that argument to the jury. [FN12]

If these comments misled the jury to believe that the technical feasibility defense to the design defect claim had been decided against Ford, then error occurred. As set forth below, however, we do not believe that is what happened. As to the remark by Johan's lawyer during his opening statement, he immediately moved into a discussion of other issues the jury had to decide, the first of which was technical feasibility. Therefore, we do not believe the jury would interpret the preceding remarks as an indication that the technical feasibility issue was somehow covered by the instruction or removed from the jury's consideration. As to the second comment, by telling the jury that the language from the instruction was more precise than stating that the lap belt had been found to be defective, the trial court impliedly rejected the contention that a dangerous condition was the same as a defect.

As to the court's statement that Johan's lawyer could argue that the lap belt had been found to be defective, those comments were made outside the jury's presence and, by themselves, had no effect on the outcome. Instead, because at the heart of Ford's contention is a claim that the court erred in its interpretation and application of a jury instruction, we look to the evidence, the other instructions, and the closing arguments in their entirety to determine whether prejudicial error occurred. (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 976, 105 Cal.Rptr.2d 88 [test for instructional error in civil cases depends heavily on the nature of the error, requiring us to examine the state of the evidence, the effect of other jury instructions, the effect of counsel's arguments, and any indications by the jury that it was misled; the error must have been prejudicial, and the prejudice must have been probable, not just possible].)

***13** Ford introduced extensive evidence on the technical feasibility issue, including expert testimony on the following points: Ford wanted to design a three-point restraint system for the rear bench center seat; a design requirement of a minivan includes having a rear bench that folds flat and can be removed; those design requirements made it difficult to attach a shoulder harness assembly to the van; because the seat must be removable, it must be lightweight; prototype seats were built from high-strength, low-weight metals, but the casting process used to construct the prototypes could not be repeated; the prototypes Ford built would not have passed then-existing federal safety standards; later prototypes built with more conventional materials in 1997 would not have passed federal safety standards; in 1996, there were no alternative three-point harness designs in the rear center seat of other vehicles sold in the United States that met federal safety standards; lap and shoulder harness designs on Ford minivans sold in the United Kingdom in 1996 were installed for seats that could be removed only by unbolting them from the floor; and three-point harness restraints can be very dangerous to small children because they can cause upper spine injuries. Johan's own expert witness admitted on cross-examination that federal safety studies from the mid to late 1980s showed that lap belts were very effective in preventing deaths and reducing injuries and that even as of the time of trial the federal government did not require three-point restraints in rear center seats. This evidence, and the issue of technical feasibility, were discussed at length by the parties during their arguments to the jury. [FN13] Also, the jury was instructed that it had to make findings on that issue, and we presume that the jury followed that instruction. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803, 16 Cal.Rptr.3d 374, 94 P.3d 513 (*Cassim*).) In short, given the abundant evidence and argument that the jury heard on the technical feasibility issue, along with the instructions which told the jury it had to make a finding on technical feasibility, we do not believe sanction number two was expanded so as to preclude the jury from reaching the issue.

Ford also contends that the trial court used sanction number 2 to exclude a variety of mostly historical evidence about federal automotive safety standards and how they affected Ford's decision to have a lap belt, not a three-point system, in the rear center seat. This included evidence that the federal government at one time required lap belts in order to secure child safety seats, and that no manufacturer in 1996 or earlier warned that a lap belt was a dangerous condition. It also included an attempt to have Ford's expert testify that lap belts were effective in reducing injuries, then allowing Johan's lawyer to cross-examine the expert on that topic.

Although these disputed rulings were issued in the context of interpreting a discovery sanction, they were still rulings to exclude evidence. In order to obtain a reversal based on the erroneous exclusion of evidence, Ford must show that a different result was probable if the evidence had been admitted. (Evid.Code, § 354; *People v. Earp* (1989) 20 Cal.4th 826, 880, 85 Cal.Rptr.2d 857, 978 P.2d 15.) Ford's appellate brief describes the excluded evidence only in general terms and refers us to specified pages in the reporter's transcript where it sought admission of the evidence, but does not set forth the evidence it claims was erroneously admitted, does not acknowledge all the other evidence that was admitted on the issue of technical feasibility, including evidence of federal studies showing that lap belts were effective and of how federal regulations still did not require three-point restraints in the rear center seat, and does not discuss or analyze how a different result would have been probable if the disputed evidence had been admitted. We therefore deem the issue waived. (*Id.* at p. 880, 85 Cal.Rptr.2d 857, 978 P.2d 15.)

***14** Finally, Ford contends the trial court erred by instructing the jury that certain testimony by its expert on the issue of lap belt effectiveness could be considered only for purposes of punitive damages, and could not be considered "for the proposition if the seat belt in this case did not provide adequate protection to plaintiff, and if Ford failed to warn plaintiff of this dangerous condition." We have already held that the instruction issued pursuant to sanction number 2 was appropriate and we see no error in telling the jury that it could not consider evidence for a proposition inconsistent with that instruction. However, to the extent evidence about the effectiveness of lap belts was relevant to the issue of technical feasibility, the instruction was wrong because it told the jury the

evidence was relevant to punitive damages only. Even so, we conclude that the error was harmless. As noted earlier, Ford introduced a great deal of evidence on the technical feasibility issue, including an admission from Johan's expert witness that lap belts were effective. Ford does not explain how precluding the jury from considering that one piece of evidence was enough to tip the scales and lead the jury to find differently on the technical feasibility issue. We do not believe it was. Combined with the fact that the jury found for Johan on the alternative failure to warn theory, any error was harmless. [FN14]

D. *The Special Instruction on Concealing Evidence Was Proper*

Special Instruction No. 1 told the jury that Ford had attempted to conceal evidence from being used at trial, and that the jury could consider that fact in determining what inferences to draw from the evidence as it related to the technical feasibility issue. The instruction, which is based on Evidence Code section 413, was ordered as a lesser sanction to original sanctions 4 and 5 which was suggested by our *Palma* notice and then adopted by the trial court at the August 15, 2003, hearing. [FN15] Ford contends the revised sanction was imposed without notice and an opportunity to be heard and must be reversed. Although it does not appear that Ford had a chance to consider the sanction beforehand, the August 15 hearing was set with two weeks notice to give the parties the opportunity to address the issue of what lesser sanctions might be appropriate after we had issued our *Palma* notice. Ford did not object that it had not been given proper notice and did not ask for a continuance of the hearing. Instead, it argued the matter on the merits. We therefore hold that the notice issue has not been preserved for appeal. (*Anderson v. Metalclad Insulation Corp.* (1999) 72 Cal.App.4th 284, 291, 85 Cal.Rptr.2d 331.) [FN16]

Ford also contends that Special Instruction No. 1 was improper because: (1) there was no evidence of willful suppression; (2) despite its lawyer's requests, the court refused to specify the precise evidence Ford tried to conceal, meaning Ford did not know why that sanction was being imposed; (3) the sanction was not designed to remedy any discovery prejudice because Ford's witnesses had already been deposed about the documents and because sanctions 6, 7, and 8 provided adequate relief; and (4) under *People v. Bell* (2004) 118 Cal.App.4th 249, 12 Cal.Rptr.3d 808 (*Bell*), Special Instruction No. 1 allowed the jury to speculate improperly, without appropriate guidance, as to what it should do about Ford's misconduct. According to Ford, this error was exacerbated by Johan's closing argument, which repeatedly brought up the instruction in order to smear Ford and inflame the jury.

***15** Ford's first three arguments ignore the referee's findings in his fifth report. The referee found that Ford never disclosed that documents responsive to TCT's discovery requests could be found in the passive restraint reading room, directing it instead to the rear belt reading room. Those documents were fortuitously discovered by a TCT **paralegal** working on another case. The referee then found that Ford never prepared a declaration identifying the documents in either of the two reading rooms, and that Ford's failure was intentional. As a result, TCT was forced to depose numerous witnesses and created such delays that the discovery cut-off had passed, at which point Ford declared it would produce no more witnesses or documents. The referee also found that instead of telling TCT and Johan early on that evidence concerning Ford's three-point restraint prototypes was in the possession of Ford's outside contractors, Ford said it would produce the information. By the time Ford told the truth, TCT was unable to obtain the information. Ford's conduct was not in good faith, the referee found.

The findings that Ford acted intentionally and in bad faith are the functional equivalent of a finding that it acted willfully. As for the court's refusal to specify what documents or evidence Ford tried to conceal, the trial court said that because Ford had "decided to play hide-the-ball," it would "have to pay the price." We agree. As TCT's motion and the referee's findings made clear, Ford was being sanctioned for precisely that misconduct. Ford's discovery violations essentially prevented Johan from obtaining complete discovery. As a result, it is impossible to specify precisely what Ford tried to conceal. Under these circumstances, Ford's claim that it did not know why it was being sanctioned rings hollow. We also reject

Ford's contention that Special Instruction No. 1 was not warranted because its witnesses were deposed and because sanctions 6, 7, and 8 meant Ford could not introduce evidence that it was unaware of the technical feasibility of a three-point restraint and could not object to any evidence obtained from the two reading rooms. Ford's inability to introduce evidence that it was unaware of the technical feasibility of a three-point system only came into play if it were shown that such a system was feasible, and Ford was allowed to introduce evidence on that issue. Ford's impedance of Johan's discovery on technical feasibility was the point of the referee's findings and supported the lesser sanction of Special Instruction No. 1 instead of original sanctions 4 and 5, which were more severe. The jury was correctly told that in determining whether a three-point restraint was technically feasible, it could take into account the fact that Ford had tried to suppress evidence on the subject. The instruction did not tell the jury that a three-point restraint system was technically feasible.

As for *Bell, supra,* 118 Cal.App.4th 249, 12 Cal.Rptr.3d 808, we believe it is inapposite. The defendant in *Bell* was convicted of murder. At trial, he called three alibi witnesses. Due to delays caused by defense counsel and his investigator, the prosecutor got the statements of those witnesses just 10 days before trial, not the 30 days required by the criminal discovery statutes. The court allowed the alibi witnesses to testify, but instructed the jury pursuant to CALJIC No. 2.28 that the defendant failed to timely disclose the witness statements without lawful justification and that the "weight and significance of any delayed disclosure are matters for your consideration. However, you should consider whether the untimely disclosed evidence pertains to a fact of importance, something trivial or subject matters already established by other credible evidence." The court of appeal reversed the judgment for two reasons: First, the instruction blamed defendant personally for the untimely disclosure, when the evidence showed that the fault lay solely with defense counsel and his investigator; second, there was no evidence that the prosecution was actually disadvantaged by the delay; and third, because the instruction did not tell the jury what, if anything, it should do, the jury was left to speculate about what to do and might have led it to conclude it could find the defendant guilty simply because he failed to comply with the discovery statute. (*Bell, supra,* 118 Cal.App.4th at pp. 254-256, 12 Cal.Rptr.3d 808; see also *People v. Lawson* (2005) 131 Cal.App.4th 1242, 1247-1249, 32 Cal.Rptr.3d 634.) Unlike *Bell,* the referee here found prejudice from Ford's discovery conduct and the jury in this case was told precisely what it could do with a finding that Ford tried to conceal evidence--determine what inferences to draw about the technical feasibility of a three-point restraint system. Therefore, *Bell* and its rationale do not apply here.

2. *Ford Waived its Objections to Plaintiff's Arguments About Concealing Evidence*

***16** During closing argument, Johan's lawyer made several references to Special Instruction No. 1 and Ford's attempted concealment of evidence, stating this is what they did (conceal documents) to a "little boy [that was] five years old," that the jury could either "vote for Johan or ... vote for the people that destroyed the records," and that Ford had hidden and torn up documents. Ford contends that these comments misused Special Instruction No. 1 as an argument in favor of punitive damages, thereby improperly expanding its reach. (See *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 918, 114 Cal.Rptr.2d 708 (*De Anza*) [litigation conduct and trial tactics may not serve as a basis for punitive damages].) [FN17] Ford also contends that this argument mischaracterized the evidence because there was no proof that Ford had ever destroyed or torn up any documents.

We agree that any references to Ford having destroyed or torn up documents was not supported by the evidence and constituted improper argument. We reject Ford's legal contentions, however, for two reasons: First, because Ford did not object until the last comment was made, and second, because the last comment was harmless.

Of the passages Ford cites as improper argument, Ford objected to only one of them. Ordinarily, failure to object waives any error. (*Cassim, supra,* 33 Cal.4th 780, 16 Cal.Rptr.3d 374, 94 P.3d 513.) Ford contends that because it filed an unsuccessful

motion in limine to prevent Johan from making the same objectionable arguments, it preserved the issue. (*People v. Wharton* (1991) 53 Cal.3d 522, 549, 280 Cal.Rptr. 631, 809 P.2d 290, fn. 3 (*Wharton*).) An examination of *Wharton* makes clear why that decision is inapplicable. The defendant in *Wharton* unsuccessfully raised the psychotherapist-patient privilege before trial to exclude the testimony of two therapists, but did not raise the claim again during trial. On appeal, the court held that the issue had not been waived because the defendant's pretrial motion was "advanced on a specific legal theory, was directed to a 'particular, identifiable body of evidence,' and the motion was made 'at a time ... when the trial judge [could] determine the evidentiary question in its appropriate context.' " (*Ibid.*) In contrast, Ford's motion in limine was filed in June 2002, two weeks before TCT brought the discovery motion that led to the referee's fifth report and the discovery sanctions, and more than eight months before those sanctions were recommended by the referee. The motion was aimed at precluding evidence of Ford's "alleged" discovery abuses and, for obvious reasons, made no mention of comments during a closing argument that would not occur for another 15 months. Unlike *Wharton,* therefore, Ford's motion was not directed to any particular, identifiable comments and was not made at a time when the trial court could determine the question in its appropriate context.

Ford also contends that it was excused from making any objections because they would have been futile, pointing to the following: (1) the trial court made it clear early on that Johan would be allowed to argue Ford's concealment of evidence; and (2) the court's comments in denying Ford's post-trial motions for a new trial and a judgment notwithstanding the verdict showed that it would have overruled any objections. Neither contention is well taken.

***17** The first is based on the court's statement right before trial started that Johan would not be allowed to mention the evidence concealment instruction during his opening statement, but would be allowed to raise the issue when arguing the case to the jury. Stating that Johan would be allowed to argue a proper jury instruction is hardly an anticipatory endorsement of any later improper arguments based on that instruction, and we therefore reject Ford's contention.

The second is based on comments by the trial court during Ford's post-trial motions for a new trial and a judgment notwithstanding the verdict. Ford's complaints about the closing argument comments of Johan's lawyer formed a small part of those motions. The hearing on those motions focused on one of Ford's contentions--that jury misconduct called for reversal. [FN18] As part of Ford's argument on the jury misconduct issue, it pointed out how Johan's arguments concerning the evidence concealment instruction connected with that alleged misconduct. That led to a brief discussion about how the concealment instruction was argued, with the court stating it was not sure if any of the disputed comments were improper. At one point, the court said that Johan's lawyer "took my instruction and ran with it, like a good lawyer would. You would have done the same thing had the sanctions been in your favor. You know it as well as I do. He did what he did as a competent attorney." We acknowledge this casts some doubt as to how the court might have ruled had Ford timely objected to the disputed remarks by Johan's lawyer. However, given the context in which the court's statements were made, we cannot say as a matter of law that proper and timely objections by Ford at the first instance of alleged misconduct would have been overruled.

The one comment to which Ford raised an objection came at the very end of Johan's rebuttal argument. After Johan's lawyer said, "This is your chance that maybe companies won't try to destroy ...," Ford's counsel cut him off with an objection. That objection was overruled, and Johan's lawyer then said, "This is a chance for you to say, 'Hey Ford, if you know about a problem that is taking place, then do something about it.' " Johan's lawyer concluded his argument soon after, with no mention of Special Instruction No. 1 or Ford's attempt to conceal evidence. It is not entirely clear that Johan's lawyer was even going to say anything about concealment before the objection was made. Even if he were, however, and the court erred by overruling the objection, because Johan's lawyer did not complete the thought or mention concealment of documents again, and because other comments about

Ford having destroyed documents came in without objection, there was no prejudice from that one comment.

As for Ford's complaint that Johan's lawyer used Special Instruction No. 1 during closing argument as a basis for awarding punitive damages, we first reject that contention because the jury was instructed to use the attempted concealment evidence only as to technical feasibility, and we presume the jury followed that instruction. (*Cassim, supra,* 33 Cal.4th at p. 803, 16 Cal.Rptr.3d 374, 94 P.3d 513.) And, as above, the issue was waived for failure to object except as to the last comment, which was harmless. [FN19]

3. *The Trial Court Did Not Err by Reinstating Johan's Punitive Damage Claim*

***18** Shortly before the referee issued his fifth report and recommendation for sanctions, a different judge than the trial judge granted Ford summary adjudication on Johan's punitive damage claim because there was no evidence that high level corporate officers or employees acted in a despicable manner with a willful and conscious disregard of consumer safety. (Civ.Code, § 3294, subd. (b); *Ehrhardt v. Brunswick, Inc.* (1986) 186 Cal.App.3d 734, 741, 231 Cal.Rptr. 60.) The court also found that the warnings contained in the Windstar owner's manual refuted any inference of conscious disregard of child safety. After the referee's fifth report and sanctions recommendations were issued, Johan sought reconsideration of the summary adjudication ruling, contending that the discovery sanctions filled in the evidentiary gaps as to the knowledge of senior management that led to the original ruling. The issue was presented to the judge who heard the original motion. That judge granted the motion for reconsideration and reinstated Johan's punitive damages claim. Ford contends this was error because the sanctions did not remedy the evidentiary defects that led the court to grant the summary adjudication in the first instance.

Marketing a product that is known to be defective and dangerous to consumers supports an inference of malice for purposes of punitive damages. (*Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757, 814, 174 Cal.Rptr. 348.) At the time the court granted reconsideration and reinstated the punitive damages claims, the original sanctions recommendations had not yet been modified to substitute the concealment instruction for sanctions 4 and 5. The original sanctions established that the lap belt was a dangerous condition about which Ford gave no warnings, and that Ford could have installed a three-point restraint. The sanctions also prevented Ford from introducing any evidence that it warned Johan of the dangerous condition, that its management was not aware of the failure to warn, that it was not technically feasible to develop a three-point restraint system, and that Ford was unaware that a three-point system was technically feasible. The combined effect of these original sanctions could lead a jury to conclude that Ford, including senior management, knew it was marketing a defective and dangerous product and failed to warn about those dangers.

Ford also complains that reconsideration was improperly based in part on sanctions 4 and 5, which were later removed and replaced with Special Instruction No. 1 as a lesser sanction, but cites no authority for the proposition that we should review the trial court's reconsideration order based on subsequent facts or changed circumstances. If Ford believed that replacing sanctions 4 and 5 with the lesser sanction was that significant on the punitive damages claim, it could have sought reconsideration of the order reinstating punitive damages or asked the court to look at the issue again in light of the modified sanction. (See *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108, 29 Cal.Rptr.3d 249, 112 P.3d 636.) It did not.

4. *Sanctions Against Johan for Loss of the Rear Bench Seat*

***19** More than a year before trial, Ford brought a motion in limine to preclude Johan from presenting evidence that his lap belt had been properly tightened and adjusted. That motion was based upon the disappearance of the rear bench from the Karlssons' Windstar at some point after TCT's experts had been able to examine it. According to Ford's motion, a physical examination of Johan's lap belt was necessary

in order to look for signs of wear and stress, including occupant "loading" of the latch plate which would show whether the belt had been worn properly. All that remained after TCT's examination were photographs that TCT took of the rear bench and the lap belt. Johan did not file written opposition to the motion, but TCT did, arguing that Ford had other evidence from which it could argue that Johan had not been properly belted. TCT also argued that the proposed sanction went too far, because Ford would still be allowed to offer expert testimony about the lap belt based on the photographs, meaning Johan should be allowed to present contrary opinion testimony based on that evidence. No supporting declaration or evidence of any kind was offered by the parties in support of or opposition to the motion. At an August 25, 2003, hearing concerning numerous pre-trial motions, the court denied the motion, but said Ford could introduce evidence that the seat was missing. The court also indicated that it might give an instruction on that point as well. At trial, the court instructed the jury pursuant to Evidence Code section 413 that if it found a party had willfully suppressed or destroyed evidence that the jury could consider that fact in determining what inferences to draw from the evidence. The jury received evidence that Johan's lawyer took possession of the Windstar in July 1997, and Ford argued the disappearance of the rear seat to the jury.

Ford contends that the court erred by denying its motion in limine. Rather than acknowledging that a lesser sanction was imposed by allowing Ford to argue that Johan had concealed the evidence, Ford's opening brief states simply that the trial court "denied this motion" and refused "to take any corrective action." Ford glosses over the lesser sanction by an oblique, footnoted reference to the court having allowed it to "argue the spoliation inference." Even though Johan's brief does mention the lesser sanction, Ford's reply brief does not address it. As properly framed, the issue before us should be whether the trial court abused its discretion by imposing a lesser sanction than Ford requested. Ford did not address that issue at all until filing an unrequested supplemental brief shortly before oral argument, and we therefore deem it waived. (*Landry, supra,* 39 Cal.App.4th at pp. 699-700, 46 Cal.Rptr.2d 119.) [FN20]

5. *Although Juror Misconduct Occurred, It Was Not Prejudicial*

Ford contends that juror Bowman committed prejudicial misconduct in three instances: (1) mid-trial, when he saw a television news report about the trial; (2) during jury deliberations when he examined a 2003 Windstar, saw that the center rear seat still had only a lap belt, which he took to mean Ford had done nothing to correct its misconduct; and (3) when he examined a Ford Mercury minivan and saw that it had a three-point restraint, which he took to mean that Ford could have installed a three-point restraint in the Windstar if it wanted to. Based on this, Ford sought both a mistrial and a new trial, but its motions were denied.

***20** Jury misconduct is a ground for a new trial. (Code Civ. Proc., § 657, subd. (2).) Receiving evidence from sources outside of trial, or reading news reports about the trial, is generally considered to be misconduct. (*People v. Nesler* (1997) 16 Cal.4th 561, 578, 66 Cal.Rptr.2d 454, 941 P.2d 87 (*Nesler*); *People v. Cummings* (1993) 4 Cal.4th 1233, 1331, 18 Cal.Rptr.2d 796, 850 P.2d 1.) Once misconduct occurs, it raises a presumption of prejudice that can be rebutted by an affirmative evidentiary showing that prejudice does not exist, or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417, 185 Cal.Rptr. 654, 650 P.2d 1171.) In reviewing the trial court's ruling on a new trial motion, we accept the trial court's credibility determinations if they are supported by substantial evidence, including all favorable inferences that may be drawn from the evidence. Whether prejudice arose is a mixed question of law and fact subject to our independent review. (*Enyart v. City of Los Angeles* (1999) 76 Cal.App.4th 499, 508, & fn. 3, 90 Cal.Rptr.2d 502.)

The television news story incident occurred during the trial. Bowman saw a news report on KNBC that aired on Thursday, September 17, 2003, and the court attendant overheard Bowman tell some other jurors that "it must be a famous case if it was on

the news." The court reviewed a transcript of the story, which included a statement by the reporter that Ford would not "be able to challenge in front of the jury [that the lap belt was defective]. That's Ford Motor Company's punishment according to a judge, for [allegedly] not turning over important documents." The reporter also attributed to a Ford spokesperson that Ford "has a solid history of ethical behavior during litigation [and] to suggest otherwise is ridiculous. What's more, this accident is in the top 10% for severity and the vehicle did an outstanding job protecting the occupants. [¶] This accident is a tragic reminder that seatbelts can protect passengers only when they are used properly. Ford says that little Johan did not have a seatbelt on properly." Ford asked to have Bowman removed from the jury. The court attendant questioned the jurors and concluded Bowman was the only juror who saw the news report. The court questioned Bowman, who said the story was "very innocuous," had no bearing on the case, and that he could easily disregard it. Ford declined the chance to question Bowman. The court did not remove Bowman but said it would admonish the jury to disregard any news coverage. Ford's lawyer said that was agreeable. On the following Monday, September 22, Ford moved for a mistrial based on Bowman's actions. The court reviewed the videotape and denied the motion because the news report included Ford's point of view and was "innocuous," and because Bowman said he could disregard it and would consider only the evidence at trial. Ford raised the issue again as part of its new trial motion, and the trial court denied it again on the same basis.

***21** We believe the trial court did not err. [FN21] Ford's biggest complaint is that the story incorrectly informed Bowman that Ford could not contest whether the lap belt was defective. First, as we have already observed technical feasibility was irrelevant on the failure to warn theory, one of the two bases for the jury verdict (see fn. 13, *ante*). As to the design defect, we discussed at length in discussion section 1. C., *ante,* that it was made very clear to the jury that the evidence concealment instruction did not affect Ford's ability to show that a three-point restraint was technically infeasible. The transcript of the news story also included several comments favorable to Ford, especially the reporter's conclusion that Ford claimed Johan had not worn his seat belt properly and that what happened to Johan was a reminder of the need to do so. On balance, we believe the innocuous nature of this story rebutted any presumption of prejudice. (*People v. Marshall* (1996) 13 Cal.4th 799, 864, 55 Cal.Rptr.2d 347, 919 P.2d 1280.)

The two other asserted instances of misconduct by Bowman were supported by the affidavits of two jurors, who stated that on October 14, 2003, while the jury was deliberating on punitive damages, Bowman said he had visited a Ford dealership over the weekend in order to inspect current Ford models. Bowman supposedly said he examined a current model Windstar and found that a lap belt was still used in the rear bench center seat. Bowman said he had also examined a Mercury vehicle that had a three-point system in the center rear position. According to the jurors, Bowman said this showed that Ford could install such a system if it wanted to, and that it had done nothing to correct the situation in the Windstar.

In opposition, Bowman said he inadvertently parked next to a Mercury Mountaineer in a shopping mall's parking lot. He peeked into the vehicle and saw the second row bench seating. He also admitted seeing a 2003 Windstar at a Ford dealership. Bowman denied saying that what he saw demonstrated that Ford could install a three-point system if it wanted to. According to Bowman, the jury had already decided to award punitive damages by that time, and was deliberating about the size of the award. Juror Houchin submitted a declaration stating that Bowman might have mentioned seeing a current model Windstar. Jury foreperson Yoshizuka said that while Bowman might have mentioned something about seeing a 2003 Windstar, it was a passing comment. [FN22]

The trial court found that the factual statements in the declarations of Bowman, Houchin, and Yoshizuka were true. Specifically, the court found that Bowman went to a Ford dealer intending to examine current Ford models; Bowman did not contradict that assertion in his declaration. Because the jury heard evidence from Ford's design engineer that the 2003 model Windstar still had just a lap belt in the rear bench center seat, the court concluded that Bowman's observations and statements

about that were simply cumulative of the evidence and therefore not prejudicial. The court was troubled by Bowman's view of the Mercury Mountaineer, because the undisputed evidence showed that he must have said something to the other jurors about having noticed that it had a three-point restraint in the second row bench seats. However, because the jury heard evidence that Ford was capable of installing three-point restraints in the center bench seats of other Ford vehicles, the court believed Bowman's observations and comments were also merely cumulative, thereby rebutting the presumption of prejudice.

***22** In reviewing this issue, we must first determine what the evidence shows took place, keeping in mind that the court accepted as true the assertions in the declarations of Bowman and his supporting jurors. Based on the evidence, it appears that Bowman went to a Ford dealer for the purpose of examining the then-current model Windstar, and saw that the rear bench center seat still had a lap belt. Bowman also took a peek inside a Mercury Mountaineer he had parked next to and noticed that its second row bench center seat had a three-point restraint. Bowman did not say that his view of the Mountaineer showed that Ford could install a three-point restraint if it wanted to. He did not deny saying that 2003 model Windstar still had a lap belt in the rear bench center seat. Juror Houchin declared that Bowman might have mentioned seeing a 2003 Windstar. Juror Yoshizuka said that Bowman made a passing comment about having done so.

We believe the presumption of prejudice from these incidents was rebutted because the jury already heard from Ford's own witness that the 2003 Windstar still had a lap belt in the rear bench center seat, and the jury also heard that Ford had installed three-point restraints in other vehicles, making Bowman's comments and personal observations cumulative of the evidence (*People v. Sutter* (1982) 134 Cal.App.3d 806, 820-821, 184 Cal.Rptr. 829.) [FN23] Furthermore, Bowman looked at the Mountaineer's middle-row seat when he saw the three-point restraint, and the jury already knew that the 1996 Windstar had such a restraint in the middle seat of its middle-row bench.

We also believe the presumption of prejudice was rebutted based on the evidence before the trial court and its findings when ruling on the new trial motion: (1) Bowman said nothing about the Mercury other than having seen a three-point restraint; (2) he said nothing about the 2003 Windstar other than noting that it still had a lap belt in the rear bench center seat; (3) his comments were described as having been made in passing and there is no indication that he ever brought the matter up again, or urged the jury to consider those matters in its deliberations; and (4) the disputed observations and comments related to only technical feasibility design defect, while the jury found liability under both that theory and the separate failure to warn theory.

Ford contends that even if the other jurors were unaffected by Bowman's misconduct, the fact that Bowman took the trouble to mention what he saw establishes that he was actually biased, compelling a finding of prejudice. (*Nesler, supra,* 16 Cal.4th at pp. 578, 586-587, 66 Cal.Rptr.2d 454, 941 P.2d 87.) Bias in this context is the same type of bias that would permit a challenge for cause to a prospective juror and requires a showing of a state of mind on the part of the juror which will prevent him from acting with entire impartiality and without prejudice to the rights of any party. (*Id.* at p. 581, 66 Cal.Rptr.2d 454, 941 P.2d 87.) Actual bias existed in *Nesler* when a juror, during deliberations on the sanity phase of a murder trial, met someone in a bar who claimed to have worked for the defendant as a babysitter and discussed the defendant's drug use and acts of child neglect. When those issues arose during the jury's deliberations, the juror repeatedly interjected what she had learned and used that information in order to persuade the other jurors. Based on that conduct, the Supreme Court concluded that the offending juror had been actually biased against the defendant. (*Id.* at pp. 583-587, 66 Cal.Rptr.2d 454, 941 P.2d 87.)

***23** As discussed above, however, the evidence accepted by the trial court shows that Bowman made only a passing reference to having seen a lap belt in the 2003 Windstar, and, although he said something about seeing a three-point restraint in the Mercury, did not say that it showed Ford could have installed one had it wanted

to. There is no suggestion that he said anything more than that, repeated what he had seen, or used that information to persuade the other jurors. Accordingly, we hold that there was an insufficient showing that Bowman was actually biased against Ford. [FN24]

6. *Ford Waived its Federal Preemption Claim*

Citing *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 120 S.Ct. 1913, 146 L.Ed.2d 914 (*Geier*), and *Griffith v. General Motors Corp.* (11th Cir.2002) 303 F.3d 1276 (*Griffith*), Ford contends that Johan's entire action is preempted by federal automotive safety standards concerning passenger restraint systems. We need not resolve this issue, however. Because Ford did not raise preemption below, but has instead raised it on appeal for the first time, the issue is waived. (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 849, 263 Cal.Rptr. 850 (*Hughes*).) Ford contends that its federal preemption claim is one of subject matter jurisdiction, which cannot be waived, rather than choice of law, which is waivable. We disagree. *Geier* and *Griffith* were decided under the National Traffic and Motor Vehicle Safety Act, which includes a provision preempting state regulations and lawsuits that actually conflict with that act (49 U.S.C. § 30103(b)(1)) and a provision permitting state law tort claims for product liability that do not conflict with it. (49 U.S.C. § 30103(e); *Geier,* at pp. 868-869.) Subject matter jurisdiction concerns the authority of the court to try a certain type of action, and involves areas of exclusive federal jurisdiction, such as bankruptcy, admiralty, and patent law. Where jurisdiction resides in both the federal and state courts, whether federal law applies is a choice of law question. Choice of law preemption issues may be waived. (*Hughes,* at pp. 849-851, 263 Cal.Rptr. 850.) Because common law product liability claims are allowed under the NTMSA unless they conflict with its provisions, choice of law preemption was involved. Both *Geier* and *Griffith* were decided well before this case went to trial, and Ford should have raised the preemption issue in the trial court.

DISPOSITION

For the reasons set forth above, the judgment is affirmed. Respondent to recover his costs on appeal.

We concur: COOPER, P.J., and BOLAND, J.

FN1. With limited exceptions that we discuss, *post,* Ford's opening brief does not argue that the referee's findings adopted by the trial court were not supported by the facts, and does not argue that we should reject those factual findings. In its reply brief, however, Ford does claim that some of the sanctions were not supported by the evidence. Because Ford did not raise the issue until its reply, the argument is waived. (*Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1372, fn. 11, 131 Cal.Rptr.2d 524.) Accordingly, we accept as true the version of events recounted in the referee's fifth report.

FN2. During the discovery phase of litigation, lap belt warnings were in issue both generally and in regard to their use with booster seats. As discussed in more detail in footnote 7, *post,* the booster seat issue was later dropped.

FN3. Ford contended during oral argument that Johan gained access to the documents in the passive restraint reading room early on in the course of the litigation, suggesting that Johan had ample time to review those documents and cure any resulting prejudice. The record shows that the documents were discovered on March 20, 2002, just two months before TCT brought the discovery motion that led to the referee's fifth report and the sanctions in question. If Ford means to challenge the referee's finding that the result of Ford's conduct was to delay matters until no more discovery motions could be brought, as noted in footnote 1, *ante,* Ford has failed to meet its burden of articulating the point through discussion, analysis, citation to authority, and citation to the record. If Ford means to suggest that Johan was not prejudiced by the delay in turning over the documents, it failed to meet its

burden by pointing us to any of the documents found in the passive restraint room and showing that Johan either had access to the same evidence from other sources, or that the evidence was of little or no relevance to his case. We, therefore, deem the argument waived.

FN4. *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180, 203 Cal.Rptr. 626, 681 P.2d 893.

FN5. The plaintiffs in *Vallbona* sued a physician for fraud after undergoing laser treatment to remove cellulite. The defendant claimed his machine had been approved by the Food and Drug Administration. In January 1992, plaintiffs sought discovery on that issue and others. In April 1992, defense counsel responded informally, providing copies of some responsive documents, while stating that defendant did not have the other requested material. No documents on FDA approval were provided. The defendant was deposed in September 2002, one year before trial. He said he once had FDA-related documents, had declined to produce them earlier for no particular reason, and said they had been stolen in May 1992. When the trial began, the defendant brought to trial documents on the FDA approval, and plaintiffs were awarded evidence and issue sanctions establishing that the defendant never sought FDA approval for his laser removal device. Even though the defendant had violated no court order compelling him to produce the documents, the appellate court affirmed, because obtaining a motion to compel at an earlier time would have been futile, based on the defendant's claim that the documents had been stolen. (*Vallbona, supra,* 43 Cal.App.4th at pp. 1544-1549, 51 Cal.Rptr.2d 311.) Evidence sanctions were approved in *Do It Urself,* in the absence of a previous order compelling discovery, where the defendant delayed trial promising to supply an audit, then admitted that it could not perform the audit. (*Do It Urself, supra,* 7 Cal.App.4th at p. 35, 9 Cal.Rptr.2d 396.)

FN6. That we previously denied writ relief on this subject does not preclude us from revisiting it on appeal. (*Gammoh v. City of Anaheim* (1999) 73 Cal.App.4th 186, 195-196, 86 Cal.Rptr.2d 194.)

FN7. Part of Johan's failure to warn theory claim was based on the contention that Ford did not include booster seat warnings in the Windstar owner's manual. Johan's mother came from Sweden, which apparently has different laws concerning booster seat requirements and warnings, and Johan moved in limine to exclude any references to his mother's knowledge about the Swedish requirements. The court granted that motion. Although the parties do not explain it well and the record is less than clear, it appears that because a booster seat could not have been used in Johan's seat that the issue of booster seat warnings was deemed irrelevant and was removed from the case.

FN8. See fn. 1, *ante.*

FN9. The owner's manual, which was in evidence, warned that lap belts had to be worn snugly and as low around the hips as possible to avoid increasing the risk of personal injury. The manual also warned that if seat belts were not properly worn and adjusted, the risk of serious injury to a child would be much greater.

FN10. The court also noted that the plaintiff relied on the sanction when deciding to forgo certain deposition questions. (*Kuhns, supra,* 8 Cal.App.4th at p. 991, 10 Cal.Rptr.2d 773.)

FN11. It is often the case that evidentiary and issue sanctions leave the jury with a misimpression as to some actual facts by effectively removing from the jury's consideration evidence favorable to the offending party's position, or by deeming issues in favor of the aggrieved party even though the offending party has strong evidence to the contrary. Such is the natural consequence of serious discovery violations. Here, Ford benefited from the fact that despite the sanctions, the trial court did not excise the warnings contained in the

Windstar owner's manual.

FN12. The portion of the transcript cited by Ford involves Johan's response to Ford's argument's concerning the technical feasibility of a three-point restraint in the rear center seat. Johan's lawyer pointed out that "[t]hat has already been ruled against. They are already toast on the two-point belt. They are wrong. It is defective. It doesn't give adequate protection. They didn't warn about it."

FN13. Although technical feasibility can be viewed as just one part of the overall risk-benefit analysis conducted in design defect claims, our Supreme Court has declared that the entire analysis involves "technical issues of feasibility, cost, practicality, risk, and benefit [citation] which are 'impossible' to avoid [citation]." (*Soule, supra,* 8 Cal.4th at p. 567, 34 Cal.Rptr.2d 607, 882 P.2d 298.) Given the evidence that the jury received on this issue, and the arguments that were made, we believe the jury was allowed to consider technical feasibility in the latter, all-encompassing manner described by *Soule.*

FN14. In connection with this, we believe telling the jury the lap belt was defective was not necessarily incorrect as to the failure to warn theory. Some courts have concluded that a flawless product that is dangerous is rendered "*defective* " by a failure to warn of the product's dangerous propensities (*Finn v. G.D. Searle & Co., supra,* 35 Cal.3d at pp. 699-700, 200 Cal.Rptr. 870, 677 P.2d 1147), and the jury was properly instructed that the lap belt was a dangerous condition about which Ford failed to warn. On the design defect claim, however, a product is not defective if an alternative design was not technically feasible. Because technical feasibility was at issue, it would have been better to restrict Johan's argument to statements that the product had been found to be "*dangerous* " rather than "*defective* " in order to avoid confusing the two concepts. We observe that the new form jury instructions have deleted previous references to the terms "defect" or "defective" when referring to the failure to warn theory. (Compare CACI No. 1205 with BAJI No. 9.00.7.) Regardless, for the reasons set forth above, we believe that any error was harmless.

FN15. Evidence Code section 413 provides: "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case."

FN16. Ford's reliance on *Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758, 15 Cal.Rptr.3d 839, for the proposition that no waiver occurred is misplaced. At issue in *Urshan* was a trial court's sua sponte order shortening the statutorily required notice period for summary judgment motions, essentially strong-arming the plaintiff into following the shortened time schedule that followed. Critical to the order reversing the summary judgment that was entered for defendant was the fact that any objection to the statutorily unauthorized shortened notice period would have been futile. (*Id.* at p. 768, 15 Cal.Rptr.3d 839.) At issue here was not a motion for discovery sanctions in the first instance. Instead, the court and the parties were trying to fashion lesser alternative sanctions to those previously ordered after Ford sought writ relief from this court and we signaled our intention to grant it. We see nothing in the record that suggests an objection by Ford or a request for a continuance would have been futile.

FN17. *De Anza* did not involve arguments based on discovery violations. Instead, the plaintiff did not pursue its tort claims and sought punitive damages based solely on litigation tactics such as taking unreasonable legal positions, along with acts of intimidation and harassment. A decision not cited by Ford--*Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 539-540, 238 Cal.Rptr. 363--could be read to support Ford's position, but we

need not reach that issue. Instead, we assume, but do not decide, that the disputed remarks were improper.

FN18. We discuss that issue, *post.*

FN19. We also note that none of the comments complained of in Ford's brief actually contained a direct call for the jury to award punitive damages based on Ford's discovery misconduct. In fact, when Johan's lawyer argued the punitive damages issue, he tried to distinguish Ford's litigation conduct, such as "lying about the documents" and using untrustworthy experts from something that was "really bad"--that Ford knew lap belts were very dangerous.

FN20. As part of its argument, Ford contends the trial court's error was compounded by its decision to allow Johan to call a last-minute, undesignated expert witness. While our holding that the sanctions issue has been waived means we need not reach the expert witness issue, we note that this argument was not supported by citation to authority or analysis. (Cal. Rules of Court, rule 14(1)(B).)

FN21. Ford appears to have analytically lumped together the court's rulings refusing to remove Bowman, denying Ford's mistrial motion, and denying Ford's new trial motion. Because all these raise virtually the same issues, this makes no difference to our analysis and we will discuss them in combination.

FN22. The declarations of these jurors also included statements about their internal thought processes, including testimony that nothing Bowman might have said had any impact on them. Ford objected to those portions of the declaration because they were inadmissible. (Evid.Code, § 1150.) The trial court correctly sustained Ford's objections and said it would disregard those portions of the declarations.

FN23. On cross-examination by Johan's lawyer, a Ford witness testified that the then-current 2003 Windstar still had only a lap belt in the rear center seat. One of Johan's experts testified on redirect examination that before 1996, a Ford station wagon sold in Australia had three-point belts all across the rear bench seats, while another testified that such a system was technologically feasible for minivans sold in the United States before 1996, and that Ford had such a system as of 1995 in its transit bus, a minivan-sized vehicle being sold in the United Kingdom.

FN24. Even so, we want Bowman to know that his conduct was improper and, with a different evidentiary showing, could have resulted in a new trial. It is particularly troubling that he looked at the two vehicles after the trial judge spoke to him outside the presence of the other jurors about watching the KNBC news story. Should he ever sit on another jury, we expect he will not repeat his misconduct.

--- Cal.Rptr.3d ----, 2006 WL 1740394 (Cal.App. 2 Dist.)

Briefs and Other Related Documents (Back to top)

• 2005 WL 1397608 (Appellate Brief) Respondent's Brief (May 5, 2005)Original Image of this Document (PDF)

• 2005 WL 921758 (Appellate Brief) Appellant's Opening Brief (Feb. 7, 2005)Original Image of this Document (PDF)

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Briefs and Other Related Documents

KENNETH HAYES, APPELLANT
v.
THE STATE OF TEXAS, APPELLEE
NO. 07-04-0546-CR NO. 07-04-0547-CR

Court of Appeals of Texas, Amarillo.

JUNE 27, 2006

FROM THE 140TH DISTRICT COURT OF LUBBOCK COUNTY; NOS.2002-400482 & 2002- 400483; HONORABLE JIM BOB DARNELL, JUDGE

Before QUINN, C.J., and REAVIS and CAMPBELL, JJ.

MEMORANDUM OPINION

Don H. Reavis Justice

Following pleas of not guilty, appellant Kenneth Hayes was convicted of four counts of aggravated sexual assault and sentenced to four life terms. Presenting six issues, he challenges the trial court's judgments asserting ineffective assistance of counsel during the punishment phase and error by the trial court in denying his request for expert assistance. Specifically, his first two issues are directed at counsel's failure to investigate, obtain, and present extensive mitigating evidence in violation of the Sixth Amendment and Article I, Section 10 of the Texas Constitution, and deprivation of a fair trial and due process of law guaranteed by the Fifth and Fourteenth Amendments and Article I, Section 19 of the Texas Constitution. By his third, fourth, fifth, and sixth issues, he maintains the trial court erred in denying his request for appointment of a registered sex offender therapist resulting in deprivation of due process of law guaranteed by the Fourteenth Amendment and Article I, Section 19 of the Texas Constitution, and articles 1.04 and 1.05 of the Texas Code of Criminal Procedure, in deprivation of the right to effective assistance of counsel guaranteed by the Sixth Amendment and Article I, Section 10 of the Texas Constitution and articles 1.04, 1.05, 1.051, and 26.04 of the Texas Code of Criminal Procedure, in deprivation of equal protection in violation of the Fifth and Fourteenth Amendments, Article I, Section 3 of the Texas Constitution, and article 1.05 of the Texas Code of Criminal Procedure, and in violation of the mandates of article 26.05 of the Texas Code of Criminal Procedure. We affirm.

Appellant was convicted of sexually assaulting two young girls who lived in the same apartment complex as he and his wife. He suffers from mild mental retardation and has a low IQ and speech impediment. His wife is also mentally challenged. Following pretrial hearings in 2002, he was evaluated by Dr. Elvira G. Pascua-Lim, a court-appointed psychiatrist, and found to be incompetent to stand trial. He spent approximately four months at North Texas State Hospital in Vernon for observation and treatment and was then found competent to stand trial. Appellant's medical records indicated presumptive evidence that he was a pedophile.

At trial, the victims testified they visited appellant in his apartment to watch television, listen to music, and play games. They described sexual acts of anal and vaginal penetration committed by appellant that occurred in an upstairs bedroom. Appellant offered them cookie dough in exchange for their silence. According to the victims, appellant's wife remained downstairs and never participated. Additionally, two separate statements made by appellant in which he confessed his actions with the victims were introduced at trial while the investigating detective was testifying.

Following the guilt/innocence phase, the trial court conducted a hearing outside the jury's presence to hear testimony from the State's two punishment witnesses, a former police officer and a sexual assault victim of appellant from 1992. The former officer testified about investigating the 1992 sexual assault allegation and the victim, 25 years old at the time of trial, testified that appellant had sexually assaulted her when she was 13. No charges were ever filed. The trial court ruled any testimony of the extraneous conduct inadmissible, but allowed both witnesses to testify before the jury that appellant had a bad reputation as a law abiding citizen. No aggravating evidence was presented by the State during punishment.

Defense counsel's punishment evidence was limited to appellant taking the stand to testify he had never been convicted of a felony. The State did not cross-examine him. During closing argument, the State argued against probation and requested a "stiff sentence." Defense counsel briefly explained the probation process to the jury and argued he did not believe a life sentence was called for if the jury considered probation inappropriate. During rebuttal, the State argued the victims would be affected for life and requested four life sentences as appropriate punishment.

Following his conviction and appointment of new counsel, appellant filed a motion for new trial alleging, among other grounds, ineffective assistance of counsel during the punishment phase for counsel's failure to present mitigating evidence. At a hearing on the motion, numerous witnesses testified, including trial counsel. The trial court overruled appellant's motion. Following is a summary of each witness's testimony presented at the motion for new trial hearing.

Bonnie Hayes, Appellant's Sister

Bonnie testified that although appellant and his father enjoyed a good relationship, he had a difficult childhood and was not close to most of his siblings. Appellant had suffered a severe head injury as a child that led to serious seizures and eventually resulted in him dropping out of school. After his father died, his mother sent him to a state school. Bonnie also testified that her ex-husband had sexually abused appellant.

Jesse Valdez, Appellant's Co-worker

Valdez worked with appellant as a janitor at a local high school. He testified that appellant was a good worker and followed instructions. He did not believe that appellant took an interest in any high school girls.

Rob Cowie, Private Investigator

Cowie testified he was a recent law school graduate awaiting bar exam results. As a private investigator he had investigated mitigation evidence on two capital cases. According to his investigation of the underlying case, trial counsel spent a minimal amount of time investigating mitigating evidence of appellant's mental retardation, alcoholism, education records, and troubled childhood. He testified that mental retardation is always a factor in presenting mitigating evidence, although he acknowledged there was no doubt appellant was mentally retarded.

On cross-examination, he admitted he had never tried a case; however, his personal guideline was that a mentally retarded person should always have a mitigation case developed. He also believed a jury should be presented with the "entire picture of a person" to determine appropriate punishment. He conceded, however, that his job was to investigate and not make strategic choices.

Brian Murray, Criminal Defense Attorney

Murray testified as an expert on mitigation evidence cases and believes a good starting point is with the client, although the client should not dictate the investigation. His opinion is that an attorney has an ethical obligation to fully investigate regardless of a client's wishes. Murray testified that under the facts of the underlying case, he would have utilized the services of an investigator to look into appellant's social, psychological, medical, and biological background.

He testified that a Lubbock County jury would assess a life sentence to a defendant who anally and vaginally raped young girls. However, he believed the jury should have heard negative evidence about appellant and then be given a reason to disbelieve it by arguing his low IQ, mental retardation, or history of his head injury.

Dr. Elvira G. Pascua-Lim, Psychiatrist

Dr. Pascua-Lim evaluated appellant in Vernon pursuant to a pretrial court order to determine his competency to stand trial. After she submitted her evaluation, she was not contacted by trial counsel until a year and a half later, the week before trial. She notified him she would be out of town and left a contact number. Although counsel had designated her as an expert witness, he made the strategic choice not to call her as a witness.

At the motion for new trial hearing, she testified extensively about appellant's background. Most of her information came from appellant's mental health and mental retardation records. Appellant had a low IQ and suffered from a speech impediment that made communication difficult. He had suffered a head injury and seizures as a youth and spent ten years in the Lubbock State School. After being de-institutionalized, he lived in various group homes. He began abusing alcohol at age 13 and also used marihuana. He also spent 90 days in a hospital in Big Spring for depression and suicidal ideation. She communicated with Helga Gongaware, a human rights officer with MHMR, who knew appellant well. She questioned why appellant was not treated for his problems before things got out of control and Gongaware indicated the system had budget concerns. Dr. Pascua-Lim, however, believed that appellant was never treated because of his ability to maintain employment and manage his finances.

Helga Gongaware, MHMR Human Rights Officer

Appellant spent approximately 20 years receiving services from the Mental Health Mental Retardation Department. Although Gongaware was never assigned to appellant as a case manager or service coordinator, she had frequent contact with him regarding his progress. After he was arrested in the underlying case, she became a client advocate for him. She testified for him at the suppression hearing to shed light on his mental retardation. She initiated several communications with trial counsel and telephoned several times, although her calls were not returned. In her opinion, appellant's life history was relevant to the jury in assessing punishment.

Jeff Nicholson, Trial Counsel

Counsel's defense strategy was to suppress appellant's statements due to overreaching by the detective and convince the jury that the victims had concocted the abuse allegations. The motion to suppress was denied. Acknowledging that trial strategy is gauged by reasonableness, counsel testified that in his experience, mitigating evidence is useful when attempting to show that a good person has committed a bad act. He did not, however, want to pursue mitigating evidence that could do more harm to appellant than good, especially during punishment, when the State could offer almost any evidence.

Counsel designated Dr. Pascua-Lim, a psychiatrist, as an expert witness to testify on appellant's mental condition and other matters. She had previously evaluated appellant's competency to stand trial and found as a risk assessment that if the aggravated sexual assault was proven, it was a "past history of behavior that [would] definitely be a factor to consider in assessing future risk of harming others." In reviewing three reports she prepared on appellant's competency, counsel testified he made a strategic decision not to call her as a witness for fear that cross-examination might reveal harmful information.

Counsel did communicate with Helga Gongaware who was familiar with appellant through his MHMR services. Counsel believed that Gongaware thought of appellant as a "nice guy" who was always eager to please. He made the strategic decision not to call her during punishment because he was apprehensive she might open the door for the State to pursue extraneous offenses.

Counsel's strategy in not presenting evidence of appellant's mental retardation was that his condition was apparent to the jury. He also believed that appellant's mental retardation was not an excuse for his conduct and would not elicit sympathy from a jury.

Counsel testified that appellant was adamant he not interview his wife nor family members, except for his brother, Larry. Counsel made several unsuccessful attempts to contact Larry, and he died before trial. Appellant led counsel to believe his family members would not be helpful. After trial, counsel spoke with an older brother of appellant's, Ronnie, who claimed that appellant had raped and impregnated his daughter. Although counsel learned this after trial, it confirmed his opinion that testimony from appellant's family members would have been highly prejudicial.

By his first two issues, appellant contends counsel's failure to investigate, obtain, and present mitigating evidence during the punishment phase denied him his constitutional right to effective assistance of counsel. We disagree. A claim of ineffectiveness at the punishment phase is reviewed under the standard set out in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See* Hernandez v. State, 988 S.W.2d 770, 771-72 (Tex.Cr.App.1999). Under *Strickland*, a defendant must establish that (1) counsel's performance was deficient (*i.e.*, fell below an objective standard of reasonableness), and (2) there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different, a reasonable probability being a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 690-94. *See also* Rylander v. State, 101 S.W.3d 107, 110 (Tex.Cr.App.2003); Hernandez v. State, 726 S.W.2d 53, 55 (Tex.Cr.App.1986). In other words, appellant must demonstrate by a preponderance of the evidence that the deficient performance prejudiced his defense. Mitchell v. State, 68 S.W.3d 640, 642 (Tex.Cr.App.2002); Thompson v. State, 9 S.W.3d 808, 813 (Tex.Cr.App.1999). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Thompson*, 9 S.W.3d at 814, citing *Strickland*, 466 U.S. at 700.

The adequacy of defense counsel's assistance is based upon the totality of the representation rather than by isolated acts or omissions of trial counsel. *Id.* Although the constitutional right to counsel ensures the right to reasonably effective counsel, it does not guarantee errorless counsel whose competency or accuracy of representation is to be judged by hindsight. Ingham v. State, 679 S.W.2d 503, 509 (Tex.Cr.App.1984); *see also* Ex Parte Kunkle, 852 S.W.2d 499, 505 (Tex.Cr.App.1993). Appellate review of trial counsel's representation is highly deferential and presumes that counsel's conduct fell within the wide range of reasonable and professional representation. *See* Andrews v. State, 159 S.W.3d 98, 101 (Tex.Cr.App.2005). *See also* Bone v. State, 77 S.W.3d 828, 833 (Tex.Cr.App.2002).

Judicial scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689. It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court examining counsel's defense after it has proved unsuccessful to conclude that a particular act or omission of counsel was unreasonable. *Id.* Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *Id.* at 690-91. In any ineffectiveness claim, a decision not to investigate must be directly assessed for reasonableness. *Id.* at 691. *See also* Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

The voluminous record sheds light on appellant's family and social history. He has numerous siblings, but did not have an ideal childhood. The brother he was closest to died before trial. Appellant suffered a severe head injury at a young age that caused him to experience seizures. He did not finish high school, and at age 17 was admitted to a State hospital where he resided until 1987. He received services from

the Department of Mental Health and Mental Retardation for approximately two decades. He was hospitalized in 1992 for suicidal ideation and depression following an allegation of sexual assault by a teenage girl. He has abused alcohol since he was 13 and also uses marihuana, both of which affect the brain, especially in someone with intellectual dysfunction.

To support his ineffective assistance claim, appellant relies on recent United States Supreme Court decisions involving assessment of death sentences. He also relies on the ABA Standards for Criminal Justice, which the Court applies in determining reasonableness. [FN1] In Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), the Court found counsel deficient in failing to investigate the court file on the defendant's prior convictions because counsel knew the prosecution was seeking the death penalty by using violent prior convictions to prove aggravating factors. According to the Court, counsel compromised the opportunity to respond to a case for aggravation. *Id.* at 2465. In the underlying case, the State only presented two witnesses whose testimony was limited to appellant having a bad reputation as a law abiding citizen. No aggravating evidence was presented by the State that required counsel to respond. Additionally, counsel explained that his trial strategy in not presenting mitigating evidence was to prevent harmful cross-examination.

> FN1. Paragraph 4-4.1 of the ABA Standards provides in part:
> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

A significant decision relied on by appellant is Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). In *Wiggins*, the Court found trial counsel ineffective for failing to discover and present powerful mitigating evidence of appellant's troubled history. Counsel's limited investigation fell short of the prevailing professional standards. During her opening statement counsel told the jury it would hear of the defendant's difficult life but failed to introduce any evidence thereof during the proceedings. In assessing the reasonableness of counsel's failure to conduct a thorough investigation, the Court found it resulted from inattention and abandonment of the investigation at an unreasonable juncture, and not from reasoned strategic judgment. *Id.* at 524-527. *See generally* Ex parte Woods, 176 S.W.3d 224, 226-27 (Tex.Cr.App.2005) (denying habeas corpus relief based on applicant's claim of ineffective assistance of counsel because counsel's decision not to pursue certain mitigating evidence that would have been subject to cross-examination was based on "reasonable professional judgments [supporting] the limitations on investigation.")

A third decision relied on by appellant is Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In sustaining Williams's ineffective assistance claim, the Court found that counsel failed to investigate and present substantial mitigating evidence during sentencing proceedings. *Id.* at 363. According to the record, counsel began preparing for sentencing a week beforehand and failed to discover extensive records of the defendant's "nightmarish childhood," his borderline mental retardation, and favorable evidence demonstrating that Williams had received commendations for helping crack a prison drug ring and for returning a guard's wallet. *Id.* at 396. Counsel was also ineffective in failing to discover testimony from prison officials that Williams was least likely to act violently or dangerously among inmates and testimony from a prison minister that Williams thrived in a more regimented and structured environment. *Id.* The Court found that failure to introduce favorable evidence was not the result of a tactical decision to focus on Williams's confession. *Id.*

We distinguish *Williams* for several reasons. First, there is no evidence in our record that trial counsel waited until shortly before the sentencing phase to begin

preparing. Additionally, except for appellant's employment and ability to manage his finances, no positive mitigating evidence was presented at the motion for new trial hearing that might have impacted the jury's assessment of punishment.

Counsel in the underlying case supported his strategic decision not to pursue a mitigation case out of concern that more harm than good would result. Although he designated Dr. Pascua-Lim as an expert, he did not follow through because cross-examination might have disclosed prejudicial information. He made a strategic choice not to interview family members or co-workers at his client's insistence, which later proved to be reasonable. When a defendant gives counsel reason to believe that pursuing certain investigations may be more harmful than useful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. *Strickland*, 466 U.S. at 690-91. In short, inquiry into conversations between counsel and his client may be critical to a proper assessment of counsel's strategic choices. *Id.*

Testimony from an inexperienced law school graduate and a **non-lawyer** that a jury was entitled to presentation of appellant's entire life should not outweigh counsel's strategic decision based on his experience in these type cases in the Lubbock community. Neither should another attorney's opinion on how he would have defended the case be applied under these facts to find trial counsel's choices were unreasonable.

Strickland does not require trial counsel to investigate every conceivable line of mitigating evidence nor present mitigating evidence. *Wiggins*, 539 U.S. at 512. The jury's assessment of four life sentences in the underlying case does not authorize this Court to judge counsel's performance in hindsight. *See Ingham*, 679 S.W.2d at 509. Appellant has not satisfied his burden that based on the totality of counsel's representation any identified acts or omissions were outside the wide range of reasonable and professional representation. Applying a heavy measure of deference to counsel's judgments, we conclude his strategic choice in making a less than complete investigation was based on reasonable professional judgments supporting the limitations on investigation. *Id.* Issues one and two are overruled.

By his remaining four issues, appellant contends the trial court erred in denying his motion for expert assistance filed pursuant to article 26.05 of the Texas Code of Criminal Procedure. We disagree. Article 26.05(d) provides that appointed counsel in a noncapital case shall be reimbursed for reasonable and necessary expenses incurred with prior court approval, including expenses for mental health and other experts. The decision to appoint an expert under the statute lies within the sound discretion of the trial court. Stoker v. State, 788 S.W.2d 1, 16 (Tex.Cr.App.1989), *cert. denied*, 498 U.S. 951, 111 S.Ct. 371, 112 L.Ed.2d 333 (1990).

Appointment of an expert is required when a defendant makes a preliminary showing of a significant issue of fact on which the State would present expert testimony and which the knowledge of a lay jury would not be expected to encompass. Rey v. State, 897 S.W.2d 333, 339 (Tex.Cr.App.1995). A trial court does not err in refusing to appoint an expert witness to assist an indigent defendant in rebutting a type of expert opinion that the State did not present. Jackson v. State, 992 S.W.2d 469, 474 (Tex.Cr.App.1999).

By his motion for expert assistance, appellant requested authorization for expenses of a registered sex offender therapist. He provided the expert's curriculum vitae and an estimate of his fees and expenses. He alleged the expert would be crucial in establishing trial counsel's ineffectiveness in not presenting mitigating evidence. He further alleged the expert's testimony on appellant's manageability as a sex offender would have impacted the jury's decision.

The motion was supported by an investigator's affidavit in which he averred he had reviewed trial records and appellant's psychiatric records. He believed appellant's evaluating psychiatrist, who was unavailable to sign an affidavit, could have provided relevant mitigating evidence. He also recommended evaluation by a

registered sex offender therapist for candidacy for probation. No affidavit from a sex offender therapist nor any other evidence indicating the need for funds for such an expert was provided.

The only expert witnesses presented by the State during the guilt/innocence phase were the forensic interviewer who interviewed the two young victims and the sexual assault nurse who examined them. The State did not offer any expert evidence on sex offender programs. Appellant failed to make a preliminary showing of a significant fact on which the State would present expert sex offender evidence.

Additionally, we have concluded that trial counsel was not ineffective in deciding not to present a mitigation case. Thus, the trial court did not abuse its discretion in denying appellant's motion for authorization of expenses for a sex offender therapist. There being no error, appellant's constitutional rights were not violated. Issues three, four, five, and six are overruled.

Accordingly, the trial court's judgments are affirmed.

Not Reported in S.W.3d, 2006 WL 1749585 (Tex.App.-Amarillo)

Briefs and Other Related Documents **(Back to top)**

- 07-04-00546-CR (Docket) (Nov. 22, 2004)
- 07-04-00547-CR (Docket) (Nov. 22, 2004)

END OF DOCUMENT

Briefs and Other Related Documents

Only the Westlaw citation is currently available.

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Supreme Court of Colorado,
En Banc.
The PEOPLE of the State of Colorado, Plaintiff-Appellant
v.
Duane MANZANARES, Defendant-Appellee.
No. 05SA249.

June 26, 2006.

Interlocutory Appeal from the District Court, Pueblo County, District Court, Case No. 05CR928, Victor Reyes, Judge.

Bill Thiebaut, District Attorney, Tenth Judicial District, Karl S. Tameler, Chief Trial Deputy District Attorney, Steven B. Fieldman, Deputy District Attorney, Pueblo, Colorado, Attorneys for Plaintiff-Appellant.

David C. Kaplan, Colorado State Public Defender, Suzanne C. Reynolds, Deputy State Public Defender, Cobea Becker, Deputy State Public Defender, Pueblo, Colorado, Attorneys for Defendant-Appellee.

Justice RICE delivered the Opinion of the Court.

I. Facts and Procedural History

***1** The defendant, Duane Manzanares, was charged with murder in the first degree, section 18-3-102(1)(a), C.R.S. (2005), and assault in the first degree, *id.* section 18-3-202(1)(a), on August 5, 2005, in Pueblo County District Court. The crimes were alleged to have been committed on June 1, 2005. In early August, the defendant filed a Motion to Appoint a Special Prosecutor, which was followed two days later by a Supplemental Motion to Appoint a Special Prosecutor.

The first motion asserted that "Cecil Turner, formerly a defense attorney who represented Mr. Manzanares, is currently an employee of the District Attorney's office in Pueblo County. There is an appearance of impropriety with respect to the District Attorney's office prosecuting Mr. Manzanares." This motion was supported by an affidavit from Kristi K. Martinez, an investigator with the Pueblo regional office of the Colorado State Public Defenders, in which she stated that, based upon a review of court records, Cecil Turner had represented the defendant in three prior criminal cases.

The supplemental Motion to Appoint a Special Prosecutor asserted that "Doug McMillen, formerly an employee for Cecil Turner and Cory TenBrink, is currently an employee of the District Attorney's office in Pueblo County. There is an appearance of impropriety with respect the District Attorney's office prosecuting Mr. Manzanares." This motion was supported by an affidavit from Cory TenBrink, a private attorney in Pueblo, who stated that at the time of the alleged murder, Doug McMillen was employed by both Cecil Turner and Cory TenBrink. The affidavit further averred that the defendant, Duane Manzanares, made calls about this case to the office in which McMillen was employed. TenBrink further asserted in the affidavit that "all information disclosed by Mr. Manzanares [about the case] was imputed within the office of Cory TenBrink."

The District Attorney's Office waived the statutory two-week time period in which to file a response, and a hearing was set for August 19. The District Attorney's Office did not file a responsive pleading prior to the hearing.

At the August 19 hearing, attorney Cory TenBrink testified that the defendant called him at his office to discuss the instant case shortly after June 1. TenBrink testified that he and the defendant discussed the facts of the case, including confidential information about the case. In addition, TenBrink testified, TenBrink and the defendant talked about possible defenses and triable issues. Doug McMillen worked at the law firm as a clerical employee during that time.

After the initial phone conversation, TenBrink and McMillen discussed the information Manzanares had given to them, including the confidential information disclosed by the defendant. McMillan later received up to three additional calls from Manzanares about the case. In addition, there were several in-office meetings with McMillan and/or TenBrink and Manzanares, all of which pertained to the homicide case in question.

***2** TenBrink further testified that, prior to McMillan terminating his employment with TenBrink, TenBrink instructed him not to talk about any of the cases he had been working on in the District Attorney's Office or anywhere else.

The People presented no testimony at the hearing. However, the People submitted an affidavit from Florence Hunt, a supervisor at the District Attorney's Office. In her affidavit, Hunt stated that, as of June 1, 2005, the District Attorney's Office had adopted a screening policy entitled "Policy Screening Current District Attorney Employees From Participating In the Prosecution Of Former Clients." [FN1]

FN1. The policy provides:
1. This policy pertains to any employee of the Office of the District Attorney for the Tenth Judicial District Attorney who formerly represented clients in criminal cases now pending prosecution in this office. This member shall be referred to in this policy as "employee." It also applies to all staff of the Office of the District Attorney for the Tenth Judicial District insofar as they are involved in carrying out the provisions of this policy.
2. The employee shall be barred from any participation whatsoever in the prosecution of his/her former client's case(s).
3. The employee shall not access the file of the former client.
4. The employee shall not consult with the prosecutor for the Tenth Judicial District regarding the former client.
5. The employee shall not access any of the photographs, documents, recorded interviews, recorded surveillance activities, tangible evidence, criminal charges, criminal records, motions filed by either party, orders of the court, or any other matter related to any case involving his/her former client.
6. The employee shall not relate any confidential information revealed to the employee during his/her representation of the former client to any member of the Office of the District Attorney for the Tenth Judicial District.
7. The employee shall not be called upon to attend, nor represent the Office of the District Attorney for the Tenth Judicial District, any court dates, no matter how minor in nature, regarding his/her former client.
8. Whenever an attorney, who represents clients with pending criminal cases, or an employee of such an attorney is hired by the Office of the District Attorney for the Tenth Judicial District, a list of the cases the employee has handled shall be posted by email to all members of the office, and posted at the mailbox area where it is openly visible for the inspection of all employees.
9. This policy has been distributed to all employees of the Office of the District Attorney for the Tenth Judicial District, and forms part of their expected duties as an employee thereof.
10. This policy will be provided to every former client of such an employee of the Office of the District Attorney for the Tenth Judicial District as said clients become known. It shall be the duty of every attorney in this office to

> provide any former client this policy.
> 11. This policy is available to any judicial officer and attorney handling cases of the employee's former clients.
> 12. Every member of the Office of the District Attorney for the Tenth Judicial District shall act independently of the employee in judgment and discretion regarding the prosecution of former clients. If the employee is in a supervisory position within the Office of the District Attorney for the Tenth Judicial District, the subordinates of the employee shall look to the next highest member of the office for review of any issues that office policy otherwise requires regarding cases of his/her former client. If the next highest member of the office is the District Attorney, he may designate either the Chief Deputy District Attorney or another supervisor to perform such review.

The affidavit further avers that Doug McMillan was hired on August 1, 2005 by the District Attorney's Office as a temporary employee for a maximum period of two months. He was hired to perform clerical and menial duties. At the time he was hired, McMillan read the policy and signed a copy of it, indicating that he understood the policy. A copy of the policy signed by McMillan was attached to the affidavit. In addition, according to Hunt's affidavit, Hunt had not seen McMillan violate the agreement.

The trial court granted the motion for appointment of special counsel, holding that the evidence presented at least an appearance of impropriety that might deprive the defendant of a fair trial.

II. Analysis

A. Section 20-1-107(2) Eliminates Appearance of Impropriety as a Basis for Disqualification of District Attorneys

For the reasons discussed in *People v. N.R.*, Nos. 05SA273, 05SA294, which we also announce today, section 20-1-107, C.R.S. (2005), eliminates "appearance of impropriety" as a basis for disqualification of district attorneys. *N.R.*, slip op. at 10-11. To the extent the trial court relied on this basis, therefore, its disqualification decision was erroneous.

Under section 20-1-107(2), C.R.S. (2005), a trial court may disqualify the district attorney's office 1) when the district attorney requests disqualification, 2) when the district attorney has a personal or financial interest in the prosecution, or 3) when "circumstances exist that would render it unlikely that the defendant would receive a fair trial." The first two scenarios are not present in the instant case; below we evaluate whether the third scenario is present.

B. The Case Must be Remanded to Determine Whether "Special Circumstances" Exist That Render it Unlikely That Defendant Would Receive a Fair Trial if Prosecuted by the District Attorney's Office

In *People v. Chavez,* which we also announce today, we hold that section 20-1-107(2), C.R.S. (2005), requires disqualification of an assistant district attorney who, as a private attorney, had developed an attorney-client relationship with the defendant in connection with the case for which the defendant was being prosecuted. *Chavez,* No. 05SA311, slip op. at 12. This situation, we hold in *Chavez,* constitutes "circumstances ... that would render it unlikely that defendant would receive a fair trial" under section 20-1-107(2). *Id.*

***3** The instant case presents similar issues. As described above, Assistant District Attorney Turner has previously represented the defendant. Further, Doug McMillan was employed by an attorney who had consulted with the defendant about defendant's case, and through his employment with this attorney McMillan received confidential information pertaining to the case.

We are unable to determine, on the record before us, whether "special circumstances exist that would render it unlikely that the defendant would receive a fair trial" if prosecuted by the District Attorney's Office. First, the record does not disclose whether Turner's prior representation of the defendant was "substantially related"

to the instant prosecution. *See Chavez,* slip op. at 11.

Second, it is unclear whether McMillan's employment with the District Attorney's Office requires disqualification of the Office. The potential for unfairness that results when an attorney in the district attorney's office has had an attorney-client relationship with the defendant is equally present when an employee of the district attorney's office has gained confidential information about the defendant's cases through his employment with an attorney who consulted with the defendant. In either case, there is a distinct possibility that confidential information could be used to the advantage of the government. *See Osborn,* 619 P.2d 41, 45 (Colo.1980). In the instant case, the court found that "Mr. TenBrink and Mr. McMillan did in fact discuss the facts of this particular case with [defendant]," and it is undisputed that McMillan was subsequently employed by the District Attorney's Office while defendant's case was pending.

On the other hand, the People argue that the fact that McMillan signed the District Attorney's Office's screening policy, along with the testimony that McMillan was told not to share information about the cases on which he worked during his time with TenBrink and the affidavit of the supervisor of the District Attorney's Office stating that she had not observed McMillan violate the policy, demonstrate that no circumstances exist that render it unlikely that the defendant would receive a fair trial.

With respect to the screening policy, we conclude that a properly drafted screening policy is indeed relevant to the determination of whether disqualification is necessary to ensure the defendant receives a fair trial. *See People v. Chavez,* slip op. at 14-15; *Cleary v. Dist. Court,* 704 P.2d 866, 873 (Colo.1985) (concluding that "a government prosecutor may be presumed to have some knowledge of the cases prosecuted by his co-workers," but that "in circumstances not involving vertical intra-agency relationships ... the presumption may be rebutted by contrary evidence"). However, a review of the screening policy in the instant case does not foreclose the possibility that prosecutors in the District Attorney's Office received knowledge of defendant's case because of McMillan's employment at the Office. It is not clear from the text of the policy that the policy applies to a **non-lawyer** employee of the District Attorney's Office who received confidential information as a result of his former employer's attorney-client relationship with the defendant. [FN2]

> FN2. Paragraph 1 of the Policy provides that
> [t]his policy pertains to any employee of the Office of the District Attorney for the Tenth Judicial District Attorney who formerly represented clients in criminal cases now pending prosecution in this office. This member shall be referred to in this policy as "employee." It also applies to all staff of the Office of the District Attorney for the Tenth Judicial District insofar as they are involved in carrying out the provisions of this policy.

***4** Therefore, it is necessary to remand to the trial court to make the factual determination of whether confidential information has been and can continue to be screened from those members of the District Attorney's Office who would actually prosecute defendant's case. If so, disqualification is unnecessary. See *Chavez,* slip op. at 15.

We note that the testimony of members of the District Attorney's Office alone would not mitigate any "special circumstances" present in this case. We agree with the court of appeals' reasoning in *People v. Stevens* that evidence of sharing of confidential information within the District Attorney's Office, "being under the control of the prosecution, would be well-nigh impossible for a defendant to bring forth." 642 P.2d 39, 41 (Colo.App.1981). Therefore, while a properly drafted screening policy provides evidence pertaining to whether confidential information was shared, the assertions of members of the District Attorney's Office, without more, cannot justify the conclusion that no information was shared.

III. Conclusion

For the foregoing reasons, we reverse the trial court's disqualification order and remand with instructions to determine whether "special circumstances" require disqualification under section 20-1-107(2).

Justice BENDER specially concurs, Chief Justice MULLARKEY and Justice MARTINEZ join in the special concurrence.

Justice BENDER, specially concurring.

I agree with the majority's decision to remand for a determination of whether the disqualified attorneys can be effectively screened pursuant to Colorado Rules of Professional Conduct 1.11. However, I stand on my construction of the disqualification statute, section 20-1-107, C.R.S. (2005), as expressed in my dissent in *People v. N.R.*, 05SA273.

I am authorized to state that Chief Justice MULLARKEY and Justice MARTINEZ join in the special concurrence.

--- P.3d ----, 2006 WL 1737814 (Colo.)

Briefs and Other Related Documents (Back to top)

- 2005 WL 3221752 (Appellate Brief) Defendant-Appellee's Response Brief (Oct. 25, 2005)

- 2005 WL 3221753 (Appellate Brief) Plaintiff-Appellant's Opening Brief (Oct. 14, 2005)

END OF DOCUMENT

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
D. Arizona.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
LENNAR HOMES OF ARIZONA, INC., Defendant.
No. CV-03-1827-PHX-DGC.

June 23, 2006.

Karen E. Nutter, Mary Joleen O'Neill, P. David Lopez, Sally Clifford Shanley, Michelle G. Marshall, Equal Employment Opportunity Commission, Phoenix, AZ, Rita Byrnes Kittle, EEOC, Denver, CO, for Plaintiff.

Peter D. Baird, Richard Seth Cohen, Robert Gerald Schaffer, Lewis & Roca LLP, Phoenix, AZ, Ted D. Meyer, Jones Day, Houston, TX, for Defendant.

ORDER

DAVID G. CAMPBELL, District Judge.

***1** The Court held a final trial conference with the parties on June 22, 2006. A number of trial issues were addressed. On the basis of the discussion at the conference and motions previously filed,

IT IS HEREBY ORDERED:

1. Plaintiff's Motion to Strike Report and Testimony of Brooke Warrick, Ph.D. (Doc. # 194) is **granted**. Defendant did not oppose this motion.

2. Plaintiff's Motion to Strike Report and Testimony of Robert H. Taylor (Doc. # 191) is **granted**. The motion was filed on March 3, 2006, and Defendant never filed a response. Although defense counsel stated at the final conference that they desired to respond, the time for response has passed. Trial is three weeks away. Defendant's failure to respond constitutes a consent to the Court's granting of the motion. LRCiv 7.2(i).

3. The Court heard oral argument on Plaintiff's Motion to Exclude Testimony of Defense Expert James Ward, Ph.D. (Doc. # 178). Defense counsel stated during the argument that Defendant will not present Dr. Ward to testify about the importance of customer satisfaction generally or to testify that the customer satisfaction results at the Arroyo Verde and Monterey communities were below the mean for Defendant's properties. Defendant does intend to have Dr. Ward testify that the problem of small sample size for the surveys can be overcome by pooling the results to increase the sample size. Dr. Ward provided such an opinion in his expert report. *See* Doc. # 178, Ex. B at 3. The Court will permit Dr. Ward to express this opinion, provided adequate foundation is laid.

Given Defendant's concessions during the hearing and the merits of Plaintiff's motion, the motion is **granted** with respect to Dr. Ward's opinions about the value of customer satisfaction in business generally and about the actual customer satisfaction levels at the Arroyo Verde and Monterey communities. To the extent Dr. Ward is asked to express opinions other than the opinion on pooling of survey results discussed above, the Court will entertain objections from Plaintiff at the time of his testimony. In no event will Dr. Ward be permitted to express opinions

that were not set forth in his expert reports.

4. The Court heard oral argument on Defendant's Rule 37 Motion to Exclude EEOC's Damages Claim. Doc. # 242. The Court took this motion under advisement.

Plaintiff disclosed its intent to seek back pay in this case in its first disclosure statement on December 19, 2003. Doc. # 242, Exhibit. Plaintiff also disclosed that the claim would be for the difference between wages actually earned by the claimants and wages they would have earned had they not been terminated by Defendant. *Id.* The first disclosure statement provided damages amounts (without computations) for claimants Judge, Nikrant, and Cameron. *Id.*

In their third supplemental disclosure statement, dated November 23, 2004, claimants provided a detailed explanation of the damages calculation for claimant Cameron. *Id.* They did not provide such an explanation for the other claimants. When claimants were asked in their depositions to state the amount of their damages, they did not provide calculations, but instead simply stated that they would seek damages for lost wages in the amount permitted by law.

***2** On February 11, 2005, Plaintiff submitted the expert report of Dr. Tun. *Id.* Dr. Tun calculated back pay damages for each of the claimants and provided charts reflecting his computations. Dr. Tun was deposed and a counter-expert was designated by Defendant.

Shortly before the Final Pretrial Conference on March 17, 2006, Plaintiff notified Defendant that Dr. Tun was being withdrawn as a witness in this case. Doc. # 247, Ex. 1. Plaintiff stated that it would supplement its damages disclosures in light of this development. *Id.* at Ex. 2. It was not until May 30, 2006, weeks before trial and months after the close of discovery and motion practice, that Plaintiff provided a tenth supplemental disclosure statement setting forth a back pay damages computation for each claimant. *Id.* at Ex. 3.

Early in the case, Plaintiff had stated that one of the **paralegals** employed by Plaintiff's counsel might testify about the calculation of back pay damages. Doc. # 242, Exhibit. The **paralegal** never produced an expert report setting forth such calculations and was never deposed by Defendant on this subject. Plaintiff's counsel agreed at the hearing that the **paralegal** was not deposed because the parties anticipated that Dr. Tun would present Plaintiff's damages case.

With Dr. Tun withdrawn, Plaintiff now proposes to present its damages case through claimants and the **paralegal**. Plaintiff apparently intends to have each claimant testify about the amount of money earned while employed at Defendant and the amount of money earned since that time, and then do the math to calculate the difference. Plaintiff may also have the **paralegal** perform these computations, and will have her testify about interest rates that should be applied to the lost wages quarter-by-quarter, based on published interest rates from the Internal Revenue Service. The claimants and **paralegal** have never been deposed on these subjects. Thus, although Defendant has conducted discovery into the jobs held and the money earned by claimants since they left Defendant's employment, the claimants have never testified about damages calculations and the **paralegal** has never been deposed about those calculations or the application of IRS interest rates.

Moreover, Plaintiff asserts a claim for front pay. Plaintiff will ask the Court, as an alternative to reinstatement, to award future lost wages to the claimants. Counsel for Plaintiff stated that he did not know how Plaintiff would present evidence concerning the present value of such lost wages.

Defendant makes the point that this is not a simple damages case. The claimants were employed in the real estate business and experienced significant fluctuations in their income from year to year. Thus, determining how much they would have earned had they continued to be employed in the real estate business with Defendant is no easy task. Although Defendant knows from Plaintiff's recent disclosures the amount the claimants will claim they would have earned, Defendant does not know how they

will justify that amount or how they will respond to specific questions. The purpose of the discovery and disclosure rules, of course, is to prevent this disadvantage. Parties are to be given an opportunity to understand and investigate the opposing side's case before trial.

***3** Plaintiff was required to reveal a "computation" of its damages claim in a written disclosure statement under Rule 26(a)(1)(C) of the Federal Rules of Civil Procedure. Although Plaintiff disclosed a single damages amount for three of the claimants in its first disclosure statement, such a disclosure does not satisfy the "computation" requirement. "[T]he 'computation' of damages required by Rule 26(a)(1)(C) contemplates some analysis." *City and County of San Francisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219, 221 (N.D.Cal.2003). Plaintiff included a computation for claimant Cameron in its third disclosure statement, but not for the other four claimants.

Plaintiff's tenth disclosure statement, provided to Defendant on May 30, 2006, included a computation of damages for all five claimants. This was the first computation disclosure in a Rule 26 disclosure statement (other than for claimant Cameron), and it was untimely. Rule 26(e)(1) requires a party to supplement its disclosure statement "at appropriate intervals." For a case that has been pending almost three years, and in which discovery and motion practice closed months ago, a supplemental disclosure statement filed weeks before trial is not filed at an "appropriate" interval, particularly when it concerns a damages computation that has been known to Plaintiff for more than one year.

Were this the only relevant rule, the Court would be inclined to hold that Plaintiff has failed to satisfy its disclosure obligations. Rule 26(e)(1) also states, however, that a party must supplement "its disclosure statement under subdivision (a) if the party learns that in some material respects the information disclosed is incomplete or incorrect *and if the additional or corrective information has not otherwise been made known to the other party during the course of the discovery process or in writing.*" (Emphasis added.) In this case, Plaintiff's damages computation for all five claimants was made known to Defendant in the expert report of Dr. Tun dated February 11, 2005. Plaintiff's counsel avowed at the final conference that the damages computation contained in the tenth supplemental disclosure statement applies the same methodology as Dr. Tun's report and has simply been updated to the time of trial, with some reduction in the applicable rate of interest. The Court concludes that because the damages computation was "otherwise made known" to Defendant through Dr. Tun's report, Plaintiff was not required to include it in a Rule 26(e)(1) supplement and should not be sanctioned for failing to do so in a timely manner.

The Court also notes that Defendant has conducted substantial discovery concerning the claimant's alleged damages, including obtaining documents and testimony about jobs held and income earned by the claimants since they left Defendant's employment. This discovery has been conducted precisely because Defendant knew Plaintiff was asserting a claim for back pay on behalf of the five claimants.

***4** But this does not solve the problem of Defendant never having had an opportunity to depose the claimants on the damages testimony they now intend to give at trial. The Court concludes that this problem can be solved with an order short of dismissing Plaintiff's damages claims. Between now and the beginning of trial on July 14, 2006, Defendant will be permitted to depose the five claimants, for up to two hours each, on the damages testimony they will give at trial. Plaintiff shall make the claimants available at a time and place noticed by Defendant.

The Court is more troubled by the proposed use of Plaintiff's **paralegal** as a damages witness at trial. Although the **paralegal** was identified as a possible damages witness in Plaintiff's early disclosure statements, this prospect vanished when Plaintiff identified Dr. Tun. The **paralegal** was never deposed and Plaintiff never provided disclosures concerning her testimony. With Dr. Tun withdrawn, Plaintiff again proposes to use the **paralegal** as its damages witness.

Plaintiff would use the **paralegal** to compute each claimant's damages, identify and apply a fluctuating IRS interest rate to the various quarterly damages calculations for each claimant, and possibly provide a present value calculation for Plaintiff's front pay claim. The Court concludes that such testimony falls under Rule 702 of the Federal Rules of Evidence because it requires the application of "scientific, technical, or other specialized knowledge."

Rule 701 states that lay witness may provide opinion testimony that is "not based on scientific, technical, or other specialized knowledge withing the scope of Rule 702." The purpose of this limitation is "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." F.R.E. 701 Advisory Committee Notes (2000 Amendment). The provision "also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 ... by simply calling an expert witness in the guise of a layperson." 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 701App.03[2] (2d ed.2005).

The **paralegal** in this case would not be testifying as a lay witness about events she observed or conversations she heard. Nor would she be recounting a calculation she did as part of the underlying events in this case. Rather, she would be applying mathematical, accounting, and interest principles to calculate claimants' damages. This testimony falls squarely within Rule 702.

Rule 26(a)(2)(A) requires a party to "disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence." Rule 26(a)(2)(B) requires such witnesses to provide detailed expert reports if they are "retained or specially employed" for this purpose. [FN1] The Court required Plaintiff to make these Rule 26 disclosures by February 11, 2005. Doc. # 55. Although Plaintiff previously had disclosed the **paralegal** as a possible witness on damages, Plaintiff did not disclosure her pursuant to the Court's order as a witness who would provide testimony under Rule 702 and did not provide a Rule 26(a)(2)(B) report setting forth the opinions she would provide at trial. As a result, Defendant has not been afforded the disclosures and the discovery opportunities the federal rules require.

> FN1. Although there is some question whether the **paralegal** constitutes an expert "retained or specially employed" within the meaning of Rule 26(a)(2)(B), she is being presented as a substitute for Dr. Tun, Plaintiff's designated expert. Had this issue arisen in a timely fashion, the Court would have held that the **paralegal** must provide an expert report just like the witness she is replacing.

***5** Rule 37(c)(1) states that "[a] party that without justification fails to disclose information required by Rule 26(a) ... is not, unless such failure is harmless, permitted to use as evidence at a trial ... any witness or information not so disclosed." The Court cannot conclude that the untimely designation of Plaintiff's **paralegal** as a Rule 702 damages expert has been made with justification. Plaintiff's withdrawal of Dr. Tun appears to have been a strategic decision. Plaintiff has provided no explanation for the decision other than passing references to the fact that Dr. Tun did not provide the testimony Plaintiff had hoped. Such a strategic decision certainly is Plaintiff's to make, but it does not provide justification for the late disclosure of an alternate Rule 702 witness.

Nor does the Court find the late disclosure of the **paralegal** as a substitute for Dr. Tun to be harmless. Trial is only weeks away. Defendant prepared to face Dr. Tun as an expert, not the **paralegal**. The **paralegal** has not produced a report and has never been deposed. Motions directed to the qualifications of experts and other Rule 702 issues were due months ago and have been resolved. Moreover, matters raised in discovery related to this witness might have been addressed in summary judgment briefing completed in 2005.

In short, Defendant has been deprived of the opportunity to depose, evaluate, and file motions concerning the **paralegal** as a Rule 702 witness on one of the critical

issues in this case--the amount of claimants' damages. Such an effect is not harmless. The Court holds under Rule 37(c)(1) that the **paralegal** will not be permitted to testify as a damages witness at trial.

In summary:

1. Defendant's Rule 37 Motion to Exclude EEOC's Damages Claim (Doc. # 242) is **granted** with respect to Plaintiff's **paralegal**, but **denied** with respect to damages testimony by the claimants. This ruling will not preclude Defendant from asserting appropriate objections at trial concerning the claimants' testimony about lost future earnings, the application of IRS interest rates, and similar matters. [FN2]

> FN2. This might result in Plaintiff being unable to present the interest calculations that otherwise would have been presented by Dr. Tun or the **paralegal**. Although this would likely reduce the amount of damages available to Plaintiff, the Court concludes that such a result is required by Plaintiff's failure to comply with disclosure obligations set forth in the federal rules.

2. Between now and the start of trial on July 14, 2006, Defendant shall be permitted to depose the claimants for up to two hours each on their damages testimony. Plaintiff shall make the claimants available for such depositions at a time and place notice by Defendant.

Slip Copy, 2006 WL 1734594 (D.Ariz.)

Motions, Pleadings and Filings **(Back to top)**

- 2006 WL 1183052 (Trial Motion, Memorandum and Affidavit) Plaintiff's Motion to Strike Report and Testimony of Robert H. Taylor (Mar. 3, 2006)Original Image of this Document (PDF)

- 2006 WL 1183053 (Trial Motion, Memorandum and Affidavit) Plaintiff's Motion to Strike Report and Testimony of Brooke Warrick, Ph.D. and, Alternatively, Request for Hearing (Mar. 3, 2006)Original Image of this Document (PDF)

- 2005 WL 2508810 (Trial Motion, Memorandum and Affidavit) Reply in Support of Motion to File a Reply Statement of Facts in Support of Lennar's Motion for Partial Summary Judgment: Re: Carol A. Nikrant, Jacque R. Judge, and Gordon J. Cameron II (Aug. 8, 2005)Original Image of this Document (PDF)

- 2005 WL 2508814 (Trial Motion, Memorandum and Affidavit) Defendant's Reply in Support of Motion to Strike Exhibit and Affidavit to Plaintiff's ''Response to Motion for Partial Summary Judgment Re: Carol A. Nikrant, Jacque R. Judge, and Gordon J. Cameron II'' (Aug. 8, 2005)Original Image of this Document (PDF)

- 2:03cv01827 (Docket) (Sep. 18, 2003)

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
S.D. Ohio,
Eastern Division.
Mary MILLER Hall & Charles Miller, Plaintiffs,
v.
Daryl MILLER, et al., Defendants.
Civil Action 2:06-CV-01.

June 22, 2006.

Mary Miller Hall, Columbus, OH, pro se.

Charles Miller, Columbus, OH, pro se.

Daryl Miller, Tucson, AZ, pro se.

Tommie Miller, Tucson, AZ, pro se.

Laura V. Macban, Attorney at Law, Tuscon, AZ, pro se.

Kathryn J. Winters, Kathryn J. Winters, Arizona Assistant Attorney Generals, Tucson, AZ, for Defendants.

OPINION & ORDER

GREGORY L. FROST, District Judge.

***1** This matter is before the Court pursuant to a motion to dismiss filed by Defendant Laura MacBan ("MacBan"). (Doc. # 7). Defendants Daryl Miller ("Daryl") and Tommie Miller ("Tommie") joined in MacBan's motion to dismiss. (Doc. # # 11, 13). *Pro se* Plaintiff Mary Miller Hall ("Hall") filed a memorandum in opposition (Doc. # 15), to which MacBan replied. (Doc. # 16). Hall then filed a sur-reply. (Doc. # 17). The Court **STRIKES** Hall's sur-reply (Doc. # 17) for failure to comport with S.D. Ohio Civ. R. 7.2, and **GRANTS** MacBan's motion to dismiss (Doc. # 7).

BACKGROUND

Cognizant of Hall's *pro se* status, and addressing the case within a motion to dismiss, the Court shall treat the allegations contained within Hall's Complaint as true. *See Haines v. Kerner, 404 U.S. 519, 520 (1972)* (addressing treatment of *pro se* pleadings and filings by courts).

Hall is an Ohio resident who lives with her son, Charles Miller ("Charles"). [FN1] (Doc. # 1). MacBan resides and practices law in Arizona. (Doc. # 7 Ex. 10). Daryl and Tommie, former husband and wife, reside in Arizona. (Doc. # 1). Daryl is Hall's son; Tommie is Hall's former daughter-in-law. (Doc. # 1; Doc. # 15 at 3).

FN1. Hall names Charles as a Plaintiff. (Doc. # 1). However, Charles did not sign the Complaint and the Complaint does not detail his involvement in the underlying facts that gave rise to this case. In addition, Hall is not an attorney. Therefore, Charles is not a proper party to this action. *See Walker v. General Tel. Co., 25 Fed. Appx. 332, 335 (6th Cir.2001)* (finding that *pro se* plaintiff, who was not an attorney, had engaged in the **unauthorized practice** of **law** by purporting to represent other individuals in another lawsuit).

Hall instigated at least three previous lawsuits in Arizona state court that are of import in the case *sub judice*. The first involved allegations by Hall that Daryl and Tommie had improperly taken control of an investment account Hall had created in her name and Daryl's name. (Doc. # 7 Ex. 3, 4). [FN2] After a bench trial, Defendant Judge John F. Kelly ("Judge Kelly") entered a verdict in favor of Daryl and Tommie. (Doc. # 7 Ex. 4).

> FN2. The Court may, and shall, take judicial notice of court records. This does not convert the present motion to dismiss to a motion for summary judgment. *Frazier v. Nat'l City Bank, NA.*, No. 2:05-cv-300, 2005 U.S. Dist. LEXIS 24053, at *10 n. 3 (S.D.Ohio 2005) (citing *Plassman v. City of Wauseon*, Case No. 95-3736, 1996 WL 254662, *3 (6th Cir. May 14, 1996) (citing *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 738 (6th Cir.), cert. denied, 449 U.S. 996 (1980)). *See also Dalton v. Jefferson Smurfit Corp.*, 979 F.Supp. 1187, 1193 (S.D.Ohio 1997) ("the Court's consideration of matters outside the pleadings does not convert the Rule 12(b)(1) motion into one for summary judgment").

In the second suit, Hall alleged that St. Joseph's Hospital engaged in a conspiracy with Daryl to have her falsely imprisoned. (Doc. # 7 Ex. 5). MacBan represented the hospital in that matter while Defendant Allan Duprey ("Duprey"), an attorney, represented Hall. (Doc. # 7 Exs. 6, 10; Doc. # 15 at 2, 11-12). The jury returned a unanimous defense verdict, and Defendant Judge Charles Sabalos ("Judge Sabalos") ordered Hall to pay taxable costs in the amount of $ 29,853.04. *Id.*

The third case involved Hall's allegations that Daryl and Tommie had engaged in perjury, theft, slander, and malicious interference with her health. (Doc. # 7 Ex. 7). Judge Kelly was assigned to preside over the case. (Doc. # 7 Exs. 7, 8, 9). MacBan represented Tommie in that case. *Id.* Judge Kelly granted Tommie's motion to dismiss, and he also imposed sanctions in the amount equal to Tommie's attorney's fees against Hall. (Doc. # 9).

After the conclusion of those suits, Hall moved to Ohio and instigated the current action on January 3, 2006. (Doc. # 1). Although quite difficult to discern, it appears that Hall alleges that MacBan, Daryl, Tommie, Judges Kelly and Sabalos, and Duprey violated her civil rights under 42 U.S.C. § 1983. *Id.* Hall also seems to assert that the Defendants committed perjury and conspired to unlawfully detain her. *Id.*

***2** Defendants MacBan, Daryl, and Tommie now move to dismiss all of Hall's claims against them pursuant to Fed. Rs. Civ. P. 12b(1), (2), (3), (5), and (6). (Doc. # # 7, 11, 13). With briefing on the motion now complete, the Court turns to an examination of the issues presented within that motion.

STANDARD OF REVIEW

MacBan, Daryl, and Tommie assert that five separate grounds contained within Fed.R.Civ.P. 12b warrant dismissal. The Court shall only set forth the standard of review for those sections that the Court finds applicable to the instant motion.

I. Rule 12b(1)--Lack of Jurisdiction Over the Subject Matter

Defendants first contend that dismissal is warranted under Fed.R.Civ.P. 12(b)(1), which enables a defendant to raise by motion the defense of "lack of jurisdiction over the subject matter." In considering such a motion:

> the court may consider evidence outside the pleadings to resolve factual disputes concerning jurisdiction, and both parties are free to supplement the record by affidavits. However, where a defendant argues that the plaintiff has not alleged sufficient facts in her complaint to create subject matter jurisdiction, the trial court takes the allegations in the complaint as true.

Nichols v. Muskingum College, 318 F.3d 674, 677 (6th Cir.2003) (citations omitted). A plaintiff bears the burden of proving jurisdiction. *Id.*; *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir.1990).

Motions to dismiss for lack of subject matter jurisdiction generally take one of two forms. *Ohio Nat'l Life v. Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir.1990). A facial attack on the subject matter jurisdiction alleged by the complaint merely questions the sufficiency of the pleading. *Id.* In reviewing such a facial attack, a trial court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss. *Id.* On the other hand, when a court reviews a complaint under a factual attack, no presumptive truthfulness applies to the factual allegations. *Id.* Such a factual attack on subject matter jurisdiction commonly has been referred to as a "speaking motion." *See generally* C. Wright & A. Miller, Federal Practice and Procedure § 1364, at 662-64 (West 1969). When facts presented to the district court give rise to a factual controversy, the district court must therefore weigh the conflicting evidence to arrive at the factual predicate that subject matter jurisdiction exists or does not exist. *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1130 (6th Cir.1996). Thus, at issue in a factual 12(b)(1) motion is the

> trial court's jurisdiction its very power [sic] to hear the case--there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover the plaintiff will have the burden of proof that jurisdiction does in fact exist.

***3** *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir.1996) (quoting *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d 884, 890 (3d Cir.1977)); *see also Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981). Accordingly, in reviewing speaking motions, such as the motion presently before the Court, a trial court has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts. *See RMI Titanium Co.*, 78 F.3d at 1134; *see also Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981).

II. Rule 12b(2)--Lack of Jurisdiction Over the Person

Because MacBan, Daryl, and Tommie have challenged personal jurisdiction pursuant to Rule 12(b)(2), Hall bears the burden of establishing personal jurisdiction. "In the face of a properly supported motion for dismissal, the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction." *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir.1991). Because the Court has not and will not conduct an evidentiary hearing on the matter, Hall only needs to make a *prima facie* showing, and the Court views the evidence in the light most favorable to Hall. *See Sports Auth. Mich., Inc. v. Justballs, Inc.*, 97 F.Supp.2d 806, 809 (E.D .Mich.2000).

III. Rule 12b(6)--Failure to State a Claim Upon Which Relief can be Granted

An alternative basis for dismissal according to MacBan, Daryl, and Tommie is Fed.R.Civ.P. 12b(6). Dismissal is appropriate under that rule if: " 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir.1996) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)), *cert. denied*, 520 U.S. 1251 (1997). The focus is therefore not on whether a plaintiff will ultimately prevail, but rather on whether the claimant has offered "either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Rippy ex rel. Rippy v. Hattaway*, 270 F.3d 416, 419 (6th Cir.2001) (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir.1988)). In making such a determination, a court must " 'construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein.' " *Sistrunk*, 99 F.3d at 197 (quoting *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir.1994)). A court need not, however, accept conclusions of law or unwarranted inferences of fact. *Perry v. American Tobacco Co., Inc.*, 324 F.3d 845, 848 (6th Cir.2003).

DISCUSSION

I. Subject Matter Jurisdiction

MacBan, Daryl, and Tommie maintain that the Court lacks subject matter jurisdiction over the matter because the requirements for federal question jurisdiction and diversity jurisdiction are not satisfied. Hall responds by asserting that her Complaint is based upon "diversity of location" which the Court shall construe to mean diversity jurisdiction. (Doc. # 1).

***4** Federal courts are courts of limited jurisdiction possessing only that power granted by the Constitution or authorized by Congress. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A district court may hear a case only if it is authorized to do so by a congressional grant of jurisdiction. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). In this case, Hall has set forth a basis for this Court's subject matter jurisdiction in her Complaint.

Title 28, Section 1331 provides that "the district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treatises of the United States." The Supreme Court has long held that actions arising under the Constitution, laws, or treatises of the United States for purposes of federal question jurisdiction refer only to those cases in which "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 807 (1986) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 28 (1983)).

Here, Hall asserts that MacBan, Daryl, and Tommie deprived her of her civil rights, presumably in violation of 42 U.S.C. § 1983. (Doc. # 1). Section 1983 creates a cause of action for deprivation of civil rights. *J.D. P'ship v. Berlin Twp. Bd. of Trs.*, 412 F.Supp.2d 772, 777 (S.D.Ohio 2005) (citing *Jaco v. Bloechle*, 739 F.2d 239, 241 (6th Cir.1984)). Thus, the Court has subject matter jurisdiction over Hall's § 1983 claims and her state claims as well because those claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C.S. § 1367. Accordingly, the Court **DENIES** the motion to dismiss based upon Fed.R.Civ.P. 12b(1) and the Court need not discuss whether the elements of diversity jurisdiction are present. [FN3]

> FN3. Briefly, the Court notes that diversity jurisdiction is lacking because complete diversity does not exist among the parties. *See Glancy v. Taubman Ctrs., Inc.*, 373 F.3d 656, 664 (6th Cir.2004) (holding that federal courts have diversity jurisdiction where the amount in controversy is met and the action is between citizens of different states. The rule of complete diversity requires that each plaintiff be a citizen of a different state from each defendant). *See also* 28 U.S.C. § 1332.

II. Personal Jurisdiction

More successful is the argument of MacBan, Daryl, and Tommie made pursuant to Fed.R.Civ.P. 12b(2) that the Court lacks personal jurisdiction over them. (Doc. # 7 at 4-5). Hall's response is devoid of any mention to this argument. (Doc. # 15).

"To hear a case, a court must have personal jurisdiction over the parties, 'that is, the power to require the parties to obey its decrees.' " *Daynard v. Ness, Motley, Loadholt, Richardson & Poole. P.A.*, 290 F.3d 42, 50 (1 st Cir.2002) (quoting *United States v. Swiss Am. Bank. Ltd.*, 191 F.3d 30, 35 (1st Cir.1999)). It is Hall's burden to prove that the Court possesses personal jurisdiction over MacBan, Daryl, and Tommie. *See id.*

In federal question cases in the Sixth Circuit, "personal jurisdiction over a defendant exists 'if the defendant is amenable to service of process under the

[forum] state's long-arm statute and if the exercise of personal jurisdiction would not deny the defendant[ ] due process.' " *Bird v. Parsons*, 289 F.3d 865, 871 (6th Cir.2002) (quoting *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174, 1176 (6th Cir.1992)). *See also* *Brunner v. Hampson*, 441 F.3d 457 (6th Cir.2006). The Sixth Circuit has recognized that " 'the Ohio Supreme Court has ruled that the Ohio long-arm statute does not extend to the constitutional limits of the Due Process Clause.' " *Bird*, 289 F.3d at 871 (quoting *Calphalon Corp. v. Rowlette*, 228 F.3d 718, 721 (6th Cir.2000)). "Nevertheless, in evaluating whether personal jurisdiction is proper under Ohio's long-arm statute, [the Sixth Circuit Court of Appeals has] consistently focused on whether there are sufficient minimum contacts between the nonresident defendant and the forum state so as not to offend 'traditional notions of fair play and substantial justice.' " *Id .* at 871-72 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316(1945)).

***5** In accordance with Sixth Circuit precedent, the Court will employ the following test to determine whether it has personal jurisdiction over MacBan, Daryl, and Tommie:

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Id. at 874 (quoting *Southern Machine Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir.1968)). The first two prongs target the "tighter fit" required by Ohio law, while the third prong examines the due process limitation on the exercise of personal jurisdiction. *Brunner*, 441 F.3d 457, 2006 WL 462913, at *8-10.

A. MacBan

Defendant MacBan is an Arizona resident who has never traveled to Ohio. (Doc. # 7 Ex. 10 ¶ ¶ 3, 6). The cause of action in the case at bar apparently arises from MacBan's alleged actions in Arizona state court during Hall's previous lawsuits in that forum. Because those actions took place in Arizona and the only reason this case is before the Court is because Hall is now an Ohio resident, the Court concludes that a substantial enough connection with the forum state does not exist to make the exercise of jurisdiction over MacBan reasonable. Thus, the Court concludes that Hall has failed to satisfy her burden and the Court **GRANTS** MacBan's motion to dismiss Hall's claims against her for lack of personal jurisdiction. (Doc. # 7).

B. Daryl

Daryl is an Arizona resident. (Doc. # 1). Hall's current complaint seems to stem from Daryl's actions during the prior litigation among and between Hall, Daryl, and Tommie in Arizona. In addition, the record before the Court lacks any evidence that Daryl has purposefully availed himself of the privilege of acting in Ohio or that he has caused a consequence in Ohio other than the fact he may have attended college at The Ohio State University some years ago. (Doc. # 15). Lastly, the Court cannot see how Daryl's acts during the other lawsuits have a substantial enough connection with Ohio such that exercising jurisdiction over him would be reasonable. Therefore, the Court finds that Hall has not sustained her burden and **GRANTS** Daryl's motion to dismiss for lack of personal jurisdiction. (Doc. # 13).

C. Tommie

Like MacBan and Daryl, Tommie is an Arizona resident. Also like MacBan and Daryl, there is no evidence before the Court that Tommie purposefully availed herself of the privilege of acting in the forum state or that Tommie caused a consequence in the forum state other than the fact that she attended college at The Ohio State University. (Doc. # 15). Hall's claims against Tommie likewise appear to be a result of Hall's previous suits against Tommie in Arizona state court, and Tommie's actions during those suits do not have a substantial enough connection with Ohio to make the

exercise of jurisdiction over Tommie reasonable. Accordingly, the Court **GRANTS** Tommie's motion to dismiss for lack of personal jurisdiction. (Doc. # 11).

III. Failure to State a Claim Upon Which Relief Can be Granted

***6** Alternatively, the Court concludes that Hall fails to state a claim against MacBan, Daryl, and Tommie upon which relief may be granted under Fed.R.Civ.P. 12b(6). (Doc. # 7 at 4-6).

A Section 1983 claim must satisfy two elements: 1) the deprivation of a right secured by the Constitution or laws of the United States, and 2) the deprivation was caused by a person acting under color of state law. *J.D. P'ship.*, 412 F.Supp.2d at 778 (citing *Ellison v. Garbarino*, 48 F.3d 192, 194 (6th Cir.1995)). Hall fails to state a Section 1983 claim because the record indicates that MacBan, Daryl, and Tommie are all private persons and not state actors. (Doc. # 7 Ex. 10). Furthermore, Hall does not contest this conclusion in her memorandum in opposition. (Doc. # 15). Thus, the Court grants the motion to dismiss based on Fed.R.Civ.P. 12b(6). (Doc. # # 7, 11, 13). And, because the Court dismisses the lone basis for federal jurisdiction, the Court declines to exercise jurisdiction over the remaining state claims that Hall asserts against those defendants. *See* 28 U.S.C. § 1367.

IV. Motion for Sanctions

MacBan, Daryl, and Tommie ask the Court to impose a sanction against Hall in the amount of $ 5,000.00 pursuant to Fed.R.Civ.P. 11. (Doc. # 7 at 6). In support of their request, those Defendants state that Hall "has a history of filing frivolous lawsuits" and that "the prior imposition of sanctions ... has not prevented her from continuing in her litigious ways." *Id.*

Because this is the first time that Hall has filed suit in this Court, the Court **DENIES** the motion for sanctions. (Doc. # 7).

CONCLUSION

The Clerk is **ORDERED** to strike Doc. # 17 from the record and to correct the docket to indicate that Charles Miller is not a plaintiff in this case.

The motions to dismiss are **GRANTED**. (Doc. # # 7, 11, 13).

The motion for sanctions is **DENIED**. (Doc. # 7).

IT IS SO ORDERED.

Slip Copy, 2006 WL 1735355 (S.D.Ohio)

Motions, Pleadings and Filings **(Back to top)**

- 2006 WL 1173673 (Trial Pleading) Answer to Motion to Dismiss (Mar. 6, 2006)Original Image of this Document (PDF)

- 2006 WL 800919 (Trial Motion, Memorandum and Affidavit) Motion to Dismiss (Feb. 8, 2006)Original Image of this Document (PDF)

- 2:06cv00001 (Docket) (Jan. 3, 2006)

END OF DOCUMENT

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
M.D. Georgia,
Albany Division.
J. Michael CAMPBELL c/o Deutsche Bank National Trust Company, Plaintiff,
v.
Johnnie and Kareem ROSS, Defendants,
Johnnie Ross, Charles Meadows, Joseph Riggins and Nicole Riggins, Third Party Plaintiffs,
v.
Ameriquest Mortgage Company, Tracey K. Dewrell, Individually, Mara S. Sacks, Individually, and Dewrell Sacks, LLP., Third Party Defendants.
No. 1:05-CV-107 (WLS).

June 21, 2006.

J. Michael Campbell, Atlanta, GA, pro se.

Bryan A. Vroon, John W. Crongeyer, Atlanta, GA, Jimmie H. Brown, Ralph O. Scoccimaro, Albany, GA, for Defendants and Third Party Plaintiffs.

Ashby L. Kent, John O'Shea Sullivan, Christine L. Mast, Michael J. Goldman, Jonah Allen Flynn, Hawkins & Parnell, LP, Atlanta, GA, Howard P. Walthall, Jr., Birmingham, AL, for Third Party Defendants.

ORDER

W. LOUIS SANDS, Chief District Judge.

***1** Pending before the Court are numerous motions filed by the parties. First is a joint motion by the parties to postpone the preliminary Rule 16/26 requirements. (Doc. 30). In a similar vein is Third Party Defendants' motion to stay discovery until 10 days after the motion to dismiss is decided by this Court. (Doc. 40). Also, pending is Third Party Plaintiff's motion to amend/correct the order entered by this Court on March 29, 2006. (Doc. 36). Lastly, pending is the Third Party Defendants Dewrell's, Sacks' and Dewrell Sacks, LLP's (hereinafter "Dewrell-Sacks") motion to vacate the conditional transfer order. (Tab 35). For the following reasons, the parties' motion to stay the preliminary Rule 16/26 requirements (Doc. 30) is **GRANTED**; the Third Parties request to stay discovery (Doc. 40) is **GRANTED-IN-PART and DENIED-IN-PART**; the Third Party Plaintiff's motion to amend/correct the March 29, 2006, order (Doc. 36) is **DENIED**; and the motion to vacate the conditional transfer order, to the extent it is addressed to this Court, (Doc. 35) is **DENIED**.

DISCUSSION

This case arises out of a dispossessory proceeding in Magistrate Court of Dougherty County filed by the J. Michael Campbell c/o Deutsche Bank Trust Company (hereinafter "Deutsche"). Ross had the case transferred to the Superior Court of Dougherty County, added the remaining Third Party Plaintiffs, and filed a third party class action complaint against Ameriquest and the Dewrell-Sacks Defendants.

Plaintiffs allege that Ameriquest has engaged in predatory lending in violation of the Georgia Fair Lending Act. Plaintiffs allege that the Dewrell-Sacks Defendants in closing these alleged predatory loans for Ameriquest has engaged in legal malpractice. Plaintiffs allege that Ameriquest and the Dewrell-Sacks have conspired to violate the Georgia Fair Lending Act. Plaintiffs also allege that the Dewrell-

Sacks Defendants engaged in the **unauthorized practice** of **law** by hiring **non-lawyers** to perform work related to the closings which Geogia law requires to be performed by licensed attorneys. Plaintiffs also seek injunctive relief and punitive damages. Plaintiffs do not raise any federal claims.

All three Dewrell-Sacks Defendants are citizens of Georgia. Ameriquest is a Delaware corporation with its principal place of business in Orange, California. The named Plaintiffs and the putative class members are all citizens of Georgia.

As noted in the March 29, 2006, order of this Court, this case appears to be similar in some ways to other actions brought against Ameriquest alleging predatory lending practices that are currently pending before the Multi-Litigation Panel. As the panel is contemplating asserting jurisdiction over this case, it is appropriate to stay the filing of the proposed discovery order and to stay discovery until the jurisdictional issue is decided by the Multi-Litigation Panel. Therefore, the parties request to postpone the requirements of the Rule 16/26 order (Doc. 30) is **GRANTED** until further order of this Court and Third Party Defendants' motion to stay discovery until after this Court should decide the motion to dismiss (Doc. 40) is **GRANTED-IN-PART and DENIED-IN-PART**. Discovery is stayed until further order of this Court.

***2** Third Party Plaintiffs asks this Court to amend/correct its March 29, 2006, order to omit the language observing that this case raises similar issues as those cases already accepted by the Multi-Litigation Panel. (Doc. 36). The statement, taken in context, was not meant as a legal finding or as an attempt to usurp the authority of the Multi-Litigation Panel in deciding whether to accept jurisdiction over this case. Instead, it was a casual observation that there were overt similarities between this case and the other cases to warrant further analysis by the Panel. Therefore, with this explanation in mind, Third Party Plaintiffs' motion to correct/amend said order (Doc. 36) is **DENIED**. Lastly, pending is the Dewrell-Sacks Defendants' motion to vacate the conditional transfer order. (Doc. 35). The pleading reveals that the motion is addressed to the Multi-Litigation Panel, not to this Court. To the extent the motion is addressed to this Court, it (Doc. 35) is **DENIED without prejudice**.

SO ORDERED, this *20th* day of June, 2006.

Slip Copy, 2006 WL 1735896 (M.D.Ga.)

Motions, Pleadings and Filings (Back to top)

- 2006 WL 1492042 (Trial Pleading) Answer of Third-Party Defendants Tracey K. Dewrell, Mara S. Sacks, and Dewrell Sacks, LLP to Third Party Complaint of Johnnie Ross (Apr. 28, 2006)

- 2006 WL 1492043 (Trial Pleading) Ameriquest Mortgage Company's Answer, Counterclaim and Cross-Claims (Apr. 28, 2006)

- 2006 WL 1492041 (Trial Motion, Memorandum and Affidavit) Ameriquest Mortgage Company's Memorandum in Opposition to Motion to Redact or Amend Portions of Court's Order of March 29, 2006 (Apr. 27, 2006)

- 2005 WL 3280666 (Trial Motion, Memorandum and Affidavit) Third Party Complaint Plaintiffs' Reply Memorandum in Support of Motion to Remand, or Alternatively, Motion for Abstention (Oct. 17, 2005)

- 2005 WL 2912970 (Trial Motion, Memorandum and Affidavit) Reply Brief in Further Support of Motion to Dismiss Third-Party Complaint by Tracey K. Dewrell, Mara S. Sacks and Dewrell Sacks LLP (Sep. 23, 2005)

- 2005 WL 2912971 (Trial Motion, Memorandum and Affidavit) Ameriquest Mortgage Company's Reply Brief in Support of Motion to Dismiss (Sep. 23, 2005)

• 2005 WL 2912973 (Trial Motion, Memorandum and Affidavit) Ameriquest Mortgage Company's Reply Brief in Support of Motion to Strike (Sep. 23, 2005)

• 2005 WL 2912965 (Trial Motion, Memorandum and Affidavit) Defendants Tracey K. Dewrell, Mara S. Sacks and Dewrell Sacks LLP's Response to Third Party Complaint Plaintiffs' Motion for Remand (Sep. 15, 2005)

• 2005 WL 2912967 (Trial Motion, Memorandum and Affidavit) Ameriquest's Memorandum in Opposition to Third Party Plaintiffs' Motion to Remand, or Alternatively, Motion for Abstention (Sep. 15, 2005)

• 2005 WL 2671214 (Trial Motion, Memorandum and Affidavit) Third-Party Plaintiffs' Brief in Opposition to Ameriouest Mortgage Co's Motion to Dismiss the Third-Party Complaint (Sep. 6, 2005)

• 2005 WL 2671215 (Trial Motion, Memorandum and Affidavit) Third-Party Plaintiffs' Brief in Opposition to the Dewrell Sacks' Motion to Dismiss the Third-Party Complaint (Sep. 6, 2005)

• 2005 WL 2671213 (Trial Motion, Memorandum and Affidavit) Third Party Complaint Plaintiffs' Memorandum in Support of Motion to Remand, or Alternatively, Motion for Abstention (Aug. 23, 2005)

• 2005 WL 2671210 (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Motion to Dismiss (Aug. 12, 2005)

• 2005 WL 2671212 (Trial Motion, Memorandum and Affidavit) Brief in Support of Motion to Dismiss Third-Party Complaint by Tracey K. Dewrell, Mara S. Sacks and Dewrell Sacks LLP (Aug. 12, 2005)

• 2005 WL 2671211 (Trial Motion, Memorandum and Affidavit) Ameriquest Mortgage Company's Motion to Strike and Memorandum in Support Thereof (2005)

• 2005 WL 2671217 (Trial Motion, Memorandum and Affidavit) Third Party Plaintiff Johnnie Ross's Response to Ameriouest Mortgage Company's Motion to Strike Certain Portions of the Third-Party Complaint (2005)

END OF DOCUMENT

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
District of Columbia.
Jeffery K. ARMSTRONG, Plaintiff,
v.
Norman Y. MINETA, Defendant.
Civil Action 04-01661(HHK).

June 19, 2006.

Michael J. Kator, Kator, Parks & Weiser, PLLC, Washington, DC, for Plaintiff.

John C. Truong, U.S. Attorney's Office for the District of Columbia, Civil Division, Washington, DC, for Defendant.

MEMORANDUM OPINION AND ORDER

KENNEDY, J.

***1** Jeffrey K. Armstrong brings this action against Norman Y. Mineta, Secretary of the Department of Transportation, [FN1] alleging that the Department of Transportation ("DOT") wrongfully terminated him from his position as a Physical Security Specialist in violation of the Civil Service Reform Act, 5 U.S.C. § 7513 ("CSRA"), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16(a) ("Title VII"). Armstrong asserts that he was terminated because of his race (Black) and because he had engaged in protected equal employment opportunity ("EEO") activity. Before the court is DOT's motion for summary judgment. Upon consideration of the motion, the opposition thereto, and the summary-judgment record, the court concludes that the motion must be granted in part and denied in part.

FN1. This action is brought against Secretary Mineta in his official capacity only.

I. BACKGROUND

Armstrong was hired by DOT's Office of Security as a Physical Security Specialist in October 2002. Before joining DOT, Armstrong spent almost four years as a Physical Security Specialist at the Federal Emergency Management Agency ("FEMA") and ten years with the Drug Enforcement Agency ("DEA") during which time he was assigned to various security-related functions.

DOT requires that all Physical Security Specialists "become a Special Deputy U.S. Marshall in order to perform his/her primary protection duties." Def.'s Ex. 1 (Physical Security Specialist (GS-080-13) Position Description). The United States Marshals Service ("USMS") Special Deputation Program, in turn, requires all Special Deputies to have certain qualifications, including the "successful completion of a basic law enforcement training program" and "previous law enforcement experience." [FN2] Def.'s Ex. 2 (USMS Policy Directive No. 99-13). While the Special Deputation Program is administered by USMS, primary responsibility for ensuring that applicants meet the requirements for deputation lies with the requesting agency.

FN2. Individuals that are granted Special Deputation have the authority to perform one or more of the following federal law enforcement functions: "(1) Seek and execute arrest warrants and search warrants; (2) Make arrests without a warrant, if there are reasonable grounds to believe that the person to be

> arrested has committed or is committing a violation of federal law; (3) Serve subpoenas and other legal writs; (4) Monitor Title III intercepts (electronic surveillance); and/or (5) Carry firearms for personal protection or the protection of persons covered under the federal assault statutes." Def.'s Ex. 2 (USMS Policy Directive No. 99-13).

Armstrong first became a Special Deputy when he was employed by FEMA. At FEMA Armstrong was a Physical Security Specialist with responsibilities that included providing executive protection for a FEMA federal coordinating officer and physical security for various facilities utilized by FEMA employees. FEMA required that Physical Security Specialists with these type of protection duties apply for Special Deputy status, a requirement with which Armstrong complied. Armstrong's first request for Special Deputy status was filed on April 8, 1999, and that request was granted shortly thereafter.

Upon Armstrong's October 2002 transfer to DOT, Armstrong was required to reapply for Special Deputy status because the agency sponsoring his application had changed. In connection with this application, DOT certified that Armstrong satisfied all the requirements necessary for Special Deputy status, and the application was granted. On July 2, 2003, Armstrong once again sought to renew his Special Deputy status, and again, the DOT certified that Armstrong was eligible for Special Deputy status. As with the previous application, this application was granted.

***2** Armstrong worked for several months at DOT without incident. In June 2003, however, Armstrong maintains that the then-Acting Director for the Office of Security, Michael Prendergast, began to question the proprietary of Armstrong's use of administrative leave. According to Armstrong, Prendergast expressed concern that he had taken an uncommon number of days off within a five month period. Armstrong believed that his leave was justified and proper, and therefore raised the issue with Lee Privett, Prendergast's supervisor and the Director of Security. According to Armstrong, Privett accepted his explanations and, despite Prendergast's inquiries, ultimately no disciplinary action was taken against him for the alleged abuse of administrative leave.

On August 20, 2003, Armstrong submitted an affidavit during the investigation of an EEO complaint filed by a colleague, Anisa Williams. Williams claimed that she was discriminated against because of her race, and Armstrong supported her claim by submitting an affidavit that recounted the administration's review of his leave record, an effort that Armstrong believed was motivated by racial animus.

Shortly after Armstrong submitted his affidavit, he again experienced difficulty related to his use of leave. In particular, Armstrong alleges that following his participation in the EEO investigation of Williams's complaint, Privett and Prendergast denied his request for leave to undergo a federally-mandated medical examination related to his work in New York City with FEMA immediately after the September 11, 2001 terrorist attacks. Though there are conflicting accounts of the basis for the reversal of the denial, both parties concede that Armstrong was eventually permitted to take his leave and received his medical examination. [FN3]

> FN3. According to Armstrong, his request for leave was not granted until DOT's Assistant Secretary for Transportation intervened on his behalf. Compl. ¶ 13. DOT contends, however, that permission was granted once Armstrong provided the appropriate medical documentation. Answer ¶ 13.

In or around October 2003, Armstrong confronted Privett with Armstrong's belief that the inquiries concerning his use of leave were the result of discrimination. During this meeting, Armstrong told Privett that he believed Prendergast was a racist. According to Armstrong, Privett responded to this accusation by telling Armstrong that he (Privett) was "in a position to harm Mr. Armstrong's career" and "not to 'f* *k' with him." Compl. ¶ 14 (alterations in original).

Approximately a month after this meeting, while preparing for a mediation session designed to address Armstrong's prior discrimination-related grievances, Privett

noticed "discrepancies" within Armstrong's employment application. Privett states that he had hoped to be able to offer Armstrong a position with a different agency, the Transportation Security Administration ("TSA"), and was therefore preparing Armstrong's resume to be submitted in connection with a job application. One of the discrepancies that Privett discovered was an apparent contradiction between Armstrong's resume, which indicated that he had attended a Federal Law Enforcement Training Center ("FLETC") course in 2002, and his application for Special Deputy status, which indicated that he had completed the FLETC course in 2000. Upon further inquiry, Privett learned that in 2002 Armstrong had attended a two-week introductory course at FLETC that was not designed for criminal investigators. Apparently, Privett had assumed that Armstrong had participated in a more advanced "sixteen week criminal investigator's school." *Id.* The nature of the FLETC course was significant given that Armstrong had represented that this FLETC course served as his "basic law enforcement training," a necessary predicate for receiving USMS Special Deputy status.

***3** The other discrepancy that Privett observed was a statement that Armstrong had acquired "law enforcement experience" at FEMA. This concerned Privett because he did not believe that FEMA was a law enforcement agency. In order to assuage his fears, Privett contacted FEMA to determine what, if any, law enforcement duties Armstrong performed at the agency. According to Privett, he was told that Armstrong "had no law enforcement responsibilities with that agency." *Id.* Again, this apparent lack of experience was significant as an additional requirement for Special Deputy status is a year of "prior law enforcement experience."

Ultimately, Privett concluded that Armstrong was not qualified to receive Special Deputation. Accordingly, Privett contacted USMS to apprise the agency of DOT's decision to withdraw its support for Armstrong's continued status as a Special Deputy. After a number of communications between the two agencies, and because primary responsibility for verifying a Special Deputy's qualifications rests with the certifying agency, USMS accepted DOT's assessment of Armstrong's inability to remain a Special Deputy. On January 20, 2004, USMS revoked Armstrong's Special Deputy status.

Once Armstrong was stripped of his Special Deputy status, he failed to meet the qualifications required to remain a Physical Security Specialist. As a result, DOT was faced with two options: reassign Armstrong within DOT or terminate him. DOT asserts that it attempted to locate a suitable position for Armstrong within DOT but no such position existed, therefore termination was the only viable option.

Prendergast issued Armstrong a Notice of Proposed Removal on February 13, 2004. Privett was originally assigned to make the ultimate decision with respect to Prendergast's recommendation of removal. Following a request by Armstrong's counsel, however, DOT decided that in order to remove the appearance of impropriety the deciding official would be Linda Washington, the Deputy Assistant Secretary for Administration. Washington accepted Prendergast's recommendation and issued the Notice of Removal on April 22, 2004.

On May 28, 2004, Armstrong filed a "mixed case" complaint with the Merit Systems Protection Board ("MSPB") in which he alleged that his removal violated both the CSRA and Title VII. MSPB did not issue a decision within 120 days of the filing of Armstrong's complaint and this action followed.

II. ANALYSIS

Armstrong claims that (1) he was terminated in violation of the CSRA, (2) he was terminated on the basis of his race in violation of Title VII and, (3) he was terminated in retaliation for his EEO activity, also in violation of Title VII. DOT seeks summary judgment with respect to all counts. [FN4]

> FN4. Under Fed.R.Civ.P. 56, a motion for summary judgment should be granted only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party's "initial responsibility" consists of

> "informing the [trial] court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). If the moving party meets its burden, the burden then shifts to the non-moving party to establish that a genuine issue as to any material fact actually exists. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). To meet its burden, the non-moving party must show that " 'the evidence is such that a reasonable jury could return a verdict' " in its favor. *Laningham v. United States Navy*, 813 F.2d 1236, 1241 (D.C.Cir.1987) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Such evidence must consist of more than mere unsupported allegations or denials and must set forth specific facts showing that there is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 322 n. 3. If the evidence is "merely colorable" or "not significantly probative," summary judgment may be granted. *Anderson*, 477 U.S. at 249- 50.

A. CSRA Claims

As a threshold matter, the court must address whether it has subject matter jurisdiction over Armstrong's CSRA claim. The CSRA provides that final decisions of the MSPB are appealable to the U.S. Court of Appeals for the Federal Circuit, which typically has exclusive jurisdiction over such challenges. 5 U.S.C.A. § 7703(b)(1). After review of the agency record, the Federal Circuit will set aside any action, findings, or conclusions it finds to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C.A. § 7703(c).

***4** An exception to the Federal Circuit's exclusive jurisdiction exists, however, when a plaintiff sets forth a claim for a violation of the CSRA in conjunction with a claim of discrimination. When these so-called "mixed cases" are filed, jurisdiction lies with the federal district court. After a final decision from the MSPB, a plaintiff is permitted to appeal both components of a mixed case to the district court. 5 U.S.C.A. § 7703(b)(2); *Powell v. Dep't of Defense*, 158 F.3d 597, 598-99 (D.C.Cir.1998). The district court then reviews the discrimination claim *de novo*, but employs the same deferential standard used by the Federal Circuit when reviewing the administrative record accompanying the CSRA claim.

A plaintiff pursuing a mixed case, however, need not necessarily await a decision from the MSPB before bringing her mixed case to the district court. If the MSPB does not issue a final decision within 120 days of the filing of an appeal, the plaintiff may file a civil action in the district court "to the same extent and in the same manner" as allowed under Title VII and other anti-discrimination statues. 5 U.S.C.A. § 7702(e)(1)(B). It is this provision upon which Armstrong relies in bringing the instant action.

While DOT does not contest this court's jurisdiction over Armstrong's discrimination claim, DOT argues that in the absence of an underlying decision from MSPB there is no subject matter jurisdiction over Armstrong's CSRA claim. Because the district court's review of Armstrong's CSRA claim will be a deferential review of the administrative record, DOT insists that a record must be created in order to establish jurisdiction.

DOT's position has merit. This court recently addressed the question of its jurisdiction in mixed cases in *Ikossi v. England*, 406 F.Supp.2d 23 (D.D.C.2005). In *Ikossi*, the plaintiff sought to assert claims of sex, race, age, and national origin discrimination, as well as a violation of the CSRA. This court concluded that no jurisdiction exists over a CSRA claim until a ruling by the MSPB. In pertinent part, the court stated:

> [P]laintiffs who wish to bring their entire mixed case to federal district court must await a final decision of the MSPB and appeal the decision under § 7703(b)

> based on the administrative record. When the MSPB issues a final ruling on plaintiff's CSRA claims and the administrative record is filed, this court could review the decision for arbitrariness, abuse of discretion, and substantial evidence. Until then, this court has no jurisdiction over plaintiff's CSRA claims....

Id. at 30 (citations omitted); *see also* Seay v. Tenn. Valley Auth., 339 F.3d 454, 472 (6th Cir.2003) (stating that "on-the-record review is required for nondiscrimination claims ... if the 'mixed case' complaint is appealed from the MSPB."). [FN5]

> FN5. In *Seay*, the Sixth Circuit noted a distinction between mixed cases that arrive in federal district court by way of an appeal from MSPB and those that are filed following a plaintiff's use of an agency's EEO process. 339 F.3d at 472. Focusing on the EEO-process alternative, the Sixth Circuit concluded that *de novo* review of the CSRA portion of a mixed case was permissible. Here, however, Armstrong did not use the EEO process but instead appealed from the MSPB. Compl. ¶ 22.

The statutory scheme enacted by the CSRA vests MSPB with expertise in determining whether a personnel action promotes "the efficiency of service." A review of Armstrong's claim without a well-developed administrative record would deprive the court of that expertise. Accordingly, DOT is granted summary judgment with respect to Armstrong's CSRA claim.

B. Discrimination Claims

***5** The court next turns to Armstrong's Title VII claims, over which there is no dispute as to the court's jurisdiction. Title VII of the Civil Rights Act of 1964 makes it illegal to discriminate against federal employees because of their race. *See* 42 U.S.C. § 2000e-16. The Act also prohibits employers from discriminating against employees because they have assisted or participated in an administrative investigation of discrimination charges. *See* 42 U.S.C. § 2000e-3 ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."); *see also* Barns v. Small, 840 F.2d 972, 976 (D.C.Cir.1998) (reading § 2000e-16 to prohibit retaliation, as defined in § 2000e-3).

Individual Title VII claims of disparate treatment are analyzed under the familiar three-part standard first announced in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and subsequently refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Under the *McDonnell Douglas* test, the plaintiff has the burden of making a prima facie showing of discrimination. *See* McDonnell Douglas, 411 U.S. at 802. To establish a prima facie case of disparate-treatment discrimination, a plaintiff must demonstrate that " '(1) she is a member of a protected class; (2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination.' " Stella v. Mineta, 284 F.3d 135, 145 (D.C.Cir .2002) (quoting Brown v. Brody, 199 F.3d 446, 452 (D.C.Cir.1999)). To set forth a prima facie case of retaliation, the plaintiff must show (1) that she engaged in a statutorily protected activity; (2) that the employer took an adverse action; and (3) that a causal connection existed between the two. *See* Broderick v. Donaldson, 437 F.3d 1226, 1231-32 (D.C.Cir.2006). A plaintiff can show a causal connection "by showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity." Rochon v. Gonzales, 438 F.2d 1211, 1220 (D.C.Cir.2006). The existence of a prima facie case creates a presumption that the employer acted in a discriminatory manner.

Once a plaintiff has established a prima facie case, the burden shifts to the employer to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for the employment action. *See* McDonnell Douglas, 411 U.S. at 802. The defendant's burden is one of production only. *See* Hicks, 509 U.S. at 509. The ultimate burden of persuasion remains at all times with the plaintiff. *See*

Burdine, 450 U.S. at 253. Once the defendant meets her burden, the plaintiff's initial presumption of discrimination "drops from the case" and the plaintiff has the opportunity to demonstrate that the defendant's explanation is not the true reason for the employment action. *See* *Hicks*, 509 U.S. at 507-08. In determining whether the defendant's action was motivated by discriminatory animus, the court can consider (1) evidence of a prima facie case; (2) evidence attacking the employer's proffered explanation; and (3) any further evidence of discrimination. *See* *Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1289 (D.C.Cir.1998) *(en banc)*. Evidence establishing a prima facie case and disproving the employer's stated reason for its actions, without additional evidence, permits, but does not compel, a finding of discrimination. *See* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-48 (2000).

1. Prima Facie Case of Race Discrimination

***6** Here, Armstrong has stated a prima facie case of disparate-treatment discrimination. With respect to the first two prongs of the analysis, there is little question that Armstrong has carried his burden. The record is clear that (1) Armstrong is Black and (2) DOT discharged him from his position as a Physical Security Specialist.

Turning to the third prong, a plaintiff may satisfy this requirement by showing that the discharge was not the result of "the two [most] common legitimate reasons for discharge:

> performance below the employer's legitimate expectations or the elimination of the plaintiff's position altogether." *George v. Leavitt*, 407 F.3d 405, 412 (D.C.Cir.2005). Here no evidence has been presented that DOT was unsatisfied with Armstrong's performance. While Privett and Prendergast questioned Armstrong regarding his use of administrative leave, DOT admits that "[o]nce Plaintiff explained to his supervisors about his family situation and the need for his excessive sick leave, the DOT never questioned his sick leave again." [FN6] LCvR 56.1 Stmt. ¶ 3 1. Therefore, the record is uncontroverted that this potential issue affecting Armstrong's performance was a non-factor in DOT's decision to discharge Armstrong.
>
> FN6. Armstrong's complaint makes clear that he seeks recovery for his termination under various theories. It is somewhat more ambiguous, however, if Armstrong also seeks recovery for Privett's and Prendergast's allegedly unnecessary scrutiny of his leave record. To the extent that Armstrong does allege that the review of his record was in violation of Title VII, the court finds that the inquiries made by Privett and Prendergast--which, as discussed above, did not result in any disciplinary action--do not constitute "adverse employment action." *See, e.g.*, *Brody v. Brown*, 199 F .3d 446, 457 (D.C.Cir.1999). Accordingly, assuming that Armstrong has asserted any claims that arise solely from the perscrutation of his use of leave, summary judgment is granted in DOT's favor.

DOT states, however, that, following the discovery of what it believed to be shortcomings in Armstrong's qualifications, Armstrong's supervisor determined that he would be unable to perform the essential functions of his position *in the future.* This belief, however, was speculative and based solely on the manner in which DOT construed the USMS's requirements for the attainment of Special Deputation. Because the court has reservations about DOT's interpretation of the type of experience and training demanded by USMS, discussed *infra,* the court is unwilling to accept that, as a matter of law, Armstrong was unable to acquire Special Deputy status and thereby unable to perform the essential functions of a Physical Security Specialist. Moreover, Armstrong has provided sufficient evidence of prior experience and training-- including 160 hours of training while at FEMA--to survive a challenge to the showing required to establish the third element of a prima facie case of discrimination.

Even if the court were to find this showing insufficient, Armstrong could also satisfy the third prong of the prima facie analysis by demonstrating that he was

treated differently from similarly situated employees who are not part of a protected class. *See Holbrook v. Reno,* 196 F.3d 255, 261 (D.C.Cir.1999). In this regard, Armstrong directs the court's attention to the training and experience of two peers, Chris Maney and Raymond Scott Rieger. Armstrong argues that these DOT Physical Security Specialists, both white, had no experience as "sworn law enforcement officers" and lacked "basic law enforcement training" provided by FLETC, yet were nonetheless certified by DOT as eligible for Special Deputation. DOT responds by stating that both Maney and Scott had served as military police in the armed services and therefore are not "similarly situated" to Armstrong. As for their training, DOT states that both men had training as "Security Specialists," and again, this belies any argument that they are "similarly situated" to Armstrong. Def.'s Reply at 12.

***7** "[Whether two employees are similarly situated ordinarily presents a question of fact for the jury." *George,* 407 F.3d at 415-16 (quoting *Graham v. Long Island R.R.,* 230 F.3d 34, 39 (2d Cir.2000)). In this case, a reasonable jury could find that Armstrong, Maney, and Scott were similarly situated. While Maney's and Scott's military service does appear to be a distinction, the difference in the three men's training is not apparent on its face.

2. Prima Facie Case of Retaliation

Title VII shields federal employees from reprisal actions by their employers by making it unlawful to discriminate against an employee because the employee "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a); *Rochon,* 438 F.3d at 1215-16 (concluding that section 2000e-3(a) applies to federal employment actions through the language of 42 U.S .C. § 2000e-16). In order to establish a prima facie case under Title VII Armstrong must demonstrate (1) that he engaged in a statutorily protected activity; (2) that DOT took an adverse action in response to this protected activity, [FN7] and (3) that a causal connection exists between the two. *See Broderick,* 437 F.3d at 1231-32.

> FN7. Taking heed of the D.C. Circuit's instruction in *Rochon v. Gonzales,* the court is aware that a plaintiff need not demonstrate that the adverse action taken by the employer is a "personnel action" or "employment-related." 438 F.3d at 1217-18. Rather, any challenged action that "would have been material to a reasonable employee," or "dissuaded a reasonable worker from making or supporting a charge of discrimination" is actionable under Title VII. *Id.* at 1219 (quoting *Washington v. Ill. Dep't of Revenue,* 420 F.3d 658, 662 (7th Cir.2005)).
> Though this distinction could presumably have an affect on the court's earlier holding that any claim related to Privett's and Prendergast's review of Armstrong's record could not survive DOT's motion for summary judgment because it did not constitute an "adverse employment action," *see supra* n. 5, the court need not address the distinction in this context since the scrutiny of Armstrong's record began well before he engaged in any protected activity. Armstrong alleges that Privett first questioned his use of leave in or before June 2003, Pl.'s Ex. 10 at 3-4 (EEO Counselor's Report), and Armstrong did not file his affidavit in support of Williams's discrimination claim until August 20, 2003. As a result, Armstrong cannot demonstrate there was a causal connection between the inquiry into his use of leave and his decision to engage in protected activity.

Both parties concede that Armstrong filed an affidavit in support of a co-worker's claim of discrimination and thus engaged in protected activity. Similarly, neither party contests that Armstrong's termination is an adverse action that would "dissuade[ ] a reasonable worker from making or supporting a charge of discrimination," *Rochon,* 438 F.3d at 1219 (quotations omitted). As a result, the first and second prongs of the analysis are satisfied.

The third prong of the inquiry "may be established by showing that the employer had knowledge of the employee's protected activity, and that the adverse ... action took

place shortly after that activity." *Mitchell v. Baldrige*, 759 F.2d 80, 86 (1985). Armstrong filed his affidavit in support of Williams's complaint on August 20, 2003 and Privett initiated the inquiry into Armstrong's qualifications in or around November 2003, approximately three months later. Given the close proximity between the date that Armstrong engaged in protected activity, the filing of the affidavit, and the initiation of his termination proceedings, DOT does not contest that this component of Armstrong's required showing is met. Accordingly, the court finds that Armstrong has set forth a prima facie case of retaliation.

3. Legitimate, Nondiscriminatory Reason for Termination

Because Armstrong has established the elements of prima facie case of retaliation and discrimination, the court next examines whether DOT has provided a legitimate nondiscriminatory reason for its action. *See* *Broderick*, 437 F.3d at 1232 (holding that once a plaintiff establishes a prima facie case of retaliation, the burden shifts to the defendant to proffer "a legitimate, nondiscriminatory reason for its actions"); *McDonnell Douglas*, 411 U.S. at 792-93 (establishing the burden-shifting framework utilized in discrimination claims).

***8** The legitimate reason offered by DOT to justify Armstrong's removal is that Armstrong was unqualified to serve as a Physical Security Specialist because he did not have, and given his lack of appropriate training and experience, could not acquire, Special Deputy status. DOT points out that it is undisputed that DOT Physical Security Specialists are "required to become a Special Deputy U.S. Marshall in order to perform his/her primary protection duties," Def.'s Ex. 1 (Physical Security Specialist (GS-080-13) Position Description), and that it is likewise undisputed that USMS demands that Special Deputies demonstrate "successful completion of a basic law enforcement training program" and "previous law enforcement experience." Def.'s Ex. 2 (USMS Policy Directive No. 99-13). DOT argues that neither Armstrong's tenure at DEA nor his service at FEMA satisfies USMS's "law enforcement experience" requirement for acquiring Special Deputy status. DOT maintains that Armstrong's duties at DEA were "in support of" law enforcement, but not actual law enforcement. In support of this proposition, DOT cites Armstrong's response to DOT's written inquiry, which states "I worked with 1811's in support of law enforcement duties while I was with the technical operations group at the DEA." Def.'s Ex. 20 (Questionnaire dated Dec. 5, 2003). DOT also relies on Armstrong's lack of authorization to carry a firearm while employed by DEA.

With respect to Armstrong's employment at FEMA, DOT again argues that, notwithstanding Armstrong's permission to carry a firearm and his executive protection responsibilities, this position does not qualify as "law enforcement experience." DOT points out that FEMA is not a law enforcement agency and argues that law enforcement experience is limited to "working as a police officer, military police or criminal investigator." Def.'s Mot. at 19.

DOT also argues that Armstrong's law enforcement training suffered from serious deficiencies. When Armstrong applied for Special Deputy status after transferring to DOT, he indicated that he had met USMS's "law enforcement training" requirement through attendance at "FLETC Criminal Investigation School" in September 2000. [FN8] Def.'s Ex. 23 (Application for Special Deputy status, dated Oct. 24, 2002). According to DOT, the agency initially believed that this course description referred to an extensive program that takes fifty-five days to complete. Privett maintains that once he discovered that the class in which Armstrong had enrolled was a ten-day course titled "Introduction to Criminal Investigations," and designed for non-law enforcement employees, [FN9] he no longer believed that Armstrong was in compliance with the USMS's training requirements.

FN8. Armstrong's application for employment with DOT describes the training program in slightly different terms. It states that he attended the "Federal Law Enforcement Training Center (FLETC) Criminal Investigations" program in August 2002. Def.'s Ex. 14 (Armstrong application)

FN9. The Introduction to Criminal Investigations Program course description

> states that: "[I]t is designed for regulatory and compliance inspectors, **paralegals**, auditors, technical personnel, and others who might assist in a criminal investigation, be required to testify in a criminal matter, or refer a matter to court for criminal investigators." Def.'s Ex. 21 (FLETC "Introduction to Criminal Investigations Program").

In assessing DOT's proffered reason for Armstrong's termination, the court is mindful that DOT bears only a burden of production to articulate a legitimate, nondiscriminatory reason for its actions. *Hicks*, 509 U.S. at 506-07, *Burdine*, 450 U.S. at 254. At this stage of the analysis, DOT "need not persuade the court that it was actually motivated by the proffered reasons." *Burdine*, 450 U.S. at 254. Rather, "[t]he defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions, which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause for the employment action." *Hicks*, 509 U.S. at 507 (quotations omitted). In this instance, DOT has introduced admissible evidence that, if believed, demonstrates that Armstrong was not qualified to continue serving as a Physical Security Specialist. Therefore, it has met its burden.

4. Pretext

***9** Having found that DOT has offered legitimate, nondiscriminatory reasons for its termination of Armstrong, the court next considers whether Armstrong has offered evidence from which a reasonable jury could conclude that DOT's benign explanations are merely pretextual. *Mastro v. Potomac Elec. Power Co.*, 2006 WL 1359604, at *8 (D.C.Cir. May 19, 2006) (citing *Holcomb v. Powell*, 433 F.3d 889, 896 (D.C.Cir.2006). Armstrong may accomplish this task "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. When assessing the strength of Armstrong's showing, the court is free to examine all the evidence presented, including "(1) the plaintiff's prima facie case; (2) any evidence the plaintiff presents to attack the employer's proffered explanations for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff (such as independent evidence of discriminatory statements or attitudes on the part of the employer)." *Teneyck v. Omni Shoreham Hotel*, 365 F.3d 1139, 1151 (D.C.Cir.2004) (quoting *Dunaway v. Int'l Bhd. of Teamsters*, 310 F.3d 758, 763 (D.C.Cir.2002)).

a. "Experience" and "Training" Requirements

According to Armstrong, the evidence of pretext comes in many forms. Foremost among the arguments raised by Armstrong is that Privett and Prendergast manipulated the USMS's experience and training requirements in an effort to find Armstrong ineligible for Special Deputation. An essential element of this argument--about which there is no dispute, Def.'s Reply at 15--is that nowhere in USMS's regulations, nor in DOT's regulations, are the terms "law enforcement experience" or "basic law enforcement training" defined or interpreted. According to Armstrong, the subjective nature of these requirements permitted DOT to unreasonably conclude that Armstrong's work at FEMA, as well as his training at FLETC, was inadequate.

DOT responds by stating that, though no written definition of the terms exist, they have been consistently interpreted by Prendergast, Privett, and Deem, and that Armstrong simply did not meet these standards. Additionally, DOT insists that it relied upon USMS's interpretation of each requirement and was not afforded unchecked discretion to interpret the regulations.

Addressing the latter of these responses first, the court observes that there is indeed evidence in the record that Deem, an employee of USMS, ratified Privett's conclusions concerning Armstrong's lack of qualification. Specifically, DOT has submitted a letter in which Deem writes "we concur with DOT's determination that Mr. Armstrong does not meet the training requirement or the requirement of previous law enforcement experience." Def.'s Ex. 4 (Letter from Deem to Privett dated Jan. 20, 2004). Similarly, there is also evidence that Privett's conclusions regarding

Armstrong's qualifications were reviewed by Linda Washington--the ultimate decisionmaker with respect to Armstrong's removal--who likewise determined that Armstrong lacked the requisite experience and training. Def.'s Ex. 13 at 70 (Washington Dep.).

***10** These citations are not, however, dispositive. There is conflicting evidence that supports the conclusion that the each of the later affirmations of Armstrong's deficient qualifications were based solely on perfunctory examinations that relied on Privett's initial assessments. Armstrong directs the court's attention to Deem's deposition testimony in which Deems states that, traditionally, USMS relies on the agency's conclusions concerning an applicant's fitness for Special Deputation. Perhaps more significantly, Deem also discusses the January 20, 2004, letter cited above and reveals that his conclusions in that letter were based upon the information provided by DOT and nothing more. [FN10] In turn, Washington's support for Privett's proposed removal relied heavily on USMS's statement that Armstrong did not meet their criteria. *See* Def.'s Ex. 13 at 70 (Washington Dep.). As such, it is possible for a trier of fact to conclude that only Privett interpreted the requirements.

> FN10. Deem states in his deposition: Q. [I]n your letter ... what you're saying is that, look, this is what you tell me, and if you tell me he's not meeting these requirements, he doesn't meet them?
> A. Correct.
> Q. You're not making an individual determination that he met them or didn't meet them; is that right?
> A. I'm basing it on what DOT has told me.
> Pl.'s Ex. 8 at 49-50 (Deem Dep.)

As to whether or not DOT's application of USMS's Special Deputy standards is the only possible interpretation of the experience and training requirements, again, there is evidence in the record that contradicts DOT's assertions. With respect to the training requirement, DOT offers no guidance as to what criteria are necessary for a training course to pass muster as "basic law enforcement training." Instead, DOT states only that Armstrong's training was insufficient. DOT's decision rests exclusively on one aspect of the FLETC course in which Armstrong enrolled--that it was designed for non-criminal investigators (as opposed to the extensive FLETC course that it first believed Armstrong attended). No additional authority is cited.

After careful review of the record, the court has identified, at least arguably, an alternative definition of "basic law enforcement training." During the course of his deposition, Deem articulates a number of broad guidelines used by USMS in analyzing whether an applicant's training comports with its requirements for Special Deputation. Deem testified that "basic law enforcement training" should include "firearms training," "law," and "use-of-force training." Pl.'s Ex. 8 at 22-23 (Deem Dep.). In addition, when discussing the length of this program Deem testified that "I don't think there's any--I mean, every law enforcement academy and federal agency has different lengths to their academy. I mean, I don't think there's a standard length, but as long as it's a successful completion of a basic--where everything we're looking for is included." *Id.*

Applying governing principles, the court finds that whether or not Armstrong attended a course in "basic law enforcement" is a disputed issue of material fact. While at FEMA Armstrong received 160 hours of training, 80 of which were comprised by the Criminal Investigations Training Program administered by FLETC. Pl.'s Ex. 5 (Mem. re: Interview with Bob King, Chief, Physical Security, FEMA; dated Dec. 8, 2003). An additional eighty hours of instruction overseen by FEMA included forty hours of firearms training, as well as courses addressing "use of force continuum;" "vehicle stops;" "apprehension, detention and arrest;" "use of non-deadly force;" and "Miranda." *See* Pl.'s Ex. 24 (FEMA Deputy Training Program Curriculum).

***11** The court likewise finds that Armstrong has raised a triable issue of fact regarding DOT's contention that Armstrong's lack of "prior law experience" resulted in his termination. Citing the deposition testimony of Privett, Prendergast, and

Deem, DOT insists that the only acceptable forms of "prior law enforcement experience," are service as a "local cop," as a "federal agent," or as a member of the "military police." Def.'s Ex. 8 at 157-59 (Privett Dep.); *see also* Def.'s Reply Ex. D at 107-11 (Prendergast Dep.); Def.'s Ex. 3 at 25 (Deem Dep.). This narrow definition, however, does not comport with other portions of the record, in particular, Deem's deposition testimony. Deem states that an individual does not necessarily have to be working for a "law enforcement agency" in order to acquire "law enforcement" experience; rather, what is significant is that they are "doing law enforcement work." Pl.'s Ex. 8 at 23-24 (Deem Dep.). Additionally, Deem suggests that the parameters for acquiring law enforcement experience are not as rigid as DOT would have one believe and states that qualifications will be assessed "on a case-by-case basis." *Id.*

The record also contains other instances in which "law enforcement" experience receives a broader interpretation than that which is advocated by DOT. For example, Privett provided testimony regarding a particular type of retirement regulation in which "[y]ou don't necessarily have to be a law enforcement officer to qualify for law enforcement credit." Pl.'s Ex. 3 at 160 (Privett Dep.). Similarly, Bob King, Chief, Physical Security, FEMA, stated in an interview conducted at Privett's request that "FEMA considered Armstrong a qualified law enforcement office [sic] at the completion of his training [with FEMA]." Pl.'s Ex. 5 (Interview of Bob King, dated Dec. 8, 2003).

Armstrong does concede that when employed by the DEA he "worked with 1811's *in support* of law enforcement duties while [he] was with the Technical Operations Group...." Def.'s Ex. 20 (Questionnaire dated Dec. 5, 2003) (emphasis added). [FN11] Assuming arguendo that this distinction renders Armstrong's service with the DEA ineligible for classification as "law enforcement" experience, Armstrong may nevertheless have fulfilled the experience requirement while employed by FEMA. Armstrong describes his responsibilities with FEMA as follows:

> FN11. The court notes that, based on the wording of the Questionnaire DOT provided to Armstrong, it appears that categorizing a job as an "1811" position denotes that the job entails certain "law enforcement" duties. However, because DOT has not explained the significance of 1811-categorization, the court declines to make any inference from the absence of 1811-status for Armstrong's position at the DEA.

> Responsible for the development and implementation of all aspects of security for Maynard MERS, FEMA Regional office in Boston and FEMA Regional office in New York City. Responsible for the implementation and maintenance of physical, personnel and industrial security programs, which consist of performing Security Risk Assessments, Comprehensive Vulnerability Assessments of Federal Facilities, Executive Protection and Communications Security. Responsible for and conduct investigations involving theft, assault, sabotage and other criminal activity.... Serve as the lead Protective Agent for the Director of FEMA and top level government officials.

***12** Def.'s Ex. 14 (Armstrong application); *see also* Pl.'s Ex. 4 at 5 (Pl.'s Answer to Interrogs.) ("My duties during my tenure at FEMA included executive protection, criminal investigations, counterterrorism, escort of conveys [sic], special operations, security site surveys, personnel security...."). In addition, it is uncontroverted that Armstrong was granted Special Deputy status while at FEMA. As a Special Deputy, Armstrong had the authority to, *inter alia*, "seek and execute arrest warrants and search warrants," "make arrests without a warrant," and "carry firearms for personal protection or the protection of persons covered under the federal assault statutes." Def.'s Ex. 2 (USMS Policy Directive No. 99-13). [FN12] A reasonable jury could conclude that these type of duties constitute "law enforcement" experience.

> FN12. DOT has advised the court that, during Armstrong's tenure with FEMA, FEMA had a "Memorandum of Understanding" with USMS that governed how the Special Deputy program was administered. DOT suggests that this Memorandum of Understanding affected the requirements necessary for individuals employed

> with FEMA to receive Special Deputy status, in essence making the requirements less rigorous. DOT does not, however, assert that this memorandum of understanding in any way abridged the scope of a Special Deputy's authority once Special Deputy status was granted.

b. Circumstances Surrounding Investigation

In assessing whether Armstrong has successfully created a question of fact regarding whether DOT's proffered reasons for his termination are pretextual, the court also considers the circumstances that led to the investigation of Armstrong's qualifications.

The court notes that there is evidence in the record to support Armstrong's contention that his supervisors, Privett and Prendergast, took umbrage at Armstrong's charges of racial discrimination. In response to a question about his meeting with Armstrong regarding Armstrong's use of leave and Armstrong's insinuation that discrimination had something to do with the inquiry, Prendergast testified that, "[O]bviously I was very irritated, number one, at the accusation that he was implying. And number two, at his conduct. And I strongly urged Mr. Privett to support me in following up with some disciplinary action, because I thought it was warranted." Def.'s Ex. 7 at 56 (Prendergast Dep.). Additionally, Armstrong alleges that on October 15, 2004 Privett threatened to sabotage any future job opportunities that might arise if Armstrong continued to press his allegations of discrimination. Pl.'s Ex. 4 at 3 (Pl.'s Answer to Interrogs.); Pl.'s Ex. 10 at 4 (EEO Counselor's report). Similarly, Privett discouraged Armstrong from referring to Prendergast as a racist. Pl.'s Ex. 10 at 5.

The court also notes that the manner in which Privett came to review Armstrong's qualifications could be viewed by reasonable jurors as consistent with a pretextual justification for termination. Privett testified that he discovered the discrepancies in Armstrong's file during preparation for a mediation session designed to address Armstrong's grievances related to the investigation of his use of leave. Pl.'s Ex. 3 at 29 (Privett Dep.). According to Privett, he reviewed Armstrong's resume when he faxed the document to an associate at TSA as part of an effort to secure alternative employment for Armstrong. *Id.* Armstrong, however, never indicated to anyone that he had a desire to leave DOT. While Armstrong had complained about his treatment at DOT, he never stated that he no longer wished to work with the agency. Viewing the facts in a light most favorable to Armstrong, Privett's unilateral decision to seek a transfer for Armstrong lends credence to Armstrong's assertion that Privett did not wish for Armstrong to remain an employee of DOT.

***13** Because Armstrong has produced sufficient evidence for a reasonable jury to conclude that DOT's "legitimate, nondiscriminatory reason" for his discharge was a mere pretext, DOT's motion for summary judgment must be denied with respect to Armstrong's claims of race discrimination and retaliation.

III. CONCLUSION

For the aforementioned reasons, it is this 19th day of June, 2006, hereby

ORDERED that DOT's "Motion for Summary Judgment," (Dkt.# 12) is DENIED with respect to plaintiff's race and retaliation claims; and it is further

ORDERED that DOT's "Motion for Summary Judgment," (Dkt.# 12) is GRANTED with respect to plaintiff's CSRA claim.

Slip Copy, 2006 WL 1726674 (D.D.C.)

Motions, Pleadings and Filings **(Back to top)**

• 2005 WL 3174227 (Trial Motion, Memorandum and Affidavit) (Oct. 3, 2005)Original Image of this Document (PDF)

• 2005 WL 2453267 (Trial Motion, Memorandum and Affidavit) Plaintiff's Opposition to Defendant's Motion for Summary Judgment (Aug. 15, 2005)Original Image of this Document (PDF)

• 2004 WL 2597760 (Trial Pleading) Complaint (Removal From Federal Service Because Of Race And Retaliation) (Sep. 27, 2004)Original Image of this Document (PDF)

• 1:04cv01661 (Docket) (Sep. 27, 2004)

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United States District Court,
N.D. Georgia,
Atlanta Division.
PROFITEL GROUP, LLC, a Georgia Limited Liability Company, Plaintiff,
v.
POLYONE CORPORATION, an Ohio Corporation, Defendant.
Civil Action File No. 1:05-CV-1764-TWT.

June 19, 2006.

Joseph Frederick Hession, Philip S. Bubb, Carlton Fields, P.A., Atlanta, GA, for Plaintiff.

Lucas W. Andrews, Samantha Rose Mandell, Jones Day, Atlanta, GA, for Defendant.

OPINION AND ORDER

THOMAS W. THRASH, JR., District Judge.

***1** This is a breach of contract action. It is before the Court on the Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's Breach of Contract Claim [Doc. 78], the Plaintiff's Motion for Summary Judgment as to Defendant's Conditional Counterclaim [Doc. 79], the Defendant's Motion for Summary Judgment [Doc. 82], and the Defendant's Motion for Partial Summary Judgment With Respect to Liability as to Defendant's Counterclaim [Doc. 82]. For the reasons set forth below, the Plaintiff's Motion for Partial Summary Judgment as to its breach of contract claim is DENIED, and its Motion for Summary Judgment as to the Defendant's counterclaim is GRANTED. The Defendant's Motion for Summary Judgment is GRANTED, and its Motion for Partial Summary Judgment as to its counterclaim is DENIED.

I. *BACKGROUND*

Plaintiff ProfiTel Group, LLC ("ProfiTel"), is a limited liability company organized under the laws of the state of Georgia. It is in the business of auditing client telecommunications bills. In July 2003, ProfiTel entered into a contingency fee agreement, referred to as the Consulting and Confidentiality Agreement ("Consulting Agreement"), with Defendant PolyOne Corporation ("PolyOne"). Pursuant to the Consulting Agreement, ProfiTel would audit certain PolyOne telecommunications bills, including bills for long distance and data services, and identify past billing errors and non-conformances. In the event that billing errors or non-conformances were found, ProfiTel would file a claim to recover refunds or credits. ProfiTel's compensation for its auditing services was to be 50% of any "monies and/or credits for past billing errors and non-conformance actually recovered" by ProfiTel on behalf of PolyOne. (Def.'s Statement of Material Facts, Ex. A, § 2. 1.) ProfiTel alleges that it is due, but has not been paid, a fee under the Consulting Agreement based on credits PolyOne allegedly received from its telecommunications carrier.

After entering into the Consulting Agreement, PolyOne provided to ProfiTel a number of invoices from MCI, PolyOne's telecommunications carrier. In August 2003, ProfiTel notified PolyOne that its initial review of the identified invoices revealed that MCI had been overcharging PolyOne for domestic frame relay service. Specifically, after reviewing the relevant contracts between PolyOne and MCI, ProfiTel believed that PolyOne was entitled to a tariff discount over and above the 29% discount it received on frame relay service. According to ProfiTel, the overcharges resulting from the alleged discount percentage discrepancy for the period of April 2001 to August 2003 totaled more than $1 million. In December 2003 and again in February

2004, ProfiTel provided PolyOne with draft claim letters, each of which detailed ProfiTel's audit findings and demanded that MCI credit PolyOne's account for the alleged overcharges. PolyOne forwarded the letters to MCI, but MCI denied the claim both times. Thereafter, in December 2004, PolyOne advised ProfiTel that it was abandoning the claim because it believed that MCI had correctly charged for the frame relay service.

***2** Despite PolyOne's abandonment of the claim, ProfiTel alleges that PolyOne later used the audit findings as a negotiating tool with MCI. At some point during 2004, PolyOne became aware that it would not meet the minimum volume levels required by its contract with MCI. PolyOne began renegotiating its contract. In early 2005, PolyOne and MCI executed an amendment to their contract, the Second Amendment to the Global Services Agreement ("GSA"), whereby MCI reduced the minimum volume requirements for years two and three of the contract and excused any penalties associated with underutilization by PolyOne for year one. (Def.'s Statement of Material Facts, Ex. KK, ¶ ¶ 2-3.) In exchange for these concessions, PolyOne's exclusivity requirement was increased from 90% to 95% and PolyOne agreed to the following release:

> Customer hereby releases, forever quitclaims, and discharges MCI, its parents, subsidiaries, affiliates, agents, representatives, assigns, transferees, officers, directors and employees from any and all claims, causes of action, suits, damages, demands, obligations, and liabilities of every kind and nature whatsoever arising out of any alleged or actual billing errors related to frame relay services provided by MCI to customer prior to December 31, 2004 (the "Released Claims"). This release and discharge from all claims and liabilities applies to matters now known and to all matters that may hereafter be discovered, if any, with respect to the Released Claims above. After execution of this Amendment, Customer shall thereafter be barred from bringing any charge, complaint or other action against MCI relating to such matters.

(*Id.*, ¶ 5.) PolyOne asserts that MCI agreed to the utilization adjustments without discussion of any claim associated with frame relay charges, and that the release was included by MCI as an afterthought simply to memorialize the fact that PolyOne would not be pursuing the previously asserted claim. ProfiTel contends, however, that PolyOne used ProfiTel's audit findings, and the release of any claim arising out of the findings, as the basis for securing approximately $3.15 million in underutilization concessions from MCI.

ProfiTel argues that the underutilization concessions constitute a recovered "credit" under the terms of the Consulting Agreement. As such, ProfiTel alleges that PolyOne breached the Consulting Agreement by failing to pay a fee equaling 50% of the underutilization concessions. ProfiTel also asserts claims for unjust enrichment, promissory estoppel, fraud, and attorney's fees under O.C.G.A. § 13-6-11. ProfiTel moves for summary judgment on its breach of contract claim. PolyOne moves for summary judgment on all of ProfiTel's claims. In addition, PolyOne asserts a counterclaim, alleging that ProfiTel breached the Consulting Agreement. ProfiTel moves for summary judgment on this claim, and PolyOne moves for summary judgment as to liability only.

II. *SUMMARY JUDGMENT STANDARD*

***3** Summary judgment is appropriate only when the pleadings, depositions, and affidavits submitted by the parties show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The court should view the evidence and any inferences that may be drawn in the light most favorable to the nonmovant. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). The party seeking summary judgment must first identify grounds that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The burden then shifts to the nonmovant, who must go beyond the pleadings and present affirmative evidence to show that a genuine issue of material fact does exist. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986).

III. *DISCUSSION*

A. *Breach of Contract*

ProfiTel claims that PolyOne breached the Consulting Agreement by failing to pay to ProfiTel a fee for alleged credits received as a result of the audit findings. Pursuant to the Consulting Agreement choice of law provision, the contract is to be construed under and in accordance with Ohio law. (Def.'s Statement of Material Facts, Ex. A.) Under Ohio law, interpretation of a written contract, including whether terms are ambiguous, is a question of law. *Aerel v. PCC Airfoils, L.L.C.*, 371 F.Supp.2d 933, 939 (N.D.Ohio 2005). The intent of the parties to a contract must be determined from the contract language itself. *Medical Billing, Inc. v. Medical Mgmt. Scis., Inc.*, 212 F.3d 332, 337 (6th Cir.2000); *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 820 N.E.2d 910, 915 (Ohio 2004). A court may look to extrinsic evidence to ascertain the intended meaning only if the terms of the agreement are unclear or ambiguous. *Aerel*, 371 F.Supp.2d at 939; *Petro*, 820 N.E.2d at 915. In interpreting contract language, words must be given their plain and ordinary meaning "unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall content of the document." *Medical Billing, Inc.*, 212 F.3d at 337; *Petro*, 820 N.E.2d at 915. Thus, contract terms are ambiguous only if the meaning of the terms cannot be determined from reading the entire contract or if the terms are susceptible of more than one reasonable interpretation. *Waste Mgmt., Inc. v. Rice Danis Indus. Corp.*, 257 F.Supp.2d 1076, 1083 (S.D.Ohio 2003); *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, LLC*, 740 N.E.2d 328, 339 (Ohio Ct.App.2000). If terms are ambiguous, extrinsic evidence appropriately considered by the court includes: (1) the circumstances surrounding the parties at the time the contract was made; (2) the objectives intended to be accomplished by entering into the contract; and (3) any acts that demonstrate the construction the parties intended to give the agreement. *Crane Hollow, Inc.*, 740 N.E.2d at 339.

***4** ProfiTel contends that it is entitled to recover a percentage of the value of the underutilization concessions provided to PolyOne by MCI. Section 2.1 of the Consulting Agreement addresses ProfiTel's entitlement to compensation and provides, in pertinent part:

> [ProfiTel's] fee from "Audit Findings," as defined in Section 1.1 of this agreement [FN1], shall be 50% of all monies and/or credits for past billing errors and non-conformance actually recovered by [ProfiTel] on behalf of [PolyOne] ... For an abundance of clarity, [ProfiTel] will receive a percentage only of recoveries for past billing errors and non-conformances; [ProfiTel] will not receive a percentage of any recoveries on future billings.
>
> FN1. Section 1.1 of the Consulting Agreement defines "audit findings" as "[p]ast billing errors and non-conformance(s)" as identified from audits of PolyOne's long distance and data services bills. (Def.'s Statement of Material Facts, Ex. A, § 1.1.)

(Def.'s Statement of Material Facts, Ex. A, § 2. 1.) PolyOne contends that ProfiTel is not entitled to a fee under this provision for a number of reasons, arguing first that ProfiTel did not identify any actual "billing error" for which fee recovery was warranted. The parties do not argue that "billing error" is ambiguous and, therefore, the phrase will be given its plain and ordinary meaning. However, in addition to maintaining that it did identify legitimate billing errors, ProfiTel contends that PolyOne is equitably estopped from challenging the validity of the audit findings.

1. *Billing Errors*

ProfiTel was entitled to receive a fee for money or credits obtained due to billing errors or non-conformances in PolyOne's telecom bills. In conducting the audit, ProfiTel analyzed invoices that covered the following services provided to PolyOne by MCI: (1) outbound and local; (2) toll-free; (3) access; (4) frame relay; and (5) UUNET. Although four of the five invoices were validated as correct, ProfiTel stated that "the Frame Relay invoice had a significant billing error due to the misapplication of discounts that was costing PolyOne in excess of $35K per month...." (Def.'s Statement of Material Facts, Ex. M, at 2.) ProfiTel based this conclusion on its interpretation of a number of agreements between PolyOne and MCI:

the Special Customer Arrangement ("SCA"), the GSA, and the First Amendment to the GSA ("First Amendment"). (Def.'s Statement of Material Facts, Exs. N–P.) By way of background, the original service agreement between PolyOne and MCI was the SCA. With regard to discounts for frame relay service, Section 5.7 of Attachment A of the SCA governed, providing in relevant part:

> *Domestic MCI Hyperstream Frame Relay Service ("HFRS"):* Subject to Customer's enrollment under an MCI accepted HFRS Enrollment Form and Agreement ("HFRS Agreement"), Customer shall be eligible to receive during the term of this Agreement, *in addition to any discounts authorized under the HFRS Agreement, a discount equal to nineteen percent (19%)* on all service elements eligible for discount under the terms of the HFRS Agreement.

(Def.'s Statement of Material Facts, Ex. N, § 5.7) (emphasis added). On November 30, 1999, PolyOne and MCI executed the GSA, which incorporated the terms of the SCA. (Def.'s Statement of Material Facts, Ex. P, § 2.2.) Nothing in the GSA altered or amended the frame relay discount provision set forth in Section 5.7 of Attachment A of the SCA. However, as part of the First Amendment, Section 5.7 was deleted and replaced with the following:

> ***5** *Interstate Frame Relay (Option 2) Service.* For MCI WorldCom interstate Frame Relay (Option 2) Service originating and terminating in the United States (excluding Metro Frame Relay Service), Customer *will pay the then standard rates, less a discount of 29% ...* This discount does not apply against any other charges....

(Def.'s Statement of Material Facts, Ex. O, ¶ 13) (emphasis added).

In its audit findings relating to the frame relay invoice, ProfiTel acknowledged that by replacing Section 5.7, "the contract no longer explicitly stated that PolyOne was entitled to the *additional discounts authorized under the HFRS Agreement*." (Def.'s Statement of Material Facts, Ex. M, at 3.) Nevertheless, according to ProfiTel, the deletion of the additional discount language did not eliminate the tariff discount applicability and PolyOne remained entitled to that discount based on its frame relay volume and term commitments. (*Id.* at 3.) As such, ProfiTel identified as a billing error the fact that PolyOne received only a 29% discount, rather than a 54% discount, on frame relay from April 2001 through August 2003. (*Id.* at 4.) PolyOne contends that the alleged billing error resulted from an incorrect interpretation of the governing agreements.

To assess the validity of the audit findings and, thus, whether ProfiTel identified a billing error, the Court must necessarily construe the terms of the SCA, the GSA, and the First Amendment. According to the choice of law provision, these agreements are to be governed by New York law. [FN2] Under New York law, the court is to ascertain the intent of the parties based on the language of the contract itself. *Sayers v. Rochester Tel. Corp. Supplemental Mgmt. Pension Plan*, 7 F.3d 1091, 1094 (2d Cir.1993); *see also Postlewaite v. McGraw-Hill, Inc.*, 411 F.3d 63, 69 (2d Cir.2005) (applying New York law) ("The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent ... The best evidence of what parties to a written agreement intend is what they say in their writing."). "If a contract is unambiguous on its face, the parties' rights under such a contract should be determined solely by the terms expressed in the instrument itself rather than from extrinsic evidence as to terms that were not expressed or judicial views as to what terms might be preferable." *Waldman ex rel. Elliott Waldman Pension Trust v. Riedinger*, 423 F.3d 145, 149 (2d Cir.2005). Ambiguity is a question of law which the court determines based on the contract alone. *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 187 (2d Cir.2006). Language is ambiguous if, viewing it objectively, more that one meaning may reasonably be ascribed to it. *Id.*; *see Sayers*, 7 F.3d at 1095 ("Contract language is ambiguous if it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business."). Unambiguous terms are those with "a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion." *Waldman*, 423 F.3d at 149 (*quoting Care Travel Co. v. Pan Am. World Airways, Inc.*, 944 F.2d 983, 988 (2d Cir.1991)); *Sayers*, 7 F.3d at

1095. Terms that are deemed unambiguous are generally accorded their ordinary meanings. *Id.*

> FN2. Section 5.12 of the GSA incorporates by reference Section 8 of the SCA, which provides that New York law governs the agreement and any causes of action arising out of it. (Def.'s Statement of Material Facts, Exs. N, P.)

***6** Whether ProfiTel identified an actual billing error turns on what discount rate PolyOne was entitled to receive on frame relay service. Section 5.7 of Attachment A of the SCA originally provided that PolyOne was entitled to a discount in addition to the 19% discount expressly provided under the contract. However, as discussed above, the First Amendment set forth a new discount rate of 29% and eliminated the additional discount language. Despite that fact, ProfiTel contends that PolyOne remained entitled to a tariff discount in addition to the stated 29% discount. In support of this construction, ProfiTel cites to Section 1 of the SCA, titled "Service Provisioning," which states, in pertinent part:

> MCI will provide to Customer interstate and international telecommunications service(s) provided pursuant to MCI Tariff FCC No. 1, MCI Tariff FCC No. 8, WUI Tariff FCC No. 27, and any other interstate and international tariff of MCI and its U.S. affiliates, *each as supplemented by this Agreement ... This Agreement incorporates by reference the terms of each such MCI tariff.*

(Def.'s Statement of Material Facts, Ex. N, § 1) (emphasis added). ProfiTel appears to argue that the italicized portion of Section 1 indicates that the incorporated MCI tariffs, including any tariff discounts, supplement the provisions applicable to all services covered by the SCA. However, this introductory provision only addresses tariff applicability in a general manner and does not specifically refer to discounts. Rather, a subsequent "Rates and Discounts" provision provides:

> The rates, discounts, terms and conditions of this Agreement are those set forth in applicable MCI Tariffs, except as set forth in Attachment A, which is hereby incorporated by reference.

(*Id.*, § 2). "It is a fundamental principle of contract interpretation that definitive, particularized contract language takes precedence over expressions of intent that are general, summary, or preliminary." *In re Chateaugay Corp.*, 198 B.R. 848, 855 (S.D.N.Y.1996) (citation omitted); *see Aramony v. United Way of Am.*, 254 F.3d 403, 413 (2d Cir.2001) (applying New York law) ("[I]t is a fundamental rule of contract construction that 'specific terms and exact terms are given greater weight than general language.' ") (*quoting* Restatement (Second) of Contracts § 203(c) (1981); see also Arthur Linton Corbin, *Corbin on Contracts* § § 545-54, at 521 (1952) ("[W]ords of general description should generally yield to words that are more specific."). This is true even where there is no "true conflict" between the two provisions. *Aramony*, 254 F.3d at 413. Accordingly, the language of the "Rates and Discounts" section controls the determination of what discounts apply to various services.

In arguing for the proper construction of Section 2, i.e., the "Rates and Discounts" section, PolyOne focuses on the clause providing that MCI tariff discounts control, "except as set forth in Attachment A." (Def.'s Statement of Material Facts, Ex. N, § 2.) According to PolyOne, this phrase means, when given its plain and ordinary meaning, that tariff discounts are the default and apply unless a provision of Attachment A expressly addresses the applicable discount for a particular service. As previously discussed, frame relay discounts are covered by Section 5.7 of Attachment A, as amended by the First Amendment. Because Section 5.7 states only that a 29% discount will be applied to standard frame relay rates and does not provide for any additional discount, PolyOne asserts that the express discount rate trumps and renders inapplicable any unreferenced tariff-based discount.

***7** ProfiTel disagrees with PolyOne's construction, arguing that exclusion of tariff discounts may only be accomplished by using specific "in lieu of" language and that the "except as" language of Section 2 is not equivalent to "in lieu of." According to ProfiTel, the absence of the requisite "in lieu of" language means that Section 5.7 inherently provides for application of the tariff discount in addition to the stated 29% discount. ProfiTel points to several instances in Attachment A where the

parties used the "in lieu of" language when discussing the applicability of stated rates and discounts to the exclusion of tariffs. For example, Section 4.1 .3, as amended, states: "In lieu of Tariffed rates, Customer will pay the following Postalized Rates ...."; and Section 4.1.5 states: "The Customer will be charged the following ... rates for domestic network MCI Conferencing usage ... in lieu of discounts and standard tariffed rates." (Reply in Support of Pl.'s Mot. for Partial Summ. J., Ex. 13.) Based on these examples, ProfiTel claims that when MCI intended to eliminate tariffs completely for specific services, it did so with express "in lieu of" language. However, the use of the "in lieu of" language must be considered in the context of the provisions in which it appeared. Specifically, most of the sections cited by ProfiTel fall under Section 4.1 of Attachment A ("Postalized Rates"), which expressly references tariffs and states that "[t]he rates below will fluctuate with any changes in the Tariff...." (*Id.*) In light of the fact that tariffs are the expressed starting point, it was more incumbent on the parties to exclude explicitly application of the tariffs from the rates addressed in the cited Section 4.1 subsections. ProfiTel also cites to Section 5.1.1, as amended, and Section 5.3.1. However, in each of these sections, as with the Section 4.1 subsections, the "in lieu of" of language is preceded by specific references to tariffs. [FN3] In contrast, Section 5 ("Volume Discounts"), under which the relevant Section 5.7 falls, states that the "Customer will be charged the rates and receive the discounts set forth under this Agreement," without any mention of tariffs. (*Id.*) As such, the same explicit "in lieu of" language was not necessary in Section 5.7 to eliminate application of the tariff. Furthermore, although ProfiTel repeatedly states that specific "in lieu of" language is mandatory, it provides no statutory or case law support for its assertion. Consequently, the Court cannot find that MCI was required to include this particular language in order to eliminate the application of tariff discounts in addition to the stated discount for frame relay service.

> FN3. Section 5.1.1, as amended, provides: "Customer will pay standard Tariffed international outbound rates, less a 10% discount, which discount shall be in lieu of any otherwise applicable Tariffed discounts." (Pl.'s Reply, Ex. 13.) Section 5.3.1 states, in pertinent part: "In lieu of the APP discount identified in Section 5.3 above or any other rate or discount, Customer will pay...." (*Id.*) The referenced Section 5.3 provides: "The Customer will receive the rates, charges and discounts associated with the Access Pricing Plan ("APP") set forth in the Tariff...." (*Id.*)

Viewing the contract as a whole, the Court finds no ambiguity regarding what discount percentage applies to frame relay service provided to PolyOne. Rather, the Court finds that Section 2 of the SCA unambiguously provides that MCI tariffs generally govern rates and discounts. However, as indicated by the "except as" clause, in the event that Attachment A addresses the discount applicable to a particular service, the specific terms of Attachment A control. *See* *Continental Ins. Co. v. Arkwright Mut. Ins. Co.*, 102 F.3d 30, 34 (1st Cir.1996) ("except ... for" language in insurance contract unambiguously excluded specified deductible rate when another deductible provision applied); *see also* *Donovan v. Bankers Fid. Live Ins. Co.*, 26 F.3d 854, 855 (8th Cir.1994) (applying Georgia law) ("except as specifically provided" language was clear and unambiguous). Additionally, Section 5.7 of Attachment A unambiguously sets forth an exclusive discount rate for frame relay service. There is no mention of an additional discount, tariff or otherwise, and the Court will not insert or give effect to terms that were not expressed in the contract. Neither the language of Section 2 nor Section 5.7 is reasonably susceptible to an interpretation other than that PolyOne was entitled to a 29% discount on standard frame relay rates. It is undisputed that the frame relay invoice audited by ProfiTel indicated that PolyOne received a 29% discount. Consequently, ProfiTel failed to uncover any legitimate billing error.

***8** Even if Profitel had found a billing error, it has failed to show that PolyOne received monies or a credit for the error. It is undisputed that no money was received by PolyOne. Profitel argues that the concessions that PolyOne received on the minimum usage requirements was a "credit" for billing errors. But it has not shown any connection between the two. The illogic of ProfiTel's position is that the alleged billing errors that it identified--$1 million for which it would receive a

fee of $500,000--has now become a $3.15 million credit for which it should receive a fee of $1,575,000. If MCI received anything in exchange for the release, it was not release of a $3.15 million liability. It appears that the release was just an "afterthought" as MCI and PolyOne were adjusting through negotiations a complicated contractual relationship, and that it had nothing to do with a real dispute about the frame relay billings.

2. *Equitable Estoppel*

ProfiTel contends that the doctrine of equitable estoppel bars PolyOne from arguing that there were no billing errors. In order to establish equitable estoppel, as generally defined by Georgia law, ProfiTel must show that: (1) PolyOne misrepresented or concealed material facts; (2) PolyOne knew of the true facts; (3) ProfiTel did not know, nor should have known, the true facts; (4) PolyOne intended ProfiTel to act on the misrepresentation or had reason to believe that ProfiTel would rely upon it; and (5) ProfiTel reasonably and detrimentally relied upon the misrepresentation. *See* Bowers v. Blue Cross Blue Shield of Ga., 16 F.Supp.2d 1374, 1380 (N.D.Ga.1998) *(citing* National Cos. Health Benefit Plan v. St. Joseph's Hosp. of Atlanta, Inc., 929 F.2d 1558, 1572 (11th Cir.1991), *abrogated on other grounds,* Geissal v. Moore Med. Corp., 524 U.S. 74 (1998)); Kim v. Park, 277 Ga.App. 295, 296 (2006) *(citing* Hunnicutt v. Southern Farm Bureau Ins. Co., 256 Ga. 611, 613 (1987)). ProfiTel does not allege any facts to satisfy the specific elements of equitable estoppel. Rather, relying on DeShong v. Seaboard Coast Line Railroad Company, 737 F.2d 1520 (11th Cir.1984), ProfiTel argues that PolyOne may not derive a benefit from ProfiTel's audit findings, i.e., the underutilization adjustments set forth in the Second Amendment to the GSA, and subsequently contest the validity of those findings to avoid paying ProfiTel a fee. In *DeShong,* the plaintiff claimed to be an employee of one company for purposes of recovering under Florida's Workmen's Compensation Act, and then later asserted a claim under the Federal Employers' Liability Act, claiming that he was an employee of another company. [FN4] *Id.* at 1521. In addressing whether that plaintiff was estopped from asserting those allegedly inconsistent positions, the Eleventh Circuit Court of Appeals stated:

> FN4. Specifically, the plaintiff was employed as a truck driver for Seacoast Transportation Company ("Seacoast"). After being injured while coupling his truck to a trailer owned by the defendant company, the plaintiff received workmen's compensation benefits from Seacoast, a wholly-owned subsidiary of the defendant. The defendant argued that the plaintiff could not claim to be the employee of two separate companies in order to recover under different statutes. *DeShong,* 737 F.2d at 1521. The Eleventh Circuit determined that a plaintiff in a FELA action may properly be found to be an employee of both a wholly-owned subsidiary of a railroad and the railroad itself. Thus, because "inconsistency is the crucial element of the doctrine of estoppel," the court ultimately held that equitable estoppel was inapplicable in that case. *Id.* at 1523-24.

> Under the doctrine of equitable estoppel a party with full knowledge of the facts, who accepts the benefits of a transaction, contract, statute, regulation or order, may not subsequently take an inconsistent position to avoid the corresponding obligations or effects. *Thus, a plaintiff should not be permitted to assert formally the existence of one state of facts in a claim against one party and accept benefits in satisfaction of that claim, and then maintain an action against another party on the ground that the facts first asserted did not exist.*

***9** *Id.* at 1522 (emphasis added). Therefore, it appears from the language employed by the Eleventh Circuit that equitable estoppel will apply if a party formally asserts a factual position as the basis for a legal claim only to allege inconsistent facts in a subsequent claim.

Application of the *DeShong* estoppel is fundamentally rooted in aiding the law in the administration of justice. *DeShong,* 737 F.3d at 1522. ProfiTel seeks to expand its scope far beyond that to create contract-like rights based upon allegedly inconsistent actions in transactions with other private parties. The Court is not inclined to go down that path. [FN5] In any event, PolyOne is not taking

inconsistent positions. Releasing a claim and now saying that the claim was worthless are not inconsistent positions. Accordingly, PolyOne is permitted to challenge the validity of the audit findings to defend against ProfiTel's breach of contract claim.

> FN5. ProfiTel also relies on *Teldata Control, Inc. v. County of Cook*, No. 02 C 7439, 2004 WL 2997644 (N.D.Ill.Dec. 28, 2004), to support its equitable estoppel argument. In that case, which similarly involved a plaintiff seeking to recover a percentage of the defendant's recovery from telecommunications billing audits, the Northern District of Illinois stated that "the Court does not see how the [defendant] can retroactively seek to deny [the plaintiff] commissions on credits already given based on purported defects in performance that the [defendant] never mentioned until long after the credits were secured." *Id.* at *4. In making that observation, the court made no mention of nor finding regarding equitable estoppel but, rather, was solely addressing whether the plaintiff had substantially performed under the contract. *Id.* at *4-*5. Thus, ProfiTel's reliance on *Teldata Control* is not persuasive.

B. *Unjust Enrichment and Promissory Estoppel*

In its Amended Answer, PolyOne asserted an affirmative defense in which it alleged that the Consulting Agreement was not a valid and enforceable contract because of a lack or failure of consideration. (Am. Answer, Seventh Affirmative Defense.) As a result, and in the event that the Court found the Consulting Agreement to be unenforceable, ProfiTel amended its Complaint to assert claims for unjust enrichment and promissory estoppel. Indeed, unjust enrichment is available only when there is no legal contract. *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 139 F.3d 1396, 1413 (11th Cir.1998) *(citing Regional Pacesetters, Inc. v. Halpern Enters. Inc.*, 165 Ga.App. 777, 782 (1983)); *see also Smith Serv. Oil Co. v. Parker*, 250 Ga.App. 270, 272 (2001) ("The theory of unjust enrichment applies when there is no legal contract and when there has been a benefit conferred which would result in an unjust enrichment unless compensated."). Similarly, where an enforceable contract contains the promises alleged in support of a promissory estoppel claim, promissory estoppel is not available as a remedy. *See Adkins v. Cagle Foods JV, LLC*, 411 F.3d 1320, 1326 (11th Cir.2005) *(citing Bank of Dade v. Reeves*, 257 Ga. 51 (1987)). Although alleging in its Amended Answer that the Consulting Agreement lacked consideration and is therefore unenforceable, PolyOne now asserts that the agreement is indeed enforceable. (Def.'s Mem. in Support of its Mot. for Summ. J. at 23.) When neither side disputes the existence of a valid contract, claims for unjust enrichment and promissory estoppel fail as a matter of law. Thus, PolyOne is entitled to summary judgment on both claims. [FN6]

> FN6. Perhaps in response to PolyOne's concession that the Consulting Agreement is enforceable, ProfiTel did not respond to PolyOne's arguments regarding its entitlement to summary judgment on these claims. "When a party fails to respond to an argument or otherwise address a claim, the Court deems such argument or claim abandoned." *Brandon v. Lockheed Martin Aeronautical Sys.*, 393 F.Supp.2d 1341, 1346 (N.D.Ga.2005) (citations omitted); *see also Price v. Facility Mgmt. Group, Inc.*, 403 F.Supp.2d 1246, 1253 (N.D.Ga.2005) (plaintiff's ERISA claim deemed abandoned based on failure to respond to defendant's arguments); *Bute v. Schuller Int'l, Inc.*, 998 F.Supp. 1473, 1477 (N.D.Ga.1998) ("Because plaintiff has failed to respond to this argument or otherwise address this claim, the Court deems it abandoned.").

C. *Fraud*

ProfiTel asserts a claim for fraud arising out of PolyOne's alleged breach of the Consulting Agreement. To establish a fraud claim, the plaintiff must prove: (1) a false representation by the defendant; (2) scienter (knowledge that the representation was false at the time made); (3) intent to induce the plaintiff to act or refrain from acting; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff. *Next Century Commc'ns Corp. v. Ellis*, 318 F.3d 1023, 1027 (11th Cir.2003); *Perimeter Realty v. GAPI, Inc.*, 243 Ga.App. 584, 595 (2000). "The

general rule is that actionable fraud cannot be predicated upon promises to perform some act in the future. Nor does actionable fraud result from a mere failure to perform promises made. Otherwise any breach of a contract would amount to fraud." *Equifax, Inc. v. 1600 Peachtree, L.L.C.*, 268 Ga.App. 186, 195 (2004) *(quoting Beltz v. Atlanta Coachworks Corp.*, 172 Ga.App. 604, 605 (1984)); *see also Next Century Commc'ns Corp.*, 318 F.3d at 1027. An exception to the general rule exists when the promise regarding the future event is made with the present intention not to perform. *Perimeter Realty*, 243 Ga.App. at 595-96. ProfiTel alleges that PolyOne entered into the Consulting Agreement with the present intention not to abide by its terms. However, not only has ProfiTel failed to establish that the Consulting Agreement was breached, but it has further failed to present any evidence that PolyOne intended to breach the Consulting Agreement at the time the contract was entered into. Thus, ProfiTel's fraud claim fails and PolyOne is entitled to summary judgment.

D. *Attorney's Fees*

***10** ProfiTel asserts a claim for attorney's fees under O.C.G.A. § 13-6- 11. Section 13-6-11 allows a plaintiff to recover the expenses of litigation when the defendant "has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." Because ProfiTel has lost its breach of contract claim, its claim for attorney's fees fails as well. *United Cos. Lending Corp. v. Peacock*, 267 Ga. 145, 147 (1996) ("A prerequisite to any award of attorney fees under O.C.G.A. § 13-6-11 is the award of damages or other relief on the underlying claim."). Moreover, even if ProfiTel's underlying claim was successful, Georgia courts have held that statutes allowing for the recovery of attorney's fees, including Section 13- 6-11, are substantive for purposes of *Erie*. *See Elberta Crate & Box Co. v. Cox Automation Sys., LLC*, No. 6:05 CV 03(HL), 2005 WL 1972599, at *5-*6 (M.D.Ga.2005); *Pinkerton & Laws, Inc. v. Royal Ins. Co. of Am.*, 227 F.Supp.2d 1348, 1357 (N.D.Ga.2002) *(citing McMahan v. Toto*, 256 F.3d 1120, 1132 (11th Cir.2001); *All Underwriters v. Weisberg*, 222 F.3d 1309, 1311-12 (11th Cir.2000)). Consequently, under Georgia's choice of law rules, Section 13-6-11 is not applicable if the laws of another state apply to the issues in this case. *Elberta Crate & Box Co.*, 2005 WL 1972599, at *6; *Pinkerton & Laws, Inc.*, 227 F.Supp.2d at 1357. Here, the choice of law provision set forth in the Consulting Agreement specifies that Ohio substantive law applies. Because the attorney's fees claim arises out of ProfiTel's breach of contract claim, the choice of law provision controls this claim as well. *See Elberta Crate & Box Co.*, 2005 WL 1972599, at *6 (Section 13-6-11 inapplicable where Illinois law applied pursuant to contract choice of law provision); *see also Boyd Rosene & Assocs., Inc. v. Kansas Mut. Gas Agency*, 174 F.3d 1115, 1127- 28 (10th Cir.1999) (choice of law provision controlled award of attorney's fees even though contract did not expressly address the issue); *Fairmont Supply Co. v. Hooks Indus., Inc.*, 177 S.W.3d 529, 535-36 (Tex.App.2005) ("[T]he award of attorney's fees is inextricably intertwined with the substantive issue of contractual liability--an issue that is undisputably governed by the choice-of-law provision."). Thus, O.C.G.A. § 13-6-11 is inapplicable, and summary judgment for PolyOne is proper.

F. *PolyOne's Counterclaim*

PolyOne's breach of contract counterclaim arises out of the same agreement that is the subject of ProfiTel's breach of contract claim. At issue in PolyOne's counterclaim is Section 4.2 of the Consulting Agreement, which states:

> [PolyOne] shall supply to [ProfiTel] all information reasonably requested by [ProfiTel] for the purpose of performing the services contemplated herein. For an abundance of clarity, [PolyOne] has entered into this agreement to relieve itself of the burden of auditing its communication services providers, and to otherwise deploy its internal human resources. *[ProfiTel] shall not utilize [PolyOne's] personnel to perform auditing or analysis activities hereunder, and shall provide all personnel and resources necessary to accomplish the auditing and analysis to the standard of commercial reasonableness.*

***11** (Def.'s Statement of Material Facts, Ex. A) (emphasis added). PolyOne asserts that, in breach of the agreement, ProfiTel used PolyOne personnel to assist in the performance of auditing and analysis activities and that ProfiTel performed the

audit at a standard falling below that of commercial reasonableness. PolyOne contends that these breaches resulted in lost opportunity costs, or lost savings, in the amount of $638,638.00. PolyOne moves for summary judgment as to liability, arguing that ProfiTel was negligent per se, and thus breached the standard of commercial reasonableness provision, by engaging in the **unauthorized practice** of **law**. ProfiTel argues, however, that the claim fails in its entirety as a matter of law because the consequential damages alleged by PolyOne are speculative and not the result of any alleged breach.

Under Ohio law, [FN7] damages can be awarded in a breach of contract case for "the natural or probable consequence of the breach of contract or damages resulting from the breach that were within the contemplation of both parties at the time of the making of the contract." *Gomez v. Huntington Trust Co.*, 129 F.Supp.2d 1116, 1128-29 (N.D.Ohio 2000) *(quoting Toledo Group, Inc. v. Benton Indus., Inc.*, 623 N.E.2d 205, 211 (Ohio Ct.App.1993)). "[G]enerally courts have required greater certainty in the proof of damages for breach of contract than for a tort." *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 684 N.E.2d 1261, 1266 (Ohio Ct.App.1996); *Kinetico, Inc. v. Independent Ohio Nail Co.*, 482 N .E.2d 1345, 1350 (Ohio Ct.App.1984). As such, damages must be established with a reasonable degree of certainty and speculative damages are not recoverable. *Id.* Additionally, the plaintiff has the burden of proving that any claimed damages were actually caused by the alleged breach. *Textron Fin. Corp.*, 684 N.E.2d at 1266.

> FN7. As noted above, the Consulting Agreement contains a choice of law provision which provides that the contract is to be governed by Ohio law. ProfiTel asserts that it is unclear whether Georgia or Ohio law governs the burden associated with proving damages. However, ProfiTel cites to no case which states that a choice of law provision, while establishing the law applicable to contract construction, does not likewise control the analysis of damages arising out of a breach of that contract. Absent any such precedent, the Court will apply Ohio law to all aspects of claims arising out of the Consulting Agreement.

Here, PolyOne asserts that ProfiTel wrongfully utilized PolyOne's employees and improperly requested information from non-information technology employees. PolyOne alleges that as a consequence, Richard Bradner, PolyOne's Enterprise Network Manager, had to spend an unnecessary amount of time addressing issues and problems associated with the ProfiTel project. According to PolyOne, because his time and attention were diverted, Bradner was delayed, albeit not precluded, in implementing certain other cost saving initiatives. In support of PolyOne's claim, Bradner created a chart reflecting, and testified to, the following information regarding the initiatives that were allegedly delayed: (1) the project start date; (2) the dates on which they were ultimately implemented; (3) the number of days the deployment of the initiative was delayed; and (4) the amount of cost savings associated with each initiative. (Bradner Dep., Exs. 23 & 65.) For each initiative with a fixed, ongoing savings rate, Bradner calculated the alleged lost savings by first estimating the amount of time the implementation of the initiative was delayed and then multiplying the number of days by the rate of savings associated with each initiative. (Bradner Dep. at 18-20, 334-36, 340-42.) According to PolyOne, the sum of the lost savings associated with not having each initiative in place sooner constitutes the total measure of damages caused by ProfiTel's alleged breaches.

***12** Although Bradner testified that the implementation delays resulted from his diverted attention, the Court finds his testimony too speculative to establish the existence of damages caused by ProfiTel's alleged breach of contract. In particular, Bradner testified that he spent approximately 60 days dealing with ProfiTel. However, he offers no specifics and no documentary evidence to support his assertion. Furthermore, his contentions regarding established implementation dates and the number of days that specific cost savings initiatives were delayed due to his time spent on ProfiTel matters are unsupported estimates. *(See, e.g.,* Bradner Dep. at 344-45, 360, 366, 368, 371, 397-400.) Such speculation is insufficient to support a claim for breach of contract damages. *See Eaton Corp. v. Taylor-Winfield Corp.*, No. 62361, 1993 WL 267113, at *5-*6 (Ohio Ct.App. July 15, 1993) (applying

lost profits analysis and finding claim for loss of cost savings damages to be too speculative).

As to causation, Bradner indicated that each initiative was delayed for the same reasons: "Time spent dealing with Profitel requests for information, internal issues created by Profitel dealing with non-IT personnel and research dedicated to proving/disproving Profitel Claims of Refund Credit due." (Bradner Dep., Ex. 65.) However, he could not identify particular information requests that he had to deal with or research that he had to conduct that caused the specific delays for particular projects. (*See id.* at 345-46, 357, 360, 372.) In fact, Bradner admitted that all of the listed reasons did not apply to each initiative. (*Id.* at 346-47.) Moreover, Bradner conceded that he did not know if other factors could have caused or contributed to the alleged implementation delays. (*See id.* at 360.) A breach of contract action will not survive if the alleged damages are the result of circumstances that were not the responsibility of the allegedly breaching party. *Interim Healthcare of Ne. Ohio, Inc. v. Interim Servs., Inc.*, 12 F.Supp.2d 703, 711 (N.D.Ohio 1998). Therefore, even assuming that ProfiTel breached the Consulting Agreement, absent sufficient evidence to establish damages to a reasonable degree of certainty or that the breaches caused the claimed damages, summary judgment for ProfiTel on PolyOne's counterclaim is appropriate. [FN8]

> FN8. PolyOne argues that summary judgment should be denied because it is entitled to at least nominal damages on its breach of contract claim. The Ohio Supreme Court has made clear, however, that summary judgment is proper in breach of contract cases where the plaintiff fails to provide evidence of damages caused by the breach and seeks to proceed solely on a claim for nominal damages. *DeCastro v. Wellston City Sch. Dist. Bd. of Educ.*, 761 N.E.2d 612, 617 (Ohio 2002).

IV. *CONCLUSION*

For the reasons set forth above, the Plaintiff's Motion for Partial Summary Judgment as to Plaintiff's Breach of Contract Claim [Doc. 78] is DENIED; the Plaintiff's Motion for Summary Judgment as to Defendant's Conditional Counterclaim [Doc. 79] is GRANTED; the Defendant's Motion for Summary Judgment [Doc. 82] is GRANTED; and the Defendant's Motion for Partial Summary Judgment With Respect to Liability as to Defendant's Counterclaim [Doc. 82] is DENIED. The Plaintiff's Motion to Disqualify Defendant's Expert Witness [Doc. 68] is DENIED as moot. The Plaintiff's Motion to Exclude the Late-Produced Damages Summaries and Motion for Sanctions [Doc. 71] is DENIED as moot. The Defendant's Motion to Exclude Plaintiff's Late-Produced Evidence and Motion to Strike [Doc. 76] are DENIED as moot.

***13** SO ORDERED, this 16 day of June, 2006.

Slip Copy, 2006 WL 1734271 (N.D.Ga.)

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
James T. SULLIVAN et al., Plaintiffs,
v.
WILLIAM A. RANDOLPH, INC., Defendant.
No. 04 C 2736.

June 19, 2006.

Douglas Allan Lindsay, John William Loseman, Lewis, Overbeck & Furman, Chicago, IL, for Plaintiffs.

Joseph Paul Kincaid, Alfred Emil Koehler, III, Julie Suzanne Halperin, Swanson, Martin & Bell, Chicago, IL, Kerry Lin Davidson, Renee L. Koehler, Andrews Koehler & Passarelli PC, Lisle, IL, for Defendant.

MEMORANDUM OPINION

SAMUEL DER-YEGHIAYAN, District Judge.

***1** This matter is before the court on Defendant William A. Randolph Inc.'s ("Randolph") motion for attorney's fees and costs. For the reasons stated below, we grant the motion in its entirety.

BACKGROUND

Plaintiffs alleged in this action that there were certain collective bargaining agreements ("CBAs") in effect between Randolph and its employees' union. Plaintiffs further contended that, pursuant to the CBAs, Randolph was obligated to make contributions into Plaintiff pension funds ("Funds") and that Randolph was obligated to permit the Funds to audit Randolph's books and records to assess Randolph's compliance with its contribution obligations. According to Plaintiffs, Randolph breached the CBAs by failing to make contributions to the Funds, by refusing to allow the Funds to audit Randolph's records, and by subcontracting out work in violation of the CBAs. On October 5, 2006, we granted Randolph's motion for summary judgment and denied Plaintiffs' motion for summary judgment. Randolph now seeks $55,667.00 for attorney's fees and costs pursuant to 29 U.S.C. § 1132(g)(1) ("Section 1132").

LEGAL STANDARDS

Pursuant to Section 1132, "[i]n any action under [Section 1132] by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1). There exists a " 'modest presumption' in favor of awarding fees to the prevailing party, but that presumption may be rebutted." *Herman v. Central States, Southeast and Southwest Areas Pension Fund*, 423 F.3d 684, 695- 96 (7th Cir.2005)(quoting *Harris Trust & Sav. Bank v. Provident Life & Accident Ins. Co.*, 57 F.3d 608, 617 (7th Cir.1995)). There are two tests approved by the Seventh Circuit for determining whether to award fees to a prevailing defendant under Section 1132. *Id.* at 696. Under the first test, an award of damages should be denied if the "plaintiff's position was both 'substantially justified'--meaning something more than non-frivolous, but something less than meritorious--and taken in good faith, or if

special circumstances make an award unjust." *Id.* Under the second test, the court makes a determination after considering the following factors:

> (1) the degree of the offending parties' culpability or bad faith; (2) the degree of the ability of the offending parties to satisfy personally an award of attorneys' fees; (3) whether or not an award of attorneys' fees would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' positions.

Id. The ultimate issue that needs to be determined under either test has been defined by the Seventh Circuit as whether "the losing party's position [was] substantially justified and taken in good faith, or [whether] that party simply [was] out to harass its opponent[.]" *Id.* (quoting *Quinn v. Blue Cross & Blue Shield Ass'n, 161 F.3d 472, 478 (7th Cir.1998)*).

DISCUSSION

I. Whether Fees Are Warranted

***2** Randolph indicates, and Plaintiffs do not dispute, that after the court's prior ruling, Randolph sent a letter to Plaintiffs' counsel to attempt to set up a meeting regarding fees and costs, as is required under Local Rule 54.3. Randolph indicates that he received no response and forwarded a second letter in which he included a statement of the fees and costs that he was seeking to recover. After again receiving no response from Plaintiffs' counsel, Randolph brought the instant motion. Thus, Plaintiffs have refused to engage in the required discussions concerning the applicability of fees or the appropriate fee amounts.

We first note that there is no evidence that would indicate that Plaintiffs are financially unable to satisfy the fees and costs request. Also, an award of fees and costs will serve to deter Plaintiffs and other plans from putting employers such as Randolph through the expense of litigation to defend unjustifiable requests for contributions. Employees may also indirectly benefit from the savings incurred by employers. At the very least, the additional capital retained by the employer could contribute to the fiscal stability of the employer and thus to the stability of the jobs of the employees.

As we explained in our prior ruling, Plaintiffs alleged in the instant action that Randolph was bound by CBAs for the pertinent period in 2000, simply because Randolph had allegedly employed covered employees in 1997 and because Randolph continued to send monthly reports to the Funds. Plaintiffs acknowledged that Randolph was not even a signatory to one of the CBAs, but argued that Randolph was impliedly bound by the CBA in light of its conduct. Plaintiffs also contended that Randolph hired subcontractors in a fashion that violated the provisions of the CBAs.

We pointed out in our ruling granting Randolph's motion for summary judgment that Plaintiffs' arguments ignored the fact that there is no evidence that there were any covered employees employed by Randolph during the pertinent period. (OP 10/5/05 7, 11). Plaintiffs in fact admitted that fact in response to Randolph's Local Rule 56.1 statement of facts. (R SF Par. 4). Plaintiffs' entire case was thus based on an alleged vindication of the rights of nonexistent covered employees in light of the fact that Randolph did not employ any employees covered by the CBAs during the pertinent period. We also pointed out that even if Randolph was bound by the CBAs, Randolph clearly had not violated the provisions of the CBAs. (OP 10/5/05 10-14). The CBAs provided certain requirements for "employees" and also provided Randolph with the ability to subcontract out work. (OP 10/5/05 11-14). As we noted in our prior ruling, when Plaintiffs were confronted by Randolph's arguments pointing out the deficiencies in Plaintiffs' case, Plaintiffs avoided the issues by arguing that they did not receive certain information during discovery, despite the fact that they failed to file a motion to compel during the discovery period. (OP 10/5/05 13-15). Plaintiffs also made vague arguments alleging that there were disputed facts that warranted pressing onward to trial, despite the absence of evidence to support their case. (OP 10/5/05 12-15).

***3** Such a strategy was consistent with Plaintiffs' course of action throughout this

dispute. Plaintiffs initiated the instant action without substantial justification since Plaintiffs had no legitimate basis to conclude that Randolph was bound by the CBAs. After the filing of this action, Randolph allowed Plaintiffs' auditor to review Randolph's records, which revealed that contributions were not owed because the employees at issue were subcontractors hired by Randolph. Plaintiffs forced Randolph to incur expenses during discovery and the briefing of dispositive motions. Plaintiffs then pursued a motion for reconsideration that was entirely without merit. Finally, after the court's prior ruling, Plaintiffs refused to respond to Randolph's invitations to meet and discuss fees pursuant to Local Rule 54.3 and possibly resolve any disputes concerning fees, forcing Randolph to incur further expenses in pursuing the instant motion. Plaintiffs even neglected to provide a direct response to the reasonableness of the fees requested by Randolph in their original answer brief, thus requiring the parties to incur the expense of filing supplemental briefs on the issue.

Plaintiffs argue that they cannot be found culpable for their conduct in this dispute and that there are special circumstances that make an award of fees unjust in this action because Plaintiffs are protecting the rights of employees which furthers the policies that underlie ERISA. However, ERISA defines the duties and obligations of both employee funds and employers. ERISA does not anoint employee funds with immunity to engage in any frivolous actions in pursuit of the interests of covered employees. *See* *Magin v. Monsanto Co.*, 2005 WL 83334, at *4 (N.D.Ill.2005) (concluding that there are no special circumstances merely because the plaintiff was seeking to collect benefits from an employer under ERISA). Section 1132 makes clear that a court may award fees to either party in a benefits collections case and employee funds are encouraged to engage in their protection of covered employees in a responsible manner. 29 U.S.C. § 1132(g)(1). The evidence in this case shows that Plaintiffs are entirely culpable for their conduct in this action. This conclusion is not contrary to the principles behind ERISA of protecting the rights of covered employees. As the court in *Magin*, 2005 WL 83334 stated, plaintiffs that act appropriately to recover benefits or contributions under ERISA "should have nothing to fear from this decision." *Id.* at *5. Thus, this decision is not contrary to the policies that underlie ERISA. Therefore, based on the above, we conclude in our discretion that Plaintiffs' actions and positions in this litigation were not substantially justified and we find that Randolph should be awarded fees.

II. Amount of Fees

Randolph requests that the court award him $55,667.00 for attorney's fees and costs. The reasonable amount of recoverable attorney's fees is determined according to the " 'lodestar' amount [which is] calculated by multiplying the number of hours the attorney reasonably expended on the litigation times a reasonable hourly rate." *Mathur v. Board of Tr. of Southern Illinois Univ.*, 317 F.3d 738, 742 (7th Cir.2003). The party that is requesting fees bears the burden of proving that the hours and rates for the fees requested are reasonable. *Spegon v.Catholic Bishop of Chicago*, 175 F.3d 544, 550 (7th Cir.1999). A reasonable hourly rate or market rate is defined as "the rate that lawyers of similar ability and experience in their community normally charge their paying clients for the type of work in question." *Magin v. Monsanto Co.*, 2005 WL 2171175, at *3 (N.D.Ill.2005) (quoting *Harper v. City of Chicago Heights*, 223 F.3d 593, 604 (7th Cir.2000))(stating in addition that "[e]vidence of 'market rate' includes rates other attorneys in the area charge paying clients for similar work, fee awards from prior cases, the attorney's credentials, and the attorney's actual billing rate")(citing *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 90 F.3d 1307, 1311-13 (7th Cir.1996)).

***4** In the instant action, Randolph has provided the court with documentation explaining how the lodestar amount of $55,667.00 was calculated. Randolph's attorneys provided detailed bills regarding their request for attorney's fees, including affidavits describing the number of hours, hourly rates, education, and experience of the attorneys and **paralegals** handling this matter. Randolph also provided support for its contention that the "rates charged by Koehler & Passarelli, P.C. are actually below the market rate for the Chicago area for defending this matter." (Reply 5). As Randolph correctly notes, "Plaintiffs fail to cite to any

case law or even facts to support their claim that the fees are unreasonable" or excessive. (Reply 2, 5); *see* *Spegon,* 175 F.3d at 554-55 (stating that "once the attorney provides evidence establishing his market rate, the burden shifts to the defendant to demonstrate why a lower rate should be awarded"). Instead, Plaintiffs merely raise vague arguments stating that the fees requested are unfounded and criticize Randolph for filings and legal research that were an ordinary and natural part of these proceedings. Plaintiffs contend that if "the Court awards anything at all, which it should not, significantly less than $21,811.50 should be awarded in light of the circumstances in this case." (Supp.Resp.6). Plaintiffs have not provided any detailed calculations or explanation for their theory that the amount owed is "less than $21,811.50," or provided a precise figure that Plaintiffs believe is reasonable.

Plaintiffs also contend that Randolph agreed to reduce the amount of its fee request, but Randolph denies such an agreement and it is Randolph, the movant, not Plaintiffs that determines the requested fee amount. Another factor that shows that the fees requested by Randolph are reasonable is the evidence that Randolph paid its attorneys in full for the legal services rendered on its behalf in these proceedings. *See* *Magin,* 2005 WL 2171175, at*4 (finding "[t]he fact that a client is willing to pay [the requested rates] bolsters the finding that th[o]se rates represent the market rate"). Therefore, based on the above, we conclude that the requested amounts by Randolph are both recoverable and reasonable and we award Randolph the requested $55,667.00 in attorney's fees and costs.

CONCLUSION

Based on the foregoing analysis, we grant Randolph's motion for fees and expenses in its entirety and award $55,667.00 to Randolph.

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- 2004 WL 2819235 (Trial Pleading) Complaint (Apr. 15, 2004)
- 2004 WL 2819240 (Trial Pleading) Answer (2004)

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