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**F I L E D**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUN 19 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

MARY FIELDS,  
  
Plaintiff,  
  
vs.  
  
SAND SPRINGS PUBLIC SCHOOLS,  
INDEPENDENT SCHOOL DISTRICT NO. 2,  
TULSA COUNTY,  
  
Defendant.

Case No. 94-C-672-E

O R D E R

Now before the Court is the Motion for Summary Judgment (Docket # 15) of the Defendant Sand Springs Public Schools (School System).

Plaintiff brings this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et.seq. (Title VII) and the Civil Rights Act of 1991, 42 U.S.C. §1983 (§1983) claiming that she was demoted from her position of psychometrist to the position of social studies classroom teacher because of her race. Fields began her employment with the School System in October, 1972 as a teacher. In approximately 1982, she became a certified psychometrist for the School System. In approximately 1986, Wanda Burns became employed by the School System as a part time psychometrist and part time teacher, and subsequently was employed as a full time psychometrist. In 1992, the School System recognized a need for only one psychometrist and began an analysis under a reduction-in-force policy to determine which of the psychometrists should be retained. In March, 1992, Fields was

informed that she would be placed on reduction-in-force status and that Burns would be retained as psychometrist. Fields was then able to take the position of teacher in the school system at the same pay as the position of psychometrist.

Fields asserts that the reduction-in-force analysis was manipulated in order to favor Burns, who is white, and that a correct application of the scale would have resulted in the retention of Fields instead of Burns. Defendants argue that they should be granted summary judgment because there is no direct or indirect evidence to support Fields' claim of discrimination, and on the §1983 claim, because it is barred by the statute of limitations.

1) Statute of Limitations

The School System argues that Fields' §1983 claim should be dismissed because it is barred by the applicable statute of limitations, which is two years. Fields argues that her claim is timely because it did not accrue until the school year started (August, 1992), instead of when she received notice of termination (March, 1992), and she filed her complaint on July 7, 1994.

In Oklahoma, the two-year statute of limitations applies to §1983 actions. Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988). Section 1983 claims accrue "when the plaintiff knows or has reason to know of the injury which is the basis of his action." Johnson v. Johnson County Commission Board, 925 F.2d 1299 (10th Cir. 1991) (quoting Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977)). In this instance the injury which is the basis of

Plaintiff's action is the fact that Plaintiff would not be hired the next year as a psychometrist. She knew this in March, 1992. The fact that the School System could have "corrected its discriminatory course of action" until August, 1992, is irrelevant. See Bireline, 576 F.2d at 263 (the pendency of administrative reconsideration does not extinguish a plaintiff's legal right to proceed in court or suspend it). Defendant's motion for summary judgment on the §1983 claim is granted.

2) Sufficiency of Evidence

With respect to the Title VII claim, Defendant argues that there is no direct or indirect evidence of discrimination, and Plaintiff therefore cannot prove her claim. Defendant argues that the only direct evidence offered by Plaintiff, the comment of Dr. Sharpton<sup>1</sup>, is insufficient to establish discriminatory intent. Defendant also argues that Plaintiff cannot meet her burden under the indirect burden shifting method because she cannot establish that she was adversely affected by the Defendant's employment decision.<sup>2</sup>

Plaintiff argues that she was adversely affected by the

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<sup>1</sup> Plaintiff alleges that the Superintendent, Wendall Sharpton said the following to her after the transfer decision had been made: "You are always saying you're black. Surely you don't expect me to say to the district that you're the most qualified psychometrist. I'm white. I'm white. I'm white."

<sup>2</sup> To meet the burden of establishing a prima facie case of discrimination by demotion, Plaintiff must establish: 1) that she is a member of a protected group; 2) that she was adversely affected by the Defendant's employment decision; 3) that she is qualified for the position at issue; and 4) that she was replaced by a person outside the protected group. Hooks v. Diamond Crystal Specialty Foods, Inc., 997 F.2d 793, 799 (10th Cir. 1993).

Defendant's employment decision, and that there is both direct and indirect evidence of discrimination. She claims that being moved to the position of classroom teacher was a demotion.

To show that he has been demoted, an employee must show that he receives less pay, has less responsibility, or is required to use a lesser degree of skill than his previous assignment. Hooks, 997 F.2d at 799. Plaintiff submits her own affidavit to support her argument that, as a classroom teacher, less skill is required, because a lesser educational degree is required.<sup>3</sup> The Court finds that this evidence is sufficient to establish a demotion, and that a question of fact exists as to whether the demotion was discriminatory.

Defendant's motion for summary judgment (Docket #15) is granted in part (with respect to the \$1983 claim) and denied in part (with respect to the Title VII claim).

IT IS SO ORDERED THIS 19<sup>th</sup> DAY OF JUNE, 1995.

  
JAMES O. ELLISON, SENIOR JUDGE  
UNITED STATES DISTRICT COURT

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<sup>3</sup> Plaintiff states in her affidavit that the position of classroom teacher requires only a Bachelor's Degree while the position of psychometrist requires a Master's Degree and a state certification.

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**  
NORTHERN DISTRICT OF OKLAHOMA

JUN 19 1995

ROBERT G. TILTON, an )  
individual, )  
 )  
Plaintiff, )  
 )  
vs. ) No. 92-C-1032-BU  
 )  
CAPITAL CITIES/ABC INC., a )  
New York corporation; et al., )  
 )  
Defendants. )

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

*RLC* (SF)

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**JUDGMENT**

This matter came before the Court upon the Motion for Summary Judgment (Docket Entry #243) filed by Defendants, Capital Cities/ABC, Inc. and ABC News, Inc., the Motion for Summary Judgment (Docket Entry #244) filed by Defendants, American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland and the Motion for Partial Summary Judgment (Docket Entry #257) filed by Plaintiff, Robert G. Tilton and the issues having duly considered and decisions having duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, Capital Cities/ABC, Inc., ABC News, Inc., American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland, against Plaintiff, Robert G. Tilton, and that Defendants shall recover of Plaintiff their costs of action.

DATED at Tulsa, Oklahoma, this 19<sup>th</sup> day of June, 1995.

*Michael Burrage*  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA **F I L E D**

JUN 19 1995

ROBERT G. TILTON, an )  
individual, )  
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Plaintiff, )  
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vs. )  
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CAPITAL CITIES/ABC INC., a )  
New York corporation; et al., )  
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Defendants. )

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

No. 92-C-1032-BU

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**ORDER**

On May 26, 1995, the Court entered an Order granting the Motion for Summary Judgment (Docket Entry #244) filed by Defendants, American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland and denying the Motion for Partial Summary Judgment (Docket Entry #257) filed by Plaintiff, Robert G. Tilton. The following sets forth the Court's reasons for its decision.

On November 21, 1991, Defendant, American Broadcasting Companies, Inc. ("ABC"), broadcast on its weekly television news show PrimeTime Live, a program entitled "Men of God" which focused on -- and was critical of -- three televangelists, W.V. Grant, Larry Lea and Plaintiff, Robert G. Tilton. On July 9, 1992, ABC rebroadcast its original PrimeTime Live program, with some revisions and clarifications, and broadcast a follow-up segment reporting on additional information ABC had learned about Plaintiff

after its original broadcast.<sup>1</sup> Defendant, Diane Sawyer, was the anchor and correspondent for both of the broadcasts. Defendant, Robbie Gordon, and Defendant, Kelly Sutherland, were the producer and associate producer, respectively, for the specific reports concerning Plaintiff which were entitled "The Apple of God's Eye."

On November 11, 1992, Plaintiff commenced this diversity libel and false light invasion of privacy action against Defendants,<sup>2</sup> alleging that PrimeTime I and PrimeTime II broadcast three libelous and false light statements. Plaintiff, on May 13, 1993, moved the Court for entry of a temporary restraining order and a preliminary injunction barring ABC from rebroadcasting statements contained in the PrimeTime Live broadcasts. After a five-day evidentiary hearing, the Court denied Plaintiff's request for injunctive relief finding, *inter alia*, that Plaintiff had failed to demonstrate there was a substantial likelihood of recovery on the merits of his claims. Thereafter, Plaintiff amended his complaint setting forth additional allegations of libelous and false light statements made by Defendants in PrimeTime I and PrimeTime II. At the Court's directive, Plaintiff, on July 26, 1994, filed his Final Amended Complaint, which consolidated all of his claims against

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<sup>1</sup>The November 21, 1991 and the July 9, 1992 broadcasts shall be hereinafter referred to as PrimeTime I and PrimeTime II respectively.

<sup>2</sup>Plaintiff also named Capital Cities/ABC, Inc. and ABC News, Inc. as Defendants. On May 24, 1995, the Court granted Capital Cities/ABC, Inc. and ABC News, Inc.'s summary judgment motion.

Defendants.<sup>3</sup> After conducting extensive discovery, Plaintiff has now filed his partial summary judgment motion, seeking judgment as to six segments of the broadcasts which allegedly contain libelous and false light statements. Defendants have also filed a summary judgment motion, seeking judgment as to all alleged libelous and false light statements.

The parties agree that Plaintiff is a public figure. Thus, in order to prevail on his claims, Plaintiff must establish that the alleged defamatory statements are false and that Defendants acted with actual malice in publishing the alleged defamatory statements.<sup>4</sup> Philadelphia Newspapers v. Hepps, 475 U.S. 767, 775-78, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130, 162, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). The actual malice standard is not

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<sup>3</sup>In addition to his libel and false light invasion of privacy claims, Plaintiff alleged an "equitable claim for permanent injunction" seeking to permanently enjoin the rebroadcast of any portions of the PrimeTime Live broadcasts. In light of the Court's findings in this Order and the absence of any facts which brings Plaintiff's claim within one of the exceptions to the general rule that equity will not restrain libel or slander, see, Schmoldt v. Oakley, 390 P.2d 882, 886 (Okla. 1964), the Court finds that Defendants are entitled to summary judgment as to Plaintiff's claim.

<sup>4</sup>As stated, Plaintiff has alleged both libel and false light invasion of privacy claims. Similar to libel, the tort of false light invasion of privacy requires proof that the challenged statements were false and that they were made with actual malice. See, Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983); Colbert v. World Publishing Co., 747 P.2d 286, 291 (Okla. 1987). Accordingly, the discussion in this Order concerning the falsity and actual malice elements applies to both the libel and false light claims.

satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). In order to prove actual malice, Plaintiff must show that Defendants acted with "knowledge that [the publication] was false or with reckless disregard of whether it was false or not." New York Times, 376 U.S. at 280. A reckless disregard for the truth requires more than a departure from reasonably prudent conduct. Harte-Hanks, 491 U.S. at 688. There must be sufficient evidence to support a conclusion that Defendants made the false publication with a "high degree of awareness of . . . probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), or that Defendants "entertained serious doubts as to the truth of [their publications]." St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). The actual malice standard may be proven by indirect or circumstantial evidence. Herbert v. Lando, 441 U.S. 153, 170, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). However, because First Amendment concerns are implicated, Plaintiff must prove actual malice with convincing clarity. New York Times, 376 U.S. at 285-286.

As stated, Plaintiff must also establish falsity of the alleged defamatory statements in order to prevail on his claims. Hepps, 475 U.S. at 776-78; Garrison, 379 U.S. at 74. In so doing, Plaintiff cannot simply point to minor inaccuracies in the challenged statements. Rather, he must show that the statements were not substantially true. As stated by the Supreme Court in

Masson v. New Yorker Magazine, 501 U.S. 496, 516-517, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991), it is "the substance, the gist or the sting" of the alleged defamatory statements that are critical to the Court's analysis.

Unlike the element of actual malice, the Supreme Court has not addressed the appropriate standard of proof for falsity. Harte-Hanks, 491 U.S. at 661, n. 2. The circuit courts, which have addressed the issue, have reached different conclusions. Compare Firestone v. Time, Inc., 460 F.2d 712, 722-723 (5th Cir.) (Bell, J., specially concurring), cert. denied, 409 U.S. 875 (1972) and Buckley v. Littell, 539 F.2d 882, 889-90 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977) (expressing view that clear and convincing standard applies to issue of falsity) with Goldwater v. Ginzburg, 414 F.2d 324, 341 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) and Rattray v. City of National City, 36 F.3d 1480, 1487 (9th Cir. 1994) (expressing view that preponderance of the evidence standard applies). However, in reaching its determination of the parties' motions, the Court need not make a definitive ruling in regard to the appropriate standard of proof. As will be discussed hereinafter, the Court finds Plaintiff's proof of falsity is inadequate even under the lesser standard of the preponderance of evidence in regard to several of his claims. As to other claims, the Court finds Plaintiff cannot establish the element of actual malice, and therefore, falsity need not be addressed.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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). In applying this standard, the Court must draw all reasonable inferences from the record in favor of the party opposing summary judgment. Brueggemeyer v. American Broadcasting Cos., 684 F.Supp. 452, 454 (N.D. Tex. 1988). When the non-moving party bears the burden of proof at trial, summary judgment is warranted if the non-moving party fails to "make a showing sufficient to establish the existence of an essential element of that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In determining whether a material factual dispute exists for trial, the Court views the evidence through a prism of the controlling legal standard. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, in regard to the issue of actual malice,

"the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not."

Id. at 255-56.

Applying the foregoing standards, the Court now examines the alleged libelous and false light statements in PrimeTime I and PrimeTime II.

Haitian Orphanage

PrimeTime I reported:

"SAWYER: [voice-over] And what about this mission, Tilton's orphanage in Haiti? We kept thinking about Bob Jones and how he told us you could just fix yourself up a sign and claim an orphanage.

BROTHER BOB JONES: Put your name on there, whatever you want.

SAWYER: [voice-over] Tilton uses three different names for his Haiti orphanages, so when we went to Haiti, we asked the government officials in charge of foreign missions if they'd heard of any of Tilton's orphanages. They said no.

[interviewing] So nothing from Robert Tilton here?

HAITIAN OFFICIAL: No."

PrimeTime II also reported:

"SAWYER: [voice-over] And what about this mission, Tilton's orphanage in Haiti? Well, remember Bob Jones who told us for just a few thousand a month we could put up a sign and claim an entire orphanage, even if we weren't the only contributor.

BROTHER BOB JONES: Put your name on there, whatever you want.

SAWYER: [voice-over] So even though his magazine calls it the Robert Tilton Ministries Children's Home, it's really not Tilton's place at all, which is why government officials we spoke to in Haiti hadn't heard of Tilton or his orphanage.

[interviewing] So nothing from Robert Tilton here?

HAITIAN OFFICIAL: No."

In his motion and in response to Defendants' motion, Plaintiff contends that the underlined statements in the above-quoted segments of the PrimeTime Live broadcasts were false and were published by Defendants with actual malice. Plaintiff argues that the broadcasts falsely accused him of mail fraud by stating that he claimed to own and/or to provide financial support to a Haitian orphanage, when he did not. Plaintiff contends that neither he nor

Word of Faith World Outreach Center Church ("Church") ever claimed to own an orphanage in Haiti and Defendants have never possessed any documents which shows that he or the Church ever made such a statement. Plaintiff contends that the Church did sponsor an orphanage in Haiti, World Harvest Orphanage, which was owned by Reverend Lee and Chris Sullivan. Plaintiff asserts that in 1985, Plaintiff, on behalf of the Church, sent one letter appealing for funds for the Haitian orphanage. Since 1985, however, neither he nor the Church has solicited funds for the Haitian orphanage. Plaintiff further asserts that he did not use three names to describe the Haitian orphanage as stated in PrimeTime I. Plaintiff concedes that the three names, including "Robert Tilton Ministries Children's Home," were used in his ministry magazine; however, he maintains the copy for the magazine articles, wherein the three names were referenced, was written by Reverend Lee Sullivan.

In regard to Defendants' statements as to Bob Jones, Plaintiff contends such statements tied Plaintiff's support of a Haitian orphanage to the "money laundering scheme" of Mr. Jones which was described in the segment of televangelist, W.V. Grant.<sup>5</sup> Plaintiff contends that neither he nor the Church were in any way affiliated with Mr. Jones. Moreover, Plaintiff asserts that neither he nor his Church ever sent Mr. Jones money or conducted any business with him. Plaintiff contends that Ole Anthony, a Dallas minister,

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<sup>5</sup>According to Plaintiff, the broadcasts explained that Mr. Jones ran a money laundering scheme whereby W.V. Grant would claim Mr. Jones' orphanage and send money to Mr. Jones for the orphanage and then Mr. Jones would return a kickback to him from the money received.

furnished Mr. Jones' name to Defendants and testified in the Word of Faith World Outreach Center Church, Inc. v. Morales case<sup>6</sup> that Mr. Jones had no connection with Plaintiff. Although Defendants were given a copy of Mr. Anthony's testimony prior to the PrimeTime II broadcast, Plaintiff states that they ignored the testimony and rebroadcast the statements implicating Plaintiff in Mr. Jones' scheme.

In addition, Plaintiff argues that Defendants knew, prior to the broadcast of PrimeTime I, that only a few orphanages were registered with the Haitian government. Plaintiff specifically cites to Defendant, Kelly Sutherland's notes of an interview with Fritz Artistyl in Haiti, which included the statement, "149 registered. 700 working w/o legal status," and her notes on the back of a photograph picturing World Harvest Orphanage, which included the statement, "did a survey found 700 additionally on Haitian soil--only 148 registered." (Joyce Aff., Ex. 42, Ex. 43). Plaintiff also argues that Ms. Sutherland knew, prior to the broadcast, that Plaintiff did in fact sponsor an orphanage in Haiti as she knew the name of the orphanage and the names and addresses of the Sullivans, who owned the orphanage. Plaintiff asserts that Defendants, Diane Sawyer and Robbie Gordon, also knew, prior to the broadcast, that Plaintiff supported an orphanage in Haiti. Plaintiff states that Ms. Gordon's knowledge is shown by a memo sent to Ira Rosen, senior producer for PrimeTime Live, on July 23,

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<sup>6</sup>Word of Faith World Outreach Center Church, Inc. v. Morales, 787 F. Supp. 689 (W.D. Tex. 1992), rev'd 986 F.2d 962 (5th Cir. 1993).

1991, stating that she did not expect to find out that Plaintiff's missions were nonexistent. (Joyce Aff. Ex. 38). Although Defendants had knowledge that Plaintiff sponsored an orphanage in Haiti, Plaintiff argues that Defendants knowingly broadcast the PrimeTime I segment claiming that they could not find any orphanage. Plaintiff further argues that despite the information obtained prior to PrimeTime I and the evidence obtained from Plaintiff after PrimeTime I aired, Defendants knowingly rebroadcast similar false statements in PrimeTime II.

Defendants, in response to Plaintiff's motion and in support of their motion, contend that even if Plaintiff's statements that he never "owned" an orphanage in Haiti; that he did contribute money to World Harvest Orphanage; that after 1986, he did not solicit funds for World Harvest Orphanage; and that he never associated with or knew Bob Jones were true, the broadcasts at issue did not report any such facts. Defendants contend that the broadcasts never said Plaintiff owned an orphanage. Indeed, Defendants state that PrimeTime II specifically stated "even though his ministry magazine calls it the Robert Tilton Ministries Children's Home, it's not really Tilton's place at all." Defendants assert PrimeTime I stated that they could not find any of the three orphanages identified in Plaintiff's ministry magazine and other promotional materials and PrimeTime II stated that they could not find "Robert Tilton Ministries Children's Home." Defendants contend that they accurately reported in PrimeTime I that they could not find any of the three named orphanages.

According to Defendants, the evidence shows that they conducted an exhaustive investigation to find the orphanages, including World Harvest Orphanage, but could not locate any of them. Defendants argue that they accurately reported that the Haitian officials had neither heard of Plaintiff nor any of the orphanages identified in Plaintiff's magazine and other promotional materials. Defendants also argue that they accurately reported in PrimeTime II that the Haitian officials had neither heard of Plaintiff nor Robert Tilton Ministries Children's Home. Although Plaintiff claims that he did not write the copy for the magazine articles which identified the three orphanages, Defendants contend that he was the publisher of the magazine.

As to Bob Jones, Defendants contend they never stated that Plaintiff was associated with or knew Mr. Jones. They contend the broadcasts stated that the canvas sign on the Haitian orphanage featured in Plaintiff's magazine brought to mind the statements of Mr. Jones. Defendants maintain Plaintiff cannot present any evidence to show that the canvas sign did not bring those statements to mind. In addition, Defendants state that Plaintiff cannot and has not disputed the accuracy of the quote attributed to Mr. Jones that just for a few thousand dollars a month "you could just fix up a sign and claim an orphanage" in Haiti. Defendants further state that the quote is accurate as to Plaintiff since the canvas sign on the Haitian orphanage featured in his magazine was hung only once and for the explicit purpose of photographing it.

Having reviewed the challenged segment of the broadcasts and

the evidence applicable thereto, the Court finds Plaintiff has failed to establish that he is entitled to judgment as a matter of law in regard to the segments. The Court also finds that Plaintiff has failed to present sufficient evidence, even under a preponderance of the evidence standard, to raise a genuine issue of fact as to the falsity of the segments so as to defeat Defendants' motion. In addition, the Court finds that Plaintiff has failed to raise a genuine issue of fact as to whether Defendants knew of the alleged falsity of the segments or entertained serious doubts as to their truth.

Despite Plaintiff's assertions to the contrary, the broadcasts at issue did not state that Plaintiff owned a Haitian orphanage nor did they report that Plaintiff did not provide any support to an orphanage in Haiti. PrimeTime I stated that the Haitian officials had not heard of any of the three orphanages identified in Plaintiff's magazine<sup>7</sup> and PrimeTime II stated that even though the Plaintiff's magazine called the mission, Robert Tilton Ministries Children's Home, it was not his place at all and Haitian officials had not heard of Plaintiff or his orphanage. Plaintiff has alleged that since Defendants knew the name of the orphanage sponsored by Plaintiff's Church and the individuals who ran it, Defendants could have and should have located the orphanage. However, it is

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<sup>7</sup>Although Plaintiff argues that he did not "use" three names for the orphanage he sponsored as he did not write the copy for magazine articles, the undisputed evidence shows that Plaintiff was the publisher for the magazine. Consequently, the Court opines that no reasonable juror would conclude that Plaintiff was not responsible for the use of the three names to describe the orphanage in Haiti.

undisputed that Defendants, prior to the broadcast of PrimeTime I, did attempt to locate World Harvest Orphanage and specifically questioned Haitian officials about that orphanage. The evidence also reveals that even though Defendants had the names and addresses of the Sullivans, they were unable to locate them in both Haiti and Dallas. Although Plaintiff may contend that Defendants were negligent in failing to find the orphanage, such claim does not support a finding of actual malice. Masson, 501 U.S. at 509 (mere negligence does not suffice to prove actual malice).<sup>8</sup> As to PrimeTime II, Defendants merely reported that Robert Tilton Ministries Children's Home identified in Plaintiff's magazine was not his orphanage and Haitian officials had not heard of him or the orphanage. Plaintiff has failed to present any evidence to show that such report was false or that it was made with knowledge of the falsity or with serious doubts as to its truth.<sup>9</sup>

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<sup>8</sup>Plaintiff contends that Defendants purposefully avoided the truth when Jeff Cooke failed to ask about the location of the Haiti orphanage or the names of its pastors during a job interview with Mike Groves. While purposeful avoidance of the truth may suffice to prove actual malice, see, Harte-Hanks, 491 U.S. at 692, the videotape submitted to support that contention does not show Mr. Cooke's interview with Mike Groves. Notwithstanding, the Court finds that Mr. Cooke's failure to ask the location of the Haiti orphanage does not in and of itself demonstrate an avoidance of the truth. Moreover, Plaintiff has failed to show that Mike Groves would have been privy to that information and would have disclosed that information to Mr. Cooke during his job interview.

<sup>9</sup>In attempting to demonstrate actual malice with respect to PrimeTime II, Plaintiff argues that prior to the broadcast of PrimeTime II, his attorney provided Defendants with information evidencing Plaintiff's contributions to an orphanage in Haiti. However, as stated, PrimeTime II did not say that Plaintiff provided no support to an Haitian orphanage. Instead, it reported "[s]o even though his magazine calls it the Robert Tilton

Likewise, the Court finds that the broadcasts did not state that Plaintiff knew or was associated with Bob Jones. PrimeTime I stated that "[w]e kept thinking about Bob Jones and how he told us you could just fix yourself up a sign" and PrimeTime II stated "[w]ell, remember Bob Jones who told us for just a few thousand a month we could put a sign and claim an entire orphanage, even if we weren't the only contributor." Defendant, Robbie Gordon, has testified that the canvas sign on the Haitian orphanage which was featured in Plaintiff's magazine and was shown on the broadcasts brought to mind the statements of Mr. Jones. Plaintiff has failed to present sufficient evidence to show that the canvas sign did not bring Mr. Jones to mind to Defendants.<sup>10</sup>

Plaintiff has alleged that Defendants falsely accused Plaintiff of mail fraud in the broadcasts. Plaintiff, however, has failed to present sufficient evidence to demonstrate an intent or awareness on the part of Defendants that they implicitly accused him of such conduct. See, Newton v. National Broadcasting Co., 930 F.2d 662, 681 (9th Cir. 1990) (not permissible to uphold jury verdict on basis that "because the broadcast may be capable of supporting the impression [plaintiff] claims, [defendant] must

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Ministries Children's Home, it's not really Tilton's place at all, which is why government officials we spoke to in Haiti hadn't heard of Tilton or his orphanage."

<sup>10</sup>In his briefs, Plaintiff contends that Ms. Gordon and Ms. Sutherland showed Mr. Jones the picture of the canvas sign featured in the Church's magazine and led him to make the statement about the sign. Nevertheless, Plaintiff does not dispute that Mr. Jones made the statement to Defendants. Nor does he present any affirmative evidence to establish that the picture of the canvas sign did not bring Mr. Jones' statement to mind.

therefore have intended to convey the defamatory impression at issue"); Saenz v. Playboy Enterprises, Inc., 841 F.2d 1309, 1319 (7th Cir. 1988) (to show actual malice, plaintiff must prove "with clear and convincing evidence that the defendants intended or knew of the defamatory implications"); Woods v. Evansville Press Co., 791 F.2d 480, 487 (7th Cir. 1986) (actual malice not shown where "there is no evidence that the defendants . . . shared the plaintiff's interpretation of [article] or intended that the [article] be read to contain the defamatory innuendos the plaintiff attributes to it").

#### Holy Water - Response Media

PrimeTime I and PrimeTime II reported the following:

"SAWYER: [voice-over] Tilton sends out an avalanche of things he asks viewers to sent back to him -- 'miracle prayer cloths' he promises to touch and place upon an altar, cords he says he'll place on a 'wall of deliverance,' arrows he'll use to take aim at a sufferer's needs, a tracing -- place your hand there and he'll put his hand there too. There's holy water from the River Jordan, 'miracle anointing oil' -- though Moore said some of the items come from that holy place Taiwan."

MR. MOORE: We get stuff from Taiwan."

Plaintiff, in support of his motion and in response to Defendants' motion, contends that the statements in these segments of PrimeTime I and PrimeTime II were false in that they accused Plaintiff of mail fraud by stating that he sends to his followers holy water from Taiwan rather than from the River Jordan as represented. Plaintiff contends that the evidence clearly shows that the holy water sent to his followers came from the River Jordan. He also contends that ABC's raw footage from the interview with Jim Moore shows that he never said any of Plaintiff's mailing

items came from Taiwan. According to Plaintiff, Mr. Moore's statement "[w]e get stuff from Taiwan" had nothing to do with Plaintiff's mailings items. Plaintiff states that Mr. Moore was obviously distracted when he answered the question posed by Defendant, Robbie Gordon. Plaintiff also states that ABC's raw footage of the discussion between Ms. Gordon, Ole Anthony and Jeff Cooke following the interview clearly demonstrates that Defendants recognized they lacked any evidence to support their statement in the broadcasts. Specifically, Plaintiff points to Ms. Gordon's statements that she would like to know where they "get the--that Lord's water and a couple of other things;" that she didn't "feel like we've got him nailed right now;" and that she "really wanted to get him to say that stuff is not from the River Jordan." (Joyce Aff., Ex. 18 at pp. 71, 110, 112). Plaintiff also states that ABC's notes clearly show what ABC wanted to say in the broadcasts as they state that "Tilton's miracle waters and oils, cloths, etc. - most come from Taiwan - though they imply they are from the Holy Land or somehow anointed" and "[t]he miracle waters, oils, replicas of widow's mites, etc. -- many come from Taiwan, though they imply they are from the Holy Land or they are somehow anointed." (Joyce Aff., Ex. 19, Ex. 20). Plaintiff further contends that Defendants knew that their statement about the holy water was false because prior to the rebroadcast on PrimeTime II, Plaintiff advised Defendants that the allegations regarding the holy water were false and enclosed evidence to prove that the holy water came from the River Jordan. Furthermore, Plaintiff argues that Defendants knew

that their accusation Plaintiff misrepresented Taiwanese water as River Jordan water was an accusation Plaintiff committed mail fraud as Defendant, Diane Sawyer, specifically asked John Brugger of the United States Postal Service in an interview if "the stuff they send out, the, the holy water . . . in fact, it comes from Taiwan. If they don't actually say where it comes from, again you can't-- . . . It has to be fairly specific?" (Joyce Aff., Ex. 21 at p. 15, Ex. VT-21).

Defendants, in response and in support of their motion, contend that the challenged segments did not state that the holy water came from Taiwan nor did they accuse Plaintiff of mail fraud. Rather, the broadcasts stated that some of the other items mailed to Plaintiff's followers came from Taiwan. Defendants also state that the gist of their segments was substantially true. According to Defendants, the gist of the challenged segments was that Plaintiff obtained inexpensive items for his mailings. Defendants state that discovery has confirmed the gist as some of Plaintiff's mailing items came from Hong Kong. In addition, Defendants argue that Plaintiff cannot show actual malice with respect to the broadcasts as Ms. Gordon has testified she believed that Response Media obtained some of Plaintiff's mailing items from Taiwan. Defendants stated that Mr. Moore also testified that it was possible for Ms. Gordon to have interpreted his comments to mean the mailings came from Taiwan. In regard to ABC's notes referred to by Plaintiff, which were sent to Ms. Sawyer by Ms. Gordon before Ms. Sawyer's interview with Mr. Brugger and which contained

comments that "many" or "most" of Plaintiff's "miracle waters and oils, cloths, etc." came from Taiwan "though they imply they are from the Holy Land or they are somehow anointed," Defendants contend that the notes do not support a finding of actual malice. Defendants argue that if they "wanted to say" that "many" or "most" of the mailing items came from Taiwan in the broadcasts, they could have. Likewise, if they wanted to accuse Plaintiff of mail fraud, they could have. Defendants, however, state that neither broadcast contained such statements.

Upon review of the record related to the challenged segments, the Court finds that Plaintiff has failed to show that he is entitled to judgment as a matter of law and has failed to raise a genuine issue of fact in response to Defendants' summary judgment motion as to the element of actual malice. The challenged segments did not, as Plaintiff argues, state that holy water came from Taiwan nor did they explicitly accuse Plaintiff of mail fraud. Even though Plaintiff contends that the broadcasts imply such facts, Plaintiff has failed to produce adequate evidence to establish that Defendants intended or knew that the broadcasts implied such facts. See, Saenz, 841 F.2d at 1318. Plaintiff has presented evidence to show that none of the items obtained for his mailings came from Taiwan. However, Plaintiff has not presented sufficient evidence to establish that Defendants knew that their statement "though Moore said some items come from that holy place Taiwan" was false or that they subjectively entertained serious doubts as to its truth. Plaintiff cites to Defendant, Robbie

Gordon's remarks "I would like to know, just out of curiosity, where they get the -- that Lord's water and a couple of other things;" "I really wanted to get him to say that stuff is not from the River Jordan, but I think he. . ." and "I don't think we have him nailed right now" to support his allegations of actual malice. These remarks, however, do not establish that Defendant did not believe that some of the items for Plaintiff's mailing came from Taiwan. Indeed, it is apparent from the transcript of the interview with Mr. Moore that Ms. Gordon's "nailed" remark was not directed at the holy water or other mailed items as argued by Plaintiff.<sup>11</sup> As there is an absence of clear and convincing evidence of Defendants' subjective awareness of alleged falsity, the Court concludes that Plaintiff's attack on the challenged segments must fail.

PrimeTime I and PrimeTime II also reported:

"SAWYER: [voice-over] So we decided to take hidden cameras to see what we could learn about Robert Tilton's fund-raising. It led us first to the nerve center of his ministry, the company that organizes his direct mail. It's called Response Media.

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<sup>11</sup>In his briefs, Plaintiff argues that Ms. Gordon could not have believed that Mr. Moore was referring to Plaintiff's mailing items when he said "[w]e get stuff from Taiwan." Plaintiff states that Mr. Moore, Mr. Anthony, Ms. Gordon and Mr. Cooke had left the room where the display of the Church's button mailing was located and Ms. Gordon, when asking her question to Mr. Moore, was pointing to the far wall of the room they were in at the time. Plaintiff states that it is clear that Mr. Moore was distracted when the question was asked. However, the Court finds that such facts do not establish that Ms. Gordon did not understand Mr. Moore to be referring to Plaintiff's mailing items. The transcript of the interview reveals the parties had been looking at wall displays of fund-raising activities, one of which included a button mailing of Plaintiff's Church. Ms. Gordon's question to Mr. Moore referenced buttons.

JIM MOORE: Bob is doing far better than anyone knows.

SAWYER: [voice-over] Jim Moore is president of Response Media. He handles not only Tilton, but a number of big corporate accounts. We told Moore that we were media consultants for this man, Dallas minister Ole Anthony. We asked him to show us how to start a big money ministry like Tilton's.

MR. MOORE: Give them something for free. You know, we want to mail you the latest copy of "X" and get their name and address. New names is the key, new names. Just think, 'New names.'

SAWYER: [voice-over] We learned that once people give you their names, its easy to keep them on the hook. You mail them something with a gimmick in it.

MR. MOORE: First of all, when you send an item in it, it gets their attention. That's number one.

\* \* \* \*

SAWYER: [voice-over] The letters accompanying the items are written by ghost writers to pressure followers to write back and make donations, too. Does it work? People send them in by the truckloads. It's a great marketing scheme.

\* \* \* \*

SAWYER: [voice-over] And when the letters arrive, they're processed so the company knows which fund-raising appeals you can use to squeeze followers for the most donations.

Mr. MOORE: We take the clients' files and we run them up against demographic information and create a profile of who their people are, how many people have cars that are new--

SAWYER: [voice-over] So it's market research, not God, who can tell Tilton which appeals reach the richest donors, which illnesses create the most dollar opportunities."

In their motion, Defendants contend that Plaintiff cannot prevail on his challenges of these segments of the broadcasts concerning Defendants' description of Response Media as the "nerve center" or "the company who organizes his direct mail" and their statements that "the letters accompanying the items are written by ghost writers to pressure followers to write back and make

donations, too. It's a great marketing scheme." Defendants contend that even though Plaintiff argues that Response Media was "only a printer" for him and that "[Internal Data Management] handled the mail" for him, Mr. Moore, during his interview, described Response Media's role far more than that of "only a printer." According to Defendants, Mr. Moore described to Mr. Anthony, Ms. Gordon and Mr. Cooke, a wide range of services Response Media could provide to a ministry and indicated that he performed such services for Plaintiff. The described services included sophisticated direct mail strategies, market research techniques and statistical analyses. He also explained the process of handling the direct mail. In addition, with respect to Plaintiff's ministry, Defendants contend that Mr. Moore portrayed himself as responsible for Plaintiff's success, claiming that Plaintiff "was out of business" prior to his association with Response Media. According to Defendants, Mr. Moore told his interviewees that he commuted to Dallas every day for two years, and in reference to assistance he provided to Plaintiff in reorganizing his ministry, Mr. Moore stated that he "worked with them." Mr. Moore further indicated that Response Media did the media buying for Plaintiff's Church. In light of these representations, Defendants contend they believed that Response Media was the "nerve center" of Plaintiff's Church and the "company that organizes his direct mail."

Defendants also contend that discovery has confirmed Response Media served Plaintiff's ministry as more than a printer.

Defendants state that the evidence shows Response Media acted as a consultant to the Church with respect to its mailings. Mr. Moore participated in meetings at which mailing strategies and results were discussed and analyzed. In addition, Response Media created a demographic study for Plaintiff's Church.

Even if Response Media were "only a printer" and Internal Data Management handled the direct mail operation for Plaintiff, Defendants contend that the gist or substance of the challenged segments was substantially true. According to Defendants, the gist of the broadcasts was that Plaintiff utilized a sophisticated direct mail operation which effectively brought in large amounts of contributions. Defendants argue that there is no dispute that such was the case, whether the direct mail operation was conducted by Response Media or Internal Data Management.

As to the statement in the broadcasts that Plaintiff's letters were written by ghost writers, Defendants state that such statement was true. Defendants contend that Kathryn Ingley, the Church's manager of partner correspondence, described herself as a ghost writer for Plaintiff. Defendants also assert that Plaintiff testified that he had the concept in the letter but that it was the responsibility of Internal Data Management employees as subordinates to put the letter in mailable form. Defendants further argue the evidence reveals the employees of Internal Data Management reviewed the prayer partners' letters, selected the responses to them and then mailed them out over Plaintiff's signature.

In response to Defendants' motion, Plaintiff disputes that Response Media was the nerve center. He also disputes the accuracy of Defendants' characterization of Mr. Moore's statements during the interview. While Plaintiff concedes Mr. Moore indicated that Response Media could perform a wide range of services, he contends that Mr. Moore did not state he performed such services for Plaintiff. Additionally, Plaintiff disputes the accuracy of Defendants' statement that Mr. Moore claimed credit for Plaintiff's financial success. Plaintiff states that Mr. Moore never made such a statement and in fact, the evidence shows that he was not responsible for the success. Plaintiff further asserts that Mr. Moore did not claim to do the media buying for Plaintiff. Rather, he stated that the "downtown office" did the media buying, referring to J.C. Joyce's office. Plaintiff further denies Defendants' contention that Mr. Moore was a consultant for Plaintiff. Plaintiff states that Mr. Moore was only a technical advisor involved in the layout and design of the mailing. Furthermore, Plaintiff states that Mr. Moore has only performed one profile of the Church's mailing and the Church did not use the information.

The Court, upon review of the challenged segments of the broadcasts and the record thereof, finds that Plaintiff has failed to satisfy his burden to overcome summary judgment as to the issue of actual malice in regard to Defendants' description of Response Media as the "nerve center" and as "the company that organizes his direct mail." Plaintiff has failed to provide affirmative evidence

to demonstrate that Defendants knew their statements were false.<sup>12</sup> The transcript of the interview with Mr. Moore reveals that Mr. Moore did indicate or at least suggest that he performed a wide variety of services for Plaintiff. Moreover, Mr. Moore told Ms. Gordon, Mr. Anthony and Mr. Cooke that he had commuted to Dallas for two years to work with Plaintiff's ministry and that he had been the one responsible for moving direct mailing services from in-house to Tulsa. The transcript, contrary to Plaintiff's contention, also shows that Mr. Moore did in fact take credit for Plaintiff's success. Indeed, in the interview, Mr. Moore stated:

"[w]hen I got associated with Bob he was about out of business. . . .

\* \* \* \*

He was having a very difficult time. In fact, almost--I don't know if he knew what to do at the time. When he first came on, the first mailing program that we did with him he, he tried to convince me--he went--he wanted to go with this real slick--. . . .

\* \* \* \*

And what he felt would work and what would actually work were two different things. And once he saw that this wouldn't work, he was willing to go with this. . . .

\* \* \* \*

Bob, is, is doing far better than anyone knows.

(Joyce Aff., Ex. 18 at pp. 91-92).

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<sup>12</sup>In any event, the Court finds Defendants' characterization of Response Media as the "nerve center" is non-actionable as it is an opinion which is not susceptible to proof of its truth or falsity. See, e.g., Metcalf v. KFOR-TV, 828 F.Supp. 1515, 1529-32 (W.D. Okla. 1992).

These statements clearly demonstrate that Mr. Moore claimed credit for Plaintiff's success. Furthermore, in regard to Mr. Moore's statement as to media buying, the Court concludes that the statement, at the very least, is ambiguous and in the Court's view, could be understood by Defendants as indicating that Mr. Moore and Response Media played a part in media buying.<sup>13</sup> As to demographic analysis, Plaintiff has not submitted specific facts to show that Defendants knew that the statements in regard to Response Media's participation in such activity was false or that they subjectively entertained serious doubts that their statements were false.

In regard to Defendants' statement concerning ghost writers, the Court finds that Plaintiff has failed to present sufficient evidence, even under a preponderance of the evidence standard, to establish that the statement was false. Moreover, the Court finds that Plaintiff has not shown with convincing clarity that Defendants knew such statement was false or had serious doubts as

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<sup>13</sup>The transcript of the interview reads:

"Jim Moore: He's [referring to Plaintiff], He's on more staticns, more market--I, I don't think anyone's on as many stations as he is or as many times.

Ole Anthony: Are--now, do-- now, do you do the time buying for that kind of stuff?

Jim Moore: No, and Bob--we--a friend of mine--see, I used to do all the media buying at, at Oral's when I was there. And a friend of mine that used to work there, I had him do the media buying for him initially to get him started. Then we are doing it here in Tulsa, but out of the downtown office."

(Joyce Aff., Ex. 18 at p. 92).

to its truth. The undisputed evidence shows that Kathryn Ingley and others wrote letters for Plaintiff and that Ms. Ingley considered herself as a ghostwriter. It is also undisputed that Internal Data Management employees reviewed letters from prayer partners, selected responses to those letters and then sent them out over Plaintiff's signature. Even though Plaintiff claims that the broadcast implies that the employees of Response Media were ghostwriters for the letters, the Court concludes that the gist of Defendants' statement is substantially true as Kathryn Ingley as well as Internal Data Management employees wrote letters or selected responses on behalf of Plaintiff.<sup>14</sup>

As to remainder of the challenged statement involving ghost writers and the statements concerning letters sent and received from followers, the Court finds that Plaintiff cannot satisfy his burden of proof that Defendants made the statements with knowledge of falsity or doubts as to their truth. As to Defendants' statements "[i]t's a great marketing scheme" and "So it's market research, not God, who can tell Tilton which appeals reach the richest donors, which illnesses create the most dollar

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<sup>14</sup>The Court also notes that Plaintiff challenges statements made in the follow-up segment of PrimeTime II with respect to the drafting of mailings. The statements were attributed to Marte Tilton from a deposition. In that deposition, Ms. Tilton acknowledged that the handwriting on personal letters to Plaintiff's followers was not Plaintiff's handwriting. She also admitted that letters sent to Plaintiff's Church by individuals seeking spiritual guidance were answered by individuals hired by the data processing center in Tulsa. In this action, Ms. Tilton has attested to the accuracy of those comments and Plaintiff has not presented evidence to the contrary. Therefore, Plaintiff's attack to those statements fail.

opportunities," the Court finds that such statements are non-actionable as statements of opinion, not verifiable as true or false. See, Metcalf v. KFOR-TV, 828 F.Supp. 1515, 1529 (W.D. Okla. 1992) ("statements which are opinionative and not factual in nature, which cannot be verified as true or false, are not actionable as slander or libel"); Miskovsky v. Oklahoma Pub. Co., 654 P.2d 587, 593 (Okla. 1982) (opinion or "judgmental statement in which the maker of the same expresses his views" cannot be libelous).<sup>15</sup>

### Prayer Requests

PrimeTime I and PrimeTime II reported:

"SAWYER: [voice-over] But how much does Tilton really care about the beat-up and the hurting? We kept thinking about something the head of the direct mail operation told us, that the mail doesn't go to Tilton. It's forwarded unopened to Tilton's bank in Tulsa. So the bank opens the followers' mail, not to share the agony, but to get the money.

INTERVIEWER: The bank opens the letters that come back in?

MR. MOORE: Right. And takes your money and puts it in your account. All we get is the paper document and how much the person gave.

SAWYER: [voice-over] And those items that people have prayed over and sent in, believing Robert Tilton would take them and pray over them too? If some make it to Tilton, there are thousands that didn't. We found them in the garbage at the bank and the marketing research center. The 'angels of god,' the prayer cords, the arrows--this person wanted his aimed at getting a real dad -- the tracing where Tilton said he'd place his hand, ripped up by [PrimeTime I: the bank] [PrimeTime II: letter processors]. We found heart-breaking appeals from followers and letters like this one.

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<sup>15</sup>In his Final Amended Complaint, Plaintiff challenges the statements made in PrimeTime I and PrimeTime II attributed to "Tilton's marketing director" that "when it comes to money, Tilton is very smart. He's careful not to say what donation goes where so he can avoid, again, how Jim and Tammy got caught." Upon review of the record, the Court finds that Plaintiff cannot show by clear and convincing evidence that Defendants knew the alleged falsity of the statements or entertained serious doubts as to their truth.

It came with personal photographs for Pastor Bob and a prayerful message. It also came with a seven thousand dollar pledge. The money probably made it to Tilton. The prayers went in the trash."

Plaintiff, in support of his motion and in response to Defendants' motion, contends that the above-quoted segments are false. Plaintiff contends that Response Media did not receive any prayer requests from the bank as stated by the broadcasts. Plaintiff asserts that his mail processor, Internal Data Management, received all the prayer requests. Moreover, Plaintiff contends that Mr. Moore never told Ms. Gordon, Mr. Anthony and Mr. Cooke, during their interview, that he received "the paper document [or] how much the person gave" in regard to Plaintiff's mail. Nor did Mr. Moore state that "mail doesn't go to Tilton." Plaintiff states that prayer requests were sent to him from Internal Data Management. In addition, Plaintiff contends that the statement "[a]nd those items that people have prayed over and sent in, believing Robert Tilton would take them and pray over them, too" was false because the visual shown at the time the statement was made, does not show items prayed over and sent in by followers. Rather, the pictured mail was actually prayer request forms that Plaintiff's Church had sent to Defendant, Kelly Sutherland, at her request, but which had never completed and returned to the Church. Plaintiff also states that Defendants produced videotapes shot in Dallas with techniques to make the small quantity of the Church's mail they had "look voluminous." Plaintiff further contends Defendants' statements that "[i]f some make it to Tilton, there are thousands that didn't" and "we found them in the garbage at the

bank and the marketing research center" were false. According to Plaintiff, Defendants never found any prayer requests in the garbage at the bank or the marketing center which had been placed there by employees. Nor could they find "thousands" of prayer requests. Plaintiff contends the evidence in the record establishes that no mail which was opened by Commercial Bank and Trust had any contents removed or thrown away and that no mail received by Internal Data Management was ever disposed of in its dumpster. Indeed, Plaintiff states that an employee of the janitorial service, who personally emptied the trash for Commercial Bank and Trust and Internal Data Management, wrote a letter to Defendant, Diane Sawyer, stating that no prayer requests were thrown away.

In addition, Plaintiff contends that Defendants acted with actual malice in publishing the false statements. In making the statements, Defendants relied upon Mr. Anthony, who purportedly found the trashed prayer requests. However, Plaintiff asserts that Defendant, Kelly Sutherland, was advised by Peggy Wehmeyer, now ABC's religious editor, that Mr. Anthony could not be trusted and was obsessed with his crusade against Plaintiff. Plaintiff states that Ms. Sutherland's testimony, as well as Ms. Gordon's testimony, that they believed Mr. Anthony had found the prayer requests in the trash cannot be relied upon as their credibility is at issue. Plaintiff additionally states that Defendants acted with actual malice in rebroadcasting the statements on PrimeTime II because they were advised by Plaintiff, after PrimeTime I aired, the

accusations were clearly false. Plaintiff specifically provided the trial transcript and exhibits of the Morales case to Defendants which showed that there were never thousands of prayer requests thrown in the trash.

Furthermore, Plaintiff alleges that Defendants acted with actual malice because the evidence reveals that Defendants or their agents stole prayer requests from Commercial Bank and Trust and Internal Data Management and stole handwritten letters referred to as "white mail" from the Church's sanctuary and planted 37 of the prayer requests in the trash to support their report. Plaintiff contends that Internal Data Management has the original envelopes which contained the prayer requests that Defendants claimed in the broadcasts were found in the trash dumpsters. These envelopes, Plaintiff argues, prove the prayer requests were stolen and then were placed back in the bank without the prayer requests and with only a token offering. Plaintiff argues that Defendants or their agents stole the envelopes. Plaintiff contends that Defendants filmed Mr. Anthony removing trash containing prayer requests behind the dumpsters at the Commercial Bank and Trust and took video and still pictures showing prayer requests at that location. Defendants also took video and still pictures at Internal Data Management. The video and still pictures, Plaintiff argues, were destroyed by Defendants.

Defendants, in response and in support of their motion for summary judgment, contend that Plaintiff cannot show with convincing clarity that Defendants acted with actual malice with

respect to the broadcasts. Defendants contend that Ms. Gordon has testified that Mr. Anthony told her, after their interview with Mr. Moore, that he and two of his colleagues, Powell Holloway and Harry Guetzlaff, intended to look through the trash outside Commercial Bank and Trust. Ms. Gordon and Ms. Sutherland have testified that Mr. Anthony had told them that he and his colleagues had examined the trash outside Commercial Bank and Trust, Internal Data Management and the law offices of J.C. Joyce, counsel for Plaintiff. Ms. Gordon also has testified that Mr. Anthony reported that he and his colleagues had discovered thousands of items of trash. Ms. Gordon and Ms. Sutherland further testified that on different occasions, they inspected trash which Mr. Anthony said he had found during his "trash trips" and that they believed Mr. Anthony accurately reported what he had found. Although Plaintiff contends that Ms. Sutherland had been advised that Mr. Anthony was not trustworthy and was obsessed with Plaintiff's crusade, Defendants contend that Plaintiff has shown nothing to rebut Defendant's testimony that she believed that Mr. Anthony had retrieved the prayer requests from the trash. Moreover, Defendants contend that the evidence Plaintiff has presented to challenge the credibility of Ms. Gordon and Ms. Sutherland has nothing to do with their belief that Mr. Anthony recovered prayer requests in the trash of the bank and the marketing research center. Furthermore, Defendants contend that Plaintiff has failed to present any evidence to support his accusations that Defendants stole prayer requests or planted stolen prayer requests in the trash dumpsters.

In addition to actual malice, Defendants contend that Plaintiff has failed to meet his burden of proof as to the issue of falsity. Despite Plaintiff's attacks on certain statements of the broadcasts, Defendants maintain that the gist or sting of the broadcasts was demonstrably true. According to Defendants, the gist of the reports was Plaintiff's preoccupation with money, a focus that led him to take the most stringent steps to assure that every penny he received from followers was deposited in the bank at the same time the prayers of those followers were treated with callous indifference. Defendants contend that the evidence has in fact revealed that thousands -- hundreds of thousands -- of prayer requests mailed to Plaintiff were thrown away, pursuant to Plaintiff's directive, without being prayed over by him. Defendants state that at least 180,000 P-21B and P-21C prayer forms<sup>16</sup> of Plaintiff's followers were trashed and that tens of thousands of other responses to Plaintiff's mailings were, as well, trashed. Additionally, Defendants contend that tens of thousands of handwritten letters from followers were routinely discarded. Defendants acknowledge that Plaintiff did receive a computer printout with cryptic codes referencing the form letters that Internal Data Management employees sent back to the followers.

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<sup>16</sup>According to Defendants, Internal Data Management sent to individuals, who initially responded to Plaintiff's appearances on television, the "Prayer of Agreement Miracle Campaign" mailing or the "P-21" mailing. In the mailing, Plaintiff agreed to pray in agreement with the individuals for 21 days. The mailing contained three forms on which the individuals were asked to write prayers to Plaintiff for the 1st, 8th and 15th days. The "P-21B" and "P-21C" forms were for the 8th and 15th days.

However, Plaintiff never told his followers that he prayed over the computer printouts instead of the original prayer requests. Defendants contend that all of the undisputed evidence reveals that Plaintiff did not in fact personally pray over thousands of prayer requests that were mailed to him.

The Court, having carefully reviewed the evidence submitted, finds that Plaintiff has not presented sufficient evidence to raise a genuine issue of fact as to whether Defendants acted with actual malice in regard to their reports. Plaintiff has failed to present sufficient evidence to show that Defendants knew or were aware the statements concerning Mr. Moore were false. Moreover, Plaintiff has failed to present any evidence to show that Defendants did not believe that the "mail doesn't go to Tilton." Plaintiff has additionally failed to sufficiently rebut the testimony of Ms. Gordon and Ms. Sutherland concerning Mr. Anthony's report of trashed prayer requests, their inspection of the prayer requests which Mr. Anthony stated were trashed and their belief that his report was accurate. Plaintiff claims that the credibility of Ms. Gordon and Ms. Sutherland is at issue and therefore their testimony cannot support summary judgment on the issue of actual malice. However, the evidence presented to attack the credibility of Ms. Gordon and Ms. Sutherland does not relate to Mr. Anthony, the trash trips conducted by Mr. Anthony or whether they believed Mr. Anthony retrieved the prayer requests from the trash. Moreover, the fact that Ms. Sutherland was advised that Mr. Anthony was not a credible source does not establish actual malice. Ms. Sutherland testified

that in fact the majority of information Mr. Anthony provided to her in regard to Plaintiff and his Church was accurate. Plaintiff has not shown that such testimony is untrue or that Ms. Sutherland had reason to question the veracity of Mr. Anthony's report that he had found prayer requests in the trash.<sup>17</sup> Plaintiff also claims that the reports were false because the prayer requests were stolen and then planted in the trash dumpsters. Discovery, however, has failed to uncover any factual basis for the allegations that Defendants stole and planted the prayer requests in the trash dumpsters or in fact suspected that others stole and planted the prayer requests in the trash dumpsters. Plaintiff has no evidence to reasonably show that Defendants destroyed the still and video pictures claimed by Plaintiff. With an absence of affirmative evidence or specific facts to demonstrate that Defendants knew the alleged falsity of their statements in the challenged segments or entertained serious doubts as to those statements, the Court finds that Plaintiff's claim in regard to the statements cannot prevail.<sup>18</sup>

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<sup>17</sup>As stated by the court in Brueggemeyer, the "First Amendment does not require that one who speaks on a public issue do so based only on inviolable sources; instead the First Amendment inquires whether the sources are sufficiently perfidious to cause the publisher to believe the information is probably false or to prompt the publisher seriously to doubt the truth of what the source has revealed." 684 F.Supp. at 460. The Court concludes that a jury could not reasonably find, by clear and convincing evidence, that Defendants acted with actual malice in relying upon Mr. Anthony.

<sup>18</sup>Plaintiff, in his briefs, also challenges Defendants' reliance upon the statements of Brenda Reynolds, Plaintiff's housekeeper and nanny, in her interview with Defendant, Diane Sawyer. Plaintiff contends that Defendants knew Ms. Reynolds' statement "I know for a fact that he did not pray over them" could not be true because Defendants knew she was not with Plaintiff enough hours of the day or days of the week to know. However, the

PrimeTime II also reported:

"ANNOUNCER: Eight months later, are his followers getting the full story?" (Followed by film clip of Plaintiff's videotape deposition in which he is shaking his head and saying "no.")

\* \* \* \*

"SAWYER: [voice-over] But four months later, here is Tilton in a videotaped deposition with the Texas attorney general's office, which they recently released to the press over Tilton's objection. In it, Tilton admits he doesn't really pray over every prayer request at all.

Rev. Tilton: [deposition] Not all of them are the original prayer request. Some are on a computer print-out with their specific kind of prayer that they want me to pray. So I don't get the actual document of some of them.

ATTORNEY: And what happens to the actual document?

Rev. Tilton: It's thrown away."

Plaintiff claims that the above-quoted statements in the PrimeTime II broadcasts were false and that Defendants acted with actual malice in publishing the statements. Upon review of the record, the Court finds an absence of evidence showing the statements were false. Indeed, the Court finds that the record supports the statements. The record reveals that Plaintiff admitted that he did not pray over all the prayer requests sent to him. Instead, he prayed over computer printouts with the requested prayer. The evidence also shows that Plaintiff did not tell his followers that he prayed over computer printouts. Even if there were evidence in the record to show falsity, the Court finds there

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Court finds that Plaintiff has failed to sufficiently show that Defendants had any reason to doubt Ms. Reynolds' credibility or the truthfulness of her statements. Defendants knew that Ms. Reynolds was Plaintiff's housekeeper and nanny. Moreover, Ms. Reynolds specifically told Defendants that Plaintiff told her to "just take [the prayer requests] to the trash" and "[t]hrow them away."

is no evidence whatsoever to establish Defendants knew the alleged falsity of the statements or had serious doubts as to their truth.

### Phone Ministers

PrimeTime I reported:

"SAWYER: [voice over] And if Hardy felt he was taking advantage of the callers, imagine how this woman felt, Elizabeth Montcalm, a temporary employee at AT&T. When Tilton went to Israel last year, she and others at AT&T were asked to pose as Tilton prayer ministers.

ELIZABETH MONTCALM: I got people calling about their sons being on drugs or alcoholics or husbands being an -- an alcoholic. I mean, people are telling you their most intimate secrets, their personal stuff about themselves. And here I am, you know, just a temporary employee from AT&T."

Defendants, in support of their motion, contend they are entitled to summary judgment as to Plaintiff's challenge of the underlined statement "she and others at AT&T were asked to pose as Tilton prayer ministers." Defendants assert that their description of AT&T employees posing as prayer ministers was demonstrably true. Defendants assert that when Plaintiff broadcast from Israel in September 1990, he urged viewers to phone in their prayer requests to "prayer ministers" standing by at a "miracle prayer center" in Dallas. According to Defendants, Plaintiff instructed the temporary AT&T workers, who had been retained to answer calls, to answer telephone calls by saying, "[t]hank you for calling Success N Life Ministry" and to tell "rambling" callers, "[y]our miracle will come as you pray with Pastor Bob the Prayer of Agreement." Ms. Montcalm, a temporary AT&T employee from Florida, told Defendants that when she was answering calls for Success N Life during the Israel crusade, callers told her intimate details of

their lives, apparently believing that they were speaking to prayer ministers. From what was reported, Defendants contend that they believed their statement that AT&T temporary workers were asked to pose as prayer ministers was true.

In response, Plaintiff contends that the Ms. Montcalm and others at AT&T were never asked to pose as prayer ministers. Plaintiff states that the employees were simply hired to take overflow calls which came in during the Israel crusade. Plaintiff contends that the employees were instructed not to pray for anyone. Plaintiff further contends that during her interview, Ms. Montcalm never stated that she was asked to pose as a prayer minister.

Although Plaintiff has submitted evidence to support his contention that AT&T workers were not explicitly asked to pose as prayer ministers, the Court finds that Plaintiff has not submitted any evidence whatsoever to establish with convincing clarity that Defendants knew their statement in regard to the temporary AT&T employees was false or that they entertained serious doubts of the truth of their statement. Defendants knew prior to the broadcast that Plaintiff told his viewers during the crusade that their calls were being answered by "prayer ministers" at a "miracle prayer center." They also knew that AT&T temporary employees were instructed by Plaintiff to open each call by stating "[t]hank you for calling Success N Life Ministry, how may I help you?"; to take the caller's name, address, phone number and prayer request; and to respond to some callers by saying "your miracle will come as you pray with Paster Bob the Prayer of Agreement." They further knew

that callers were divulging intimate matters to the AT&T temporary employees. Plaintiff has made no showing that Defendants had information prior to the broadcast which would have cast doubts on the truth of their statement. Therefore, Plaintiff's challenge to Defendants' statement must fail.

Tilton's College Days

PrimeTime I and PrimeTime II reported:

"SAWYER: [voice-over] But an old buddy of Tilton's remembers how in college it was all a big joke.

FORMER TILTON FRIEND: Oh dear God! Come into this young woman's life! Heal tonight!

\* \* \* \*

FORMER TILTON FRIEND: Robert Tilton, as I knew him, was practicing to become a salesman. That was his concept of success, was to be -

SAWYER: [voice-over] This man, who wanted anonymity, is just one of several old friends of Robert Tilton who talked to us.

[RADIO MUSIC PLAYING]

RADIO ANNOUNCER: You're listening to XERF, the (INAUDIBLE) .

SAWYER: [voice-over] He remembers when they were in college, they would use drugs or get drunk and go off to tent revivals as a kind of sport.

FORMER TILTON FRIEND: And we'd be drunk and go down front, fall to our knees, speak in tongues. [PrimeTime I: I think that anybody who was there would realize that some people are going to believe anything and all you have to do is capitalize on that belief.]

REV. MARVIN GORMAN: Loose him (INAUDIBLE) . . .

SAWYER: [voice-over] Tilton and his friends started developing parodies, so-called "Jesus raps" of their own.

FORMER TILTON FRIEND: Oh, dear God! Come into this young woman's life! Heal tonight! She has a need to find Christ.

TILTON: O God! In the name of Jesus, we believe in prayer!  
We believe in miracles!

FORMER TILTON FRIEND: I personally thought I was a lot better  
at it than he was.

SAWYER: [voice-over] Tilton, who never finished college,  
admits he was a drug user, but says he was saved when some people  
came to his house and explained Christ.

TILTON: I just changed. I just fell in love with everybody!

SAWYER: [voice-over] But he never tells followers how he and  
his friends talked about running preacher scams and cashing in.

FORMER TILTON FRIEND: We said that when we graduated, that we  
would buy a good tent, a dynamite sound system, a good amen  
section, and fly around the country and get rich.

TILTON: We sold everything that we had, bought an old ragged  
tent and a big old truck and a travel trailer and we headed out to  
tell people about this gospel of Jesus."

In support of his motion and in response to Defendants'  
motion, Plaintiff contends that in both PrimeTime I and PrimeTime  
II, the statements of John Michael Taylor, "Tilton's former  
friend," together with Defendant, Diane Sawyer's surrounding  
comments and the context thereby created, portrayed Plaintiff as a  
man devoid of religiosity, who mocked the very thing for which he  
now stands. Plaintiff argues that Defendants' statements that  
while in college, Plaintiff participated in tent revival meetings  
as sport and in jest while drunk, joked with friends by practicing  
so-called "Jesus raps" and religious parodies, and hatched a plan  
to get rich by engaging in a revival preaching scam, were lies and  
were broadcast with actual malice. Plaintiff argues that in  
broadcasting these statements, Defendants relied on their interview  
with John Michael Taylor. However, according to Plaintiff, Mr.

Taylor stated, in that interview, that he could not say if Plaintiff actually did what Defendants stated he did in the broadcasts. Plaintiff states that the tent revival disgrace referred to by Mr. Taylor was a fad fueled by a movie entitled "Elmer Gantry." It occurred in 1963 at North Texas State University and involved John Michael Taylor and two of his friends Doug McLeod and Michael Harbison. Plaintiff asserts that he never attended North Texas State University. Moreover, Plaintiff asserts that Doug McLeod has testified that he never knew Plaintiff and Michael Harbison has testified that he never remembered Plaintiff participating in the revival sport.

Plaintiff also asserts that ABC's raw footage videotape of Mr. Taylor's interview shows that Mr. Taylor, in speaking of the fad, used the pronoun "we" to refer to a coterie of college friends, which did not include Plaintiff, and used the pronoun "he" to refer to Plaintiff. Plaintiff thus contends that the statements "[a]nd we'd be drunk and go down front, fall to our knees, speak in tongues" did not include Plaintiff as was represented by the broadcast.

In addition, Plaintiff asserts that the broadcasts showed Mr. Taylor stating "[w]e said that when we graduated, that we would buy a good tent, a dynamite sound system, a good amen section and fly around the country and get rich." ABC's raw footage videotape, however, shows that Mr. Taylor stated "I said" rather "we said." Plaintiff argues that Defendants purposely edited Mr. Taylor's statement "I" to become "we" to include Plaintiff making that

statement. According to Plaintiff, Defendants knew that statement was false and their own executive producer, Richard Kaplan, admitted that such a change was not a proper editing practice.

Plaintiff further asserts that Defendant, Diane Sawyer, stated in the broadcasts that Plaintiff made up "Jesus raps." ABC's raw footage, however, shows that Mr. Taylor never used the phrase "Jesus raps" when describing his mockery of revival preachers. Plaintiff contends that he never conducted any "Jesus raps" with Mr. Taylor or anyone else.

Plaintiff further contends that after PrimeTime I aired, he stated on his Success N Life program that Mr. Taylor's statements were a lie. In spite of Plaintiff's statements, which were provided to Defendants, and their own raw footage, Defendants rebroadcast the segment.

Defendants, in response and in support of their summary judgment motion, argue that despite Plaintiff's statements, they had a sufficient basis for believing that Plaintiff mocked preachers and attended tent revival meetings during his college days as a kind of sport. Defendants contend that Mr. Taylor, in the interview, did say that Plaintiff imitated preachers and that he was present on more than one occasion at tent revival meetings. Defendants also contend that Mr. Taylor indicated that Plaintiff participated in and was in agreement with discussions of a becoming a revival preacher in order to get rich. Although Mr. Taylor used "I said" instead of "we said" in part of the interview when referring to becoming a revival preacher to get rich, he later used

"we said" when referring to that same topic. Defendants state that the edit change to "we said" was for clarity reasons and did not alter the meaning of the statements in any way. Defendants further contend that even though Plaintiff did not attend North Texas State University with Mr. Taylor in 1963, Defendants state that he did subsequently attend Cooke County Junior College with Mr. Taylor. Mr. Harbison also attended Cooke County Junior College during that time and was acquainted with Plaintiff.

As to the issue of actual malice, Defendants argue that Plaintiff cannot show with clear and convincing evidence that Defendants broadcast Mr. Taylor's statements knowing they were false or with serious doubts as to their truth. Defendants contend that Defendant, Robbie Gordon, who conducted the interview, confirmed Mr. Taylor's recollections with others and she independently verified the facts related to her by Mr. Taylor. According to Defendants, Ms. Gordon believed what Mr. Taylor had told her and had no reason to doubt his statements.

Having reviewed the evidence, the Court finds that Plaintiff has failed to present sufficient evidence to raise a genuine issue of fact that Defendants knew the falsity of the statements made in the broadcast or had serious doubts as to the truth of the statements. Although Plaintiff states that ABC's raw footage shows that Mr. Taylor did not actually say that Plaintiff went down front at tent revival meetings, fell on his knees and spoke in tongues, it is clear from the interview that Mr. Taylor stated that Plaintiff was present at the tent revival meetings and was a part

of the group that was involved in such behavior. Indeed, Mr. Taylor stated:

"It's been so long ago that I, I can't recall the specific time and place him there to swear to it. I can say that it took place more than one time. That it was in the behavior pattern of the group that we ran with. That it was known to all of us. That it happened and was talked about. And that he was present, and he was in that group. Whether or not he actually went down to the front, and fell on his knees, and quaked, and spoke in tongues, I cannot say. But he was running with the group that did, and that made fun of the preachers, and that held that kind of behavior in high contempt."

(Joyce 2nd Aff., Ex. 5 at p. 6). (Emphasis added).

As to "Jesus raps," it is true that Mr. Taylor did not use that phrase in referring to parodies that were performed at parties. Notwithstanding the editorializing of Defendants, the evidence does reveal that Mr. Taylor did tell Defendants that he and Plaintiff performed parodies involving preaching.<sup>19</sup> Mr. Taylor specifically stated:

We had a parody that we would drop into at parties, of preaching. And we would emulate revival preachers that we had heard on the air at parties, and, and everyone would praise the Lord and fall on their knees, . . . . And he was there, yes, he was there.

\* \* \* \*

Tilton, trying to emulate the preachers at the time was-- I'm sure that he-- we all tried to throw a pitch at one time or another. It was just part of our standard pattern, our repartee. We would throw it back and forth. Everyone would attempt it. I personally thought I was a lot better at it than he was.

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<sup>19</sup>With regard to the "Jesus raps" characterization, the Court relegates this to an editorialization and finds it represents a non-actionable opinion. See, e.g., Metcalfe, 828 F.Supp. at 1529-1532; Miskovsky, 654 P.2d at 593.

When we were at--when we were at parties and we would get into our preacher mode, all of us would throw lines back and forth. It was like a group of comedians standing around and throwing lines back and forth to one another. There was nobody that wasn't included. We all took part in this. I mean, everyone had their own little special part of it. And we played off of one another. It, it truly was like a bunch of stand up comedians, trying to work out a routine.

(Joyce 2d Aff., Ex. 5 at pp. 5, 7, & 8). (Emphasis added).

Given these statements, Plaintiff cannot show that Defendants knew it was false in stating that Plaintiff had developed parodies.<sup>20</sup>

In regard to the "I/We" change, the Court finds that such editing change does not establish actual malice. An edited or altered quotation is not sufficient to establish actual malice "unless the alteration results in a material change in the meaning conveyed in the statement." Masson, 501 U.S. at 517. In the instant case, the edited change to "we said" did not materially change the meaning conveyed by Mr. Taylor. During the interview, Mr. Taylor, in response to Ms. Gordon's question about joking with Plaintiff, did state:

We said if we didn't, if, after we graduated that we had a hard time making a living, or if we weren't making the kind of money that we wanted to, that what we should do, would be to grab an audience, become a revival preacher. And through that means we'd be able to be rich.

(Joyce 2nd Aff., Ex. 5 at p. 6).

The meaning conveyed by Mr. Taylor in the interview was that he and Plaintiff used to joke about becoming revival preachers to get rich. The alteration of the "I" to "we" did not change the meaning

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<sup>20</sup>The Court also notes Plaintiff has not presented any evidence to show that Defendants had any reason to doubt the credibility of John Michael Taylor or the truthfulness of his statements.

which had been conveyed by Mr. Taylor. Although Plaintiff contends that Mr. Taylor was not referring to Plaintiff when using "we," the Court finds that no reasonable jury would find that Mr. Taylor did not include Plaintiff when referring to "we" and no reasonable jury would find by clear and convincing evidence that Defendants acted with actual malice in making the edited change.

### Tilton's Start

PrimeTime I and PrimeTime II reported:

"SAWYER: And by 1981, [Tilton] had hit the big time? How? PrimeTime has learned that for several years, Tilton courted a man news accounts have tied to organized crime and drug smuggling, Herman Beebe, a financier whose banks gave Tilton a \$1.3 million loan, though Tilton claims he never met the man. And after Tilton got money, he got a new image, too - a permanent wave for his hair, plastic surgery and, like his good buddy, Jim Bakker, a talent for tears on demand."

In their motion, Defendants assert that they are entitled to summary judgment in regard to Plaintiff's challenge of the above-quoted segments. They contend that there is no evidence to suggest they did not believe the accuracy of their statements. Defendants state that they conducted an extensive investigation of the relationship between Plaintiff and Herman Beebe, which Plaintiff has conceded. Through that investigation, they learned that Plaintiff had obtained a \$1.3 million loan from Herman Beebe's bank in 1980, that press accounts as far back as 1976 linked Herman Beebe to organized crime and that Plaintiff's spokeswoman was quoted in the Dallas Morning News as saying Plaintiff did not know Herman Beebe. Defendants also state that their report, contrary to Plaintiff's claim, did not imply that Plaintiff was linked to drug smuggling and organized crime. As to the term "courted,"

Defendants contend that it was an editorial characterization of Plaintiff's efforts to obtain a loan and was accurate based upon the facts. Defendants further argue that the term is not actionable and it is a constitutionally protected opinion. In regard to the other statements, Defendants contend that the evidence establishes the truth of the statements. Although Plaintiff claims Defendants conveyed that the loan proceeds received from Mr. Beebe were used to pay for his permanent wave and plastic surgery, Defendants state that no such fact was conveyed by the report. Defendants explain that the broadcasts only stated that the permanent wave and the plastic surgery were obtained after the loan was received. The evidence, they argue, supports such facts. Defendants further state that the evidence shows that Jim Bakker was a friend of Plaintiff and that Plaintiff could cry on demand. Plaintiff, in response, contends that there is no evidence to support Defendants' contention that they reviewed the 1976 news article purportedly linking Herman Beebe to organized crime prior to the broadcasts. Moreover, Plaintiff contends that the article does not support their statement that Herman Beebe had links to organized crime. Plaintiff asserts that the article merely states he had associations with individuals who have organized crime connections. In addition, Plaintiff states that the statement in the report that Plaintiff "courted" Herman Beebe is false and not a protected opinion. Plaintiff concedes that he met Herman Beebe and that Mr. Beebe agreed to loan the Church money at their first meeting. However, he states that Mr. Beebe referred

him to Dallas-Fort Worth Airport Bank. Plaintiff admits that he called Dale Anderson, an associate of Mr. Beebe, about the loan approximately three times but states he also referred Plaintiff to the bank. Plaintiff thereafter called the bank's president numerous times to obtain the loan. Plaintiff additionally states that the evidence shows that the segments of the broadcast falsely implied that Plaintiff hit the big time as a result of the loan. Plaintiff states that by 1981, he and his Church were in debt and were incurring more debt. Plaintiff states that the Church had to pay the Beebe loan with other loans, which resulted in further debt. He admits that the article in the Dallas Morning News stated that "Tilton declined to be interviewed, but said through a spokeswoman that he never met Beebe," but states that Defendants' statement that "though Tilton claims to have never met the man" is false. Furthermore, Plaintiff states that Defendants' report falsely implied that he obtain a permanent wave and plastic surgery from the Beebe loan. According to Plaintiff, the permanent wave and the plastic surgery were obtained in 1989. As to Jim Bakker, Plaintiff states that he knew Jim Bakker only as a minister and not as a good friend. Plaintiff also contends that Defendant, Robbie Gordon's credibility is at issue in regard to the statement that Plaintiff can cry on demand.

The Court, having reviewed the evidence pertinent to the challenged segment, finds that Plaintiff has failed to present sufficient evidence to raise a question of fact that Defendants knew the challenged segments were false or that Defendants

subjectively entertained serious doubts as to their truth. Despite Plaintiff's contention, the evidence does reflect that Defendant, Robbie Gordon, reviewed the 1976 news article concerning Herman Beebe.<sup>21</sup> Although the report did not specifically state that Herman Beebe was linked to organized crime, it did state that Herman Beebe had associations with persons involved in organized crime. The evidence also shows that Ms. Gordon discussed the article with the author prior to the initial broadcast. As to "courting," the evidence shows that Ms. Gordon, in her investigation, was told that Plaintiff sought out Herman Beebe to obtain a loan. According to Ms. Gordon's affidavit, the inception of the relationship between Herman Beebe was described by Mr. Beebe's associate as "courting."<sup>22</sup> Ms. Gordon also reviewed prior to the initial broadcast, the Dallas Morning News article which quoted Plaintiff's spokeswoman as saying that Plaintiff did not know Herman Beebe. Plaintiff has not shown any evidence to establish that Defendants knew the statement "though Tilton claims never to have met the man" was false. Moreover, Plaintiff has not shown any evidence that Defendants knew that Plaintiff incurred more debt after receiving the Beebe loan and he has not shown that

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<sup>21</sup>Plaintiff's objection as to the admissibility of the news article on the basis that it had not been produced to him is without merit. It appears that the news article was produced to Plaintiff during the preliminary injunction hearing and it was admitted into evidence.

<sup>22</sup>In any event, the Court finds that the term "courted" fits the facts as it is defined in Random House Dictionary of the English Language 464 (2nd ed. 1987) as "to try to win the favor, preference, or goodwill of."

Defendants knew that Jim Bakker was not a good friend of Plaintiff. Furthermore, even if Ms. Gordon's testimony were discredited, Plaintiff has failed to present any affirmative evidence to show Defendants knew their statement that Plaintiff had a talent for tears on demand was false. Anderson, 477 U.S. at 256-57 (discredited testimony not normally considered a sufficient basis for drawing a contrary conclusion; plaintiff must present affirmative evidence in order to defeat properly supported summary judgment motion).

Finally, Plaintiff has failed to present sufficient evidence to establish an issue of fact that Defendants intended the alleged false implications that Plaintiff was connected to organized crime and drug smuggling, and Plaintiff paid for his permanent wave and plastic surgery from the loan proceeds received from Herman Beebe.

#### Tilton's Lavish Lifestyles

PrimeTime I reported:

"SAWYER: [voice-over] . . . But could this be the "parsonage," in swank Rancho Santa Fe, California, a four point five million lake view home . . . . Or is this the parsonage, in Fort Lauderdale, Florida . . . ."

PrimeTime II also reported:

SAWYER: [voice-over] . . . But could this be the "parsonage," in swank Rancho Santa Fe, California, a multi-million dollar lake view home. . . . Or is this the parsonage, in Fort Lauderdale, Florida . . . ."

In their motion, Defendants contend that they are entitled to summary judgment in regard to Plaintiff's challenge to the above-quoted segments. Defendants state that the gist of the challenged segments was not, as Plaintiff claims, that Plaintiff lived in more

than one house at a time but rather that unbeknownst to -- and in stark contrast to -- his "poor and hurting" followers, he lived lavishly in "parsonages" that were hardly modest homes which the word conveys. According to Defendants, whether or not Plaintiff lived in more than one home at a time, or instead moved about from one to another does not affect the truth of the gist of their report. Defendants also state that the segments in regard to Plaintiff's houses was meant to describe Plaintiff's style of living which was quite lavish and to raise with viewers the question of whether the homes in which Plaintiff reside while pastor of his Church reflected his -- or their -- idea of a parsonage. As to Plaintiff's challenge regarding the Florida residence, Defendants state that the broadcasts accurately reported that bank records reflected Plaintiff, not the Church, as the owner.

Plaintiff, in response, contends that Defendants' parsonage segments were false in that they implied that Plaintiff was a liar because he possessed more than one parsonage as represented in his Church magazine. Plaintiff contends that at the time of the broadcasts, he no longer resided at the house in Rancho Santa Fe, California, and the residence in Fort Lauderdale, Florida was personally owned by Plaintiff and his wife rather than the Church. According to Plaintiff, Defendants acted with actual malice because Defendants knew Plaintiff only had one parsonage at a time; they knew he was living in a leased house on Krohn Court while the Church's new parsonage in Los Colinas was being remodeled; they

knew he no longer resided at the house in Rancho Santa Fe, California; and they knew the Florida residence was owned by he and his wife personally.

The Court, upon review of the challenged segment and the record thereof, finds that Plaintiff has failed to raise a genuine issue of fact, even under the preponderance of the evidence standard, as to falsity of the segments and has failed to raise a genuine issue of fact as to actual malice on the part of Defendants. The Court finds that no reasonable jury would conclude the broadcasts at issue stated that Plaintiff owned four parsonages at one time. It is clear the challenged segments were only raising questions as to whether the residences were "parsonages." There is no dispute that Plaintiff lived at one time in all three of the residences shown on the broadcasts and that the Church maintained those residences as "parsonages." With respect to the Florida residence, the broadcasts did accurately reflect that Plaintiff was the owner. Although Plaintiff contends that the broadcasts imply that he was a liar because he had four parsonages when he only reported one in the Church magazine, the Court finds that Plaintiff has failed to show that Defendants intended or knew the false implication of the broadcasts. Saenz, 841 F.2d at 1318 (to show actual malice, a plaintiff must prove "with clear and convincing evidence that the defendants intended or knew of the implications" he alleges).

PrimeTime I and PrimeTime II also reported:

"SAWYER: [voice-over] He also tells followers he'll pray for their miracles, so they should send him money.

SAWYER: [voice-over] Like Jesus? The Bible says Jesus went to fast and separate himself from worldly things. Pastor Bob flew first class to a posh ski resort in Colorado, three suitcases for five days, a room with a fireplace - he even brought his own television along - while asking followers to send money."

Plaintiff challenges this report in the broadcasts on the basis that it states that Plaintiff will pray for his followers' miracles if they send money, that it states that he stayed in a "posh" ski resort in Colorado and that it implies the Colorado trip was a fundraising campaign. Defendants, in support of their summary judgment motion, contend that their statements were true. Defendants contend that the evidence shows Plaintiff repeatedly appealed to his followers for funds. Defendants state that Plaintiff in one appeal specifically asked his followers to "carefully write down the areas of your life (especially financial) where you want me to release my anointing on your behalf. . .and then write a check for the best possible gift that you can give!!!" (Gordon Aff., para. 19). With respect to his trip to Colorado, Defendants contend that Plaintiff undisputedly encouraged viewers to pay vows and the broadcasts repeatedly referenced the payment of vows. As to the "posh" reference, Defendants contend that it is not actionable as it is a constitutionally protected opinion.

The Court, having reviewed the submitted evidence, finds that Plaintiff has failed to present sufficient proof, even under a preponderance of the evidence standard, to show Defendants' statements were false. The evidence shows that Plaintiff, in his mailings, did ask his followers to write a check at the same time he asked for them to write down their prayer request. In addition,

Plaintiff has admitted that he encouraged viewers to pay vows during the broadcasts in Colorado and the broadcasts referenced the payment of vows, tithes and offerings.<sup>23</sup>

The Court further finds that Plaintiff has failed to offer any evidence whatsoever which establishes with convincing clarity that Defendants knew of the falsity of their statements or that they had serious doubts as to the truth of those statements.

Guatemala

PrimeTime II reported:

"SAWYER: . . . And what about something else Tilton said in his deposition? He claims that his contribution to his mission in Guatemala is 100 percent of their needs.

ATTORNEY: --that you were going to provide--

PLAINTIFF: We would be-

ATTORNEY: --100 percent of the support that they need to maintain their operation.

PLAINTIFF: Yes, yes.

SAWYER: So we checked this out. We spoke to the onsite missionary in Guatemala who told us, in fact, Tilton is only a partial sponsor."

In his motion and in response to Defendants' motion, Plaintiff asserts that the statement that Plaintiff "claims that his contribution to his mission in Guatemala is 100 percent of their needs" misstates Plaintiff's deposition testimony. Plaintiff

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<sup>23</sup>In regard to Defendants' use of "posh" to describe the Colorado ski resort, the Court finds the statement is not actionable. The Court finds no reasonable viewer or listener would interpret the statement as anything other than an expression of opinion. It is an evaluative characterization, not susceptible to proof of its truth or falsity. See, e.g. Metcalf, 828 F.Supp. at 1529-1532.

states that it was his original understanding that he would underwrite 100 percent of the expenses of the Guatemalan mission's ten schools and its mobile clinic, but that he did not mind if others gave additional funds. He also states that he explained in his deposition that even with intentions of full support of foreign missions, nominal donations were often received from other sources. Plaintiff further states that Hugo Morales, the Guatemalan missionary, testified that Plaintiff undertook to support the schools and the mobile clinic and supported those activities 100 percent.

Plaintiff contends that Defendants knew their statements in the above-quoted segment were untrue. According to Plaintiff, Defendants knew the meaning and content of Plaintiff's deposition testimony. They also possessed Church documents, including a copy of the monthly support check and a note on Guatemala School Support documenting Tilton's contribution of \$12,200 a month to the Guatemala mission. Plaintiff states that Defendants also possessed audio tapes and notes of two phone calls to Mr. Morales showing that Mr. Morales' first response to questioning concerning Plaintiff's support was that Plaintiff financed the mission and its schools totally.

Defendants, in response and in support of their motion, contend that Plaintiff did say in his deposition that he provided 100% of the support for the Guatemalan mission. Defendants state that they spoke with Mr. Morales before the air of PrimeTime II and he told them that he received funding from Plaintiff through the

Don Stewart Association; that he received approximately \$12,000 a month from the Don Stewart Association; and that he did not know how much of that amount came from Plaintiff. Defendants also state that Mr. Morales told them that the money received from the Don Stewart Association paid for the mission's expenses and only 50% of the teachers' salaries for his 12 schools. In addition, Defendants state that discovery has confirmed that Mr. Morales receives an additional \$2,200 a month which does not come from Plaintiff.

Having reviewed the evidence applicable to the challenged segment, the Court finds that Plaintiff has failed to raise a genuine issue of material fact as to whether Defendants had knowledge of the alleged falsity of the challenged statements or had serious doubts of the truth of those statements. Plaintiff has not presented any evidence to suggest that Defendants did not believe the statements of Mr. Morales that he received funding from Plaintiff through the Don Stewart Association; that he did not know how much of that amount came from Plaintiff and that the money received from the Don Stewart Association paid only 50% of the teachers' salaries for his 12 schools. Even if Ms. Sutherland's credibility were at issue and her testimony were discredited, Plaintiff has also not submitted affirmative evidence to satisfy his burden of proof in regard to the issue of actual malice. Anderson, 477 U.S. at 256-257.

In regard to Guatemala, PrimeTime II also reported:

"SAWYER: And the Guatemalan government has gone public to say that Tilton and his promotional material exaggerate his contribution for personal gain, including his claim of a special invitation.

PLAINTIFF: [television broadcast] I've been invited to be in the inauguration, the ball, all the celebrations and --

SAWYER: That's not true, according to the president's spokesman, Fernando Muniz.

FERNANDO MUNIZ: [through interpreter] No. That the president has invited him to attend the inauguration is by all means false, nor does he have any relation with the government. But we cannot take action against a swindler of this caliber."

In their motion, Defendants contend that they are entitled to summary judgment in regard to Plaintiff's challenge of the above-quoted segment. Defendants contend that Fernando Muniz confirmed in his deposition that he was the official spokesman for the president of Guatemala, that the president did not know who Plaintiff was and that neither the president nor his government invited Plaintiff to the inauguration. According to Defendants, Mr. Muniz explained that Plaintiff may have received an invitation from an evangelical church in Guatemala, but even if he had, it would not have been an invitation from the government. Based upon Mr. Muniz's testimony, Defendants contend their statement that Plaintiff was not invited to the inauguration by the president of Guatemala was true.

Plaintiff, in response, argues that Defendants' statement that he was not invited to the inauguration was false. Plaintiff contends that he did receive an official invitation to the inauguration ceremony. He states that the invitation came from Harold Caballeros, who had obtained the invitation from one of the five groups that had given out invitations to the ceremony in addition to the president and congress of Guatemala. According to Plaintiff, he never claimed that the president invited him to the

inauguration or that the president was his friend. Plaintiff maintains that the Church magazine article at issue, which Defendants had a copy of prior to the broadcast, only stated the "government" was so appreciative of Robert Tilton Ministries' contribution to the Guatemalan people that it sent an official invitation to Plaintiff. Plaintiff contends that Defendants' interview with Mr. Muniz solely focused on whether the president invited Plaintiff, whether he knew Plaintiff's work personally and whether he appreciated Plaintiff's work. Plaintiff further states that Mr. Muniz indicated to Defendants in the interview that it was probable that some international official of the president's party may have begun a relationship with Plaintiff.

The Court, upon review of the evidentiary materials, finds that even under the preponderance of the evidence standard, Plaintiff has not raised a genuine issue of fact as to the falsity of the report. Irrespective of the fact that the Church magazine article reported the government had invited Plaintiff and not the president, Plaintiff has failed to dispute the fact that he did not receive an invitation by either the government or the president. The evidence merely shows that he received an invitation from a religious minister. That minister, as Mr. Muniz testified and Plaintiff has not disputed, was not a part of the Guatemalan government.

In addition, the Court finds that Plaintiff has not presented sufficient evidence to raise a genuine issue of fact as to whether Defendants knew the challenged segment was false or had serious

doubts as to its truth. Although Plaintiff suggests that Defendants' possession of the magazine article which stated that the "government" had invited him and their decision to focus solely on whether an invitation was received from the Guatemalan president shows actual malice, the Court finds that such facts do not support a finding with convincing clarity that Defendants knew or were aware their statements in the broadcast were false.

### India Crusade

PrimeTime II reported the following:

"SAWYER: [voice-over] And something else about Tilton the missionary. Repeatedly, he tells his viewers that their donations enable him to win souls around the world.

TILTON: [television broadcast] And we totally - Word of Faith Ministries, you the Family Church, underwrites totally this particular evangelism unit.

SAWYER: [voice over] Tilton tells followers they finance crusades in countries too poor to pay themselves.

INDIAN TRANSLATOR: [Speaking Tamil]

DAN MORALES: He's come all the way from America!

SAWYER: [voice-over] So PT decided to follow Robert Tilton to India this past March.

TILTON: Do you want to please God tonight?

INDIAN TRANSLATOR: [Speaking Tamil]

SAWYER: [voice-over] Well, there was Tilton, passing the collection plates nightly.

[Visual of Tilton preaching, then a woman taking up an offering while Tilton was preaching, and then Tilton preaching]

If each of these people gave just a few pennies, Tilton would get back hundreds of thousands of dollars--

TILTON: . . . Hallelujah!

CONGREGATION: [Yelling in Tamil] . . . Hallelujah!

SAWYER: [voice-over] -- money taken from the people he himself calls 'the poorest people on earth.'

INDIAN MAN: [through interpreter] Tilton said, 'Please donate money. Please donate money,' so everybody got disappointed and then everybody whispered, 'This is not a crusade, it's a business.'"

In his motion and in response to Defendants' motion, Plaintiff claims Defendants falsely stated that he passed collection plates during the crusade in India. According to Plaintiff, ABC's cameraman's dope sheet for the taping of the India crusade, which provides the time sequence of the contents of the tapes, shows that the offering was actually taken up by a lady worker with a green bag. Plaintiff states that the offering was taken up at the request of Jack Harris, the coordinator for the India Crusade, before Plaintiff arrived to preach. Plaintiff also asserts that ABC's raw footage of Plaintiff shows that he did not pass a collection basket and was not present when the collection plates were passed among the crowd. He claims that ABC's raw footage instead shows another person preaching as the offering was taken by the lady worker. Moreover, Plaintiff asserts that the offering was not taken up for Plaintiff and his Church. Rather, it was taken up for the benefit of local pastors in India.

Plaintiff contends that Defendants had full knowledge of their own raw footage and cameraman's dope sheets and were therefore aware that no collection was taken while Plaintiff was present, as portrayed by the broadcasts. Plaintiff argues that Defendants had no evidence that any collection of money was taken up by Plaintiff and Defendants had no evidence that any of the money collected went

to Plaintiff. Plaintiff argues that Defendants' editing of the broadcast videotape to include Plaintiff's voice while the woman was passing the collection basket as well as Defendants' failure to investigate obvious sources who would have had knowledge of what happened in India demonstrates Defendants acted with actual malice.

Defendants, in response and in support of their summary judgment motion, argue that the evidence fails to establish that Defendants knew the alleged falsity of the report or had serious doubt about its truth. Defendants contend that they obtained their information about the India crusade from J.N. Sharma, an Indian journalist who covered the India crusade as an independent contractor for ABC News Intercontinental, Inc. According to Defendants, Mr. Sharma reported that he had personally attended Plaintiff's crusade, advertised in Madras as the Robert Tilton India Crusade. Mr. Sharma also reported that he personally observed Mr. Harris, a person whom he understood to be a representative of Plaintiff, ask the crowd at the crusade to donate money. Mr. Sharma reported that he observed Plaintiff on stage while the collection was taken up and observed many people contributing. According to Defendants, Mr. Sharma sent taped interviews of individuals who had been present at the India crusade. One of those interviewed stated that Plaintiff had asked for the money and another stated that the followers of Plaintiff had begged for money.

In regard to Defendant, Diane Sawyer's statement that "if each of these people gave just a few pennies, Tilton would get back

hundreds of thousands of dollars, money taken from the people he himself calls 'the poorest people on earth,' " Defendants argue that Plaintiff cannot dispute that the crowds attending were poor and that money was collected from them. Defendants also state that Plaintiff cannot dispute that if each of the people had given just a few pennies that hundreds of thousands of dollars would have been collected. Defendants assert that the statement does not remark as to what was to be done with the funds after they were collected. According to Defendants, the gist of the report was that Robert Tilton India Crusade took collections from the masses of the desperately poor who attended the crusade.

Upon review of the record, the Court finds that Plaintiff has failed to submit sufficient evidence to raise a genuine issue of fact as to whether Defendants knew the alleged libelous statements were false or had serious doubts as to their truth. Plaintiff's only evidence in support of actual malice is that ABC's raw footage did not have a picture of Plaintiff on stage during the collection of the offering, that the footage was edited to show Plaintiff preaching when the collection basket was passed and Plaintiff's and other persons' testimony that Plaintiff was not on stage. Such evidence, however, does not establish with convincing clarity that Defendants knew the alleged falsity of the statements or had serious doubts as to the truth of these statements. Plaintiff has failed to offer any evidence to dispute the evidence that Mr. Sharma reported to Defendants that Plaintiff was on stage at the time the offering was collected and that he sent Defendants taped

interviews with persons attending the India crusade stating Plaintiff or his followers collected an offering.<sup>24</sup> Moreover, Plaintiff has failed to dispute that the crusade was the Robert Tilton India crusade and that offerings were collected during the crusade. Plaintiff has argued that if Defendants had interviewed Jack Harris and Reverend Dayanandhan, the assistant coordinator of the India crusade, they would have discovered the truth of the statements. However, a failure to investigate is not sufficient to establish actual malice. St. Amant, 390 U.S. at 732.

In his briefing, Plaintiff asserts that Mr. Sharma was acting within the scope of his employment with ABC and therefore actual malice can be imputed to ABC. The Court, however, disagrees. Plaintiff, in support of his assertion, relies upon Mr. Sharma's affidavit. Yet the affidavit does not establish Mr. Sharma was an employee of ABC or was acting within his employment when reporting on the India crusade. Indeed, the affidavit as well as the contract attached thereto indicates that Mr. Sharma was an independent contractor for ABC. Plaintiff has not presented any evidence to show to the contrary. Therefore, the Court finds Plaintiff's assertion not compelling.<sup>25</sup>

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<sup>24</sup>Plaintiff argues, in his response to Defendants' motion, that Mr. Sharma's credibility is at issue. However, Plaintiff has failed to show that Defendants had reason to doubt Mr. Sharma's credibility or the veracity of Mr. Sharma's reporting.

<sup>25</sup>Even if the evidence were adequate to establish Mr. Sharma was an employee of ABC, the Court finds that Plaintiff has failed to proffer sufficient evidence to show that Mr. Sharma knew what he reported was false or that he had serious doubts as to the truth of the report.

### Other Missions

In PrimeTime II, Defendants reported (while showing names of five of missions):

"SAWYER: And Tilton creates the impression that after he pays for his overhead and all that expensive air time, the money goes to good works like these his missions around the world. But we tracked down every charitable contribution of Tilton and we calculate he spends more in a year on billboards around Dallas than he does on all these missions combined."

Defendants, in their motion, contend that summary judgment is appropriate as the statements made in the above-quoted segment were true. Defendants assert that, during their investigation, they attempted to obtain information from the Church in regard to its missions, but the Church denied access to any information. Defendants contend the above-quoted segment of PrimeTime II was based upon the information they were able to gather from their investigation. According to that investigation, \$180,000 per year was spent on billboards and \$150,000 on missions. In addition, Defendants state that discovery has revealed that in 1991 Plaintiff spent \$325,000 on leasing billboards and gave \$177,272 to the five missions. Defendants thus argue that Plaintiff cannot establish falsity of the segment. Furthermore, Defendants argue that Plaintiff cannot establish actual malice in regard to the segment as Plaintiff has no evidence to show Defendants deliberately selected missions which received less contributions and has not shown that they had knowledge of the alleged falsity of their report or serious doubts as to the truth of the broadcast.

In response, Plaintiff concedes that the Church spent more on billboards than the five missions shown on the broadcast. However,

Plaintiff contends that the gist of the report was to accuse Plaintiff of misleading his followers concerning support of missions and denigrate the amount of his support. Plaintiff asserts that Defendants knew the gist was false.

Even if the Court were to apply the preponderance of the evidence standard to the issue of falsity, the Court finds that Plaintiff has failed to raise a genuine issue of material fact that the challenged segment or the gist of that segment was false. In regard to the issue of actual malice, the Court finds that Plaintiff has failed to present any proof with convincing clarity to raise a genuine issue of fact that Defendants knew the alleged falsity of the statements or that they published the statements with a high degree of awareness of the probable falsity.

PrimeTime II also reported:

"SAWYER: [voice over] Also after our broadcast, Tilton attacked us for what we said about his missions, the ones he implies are his own, like this one. Here's how he promotes it on his TV show.

ANNOUNCER: And Wings of Mercy, a center sponsored by Robert Tilton Ministries --

SAWYER: [voice-over] The promotion makes you think it is Tilton's center, but listen to his deposition.

ATTORNEY: Know what Wings of Mercy is?

PLAINTIFF: Not really.

SAWYER: No wonder, since PrimeTime has learned that Tilton's contribution to that mission is just \$300 a month."

In his motion and in response to Defendants' motion, Plaintiff contends that Defendants knowingly created a context in their broadcast whereby the viewer would understand that Plaintiff's

contribution to his missions, such as Wings of Mercy, was "meager, paltry and insignificant." Plaintiff claims that he did contribute \$300 a month to the Wings of Mercy shelter and that this amount was the amount needed by the shelter. Plaintiff contends that he provided support to the mission when no one else would. Thus, his contribution was not negligible as the broadcast implied.

Defendants, in response and in support of their motion, contend that their broadcast was true. Defendants state that it is undisputed Plaintiff did promote on his television program that Wings of Mercy was a center sponsored by Robert Tilton Ministries; that his contribution was only \$300 per month and that he did not recall in his deposition what Wings of Mercy was. Defendants state they believed the information to be true.

Having reviewed the challenged segment and the evidence related thereto, the Court finds that Plaintiff has failed to raise a genuine issue, under a preponderance of the evidence standard of proof, that the broadcast was false. Moreover, the Court finds that Plaintiff has failed to raise a genuine issue of fact as to whether Defendants knew the report was false as alleged or entertained serious doubts as to the truth of the broadcast.

#### **Additional Incidents of Alleged Actual Malice**

The last three paragraphs of Plaintiff's statement of material facts in his partial summary judgment motion set forth facts addressing the issue of "malice." The first paragraph refers to a July 1992 newspaper article purporting to quote Defendant, Diane Sawyer, as saying "[w]hen I saw Tilton on TV and what he was doing,

I was appalled, . . . . He needs to be stopped." The second paragraph refers to affidavit testimony from Plaintiff that prior to PrimeTime I, he directed the Church's attorney to respond to Defendant, Kelly Sutherland's request for an interview and decline such an interview; that at his direction, the Church offered to review any broadcast to inform PrimeTime Live of errors, if any, and to furnish any documents necessary to prove the errors; that at his direction, the Church advised PrimeTime Live that the Church would enter into a contract with PrimeTime Live that the Church would not seek in any manner prior restraint of the planned broadcast if allowed to review the broadcast; but that ABC would not allow the Church to know the planned content of the broadcast to correct errors, if any. The third and final paragraph refers to handwritten notes of Defendant, Kelly Sutherland, taken during a telephone conversation with Defendant, Robbie Gordon, which state "no fraud to be had on this guy -- can have fun with him though."

Defendants responded to Plaintiff's statement of facts believing the paragraphs pertained to the issue of actual malice. Defendants addressed each of the paragraphs and argued that none of the facts stated proved actual malice. In reply to Defendants' response, Plaintiff states that the paragraphs have nothing to do with knowledge of falsity or publication with reckless disregard as to truth or falsity. He states they are concerned with malice, which is a prerequisite for punitive damages under Oklahoma law. Nonetheless, Plaintiff goes on to state that "evidence of ill will or ulterior motive, 'malice,' can bolster the inference of "actual

malice," citing to Harte-Hanks, 491 U.S. at 667 ("a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence . . . and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.") (Plaintiff's Reply to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment, p. 7).

Because of Plaintiff's latter statement that evidence of malice may bolster the inference of actual malice, the Court has reviewed the evidence in regard to the issue of actual malice.<sup>26</sup> The Court initially opines that the July 1992 newspaper article is not proper evidence for submission on summary judgment as it is inadmissible hearsay and Plaintiff has not shown that the author of the article will be available for cross-examination at trial. Fed.R.Evid. 802; Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919, 924 (2d Cir. 1985) (inadmissible hearsay may not be considered on summary judgment motion absent a showing that admissible evidence will be available at trial). However, even if the evidence were admissible and proper for submission, the Court finds that the newspaper article as well as the other evidence cited by Plaintiff in his statement of material facts are not sufficient alone or in combination with all other evidence presented by Plaintiff to establish with convincing clarity that

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<sup>26</sup>In regard to the issue of "malice," the Court finds that the evidence cited by Plaintiff is irrelevant since the Court has found that Plaintiff is not entitled to summary judgment on his claims.

Defendants had knowledge the alleged defamatory statements in PrimeTime I and PrimeTime II were false or that they entertained serious doubts as to the truth of those statements.

Based upon the foregoing, the Motion for Summary Judgment (Docket Entry #244) filed by Defendants, American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland is **GRANTED** and the Motion for Partial Summary Judgment (Docket Entry #257) filed by Plaintiff, Robert G. Tilton, is **DENIED**. Judgment shall issue forthwith.

ENTERED this 19<sup>th</sup> day of June, 1995.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 19 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 LARRY WAYNE LANG a/k/a )  
 LARRY W. LANG; COUNTY )  
 TREASURER, Tulsa County, )  
 Oklahoma; BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 Oklahoma, )  
 )  
 Defendants. )

CIVIL ACTION NO. 94-C-189-E

DEFICIENCY JUDGMENT

This matter comes on for consideration this 19 day of June, 1995, upon the Motion of the Plaintiff, United States of America, acting on behalf of the Secretary of Veterans Affairs, for leave to enter a Deficiency Judgment. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Cathy McClanahan, Assistant United States Attorney, and the Defendant, Larry Wayne Lang aka Larry W. Lang, appears neither in person nor by counsel.

The Court being fully advised and having examined the court file finds that copies of Plaintiff's Motion and Declaration were mailed by first-class mail to Defendant, Larry Wayne Lang aka Larry W. Lang, 6376 N. Columbia, Tulsa, Oklahoma 74156 and to all answering parties and/or counsel of record. The Court further finds that the amount of the Judgment rendered on July 29, 1994, in favor of the Plaintiff United States of America, and against the Defendant, Larry Wayne Lang aka Larry W. Lang, with interest and costs to date of sale is \$34,252.59.

The Court further finds that the appraised value of the real property at the time of sale was \$13,000.00.

The Court further finds that the real property involved herein was sold at Marshal's sale, pursuant to the Judgment of this Court entered July 29, 1994, for the sum of \$11,547.00 which is less than the market value.

The Court further finds that the Marshal's sale was confirmed pursuant to the Order of this Court on June 12, 1995.

The Court further finds that the Plaintiff, United States of America on behalf of the Secretary of Veterans Affairs, is accordingly entitled to a deficiency judgment against the Defendant, Larry Wayne Lang aka Larry W. Lang, as follows:

Principal Balance plus pre-Judgment Interest as of 7-29-94	\$31,363.89
Interest From Date of Judgment to Sale	1,103.89
Late Charges to Date of Judgment	250.80
Appraisal by Agency	575.00
Abstracting	391.00
Publication Fees-First Notice of Sale	172.02
Publication Fees-Second Notice of Sale	170.99
Court Appraisers' Fees	<u>225.00</u>
TOTAL	\$34,252.59
Less Credit of Appraised Value	- <u>13,000.00</u>
DEFICIENCY	\$21,252.59

plus interest on said deficiency judgment at the legal rate of 5.88 percent per annum from date of deficiency judgment until

paid; said deficiency being the difference between the amount of Judgment rendered herein and the appraised value of the property herein.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the United States of America on behalf of the Secretary of Veterans Affairs have and recover from Defendant, Larry Wayne Lang aka Larry W. Lang, a deficiency judgment in the amount of \$21,252.59, plus interest at the legal rate of 5.88 percent per annum on said deficiency judgment from date of judgment until paid.

S/ JAMES O. ELLISON

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UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



CATHY McCLANAHAN, OBA #14853  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

CM/esf

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**  
NORTHERN DISTRICT OF OKLAHOMA

JUN 19 1995

ROBERT G. TILTON, an )  
individual, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CAPITAL CITIES/ABC INC., a )  
New York corporation; et al., )  
 )  
Defendants. )

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

No. 92-C-1032-BU

ENTERED ON DOCKET  
JUN 20 1995  
DATE \_\_\_\_\_

**JUDGMENT**

This matter came before the Court upon the Motion for Summary Judgment (Docket Entry #243) filed by Defendants, Capital Cities/ABC, Inc. and ABC News, Inc., the Motion for Summary Judgment (Docket Entry #244) filed by Defendants, American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland and the Motion for Partial Summary Judgment (Docket Entry #257) filed by Plaintiff, Robert G. Tilton and the issues having duly considered and decisions having duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of Defendants, Capital Cities/ABC, Inc., ABC News, Inc., American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland, against Plaintiff, Robert G. Tilton, and that Defendants shall recover of Plaintiff their costs of action.

DATED at Tulsa, Oklahoma, this 19 day of June, 1995.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA **FILED**

JUN 19 1995

ROBERT G. TILTON, an )  
individual, )

Plaintiff, )

vs. )

CAPITAL CITIES/ABC INC., a )  
New York corporation; et al., )

Defendants. )

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

No. 92-C-1032-BU

ENTERED ON DOCKET

DATE \_\_\_\_\_

**ORDER**

On May 26, 1995, the Court entered an Order granting the Motion for Summary Judgment (Docket Entry #244) filed by Defendants, American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland and denying the Motion for Partial Summary Judgment (Docket Entry #257) filed by Plaintiff, Robert G. Tilton. The following sets forth the Court's reasons for its decision.

On November 21, 1991, Defendant, American Broadcasting Companies, Inc. ("ABC"), broadcast on its weekly television news show PrimeTime Live, a program entitled "Men of God" which focused on -- and was critical of -- three televangelists, W.V. Grant, Larry Lea and Plaintiff, Robert G. Tilton. On July 9, 1992, ABC rebroadcast its original PrimeTime Live program, with some revisions and clarifications, and broadcast a follow-up segment reporting on additional information ABC had learned about Plaintiff

after its original broadcast.<sup>1</sup> Defendant, Diane Sawyer, was the anchor and correspondent for both of the broadcasts. Defendant, Robbie Gordon, and Defendant, Kelly Sutherland, were the producer and associate producer, respectively, for the specific reports concerning Plaintiff which were entitled "The Apple of God's Eye."

On November 11, 1992, Plaintiff commenced this diversity libel and false light invasion of privacy action against Defendants,<sup>2</sup> alleging that PrimeTime I and PrimeTime II broadcast three libelous and false light statements. Plaintiff, on May 13, 1993, moved the Court for entry of a temporary restraining order and a preliminary injunction barring ABC from rebroadcasting statements contained in the PrimeTime Live broadcasts. After a five-day evidentiary hearing, the Court denied Plaintiff's request for injunctive relief finding, inter alia, that Plaintiff had failed to demonstrate there was a substantial likelihood of recovery on the merits of his claims. Thereafter, Plaintiff amended his complaint setting forth additional allegations of libelous and false light statements made by Defendants in PrimeTime I and PrimeTime II. At the Court's directive, Plaintiff, on July 26, 1994, filed his Final Amended Complaint, which consolidated all of his claims against

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<sup>1</sup>The November 21, 1991 and the July 9, 1992 broadcasts shall be hereinafter referred to as PrimeTime I and PrimeTime II respectively.

<sup>2</sup>Plaintiff also named Capital Cities/ABC, Inc. and ABC News, Inc. as Defendants. On May 24, 1995, the Court granted Capital Cities/ABC, Inc. and ABC News, Inc.'s summary judgment motion.

Defendants.<sup>3</sup> After conducting extensive discovery, Plaintiff has now filed his partial summary judgment motion, seeking judgment as to six segments of the broadcasts which allegedly contain libelous and false light statements. Defendants have also filed a summary judgment motion, seeking judgment as to all alleged libelous and false light statements.

The parties agree that Plaintiff is a public figure. Thus, in order to prevail on his claims, Plaintiff must establish that the alleged defamatory statements are false and that Defendants acted with actual malice in publishing the alleged defamatory statements.<sup>4</sup> Philadelphia Newspapers v. Hepps, 475 U.S. 767, 775-78, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130, 162, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). The actual malice standard is not

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<sup>3</sup>In addition to his libel and false light invasion of privacy claims, Plaintiff alleged an "equitable claim for permanent injunction" seeking to permanently enjoin the rebroadcast of any portions of the PrimeTime Live broadcasts. In light of the Court's findings in this Order and the absence of any facts which brings Plaintiff's claim within one of the exceptions to the general rule that equity will not restrain libel or slander, see, Schmoldt v. Oakley, 390 P.2d 882, 886 (Okla. 1964), the Court finds that Defendants are entitled to summary judgment as to Plaintiff's claim.

<sup>4</sup>As stated, Plaintiff has alleged both libel and false light invasion of privacy claims. Similar to libel, the tort of false light invasion of privacy requires proof that the challenged statements were false and that they were made with actual malice. See, Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983); Colbert v. World Publishing Co., 747 P.2d 286, 291 (Okla. 1987). Accordingly, the discussion in this Order concerning the falsity and actual malice elements applies to both the libel and false light claims.

satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989). In order to prove actual malice, Plaintiff must show that Defendants acted with "knowledge that [the publication] was false or with reckless disregard of whether it was false or not." New York Times, 376 U.S. at 280. A reckless disregard for the truth requires more than a departure from reasonably prudent conduct. Harte-Hanks, 491 U.S. at 688. There must be sufficient evidence to support a conclusion that Defendants made the false publication with a "high degree of awareness of . . . probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), or that Defendants "entertained serious doubts as to the truth of [their publications]." St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). The actual malice standard may be proven by indirect or circumstantial evidence. Herbert v. Lando, 441 U.S. 153, 170, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). However, because First Amendment concerns are implicated, Plaintiff must prove actual malice with convincing clarity. New York Times, 376 U.S. at 285-286.

As stated, Plaintiff must also establish falsity of the alleged defamatory statements in order to prevail on his claims. Hepps, 475 U.S. at 776-78; Garrison, 379 U.S. at 74. In so doing, Plaintiff cannot simply point to minor inaccuracies in the challenged statements. Rather, he must show that the statements were not substantially true. As stated by the Supreme Court in

Masson v. New Yorker Magazine, 501 U.S. 496, 516-517, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991), it is "the substance, the gist or the sting" of the alleged defamatory statements that are critical to the Court's analysis.

Unlike the element of actual malice, the Supreme Court has not addressed the appropriate standard of proof for falsity. Harte-Hanks, 491 U.S. at 661, n. 2. The circuit courts, which have addressed the issue, have reached different conclusions. Compare Firestone v. Time, Inc., 460 F.2d 712, 722-723 (5th Cir.) (Bell, J., specially concurring), cert. denied, 409 U.S. 875 (1972) and Buckley v. Littell, 539 F.2d 882, 889-90 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977) (expressing view that clear and convincing standard applies to issue of falsity) with Goldwater v. Ginzburg, 414 F.2d 324, 341 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970) and Rattray v. City of National City, 36 F.3d 1480, 1487 (9th Cir. 1994) (expressing view that preponderance of the evidence standard applies). However, in reaching its determination of the parties' motions, the Court need not make a definitive ruling in regard to the appropriate standard of proof. As will be discussed hereinafter, the Court finds Plaintiff's proof of falsity is inadequate even under the lesser standard of the preponderance of evidence in regard to several of his claims. As to other claims, the Court finds Plaintiff cannot establish the element of actual malice, and therefore, falsity need not be addressed.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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). In applying this standard, the Court must draw all reasonable inferences from the record in favor of the party opposing summary judgment. Brueggemeyer v. American Broadcasting Cos., 684 F.Supp. 452, 454 (N.D. Tex. 1988). When the non-moving party bears the burden of proof at trial, summary judgment is warranted if the non-moving party fails to "make a showing sufficient to establish the existence of an essential element of that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In determining whether a material factual dispute exists for trial, the Court views the evidence through a prism of the controlling legal standard. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Thus, in regard to the issue of actual malice,

"the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not."

Id. at 255-56.

Applying the foregoing standards, the Court now examines the alleged libelous and false light statements in PrimeTime I and PrimeTime II.

## Haitian Orphanage

PrimeTime I reported:

"SAWYER: [voice-over] And what about this mission, Tilton's orphanage in Haiti? We kept thinking about Bob Jones and how he told us you could just fix yourself up a sign and claim an orphanage.

BROTHER BOB JONES: Put your name on there, whatever you want.

SAWYER: [voice-over] Tilton uses three different names for his Haiti orphanages, so when we went to Haiti, we asked the government officials in charge of foreign missions if they'd heard of any of Tilton's orphanages. They said no.

[interviewing] So nothing from Robert Tilton here?

HAITIAN OFFICIAL: No."

PrimeTime II also reported:

"SAWYER: [voice-over] And what about this mission, Tilton's orphanage in Haiti? Well, remember Bob Jones who told us for just a few thousand a month we could put up a sign and claim an entire orphanage, even if we weren't the only contributor.

BROTHER BOB JONES: Put your name on there, whatever you want.

SAWYER: [voice-over] So even though his magazine calls it the Robert Tilton Ministries Children's Home, it's really not Tilton's place at all, which is why government officials we spoke to in Haiti hadn't heard of Tilton or his orphanage.

[interviewing] So nothing from Robert Tilton here?

HAITIAN OFFICIAL: No."

In his motion and in response to Defendants' motion, Plaintiff contends that the underlined statements in the above-quoted segments of the PrimeTime Live broadcasts were false and were published by Defendants with actual malice. Plaintiff argues that the broadcasts falsely accused him of mail fraud by stating that he claimed to own and/or to provide financial support to a Haitian orphanage, when he did not. Plaintiff contends that neither he nor

Word of Faith World Outreach Center Church ("Church") ever claimed to own an orphanage in Haiti and Defendants have never possessed any documents which shows that he or the Church ever made such a statement. Plaintiff contends that the Church did sponsor an orphanage in Haiti, World Harvest Orphanage, which was owned by Reverend Lee and Chris Sullivan. Plaintiff asserts that in 1985, Plaintiff, on behalf of the Church, sent one letter appealing for funds for the Haitian orphanage. Since 1985, however, neither he nor the Church has solicited funds for the Haitian orphanage. Plaintiff further asserts that he did not use three names to describe the Haitian orphanage as stated in PrimeTime I. Plaintiff concedes that the three names, including "Robert Tilton Ministries Children's Home," were used in his ministry magazine; however, he maintains the copy for the magazine articles, wherein the three names were referenced, was written by Reverend Lee Sullivan.

In regard to Defendants' statements as to Bob Jones, Plaintiff contends such statements tied Plaintiff's support of a Haitian orphanage to the "money laundering scheme" of Mr. Jones which was described in the segment of televangelist, W.V. Grant.<sup>5</sup> Plaintiff contends that neither he nor the Church were in any way affiliated with Mr. Jones. Moreover, Plaintiff asserts that neither he nor his Church ever sent Mr. Jones money or conducted any business with him. Plaintiff contends that Ole Anthony, a Dallas minister,

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<sup>5</sup>According to Plaintiff, the broadcasts explained that Mr. Jones ran a money laundering scheme whereby W.V. Grant would claim Mr. Jones' orphanage and send money to Mr. Jones for the orphanage and then Mr. Jones would return a kickback to him from the money received.

furnished Mr. Jones' name to Defendants and testified in the Word of Faith World Outreach Center Church, Inc. v. Morales case<sup>6</sup> that Mr. Jones had no connection with Plaintiff. Although Defendants were given a copy of Mr. Anthony's testimony prior to the PrimeTime II broadcast, Plaintiff states that they ignored the testimony and rebroadcast the statements implicating Plaintiff in Mr. Jones' scheme.

In addition, Plaintiff argues that Defendants knew, prior to the broadcast of PrimeTime I, that only a few orphanages were registered with the Haitian government. Plaintiff specifically cites to Defendant, Kelly Sutherland's notes of an interview with Fritz Artistyl in Haiti, which included the statement, "149 registered. 700 working w/o legal status," and her notes on the back of a photograph picturing World Harvest Orphanage, which included the statement, "did a survey found 700 additionally on Haitian soil--only 148 registered." (Joyce Aff., Ex. 42, Ex. 43). Plaintiff also argues that Ms. Sutherland knew, prior to the broadcast, that Plaintiff did in fact sponsor an orphanage in Haiti as she knew the name of the orphanage and the names and addresses of the Sullivans, who owned the orphanage. Plaintiff asserts that Defendants, Diane Sawyer and Robbie Gordon, also knew, prior to the broadcast, that Plaintiff supported an orphanage in Haiti. Plaintiff states that Ms. Gordon's knowledge is shown by a memo sent to Ira Rosen, senior producer for PrimeTime Live, on July 23,

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<sup>6</sup>Word of Faith World Outreach Center Church, Inc. v. Morales, 787 F. Supp. 689 (W.D. Tex. 1992), rev'd 986 F.2d 962 (5th Cir. 1993).

1991, stating that she did not expect to find out that Plaintiff's missions were nonexistent. (Joyce Aff. Ex. 38). Although Defendants had knowledge that Plaintiff sponsored an orphanage in Haiti, Plaintiff argues that Defendants knowingly broadcast the PrimeTime I segment claiming that they could not find any orphanage. Plaintiff further argues that despite the information obtained prior to PrimeTime I and the evidence obtained from Plaintiff after PrimeTime I aired, Defendants knowingly rebroadcast similar false statements in PrimeTime II.

Defendants, in response to Plaintiff's motion and in support of their motion, contend that even if Plaintiff's statements that he never "owned" an orphanage in Haiti; that he did contribute money to World Harvest Orphanage; that after 1986, he did not solicit funds for World Harvest Orphanage; and that he never associated with or knew Bob Jones were true, the broadcasts at issue did not report any such facts. Defendants contend that the broadcasts never said Plaintiff owned an orphanage. Indeed, Defendants state that PrimeTime II specifically stated "even though his ministry magazine calls it the Robert Tilton Ministries Children's Home, it's not really Tilton's place at all." Defendants assert PrimeTime I stated that they could not find any of the three orphanages identified in Plaintiff's ministry magazine and other promotional materials and PrimeTime II stated that they could not find "Robert Tilton Ministries Children's Home." Defendants contend that they accurately reported in PrimeTime I that they could not find any of the three named orphanages.

According to Defendants, the evidence shows that they conducted an exhaustive investigation to find the orphanages, including World Harvest Orphanage, but could not locate any of them. Defendants argue that they accurately reported that the Haitian officials had neither heard of Plaintiff nor any of the orphanages identified in Plaintiff's magazine and other promotional materials. Defendants also argue that they accurately reported in PrimeTime II that the Haitian officials had neither heard of Plaintiff nor Robert Tilton Ministries Children's Home. Although Plaintiff claims that he did not write the copy for the magazine articles which identified the three orphanages, Defendants contend that he was the publisher of the magazine.

As to Bob Jones, Defendants contend they never stated that Plaintiff was associated with or knew Mr. Jones. They contend the broadcasts stated that the canvas sign on the Haitian orphanage featured in Plaintiff's magazine brought to mind the statements of Mr. Jones. Defendants maintain Plaintiff cannot present any evidence to show that the canvas sign did not bring those statements to mind. In addition, Defendants state that Plaintiff cannot and has not disputed the accuracy of the quote attributed to Mr. Jones that just for a few thousand dollars a month "you could just fix up a sign and claim an orphanage" in Haiti. Defendants further state that the quote is accurate as to Plaintiff since the canvas sign on the Haitian orphanage featured in his magazine was hung only once and for the explicit purpose of photographing it.

Having reviewed the challenged segment of the broadcasts and

the evidence applicable thereto, the Court finds Plaintiff has failed to establish that he is entitled to judgment as a matter of law in regard to the segments. The Court also finds that Plaintiff has failed to present sufficient evidence, even under a preponderance of the evidence standard, to raise a genuine issue of fact as to the falsity of the segments so as to defeat Defendants' motion. In addition, the Court finds that Plaintiff has failed to raise a genuine issue of fact as to whether Defendants knew of the alleged falsity of the segments or entertained serious doubts as to their truth.

Despite Plaintiff's assertions to the contrary, the broadcasts at issue did not state that Plaintiff owned a Haitian orphanage nor did they report that Plaintiff did not provide any support to an orphanage in Haiti. PrimeTime I stated that the Haitian officials had not heard of any of the three orphanages identified in Plaintiff's magazine<sup>7</sup> and PrimeTime II stated that even though the Plaintiff's magazine called the mission, Robert Tilton Ministries Children's Home, it was not his place at all and Haitian officials had not heard of Plaintiff or his orphanage. Plaintiff has alleged that since Defendants knew the name of the orphanage sponsored by Plaintiff's Church and the individuals who ran it, Defendants could have and should have located the orphanage. However, it is

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<sup>7</sup>Although Plaintiff argues that he did not "use" three names for the orphanage he sponsored as he did not write the copy for magazine articles, the undisputed evidence shows that Plaintiff was the publisher for the magazine. Consequently, the Court opines that no reasonable juror would conclude that Plaintiff was not responsible for the use of the three names to describe the orphanage in Haiti.

undisputed that Defendants, prior to the broadcast of PrimeTime I, did attempt to locate World Harvest Orphanage and specifically questioned Haitian officials about that orphanage. The evidence also reveals that even though Defendants had the names and addresses of the Sullivans, they were unable to locate them in both Haiti and Dallas. Although Plaintiff may contend that Defendants were negligent in failing to find the orphanage, such claim does not support a finding of actual malice. Masson, 501 U.S. at 509 (mere negligence does not suffice to prove actual malice).<sup>8</sup> As to PrimeTime II, Defendants merely reported that Robert Tilton Ministries Children's Home identified in Plaintiff's magazine was not his orphanage and Haitian officials had not heard of him or the orphanage. Plaintiff has failed to present any evidence to show that such report was false or that it was made with knowledge of the falsity or with serious doubts as to its truth.<sup>9</sup>

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<sup>8</sup>Plaintiff contends that Defendants purposefully avoided the truth when Jeff Cooke failed to ask about the location of the Haiti orphanage or the names of its pastors during a job interview with Mike Groves. While purposeful avoidance of the truth may suffice to prove actual malice, see, Harte-Hanks, 491 U.S. at 692, the videotape submitted to support that contention does not show Mr. Cooke's interview with Mike Groves. Notwithstanding, the Court finds that Mr. Cooke's failure to ask the location of the Haiti orphanage does not in and of itself demonstrate an avoidance of the truth. Moreover, Plaintiff has failed to show that Mike Groves would have been privy to that information and would have disclosed that information to Mr. Cooke during his job interview.

<sup>9</sup>In attempting to demonstrate actual malice with respect to PrimeTime II, Plaintiff argues that prior to the broadcast of PrimeTime II, his attorney provided Defendants with information evidencing Plaintiff's contributions to an orphanage in Haiti. However, as stated, PrimeTime II did not say that Plaintiff provided no support to an Haitian orphanage. Instead, it reported "[s]o even though his magazine calls it the Robert Tilton

Likewise, the Court finds that the broadcasts did not state that Plaintiff knew or was associated with Bob Jones. PrimeTime I stated that "[w]e kept thinking about Bob Jones and how he told us you could just fix yourself up a sign" and PrimeTime II stated "[w]ell, remember Bob Jones who told us for just a few thousand a month we could put a sign and claim an entire orphanage, even if we weren't the only contributor." Defendant, Robbie Gordon, has testified that the canvas sign on the Haitian orphanage which was featured in Plaintiff's magazine and was shown on the broadcasts brought to mind the statements of Mr. Jones. Plaintiff has failed to present sufficient evidence to show that the canvas sign did not bring Mr. Jones to mind to Defendants.<sup>10</sup>

Plaintiff has alleged that Defendants falsely accused Plaintiff of mail fraud in the broadcasts. Plaintiff, however, has failed to present sufficient evidence to demonstrate an intent or awareness on the part of Defendants that they implicitly accused him of such conduct. See, Newton v. National Broadcasting Co., 930 F.2d 662, 681 (9th Cir. 1990) (not permissible to uphold jury verdict on basis that "because the broadcast may be capable of supporting the impression [plaintiff] claims, [defendant] must

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Ministries Children's Home, it's not really Tilton's place at all, which is why government officials we spoke to in Haiti hadn't heard of Tilton or his orphanage."

<sup>10</sup>In his briefs, Plaintiff contends that Ms. Gordon and Ms. Sutherland showed Mr. Jones the picture of the canvas sign featured in the Church's magazine and led him to make the statement about the sign. Nevertheless, Plaintiff does not dispute that Mr. Jones made the statement to Defendants. Nor does he present any affirmative evidence to establish that the picture of the canvas sign did not bring Mr. Jones' statement to mind.

therefore have intended to convey the defamatory impression at issue"); Saenz v. Playboy Enterprises, Inc., 841 F.2d 1309, 1319 (7th Cir. 1988) (to show actual malice, plaintiff must prove "with clear and convincing evidence that the defendants intended or knew of the defamatory implications"); Woods v. Evansville Press Co., 791 F.2d 480, 487 (7th Cir. 1986) (actual malice not shown where "there is no evidence that the defendants . . . shared the plaintiff's interpretation of [article] or intended that the [article] be read to contain the defamatory innuendos the plaintiff attributes to it").

**Holy Water - Response Media**

PrimeTime I and PrimeTime II reported the following:

"SAWYER: [voice-over] Tilton sends out an avalanche of things he asks viewers to sent back to him -- 'miracle prayer cloths' he promises to touch and place upon an altar, cords he says he'll place on a 'wall of deliverance,' arrows he'll use to take aim at a sufferer's needs, a tracing -- place your hand there and he'll put his hand there too. There's holy water from the River Jordan, 'miracle anointing oil' -- though Moore said some of the items come from that holy place Taiwan."

MR. MOORE: We get stuff from Taiwan."

Plaintiff, in support of his motion and in response to Defendants' motion, contends that the statements in these segments of PrimeTime I and PrimeTime II were false in that they accused Plaintiff of mail fraud by stating that he sends to his followers holy water from Taiwan rather than from the River Jordan as represented. Plaintiff contends that the evidence clearly shows that the holy water sent to his followers came from the River Jordan. He also contends that ABC's raw footage from the interview with Jim Moore shows that he never said any of Plaintiff's mailing

items came from Taiwan. According to Plaintiff, Mr. Moore's statement "[w]e get stuff from Taiwan" had nothing to do with Plaintiff's mailings items. Plaintiff states that Mr. Moore was obviously distracted when he answered the question posed by Defendant, Robbie Gordon. Plaintiff also states that ABC's raw footage of the discussion between Ms. Gordon, Ole Anthony and Jeff Cooke following the interview clearly demonstrates that Defendants recognized they lacked any evidence to support their statement in the broadcasts. Specifically, Plaintiff points to Ms. Gordon's statements that she would like to know where they "get the--that Lord's water and a couple of other things;" that she didn't "feel like we've got him nailed right now;" and that she "really wanted to get him to say that stuff is not from the River Jordan." (Joyce Aff., Ex. 18 at pp. 71, 110, 112). Plaintiff also states that ABC's notes clearly show what ABC wanted to say in the broadcasts as they state that "Tilton's miracle waters and oils, cloths, etc. - most come from Taiwan - though they imply they are from the Holy Land or somehow anointed" and "[t]he miracle waters, oils, replicas of widow's mites, etc. -- many come from Taiwan, though they imply they are from the Holy Land or they are somehow anointed." (Joyce Aff., Ex. 19, Ex. 20). Plaintiff further contends that Defendants knew that their statement about the holy water was false because prior to the rebroadcast on PrimeTime II, Plaintiff advised Defendants that the allegations regarding the holy water were false and enclosed evidence to prove that the holy water came from the River Jordan. Furthermore, Plaintiff argues that Defendants knew

that their accusation Plaintiff misrepresented Taiwanese water as River Jordan water was an accusation Plaintiff committed mail fraud as Defendant, Diane Sawyer, specifically asked John Brugger of the United States Postal Service in an interview if "the stuff they send out, the, the holy water . . . in fact, it comes from Taiwan. If they don't actually say where it comes from, again you can't-- . . . It has to be fairly specific?" (Joyce Aff., Ex. 21 at p. 15, Ex. VT-21).

Defendants, in response and in support of their motion, contend that the challenged segments did not state that the holy water came from Taiwan nor did they accuse Plaintiff of mail fraud. Rather, the broadcasts stated that some of the other items mailed to Plaintiff's followers came from Taiwan. Defendants also state that the gist of their segments was substantially true. According to Defendants, the gist of the challenged segments was that Plaintiff obtained inexpensive items for his mailings. Defendants state that discovery has confirmed the gist as some of Plaintiff's mailing items came from Hong Kong. In addition, Defendants argue that Plaintiff cannot show actual malice with respect to the broadcasts as Ms. Gordon has testified she believed that Response Media obtained some of Plaintiff's mailing items from Taiwan. Defendants stated that Mr. Moore also testified that it was possible for Ms. Gordon to have interpreted his comments to mean the mailings came from Taiwan. In regard to ABC's notes referred to by Plaintiff, which were sent to Ms. Sawyer by Ms. Gordon before Ms. Sawyer's interview with Mr. Brugger and which contained

comments that "many" or "most" of Plaintiff's "miracle waters and oils, cloths, etc." came from Taiwan "though they imply they are from the Holy Land or they are somehow anointed," Defendants contend that the notes do not support a finding of actual malice. Defendants argue that if they "wanted to say" that "many" or "most" of the mailing items came from Taiwan in the broadcasts, they could have. Likewise, if they wanted to accuse Plaintiff of mail fraud, they could have. Defendants, however, state that neither broadcast contained such statements.

Upon review of the record related to the challenged segments, the Court finds that Plaintiff has failed to show that he is entitled to judgment as a matter of law and has failed to raise a genuine issue of fact in response to Defendants' summary judgment motion as to the element of actual malice. The challenged segments did not, as Plaintiff argues, state that holy water came from Taiwan nor did they explicitly accuse Plaintiff of mail fraud. Even though Plaintiff contends that the broadcasts imply such facts, Plaintiff has failed to produce adequate evidence to establish that Defendants intended or knew that the broadcasts implied such facts. See, Saenz, 841 F.2d at 1318. Plaintiff has presented evidence to show that none of the items obtained for his mailings came from Taiwan. However, Plaintiff has not presented sufficient evidence to establish that Defendants knew that their statement "though Moore said some items come from that holy place Taiwan" was false or that they subjectively entertained serious doubts as to its truth. Plaintiff cites to Defendant, Robbie

Gordon's remarks "I would like to know, just out of curiosity, where they get the -- that Lord's water and a couple of other things;" "I really wanted to get him to say that stuff is not from the River Jordan, but I think he. . ." and "I don't think we have him nailed right now" to support his allegations of actual malice. These remarks, however, do not establish that Defendant did not believe that some of the items for Plaintiff's mailing came from Taiwan. Indeed, it is apparent from the transcript of the interview with Mr. Moore that Ms. Gordon's "nailed" remark was not directed at the holy water or other mailed items as argued by Plaintiff.<sup>11</sup> As there is an absence of clear and convincing evidence of Defendants' subjective awareness of alleged falsity, the Court concludes that Plaintiff's attack on the challenged segments must fail.

PrimeTime I and PrimeTime II also reported:

"SAWYER: [voice-over] So we decided to take hidden cameras to see what we could learn about Robert Tilton's fund-raising. It led us first to the nerve center of his ministry, the company that organizes his direct mail. It's called Response Media.

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<sup>11</sup>In his briefs, Plaintiff argues that Ms. Gordon could not have believed that Mr. Moore was referring to Plaintiff's mailing items when he said "[w]e get stuff from Taiwan." Plaintiff states that Mr. Moore, Mr. Anthony, Ms. Gordon and Mr. Cooke had left the room where the display of the Church's button mailing was located and Ms. Gordon, when asking her question to Mr. Moore, was pointing to the far wall of the room they were in at the time. Plaintiff states that it is clear that Mr. Moore was distracted when the question was asked. However, the Court finds that such facts do not establish that Ms. Gordon did not understand Mr. Moore to be referring to Plaintiff's mailing items. The transcript of the interview reveals the parties had been looking at wall displays of fund-raising activities, one of which included a button mailing of Plaintiff's Church. Ms. Gordon's question to Mr. Moore referenced buttons.

JIM MOORE: Bob is doing far better than anyone knows.

SAWYER: [voice-over] Jim Moore is president of Response Media. He handles not only Tilton, but a number of big corporate accounts. We told Moore that we were media consultants for this man, Dallas minister Ole Anthony. We asked him to show us how to start a big money ministry like Tilton's.

MR. MOORE: Give them something for free. You know, we want to mail you the latest copy of "X" and get their name and address. New names is the key, new names. Just think, 'New names.'

SAWYER: [voice-over] We learned that once people give you their names, its easy to keep them on the hook. You mail them something with a gimmick in it.

MR. MOORE: First of all, when you send an item in it, it gets their attention. That's number one.

\* \* \* \*

SAWYER: [voice-over] The letters accompanying the items are written by ghost writers to pressure followers to write back and make donations, too. Does it work? People send them in by the truckloads. It's a great marketing scheme.

\* \* \* \*

SAWYER: [voice-over] And when the letters arrive, they're processed so the company knows which fund-raising appeals you can use to squeeze followers for the most donations.

Mr. MOORE: We take the clients' files and we run them up against demographic information and create a profile of who their people are, how many people have cars that are new--

SAWYER: [voice-over] So it's market research, not God, who can tell Tilton which appeals reach the richest donors, which illnesses create the most dollar opportunities."

In their motion, Defendants contend that Plaintiff cannot prevail on his challenges of these segments of the broadcasts concerning Defendants' description of Response Media as the "nerve center" or "the company who organizes his direct mail" and their statements that "the letters accompanying the items are written by ghost writers to pressure followers to write back and make

donations, too. It's a great marketing scheme." Defendants contend that even though Plaintiff argues that Response Media was "only a printer" for him and that "[Internal Data Management] handled the mail" for him, Mr. Moore, during his interview, described Response Media's role far more than that of "only a printer." According to Defendants, Mr. Moore described to Mr. Anthony, Ms. Gordon and Mr. Cooke, a wide range of services Response Media could provide to a ministry and indicated that he performed such services for Plaintiff. The described services included sophisticated direct mail strategies, market research techniques and statistical analyses. He also explained the process of handling the direct mail. In addition, with respect to Plaintiff's ministry, Defendants contend that Mr. Moore portrayed himself as responsible for Plaintiff's success, claiming that Plaintiff "was out of business" prior to his association with Response Media. According to Defendants, Mr. Moore told his interviewees that he commuted to Dallas every day for two years, and in reference to assistance he provided to Plaintiff in reorganizing his ministry, Mr. Moore stated that he "worked with them." Mr. Moore further indicated that Response Media did the media buying for Plaintiff's Church. In light of these representations, Defendants contend they believed that Response Media was the "nerve center" of Plaintiff's Church and the "company that organizes his direct mail."

Defendants also contend that discovery has confirmed Response Media served Plaintiff's ministry as more than a printer.

Defendants state that the evidence shows Response Media acted as a consultant to the Church with respect to its mailings. Mr. Moore participated in meetings at which mailing strategies and results were discussed and analyzed. In addition, Response Media created a demographic study for Plaintiff's Church.

Even if Response Media were "only a printer" and Internal Data Management handled the direct mail operation for Plaintiff, Defendants contend that the gist or substance of the challenged segments was substantially true. According to Defendants, the gist of the broadcasts was that Plaintiff utilized a sophisticated direct mail operation which effectively brought in large amounts of contributions. Defendants argue that there is no dispute that such was the case, whether the direct mail operation was conducted by Response Media or Internal Data Management.

As to the statement in the broadcasts that Plaintiff's letters were written by ghost writers, Defendants state that such statement was true. Defendants contend that Kathryn Ingley, the Church's manager of partner correspondence, described herself as a ghost writer for Plaintiff. Defendants also assert that Plaintiff testified that he had the concept in the letter but that it was the responsibility of Internal Data Management employees as subordinates to put the letter in mailable form. Defendants further argue the evidence reveals the employees of Internal Data Management reviewed the prayer partners' letters, selected the responses to them and then mailed them out over Plaintiff's signature.

In response to Defendants' motion, Plaintiff disputes that Response Media was the nerve center. He also disputes the accuracy of Defendants' characterization of Mr. Moore's statements during the interview. While Plaintiff concedes Mr. Moore indicated that Response Media could perform a wide range of services, he contends that Mr. Moore did not state he performed such services for Plaintiff. Additionally, Plaintiff disputes the accuracy of Defendants' statement that Mr. Moore claimed credit for Plaintiff's financial success. Plaintiff states that Mr. Moore never made such a statement and in fact, the evidence shows that he was not responsible for the success. Plaintiff further asserts that Mr. Moore did not claim to do the media buying for Plaintiff. Rather, he stated that the "downtown office" did the media buying, referring to J.C. Joyce's office. Plaintiff further denies Defendants' contention that Mr. Moore was a consultant for Plaintiff. Plaintiff states that Mr. Moore was only a technical advisor involved in the layout and design of the mailing. Furthermore, Plaintiff states that Mr. Moore has only performed one profile of the Church's mailing and the Church did not use the information.

The Court, upon review of the challenged segments of the broadcasts and the record thereof, finds that Plaintiff has failed to satisfy his burden to overcome summary judgment as to the issue of actual malice in regard to Defendants' description of Response Media as the "nerve center" and as "the company that organizes his direct mail." Plaintiff has failed to provide affirmative evidence

to demonstrate that Defendants knew their statements were false.<sup>12</sup> The transcript of the interview with Mr. Moore reveals that Mr. Moore did indicate or at least suggest that he performed a wide variety of services for Plaintiff. Moreover, Mr. Moore told Ms. Gordon, Mr. Anthony and Mr. Cooke that he had commuted to Dallas for two years to work with Plaintiff's ministry and that he had been the one responsible for moving direct mailing services from in-house to Tulsa. The transcript, contrary to Plaintiff's contention, also shows that Mr. Moore did in fact take credit for Plaintiff's success. Indeed, in the interview, Mr. Moore stated:

"[w]hen I got associated with Bob he was about out of business. . . .

\* \* \* \*

He was having a very difficult time. In fact, almost--I don't know if he knew what to do at the time. When he first came on, the first mailing program that we did with him he, he tried to convince me--he went--he wanted to go with this real slick--. . . .

\* \* \* \*

And what he felt would work and what would actually work were two different things. And once he saw that this wouldn't work, he was willing to go with this. . . .

\* \* \* \*

Bob, is, is doing far better than anyone knows.

(Joyce Aff., Ex. 18 at pp. 91-92).

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<sup>12</sup>In any event, the Court finds Defendants' characterization of Response Media as the "nerve center" is non-actionable as it is an opinion which is not susceptible to proof of its truth or falsity. See, e.g., Metcalf v. KFOR-TV, 828 F.Supp. 1515, 1529-32 (W.D. Okla. 1992).

These statements clearly demonstrate that Mr. Moore claimed credit for Plaintiff's success. Furthermore, in regard to Mr. Moore's statement as to media buying, the Court concludes that the statement, at the very least, is ambiguous and in the Court's view, could be understood by Defendants as indicating that Mr. Moore and Response Media played a part in media buying.<sup>13</sup> As to demographic analysis, Plaintiff has not submitted specific facts to show that Defendants knew that the statements in regard to Response Media's participation in such activity was false or that they subjectively entertained serious doubts that their statements were false.

In regard to Defendants' statement concerning ghost writers, the Court finds that Plaintiff has failed to present sufficient evidence, even under a preponderance of the evidence standard, to establish that the statement was false. Moreover, the Court finds that Plaintiff has not shown with convincing clarity that Defendants knew such statement was false or had serious doubts as

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<sup>13</sup>The transcript of the interview reads:

"Jim Moore: He's [referring to Plaintiff], He's on more stations, more market--I, I don't think anyone's on as many stations as he is or as many times.

Ole Anthony: Are--now, do-- now, do you do the time buying for that kind of stuff?

Jim Moore: No, and Bob--we--a friend of mine--see, I used to do all the media buying at, at Oral's when I was there. And a friend of mine that used to work there, I had him do the media buying for him initially to get him started. Then we are doing it here in Tulsa, but out of the downtown office."

(Joyce Aff., Ex. 18 at p. 92).

to its truth. The undisputed evidence shows that Kathryn Ingley and others wrote letters for Plaintiff and that Ms. Ingley considered herself as a ghostwriter. It is also undisputed that Internal Data Management employees reviewed letters from prayer partners, selected responses to those letters and then sent them out over Plaintiff's signature. Even though Plaintiff claims that the broadcast implies that the employees of Response Media were ghostwriters for the letters, the Court concludes that the gist of Defendants' statement is substantially true as Kathryn Ingley as well as Internal Data Management employees wrote letters or selected responses on behalf of Plaintiff.<sup>14</sup>

As to remainder of the challenged statement involving ghost writers and the statements concerning letters sent and received from followers, the Court finds that Plaintiff cannot satisfy his burden of proof that Defendants made the statements with knowledge of falsity or doubts as to their truth. As to Defendants' statements "[i]t's a great marketing scheme" and "So it's market research, not God, who can tell Tilton which appeals reach the richest donors, which illnesses create the most dollar

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<sup>14</sup>The Court also notes that Plaintiff challenges statements made in the follow-up segment of PrimeTime II with respect to the drafting of mailings. The statements were attributed to Marte Tilton from a deposition. In that deposition, Ms. Tilton acknowledged that the handwriting on personal letters to Plaintiff's followers was not Plaintiff's handwriting. She also admitted that letters sent to Plaintiff's Church by individuals seeking spiritual guidance were answered by individuals hired by the data processing center in Tulsa. In this action, Ms. Tilton has attested to the accuracy of those comments and Plaintiff has not presented evidence to the contrary. Therefore, Plaintiff's attack to those statements fail.

opportunities," the Court finds that such statements are non-actionable as statements of opinion, not verifiable as true or false. See, Metcalf v. KFOR-TV, 828 F.Supp. 1515, 1529 (W.D. Okla. 1992) ("statements which are opinionative and not factual in nature, which cannot be verified as true or false, are not actionable as slander or libel"); Miskovsky v. Oklahoma Pub. Co., 654 P.2d 587, 593 (Okla. 1982) (opinion or "judgmental statement in which the maker of the same expresses his views" cannot be libelous).<sup>15</sup>

### Prayer Requests

PrimeTime I and PrimeTime II reported:

"SAWYER: [voice-over] But how much does Tilton really care about the beat-up and the hurting? We kept thinking about something the head of the direct mail operation told us, that the mail doesn't go to Tilton. It's forwarded unopened to Tilton's bank in Tulsa. So the bank opens the followers' mail, not to share the agony, but to get the money.

INTERVIEWER: The bank opens the letters that come back in?

MR. MOORE: Right. And takes your money and puts it in your account. All we get is the paper document and how much the person gave.

SAWYER: [voice-over] And those items that people have prayed over and sent in, believing Robert Tilton would take them and pray over them too? If some make it to Tilton, there are thousands that didn't. We found them in the garbage at the bank and the marketing research center. The 'angels of god,' the prayer cords, the arrows--this person wanted his aimed at getting a real dad -- the tracing where Tilton said he'd place his hand, ripped up by [PrimeTime I: the bank] [PrimeTime II: letter processors]. We found heart-breaking appeals from followers and letters like this one.

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<sup>15</sup>In his Final Amended Complaint, Plaintiff challenges the statements made in PrimeTime I and PrimeTime II attributed to "Tilton's marketing director" that "when it comes to money, Tilton is very smart. He's careful not to say what donation goes where so he can avoid, again, how Jim and Tammy got caught." Upon review of the record, the Court finds that Plaintiff cannot show by clear and convincing evidence that Defendants knew the alleged falsity of the statements or entertained serious doubts as to their truth.

It came with personal photographs for Pastor Bob and a prayerful message. It also came with a seven thousand dollar pledge. The money probably made it to Tilton. The prayers went in the trash."

Plaintiff, in support of his motion and in response to Defendants' motion, contends that the above-quoted segments are false. Plaintiff contends that Response Media did not receive any prayer requests from the bank as stated by the broadcasts. Plaintiff asserts that his mail processor, Internal Data Management, received all the prayer requests. Moreover, Plaintiff contends that Mr. Moore never told Ms. Gordon, Mr. Anthony and Mr. Cooke, during their interview, that he received "the paper document [or] how much the person gave" in regard to Plaintiff's mail. Nor did Mr. Moore state that "mail doesn't go to Tilton." Plaintiff states that prayer requests were sent to him from Internal Data Management. In addition, Plaintiff contends that the statement "[a]nd those items that people have prayed over and sent in, believing Robert Tilton would take them and pray over them, too" was false because the visual shown at the time the statement was made, does not show items prayed over and sent in by followers. Rather, the pictured mail was actually prayer request forms that Plaintiff's Church had sent to Defendant, Kelly Sutherland, at her request, but which had never completed and returned to the Church. Plaintiff also states that Defendants produced videotapes shot in Dallas with techniques to make the small quantity of the Church's mail they had "look voluminous." Plaintiff further contends Defendants' statements that "[i]f some make it to Tilton, there are thousands that didn't" and "we found them in the garbage at the

bank and the marketing research center" were false. According to Plaintiff, Defendants never found any prayer requests in the garbage at the bank or the marketing center which had been placed there by employees. Nor could they find "thousands" of prayer requests. Plaintiff contends the evidence in the record establishes that no mail which was opened by Commercial Bank and Trust had any contents removed or thrown away and that no mail received by Internal Data Management was ever disposed of in its dumpster. Indeed, Plaintiff states that an employee of the janitorial service, who personally emptied the trash for Commercial Bank and Trust and Internal Data Management, wrote a letter to Defendant, Diane Sawyer, stating that no prayer requests were thrown away.

In addition, Plaintiff contends that Defendants acted with actual malice in publishing the false statements. In making the statements, Defendants relied upon Mr. Anthony, who purportedly found the trashed prayer requests. However, Plaintiff asserts that Defendant, Kelly Sutherland, was advised by Peggy Wehmeyer, now ABC's religious editor, that Mr. Anthony could not be trusted and was obsessed with his crusade against Plaintiff. Plaintiff states that Ms. Sutherland's testimony, as well as Ms. Gordon's testimony, that they believed Mr. Anthony had found the prayer requests in the trash cannot be relied upon as their credibility is at issue. Plaintiff additionally states that Defendants acted with actual malice in rebroadcasting the statements on PrimeTime II because they were advised by Plaintiff, after PrimeTime I aired, the

accusations were clearly false. Plaintiff specifically provided the trial transcript and exhibits of the Morales case to Defendants which showed that there were never thousands of prayer requests thrown in the trash.

Furthermore, Plaintiff alleges that Defendants acted with actual malice because the evidence reveals that Defendants or their agents stole prayer requests from Commercial Bank and Trust and Internal Data Management and stole handwritten letters referred to as "white mail" from the Church's sanctuary and planted 37 of the prayer requests in the trash to support their report. Plaintiff contends that Internal Data Management has the original envelopes which contained the prayer requests that Defendants claimed in the broadcasts were found in the trash dumpsters. These envelopes, Plaintiff argues, prove the prayer requests were stolen and then were placed back in the bank without the prayer requests and with only a token offering. Plaintiff argues that Defendants or their agents stole the envelopes. Plaintiff contends that Defendants filmed Mr. Anthony removing trash containing prayer requests behind the dumpsters at the Commercial Bank and Trust and took video and still pictures showing prayer requests at that location. Defendants also took video and still pictures at Internal Data Management. The video and still pictures, Plaintiff argues, were destroyed by Defendants.

Defendants, in response and in support of their motion for summary judgment, contend that Plaintiff cannot show with convincing clarity that Defendants acted with actual malice with

respect to the broadcasts. Defendants contend that Ms. Gordon has testified that Mr. Anthony told her, after their interview with Mr. Moore, that he and two of his colleagues, Powell Holloway and Harry Guetzlaff, intended to look through the trash outside Commercial Bank and Trust. Ms. Gordon and Ms. Sutherland have testified that Mr. Anthony had told them that he and his colleagues had examined the trash outside Commercial Bank and Trust, Internal Data Management and the law offices of J.C. Joyce, counsel for Plaintiff. Ms. Gordon also has testified that Mr. Anthony reported that he and his colleagues had discovered thousands of items of trash. Ms. Gordon and Ms. Sutherland further testified that on different occasions, they inspected trash which Mr. Anthony said he had found during his "trash trips" and that they believed Mr. Anthony accurately reported what he had found. Although Plaintiff contends that Ms. Sutherland had been advised that Mr. Anthony was not trustworthy and was obsessed with Plaintiff's crusade, Defendants contend that Plaintiff has shown nothing to rebut Defendant's testimony that she believed that Mr. Anthony had retrieved the prayer requests from the trash. Moreover, Defendants contend that the evidence Plaintiff has presented to challenge the credibility of Ms. Gordon and Ms. Sutherland has nothing to do with their belief that Mr. Anthony recovered prayer requests in the trash of the bank and the marketing research center. Furthermore, Defendants contend that Plaintiff has failed to present any evidence to support his accusations that Defendants stole prayer requests or planted stolen prayer requests in the trash dumpsters.

In addition to actual malice, Defendants contend that Plaintiff has failed to meet his burden of proof as to the issue of falsity. Despite Plaintiff's attacks on certain statements of the broadcasts, Defendants maintain that the gist or sting of the broadcasts was demonstrably true. According to Defendants, the gist of the reports was Plaintiff's preoccupation with money, a focus that led him to take the most stringent steps to assure that every penny he received from followers was deposited in the bank at the same time the prayers of those followers were treated with callous indifference. Defendants contend that the evidence has in fact revealed that thousands -- hundreds of thousands -- of prayer requests mailed to Plaintiff were thrown away, pursuant to Plaintiff's directive, without being prayed over by him. Defendants state that at least 180,000 P-21B and P-21C prayer forms<sup>16</sup> of Plaintiff's followers were trashed and that tens of thousands of other responses to Plaintiff's mailings were, as well, trashed. Additionally, Defendants contend that tens of thousands of handwritten letters from followers were routinely discarded. Defendants acknowledge that Plaintiff did receive a computer printout with cryptic codes referencing the form letters that Internal Data Management employees sent back to the followers.

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<sup>16</sup>According to Defendants, Internal Data Management sent to individuals, who initially responded to Plaintiff's appearances on television, the "Prayer of Agreement Miracle Campaign" mailing or the "P-21" mailing. In the mailing, Plaintiff agreed to pray in agreement with the individuals for 21 days. The mailing contained three forms on which the individuals were asked to write prayers to Plaintiff for the 1st, 8th and 15th days. The "P-21B" and "P-21C" forms were for the 8th and 15th days.

However, Plaintiff never told his followers that he prayed over the computer printouts instead of the original prayer requests. Defendants contend that all of the undisputed evidence reveals that Plaintiff did not in fact personally pray over thousands of prayer requests that were mailed to him.

The Court, having carefully reviewed the evidence submitted, finds that Plaintiff has not presented sufficient evidence to raise a genuine issue of fact as to whether Defendants acted with actual malice in regard to their reports. Plaintiff has failed to present sufficient evidence to show that Defendants knew or were aware the statements concerning Mr. Moore were false. Moreover, Plaintiff has failed to present any evidence to show that Defendants did not believe that the "mail doesn't go to Tilton." Plaintiff has additionally failed to sufficiently rebut the testimony of Ms. Gordon and Ms. Sutherland concerning Mr. Anthony's report of trashed prayer requests, their inspection of the prayer requests which Mr. Anthony stated were trashed and their belief that his report was accurate. Plaintiff claims that the credibility of Ms. Gordon and Ms. Sutherland is at issue and therefore their testimony cannot support summary judgment on the issue of actual malice. However, the evidence presented to attack the credibility of Ms. Gordon and Ms. Sutherland does not relate to Mr. Anthony, the trash trips conducted by Mr. Anthony or whether they believed Mr. Anthony retrieved the prayer requests from the trash. Moreover, the fact that Ms. Sutherland was advised that Mr. Anthony was not a credible source does not establish actual malice. Ms. Sutherland testified

that in fact the majority of information Mr. Anthony provided to her in regard to Plaintiff and his Church was accurate. Plaintiff has not shown that such testimony is untrue or that Ms. Sutherland had reason to question the veracity of Mr. Anthony's report that he had found prayer requests in the trash.<sup>17</sup> Plaintiff also claims that the reports were false because the prayer requests were stolen and then planted in the trash dumpsters. Discovery, however, has failed to uncover any factual basis for the allegations that Defendants stole and planted the prayer requests in the trash dumpsters or in fact suspected that others stole and planted the prayer requests in the trash dumpsters. Plaintiff has no evidence to reasonably show that Defendants destroyed the still and video pictures claimed by Plaintiff. With an absence of affirmative evidence or specific facts to demonstrate that Defendants knew the alleged falsity of their statements in the challenged segments or entertained serious doubts as to those statements, the Court finds that Plaintiff's claim in regard to the statements cannot prevail.<sup>18</sup>

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<sup>17</sup>As stated by the court in Brueggemeyer, the "First Amendment does not require that one who speaks on a public issue do so based only on inviolable sources; instead the First Amendment inquires whether the sources are sufficiently perfidious to cause the publisher to believe the information is probably false or to prompt the publisher seriously to doubt the truth of what the source has revealed." 684 F.Supp. at 460. The Court concludes that a jury could not reasonably find, by clear and convincing evidence, that Defendants acted with actual malice in relying upon Mr. Anthony.

<sup>18</sup>Plaintiff, in his briefs, also challenges Defendants' reliance upon the statements of Brenda Reynolds, Plaintiff's housekeeper and nanny, in her interview with Defendant, Diane Sawyer. Plaintiff contends that Defendants knew Ms. Reynolds' statement "I know for a fact that he did not pray over them" could not be true because Defendants knew she was not with Plaintiff enough hours of the day or days of the week to know. However, the

PrimeTime II also reported:

"ANNOUNCER: Eight months later, are his followers getting the full story?" (Followed by film clip of Plaintiff's videotape deposition in which he is shaking his head and saying "no.")

\* \* \* \*

"SAWYER: [voice-over] But four months later, here is Tilton in a videotaped deposition with the Texas attorney general's office, which they recently released to the press over Tilton's objection. In it, Tilton admits he doesn't really pray over every prayer request at all.

Rev. Tilton: [deposition] Not all of them are the original prayer request. Some are on a computer print-out with their specific kind of prayer that they want me to pray. So I don't get the actual document of some of them.

ATTORNEY: And what happens to the actual document?

Rev. Tilton: It's thrown away."

Plaintiff claims that the above-quoted statements in the PrimeTime II broadcasts were false and that Defendants acted with actual malice in publishing the statements. Upon review of the record, the Court finds an absence of evidence showing the statements were false. Indeed, the Court finds that the record supports the statements. The record reveals that Plaintiff admitted that he did not pray over all the prayer requests sent to him. Instead, he prayed over computer printouts with the requested prayer. The evidence also shows that Plaintiff did not tell his followers that he prayed over computer printouts. Even if there were evidence in the record to show falsity, the Court finds there

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Court finds that Plaintiff has failed to sufficiently show that Defendants had any reason to doubt Ms. Reynolds' credibility or the truthfulness of her statements. Defendants knew that Ms. Reynolds was Plaintiff's housekeeper and nanny. Moreover, Ms. Reynolds specifically told Defendants that Plaintiff told her to "just take [the prayer requests] to the trash" and "[t]hrow them away."

is no evidence whatsoever to establish Defendants knew the alleged falsity of the statements or had serious doubts as to their truth.

### Phone Ministers

PrimeTime I reported:

"SAWYER: [voice over] And if Hardy felt he was taking advantage of the callers, imagine how this woman felt, Elizabeth Montcalm, a temporary employee at AT&T. When Tilton went to Israel last year, she and others at AT&T were asked to pose as Tilton prayer ministers.

ELIZABETH MONTCALM: I got people calling about their sons being on drugs or alcoholics or husbands being an -- an alcoholic. I mean, people are telling you their most intimate secrets, their personal stuff about themselves. And here I am, you know, just a temporary employee from AT&T."

Defendants, in support of their motion, contend they are entitled to summary judgment as to Plaintiff's challenge of the underlined statement "she and others at AT&T were asked to pose as Tilton prayer ministers." Defendants assert that their description of AT&T employees posing as prayer ministers was demonstrably true. Defendants assert that when Plaintiff broadcast from Israel in September 1990, he urged viewers to phone in their prayer requests to "prayer ministers" standing by at a "miracle prayer center" in Dallas. According to Defendants, Plaintiff instructed the temporary AT&T workers, who had been retained to answer calls, to answer telephone calls by saying, "[t]hank you for calling Success N Life Ministry" and to tell "rambling" callers, "[y]our miracle will come as you pray with Pastor Bob the Prayer of Agreement." Ms. Montcalm, a temporary AT&T employee from Florida, told Defendants that when she was answering calls for Success N Life during the Israel crusade, callers told her intimate details of

their lives, apparently believing that they were speaking to prayer ministers. From what was reported, Defendants contend that they believed their statement that AT&T temporary workers were asked to pose as prayer ministers was true.

In response, Plaintiff contends that the Ms. Montcalm and others at AT&T were never asked to pose as prayer ministers. Plaintiff states that the employees were simply hired to take overflow calls which came in during the Israel crusade. Plaintiff contends that the employees were instructed not to pray for anyone. Plaintiff further contends that during her interview, Ms. Montcalm never stated that she was asked to pose as a prayer minister.

Although Plaintiff has submitted evidence to support his contention that AT&T workers were not explicitly asked to pose as prayer ministers, the Court finds that Plaintiff has not submitted any evidence whatsoever to establish with convincing clarity that Defendants knew their statement in regard to the temporary AT&T employees was false or that they entertained serious doubts of the truth of their statement. Defendants knew prior to the broadcast that Plaintiff told his viewers during the crusade that their calls were being answered by "prayer ministers" at a "miracle prayer center." They also knew that AT&T temporary employees were instructed by Plaintiff to open each call by stating "[t]hank you for calling Success N Life Ministry, how may I help you?"; to take the caller's name, address, phone number and prayer request; and to respond to some callers by saying "your miracle will come as you pray with Paster Bob the Prayer of Agreement." They further knew

that callers were divulging intimate matters to the AT&T temporary employees. Plaintiff has made no showing that Defendants had information prior to the broadcast which would have cast doubts on the truth of their statement. Therefore, Plaintiff's challenge to Defendants' statement must fail.

### Tilton's College Days

PrimeTime I and PrimeTime II reported:

"SAWYER: [voice-over] But an old buddy of Tilton's remembers how in college it was all a big joke.

FORMER TILTON FRIEND: Oh dear God! Come into this young woman's life! Heal tonight!

\* \* \* \*

FORMER TILTON FRIEND: Robert Tilton, as I knew him, was practicing to become a salesman. That was his concept of success, was to be -

SAWYER: [voice-over] This man, who wanted anonymity, is just one of several old friends of Robert Tilton who talked to us.

[RADIO MUSIC PLAYING]

RADIO ANNOUNCER: You're listening to XERF, the (INAUDIBLE) .

SAWYER: [voice-over] He remembers when they were in college, they would use drugs or get drunk and go off to tent revivals as a kind of sport.

FORMER TILTON FRIEND: And we'd be drunk and go down front, fall to our knees, speak in tongues. [PrimeTime I: I think that anybody who was there would realize that some people are going to believe anything and all you have to do is capitalize on that belief.]

REV. MARVIN GORMAN: Loose him (INAUDIBLE) . . .

SAWYER: [voice-over] Tilton and his friends started developing parodies, so-called "Jesus raps" of their own.

FORMER TILTON FRIEND: Oh, dear God! Come into this young woman's life! Heal tonight! She has a need to find Christ.

TILTON: O God! In the name of Jesus, we believe in prayer!  
We believe in miracles!

FORMER TILTON FRIEND: I personally thought I was a lot better  
at it than he was.

SAWYER: [voice-over] Tilton, who never finished college,  
admits he was a drug user, but says he was saved when some people  
came to his house and explained Christ.

TILTON: I just changed. I just fell in love with everybody!

SAWYER: [voice-over] But he never tells followers how he and  
his friends talked about running preacher scams and cashing in.

FORMER TILTON FRIEND: We said that when we graduated, that we  
would buy a good tent, a dynamite sound system, a good amen  
section, and fly around the country and get rich.

TILTON: We sold everything that we had, bought an old ragged  
tent and a big old truck and a travel trailer and we headed out to  
tell people about this gospel of Jesus."

In support of his motion and in response to Defendants'  
motion, Plaintiff contends that in both PrimeTime I and PrimeTime  
II, the statements of John Michael Taylor, "Tilton's former  
friend," together with Defendant, Diane Sawyer's surrounding  
comments and the context thereby created, portrayed Plaintiff as a  
man devoid of religiosity, who mocked the very thing for which he  
now stands. Plaintiff argues that Defendants' statements that  
while in college, Plaintiff participated in tent revival meetings  
as sport and in jest while drunk, joked with friends by practicing  
so-called "Jesus raps" and religious parodies, and hatched a plan  
to get rich by engaging in a revival preaching scam, were lies and  
were broadcast with actual malice. Plaintiff argues that in  
broadcasting these statements, Defendants relied on their interview  
with John Michael Taylor. However, according to Plaintiff, Mr.

Taylor stated, in that interview, that he could not say if Plaintiff actually did what Defendants stated he did in the broadcasts. Plaintiff states that the tent revival disgrace referred to by Mr. Taylor was a fad fueled by a movie entitled "Elmer Gantry." It occurred in 1963 at North Texas State University and involved John Michael Taylor and two of his friends Doug McLeod and Michael Harbison. Plaintiff asserts that he never attended North Texas State University. Moreover, Plaintiff asserts that Doug McLeod has testified that he never knew Plaintiff and Michael Harbison has testified that he never remembered Plaintiff participating in the revival sport.

Plaintiff also asserts that ABC's raw footage videotape of Mr. Taylor's interview shows that Mr. Taylor, in speaking of the fad, used the pronoun "we" to refer to a coterie of college friends, which did not include Plaintiff, and used the pronoun "he" to refer to Plaintiff. Plaintiff thus contends that the statements "[a]nd we'd be drunk and go down front, fall to our knees, speak in tongues" did not include Plaintiff as was represented by the broadcast.

In addition, Plaintiff asserts that the broadcasts showed Mr. Taylor stating "[w]e said that when we graduated, that we would buy a good tent, a dynamite sound system, a good amen section and fly around the country and get rich." ABC's raw footage videotape, however, shows that Mr. Taylor stated "I said" rather "we said." Plaintiff argues that Defendants purposely edited Mr. Taylor's statement "I" to become "we" to include Plaintiff making that

statement. According to Plaintiff, Defendants knew that statement was false and their own executive producer, Richard Kaplan, admitted that such a change was not a proper editing practice.

Plaintiff further asserts that Defendant, Diane Sawyer, stated in the broadcasts that Plaintiff made up "Jesus raps." ABC's raw footage, however, shows that Mr. Taylor never used the phrase "Jesus raps" when describing his mockery of revival preachers. Plaintiff contends that he never conducted any "Jesus raps" with Mr. Taylor or anyone else.

Plaintiff further contends that after PrimeTime I aired, he stated on his Success N Life program that Mr. Taylor's statements were a lie. In spite of Plaintiff's statements, which were provided to Defendants, and their own raw footage, Defendants rebroadcast the segment.

Defendants, in response and in support of their summary judgment motion, argue that despite Plaintiff's statements, they had a sufficient basis for believing that Plaintiff mocked preachers and attended tent revival meetings during his college days as a kind of sport. Defendants contend that Mr. Taylor, in the interview, did say that Plaintiff imitated preachers and that he was present on more than one occasion at tent revival meetings. Defendants also contend that Mr. Taylor indicated that Plaintiff participated in and was in agreement with discussions of a becoming a revival preacher in order to get rich. Although Mr. Taylor used "I said" instead of "we said" in part of the interview when referring to becoming a revival preacher to get rich, he later used

"we said" when referring to that same topic. Defendants state that the edit change to "we said" was for clarity reasons and did not alter the meaning of the statements in any way. Defendants further contend that even though Plaintiff did not attend North Texas State University with Mr. Taylor in 1963, Defendants state that he did subsequently attend Cooke County Junior College with Mr. Taylor. Mr. Harbison also attended Cooke County Junior College during that time and was acquainted with Plaintiff.

As to the issue of actual malice, Defendants argue that Plaintiff cannot show with clear and convincing evidence that Defendants broadcast Mr. Taylor's statements knowing they were false or with serious doubts as to their truth. Defendants contend that Defendant, Robbie Gordon, who conducted the interview, confirmed Mr. Taylor's recollections with others and she independently verified the facts related to her by Mr. Taylor. According to Defendants, Ms. Gordon believed what Mr. Taylor had told her and had no reason to doubt his statements.

Having reviewed the evidence, the Court finds that Plaintiff has failed to present sufficient evidence to raise a genuine issue of fact that Defendants knew the falsity of the statements made in the broadcast or had serious doubts as to the truth of the statements. Although Plaintiff states that ABC's raw footage shows that Mr. Taylor did not actually say that Plaintiff went down front at tent revival meetings, fell on his knees and spoke in tongues, it is clear from the interview that Mr. Taylor stated that Plaintiff was present at the tent revival meetings and was a part

of the group that was involved in such behavior. Indeed, Mr. Taylor stated:

"It's been so long ago that I, I can't recall the specific time and place him there to swear to it. I can say that it took place more than one time. That it was in the behavior pattern of the group that we ran with. That it was known to all of us. That it happened and was talked about. And that he was present, and he was in that group. Whether or not he actually went down to the front, and fell on his knees, and quaked, and spoke in tongues, I cannot say. But he was running with the group that did, and that made fun of the preachers, and that held that kind of behavior in high contempt."

(Joyce 2nd Aff., Ex. 5 at p. 6). (Emphasis added).

As to "Jesus raps," it is true that Mr. Taylor did not use that phrase in referring to parodies that were performed at parties. Notwithstanding the editorializing of Defendants, the evidence does reveal that Mr. Taylor did tell Defendants that he and Plaintiff performed parodies involving preaching.<sup>19</sup> Mr. Taylor specifically stated:

We had a parody that we would drop into at parties, of preaching. And we would emulate revival preachers that we had heard on the air at parties, and, and everyone would praise the Lord and fall on their knees, . . . . And he was there, yes, he was there.

\* \* \* \*

Tilton, trying to emulate the preachers at the time was-- I'm sure that he-- we all tried to throw a pitch at one time or another. It was just part of our standard pattern, our repartee. We would throw it back and forth. Everyone would attempt it. I personally thought I was a lot better at it than he was.

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<sup>19</sup>With regard to the "Jesus raps" characterization, the Court relegates this to an editorialization and finds it represents a non-actionable opinion. See, e.g., Metcalf, 828 F.Supp. at 1529-1532; Miskovsky, 654 P.2d at 593.

When we were at--when we were at parties and we would get into our preacher mode, all of us would throw lines back and forth. It was like a group of comedians standing around and throwing lines back and forth to one another. There was nobody that wasn't included. We all took part in this. I mean, everyone had their own little special part of it. And we played off of one another. It, it truly was like a bunch of stand up comedians, trying to work out a routine.

(Joyce 2d Aff., Ex. 5 at pp. 5, 7, & 8). (Emphasis added).

Given these statements, Plaintiff cannot show that Defendants knew it was false in stating that Plaintiff had developed parodies.<sup>20</sup>

In regard to the "I/We" change, the Court finds that such editing change does not establish actual malice. An edited or altered quotation is not sufficient to establish actual malice "unless the alteration results in a material change in the meaning conveyed in the statement." Masson, 501 U.S. at 517. In the instant case, the edited change to "we said" did not materially change the meaning conveyed by Mr. Taylor. During the interview, Mr. Taylor, in response to Ms. Gordon's question about joking with Plaintiff, did state:

We said if we didn't, if, after we graduated that we had a hard time making a living, or if we weren't making the kind of money that we wanted to, that what we should do, would be to grab an audience, become a revival preacher. And through that means we'd be able to be rich.

(Joyce 2nd Aff., Ex. 5 at p. 6).

The meaning conveyed by Mr. Taylor in the interview was that he and Plaintiff used to joke about becoming revival preachers to get rich. The alteration of the "I" to "we" did not change the meaning

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<sup>20</sup>The Court also notes Plaintiff has not presented any evidence to show that Defendants had any reason to doubt the credibility of John Michael Taylor or the truthfulness of his statements.

which had been conveyed by Mr. Taylor. Although Plaintiff contends that Mr. Taylor was not referring to Plaintiff when using "we," the Court finds that no reasonable jury would find that Mr. Taylor did not include Plaintiff when referring to "we" and no reasonable jury would find by clear and convincing evidence that Defendants acted with actual malice in making the edited change.

### Tilton's Start

PrimeTime I and PrimeTime II reported:

"SAWYER: And by 1981, [Tilton] had hit the big time? How? PrimeTime has learned that for several years, Tilton courted a man news accounts have tied to organized crime and drug smuggling, Herman Beebe, a financier whose banks gave Tilton a \$1.3 million loan, though Tilton claims he never met the man. And after Tilton got money, he got a new image, too - a permanent wave for his hair, plastic surgery and, like his good buddy, Jim Bakker, a talent for tears on demand."

In their motion, Defendants assert that they are entitled to summary judgment in regard to Plaintiff's challenge of the above-quoted segments. They contend that there is no evidence to suggest they did not believe the accuracy of their statements. Defendants state that they conducted an extensive investigation of the relationship between Plaintiff and Herman Beebe, which Plaintiff has conceded. Through that investigation, they learned that Plaintiff had obtained a \$1.3 million loan from Herman Beebe's bank in 1980, that press accounts as far back as 1976 linked Herman Beebe to organized crime and that Plaintiff's spokeswoman was quoted in the Dallas Morning News as saying Plaintiff did not know Herman Beebe. Defendants also state that their report, contrary to Plaintiff's claim, did not imply that Plaintiff was linked to drug smuggling and organized crime. As to the term "courted,"

Defendants contend that it was an editorial characterization of Plaintiff's efforts to obtain a loan and was accurate based upon the facts. Defendants further argue that the term is not actionable and it is a constitutionally protected opinion. In regard to the other statements, Defendants contend that the evidence establishes the truth of the statements. Although Plaintiff claims Defendants conveyed that the loan proceeds received from Mr. Beebe were used to pay for his permanent wave and plastic surgery, Defendants state that no such fact was conveyed by the report. Defendants explain that the broadcasts only stated that the permanent wave and the plastic surgery were obtained after the loan was received. The evidence, they argue, supports such facts. Defendants further state that the evidence shows that Jim Bakker was a friend of Plaintiff and that Plaintiff could cry on demand. Plaintiff, in response, contends that there is no evidence to support Defendants' contention that they reviewed the 1976 news article purportedly linking Herman Beebe to organized crime prior to the broadcasts. Moreover, Plaintiff contends that the article does not support their statement that Herman Beebe had links to organized crime. Plaintiff asserts that the article merely states he had associations with individuals who have organized crime connections. In addition, Plaintiff states that the statement in the report that Plaintiff "courted" Herman Beebe is false and not a protected opinion. Plaintiff concedes that he met Herman Beebe and that Mr. Beebe agreed to loan the Church money at their first meeting. However, he states that Mr. Beebe referred

him to Dallas-Fort Worth Airport Bank. Plaintiff admits that he called Dale Anderson, an associate of Mr. Beebe, about the loan approximately three times but states he also referred Plaintiff to the bank. Plaintiff thereafter called the bank's president numerous times to obtain the loan. Plaintiff additionally states that the evidence shows that the segments of the broadcast falsely implied that Plaintiff hit the big time as a result of the loan. Plaintiff states that by 1981, he and his Church were in debt and were incurring more debt. Plaintiff states that the Church had to pay the Beebe loan with other loans, which resulted in further debt. He admits that the article in the Dallas Morning News stated that "Tilton declined to be interviewed, but said through a spokeswoman that he never met Beebe," but states that Defendants' statement that "though Tilton claims to have never met the man" is false. Furthermore, Plaintiff states that Defendants' report falsely implied that he obtain a permanent wave and plastic surgery from the Beebe loan. According to Plaintiff, the permanent wave and the plastic surgery were obtained in 1989. As to Jim Bakker, Plaintiff states that he knew Jim Bakker only as a minister and not as a good friend. Plaintiff also contends that Defendant, Robbie Gordon's credibility is at issue in regard to the statement that Plaintiff can cry on demand.

The Court, having reviewed the evidence pertinent to the challenged segment, finds that Plaintiff has failed to present sufficient evidence to raise a question of fact that Defendants knew the challenged segments were false or that Defendants

subjectively entertained serious doubts as to their truth. Despite Plaintiff's contention, the evidence does reflect that Defendant, Robbie Gordon, reviewed the 1976 news article concerning Herman Beebe.<sup>21</sup> Although the report did not specifically state that Herman Beebe was linked to organized crime, it did state that Herman Beebe had associations with persons involved in organized crime. The evidence also shows that Ms. Gordon discussed the article with the author prior to the initial broadcast. As to "courting," the evidence shows that Ms. Gordon, in her investigation, was told that Plaintiff sought out Herman Beebe to obtain a loan. According to Ms. Gordon's affidavit, the inception of the relationship between Herman Beebe was described by Mr. Beebe's associate as "courting."<sup>22</sup> Ms. Gordon also reviewed prior to the initial broadcast, the Dallas Morning News article which quoted Plaintiff's spokeswoman as saying that Plaintiff did not know Herman Beebe. Plaintiff has not shown any evidence to establish that Defendants knew the statement "though Tilton claims never to have met the man" was false. Moreover, Plaintiff has not shown any evidence that Defendants knew that Plaintiff incurred more debt after receiving the Beebe loan and he has not shown that

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<sup>21</sup>Plaintiff's objection as to the admissibility of the news article on the basis that it had not been produced to him is without merit. It appears that the news article was produced to Plaintiff during the preliminary injunction hearing and it was admitted into evidence.

<sup>22</sup>In any event, the Court finds that the term "courted" fits the facts as it is defined in Random House Dictionary of the English Language 464 (2nd ed. 1987) as "to try to win the favor, preference, or goodwill of."

Defendants knew that Jim Bakker was not a good friend of Plaintiff. Furthermore, even if Ms. Gordon's testimony were discredited, Plaintiff has failed to present any affirmative evidence to show Defendants knew their statement that Plaintiff had a talent for tears on demand was false. Anderson, 477 U.S. at 256-57 (discredited testimony not normally considered a sufficient basis for drawing a contrary conclusion; plaintiff must present affirmative evidence in order to defeat properly supported summary judgment motion).

Finally, Plaintiff has failed to present sufficient evidence to establish an issue of fact that Defendants intended the alleged false implications that Plaintiff was connected to organized crime and drug smuggling, and Plaintiff paid for his permanent wave and plastic surgery from the loan proceeds received from Herman Beebe.

**Tilton's Lavish Lifestyles**

PrimeTime I reported:

"SAWYER: [voice-over] . . . But could this be the "parsonage," in swank Rancho Santa Fe, California, a four point five million lake view home . . . . Or is this the parsonage, in Fort Lauderdale, Florida . . . ."

PrimeTime II also reported:

SAWYER: [voice-over] . . . But could this be the "parsonage," in swank Rancho Santa Fe, California, a multi-million dollar lake view home. . . . Or is this the parsonage, in Fort Lauderdale, Florida . . . ."

In their motion, Defendants contend that they are entitled to summary judgment in regard to Plaintiff's challenge to the above-quoted segments. Defendants state that the gist of the challenged segments was not, as Plaintiff claims, that Plaintiff lived in more

than one house at a time but rather that unbeknownst to -- and in stark contrast to -- his "poor and hurting" followers, he lived lavishly in "parsonages" that were hardly modest homes which the word conveys. According to Defendants, whether or not Plaintiff lived in more than one home at a time, or instead moved about from one to another does not affect the truth of the gist of their report. Defendants also state that the segments in regard to Plaintiff's houses was meant to describe Plaintiff's style of living which was quite lavish and to raise with viewers the question of whether the homes in which Plaintiff reside while pastor of his Church reflected his -- or their -- idea of a parsonage. As to Plaintiff's challenge regarding the Florida residence, Defendants state that the broadcasts accurately reported that bank records reflected Plaintiff, not the Church, as the owner.

Plaintiff, in response, contends that Defendants' parsonage segments were false in that they implied that Plaintiff was a liar because he possessed more than one parsonage as represented in his Church magazine. Plaintiff contends that at the time of the broadcasts, he no longer resided at the house in Rancho Santa Fe, California, and the residence in Fort Lauderdale, Florida was personally owned by Plaintiff and his wife rather than the Church. According to Plaintiff, Defendants acted with actual malice because Defendants knew Plaintiff only had one parsonage at a time; they knew he was living in a leased house on Krohn Court while the Church's new parsonage in Los Colinas was being remodeled; they

knew he no longer resided at the house in Rancho Santa Fe, California; and they knew the Florida residence was owned by he and his wife personally.

The Court, upon review of the challenged segment and the record thereof, finds that Plaintiff has failed to raise a genuine issue of fact, even under the preponderance of the evidence standard, as to falsity of the segments and has failed to raise a genuine issue of fact as to actual malice on the part of Defendants. The Court finds that no reasonable jury would conclude the broadcasts at issue stated that Plaintiff owned four parsonages at one time. It is clear the challenged segments were only raising questions as to whether the residences were "parsonages." There is no dispute that Plaintiff lived at one time in all three of the residences shown on the broadcasts and that the Church maintained those residences as "parsonages." With respect to the Florida residence, the broadcasts did accurately reflect that Plaintiff was the owner. Although Plaintiff contends that the broadcasts imply that he was a liar because he had four parsonages when he only reported one in the Church magazine, the Court finds that Plaintiff has failed to show that Defendants intended or knew the false implication of the broadcasts. Saenz, 841 F.2d at 1318 (to show actual malice, a plaintiff must prove "with clear and convincing evidence that the defendants intended or knew of the implications" he alleges).

PrimeTime I and PrimeTime II also reported:

"SAWYER: [voice-over] He also tells followers he'll pray for their miracles, so they should send him money.

SAWYER: [voice-over] Like Jesus? The Bible says Jesus went to fast and separate himself from worldly things. Pastor Bob flew first class to a posh ski resort in Colorado, three suitcases for five days, a room with a fireplace - he even brought his own television along - while asking followers to send money."

Plaintiff challenges this report in the broadcasts on the basis that it states that Plaintiff will pray for his followers' miracles if they send money, that it states that he stayed in a "posh" ski resort in Colorado and that it implies the Colorado trip was a fundraising campaign. Defendants, in support of their summary judgment motion, contend that their statements were true. Defendants contend that the evidence shows Plaintiff repeatedly appealed to his followers for funds. Defendants state that Plaintiff in one appeal specifically asked his followers to "carefully write down the areas of your life (especially financial) where you want me to release my anointing on your behalf. . .and then write a check for the best possible gift that you can give!!!" (Gordon Aff., para. 19). With respect to his trip to Colorado, Defendants contend that Plaintiff undisputedly encouraged viewers to pay vows and the broadcasts repeatedly referenced the payment of vows. As to the "posh" reference, Defendants contend that it is not actionable as it is a constitutionally protected opinion.

The Court, having reviewed the submitted evidence, finds that Plaintiff has failed to present sufficient proof, even under a preponderance of the evidence standard, to show Defendants' statements were false. The evidence shows that Plaintiff, in his mailings, did ask his followers to write a check at the same time he asked for them to write down their prayer request. In addition,

Plaintiff has admitted that he encouraged viewers to pay vows during the broadcasts in Colorado and the broadcasts referenced the payment of vows, tithes and offerings.<sup>23</sup>

The Court further finds that Plaintiff has failed to offer any evidence whatsoever which establishes with convincing clarity that Defendants knew of the falsity of their statements or that they had serious doubts as to the truth of those statements.

### Guatemala

PrimeTime II reported:

"SAWYER: . . . And what about something else Tilton said in his deposition? He claims that his contribution to his mission in Guatemala is 100 percent of their needs.

ATTORNEY: --that you were going to provide--

PLAINTIFF: We would be-

ATTORNEY: --100 percent of the support that they need to maintain their operation.

PLAINTIFF: Yes, yes.

SAWYER: So we checked this out. We spoke to the onsite missionary in Guatemala who told us, in fact, Tilton is only a partial sponsor."

In his motion and in response to Defendants' motion, Plaintiff asserts that the statement that Plaintiff "claims that his contribution to his mission in Guatemala is 100 percent of their needs" misstates Plaintiff's deposition testimony. Plaintiff

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<sup>23</sup>In regard to Defendants' use of "posh" to describe the Colorado ski resort, the Court finds the statement is not actionable. The Court finds no reasonable viewer or listener would interpret the statement as anything other than an expression of opinion. It is an evaluative characterization, not susceptible to proof of its truth or falsity. See, e.g. Metcalf, 828 F.Supp. at 1529-1532.

states that it was his original understanding that he would underwrite 100 percent of the expenses of the Guatemalan mission's ten schools and its mobile clinic, but that he did not mind if others gave additional funds. He also states that he explained in his deposition that even with intentions of full support of foreign missions, nominal donations were often received from other sources. Plaintiff further states that Hugo Morales, the Guatemalan missionary, testified that Plaintiff undertook to support the schools and the mobile clinic and supported those activities 100 percent.

Plaintiff contends that Defendants knew their statements in the above-quoted segment were untrue. According to Plaintiff, Defendants knew the meaning and content of Plaintiff's deposition testimony. They also possessed Church documents, including a copy of the monthly support check and a note on Guatemala School Support documenting Tilton's contribution of \$12,200 a month to the Guatemala mission. Plaintiff states that Defendants also possessed audio tapes and notes of two phone calls to Mr. Morales showing that Mr. Morales' first response to questioning concerning Plaintiff's support was that Plaintiff financed the mission and its schools totally.

Defendants, in response and in support of their motion, contend that Plaintiff did say in his deposition that he provided 100% of the support for the Guatemalan mission. Defendants state that they spoke with Mr. Morales before the air of PrimeTime II and he told them that he received funding from Plaintiff through the

Don Stewart Association; that he received approximately \$12,000 a month from the Don Stewart Association; and that he did not know how much of that amount came from Plaintiff. Defendants also state that Mr. Morales told them that the money received from the Don Stewart Association paid for the mission's expenses and only 50% of the teachers' salaries for his 12 schools. In addition, Defendants state that discovery has confirmed that Mr. Morales receives an additional \$2,200 a month which does not come from Plaintiff.

Having reviewed the evidence applicable to the challenged segment, the Court finds that Plaintiff has failed to raise a genuine issue of material fact as to whether Defendants had knowledge of the alleged falsity of the challenged statements or had serious doubts of the truth of those statements. Plaintiff has not presented any evidence to suggest that Defendants did not believe the statements of Mr. Morales that he received funding from Plaintiff through the Don Stewart Association; that he did not know how much of that amount came from Plaintiff and that the money received from the Don Stewart Association paid only 50% of the teachers' salaries for his 12 schools. Even if Ms. Sutherland's credibility were at issue and her testimony were discredited, Plaintiff has also not submitted affirmative evidence to satisfy his burden of proof in regard to the issue of actual malice. Anderson, 477 U.S. at 256-257.

In regard to Guatemala, PrimeTime II also reported:

"SAWYER: And the Guatemalan government has gone public to say that Tilton and his promotional material exaggerate his contribution for personal gain, including his claim of a special invitation.

PLAINTIFF: [television broadcast] I've been invited to be in the inauguration, the ball, all the celebrations and --

SAWYER: That's not true, according to the president's spokesman, Fernando Muniz.

FERNANDO MUNIZ: [through interpreter] No. That the president has invited him to attend the inauguration is by all means false, nor does he have any relation with the government. But we cannot take action against a swindler of this caliber."

In their motion, Defendants contend that they are entitled to summary judgment in regard to Plaintiff's challenge of the above-quoted segment. Defendants contend that Fernando Muniz confirmed in his deposition that he was the official spokesman for the president of Guatemala, that the president did not know who Plaintiff was and that neither the president nor his government invited Plaintiff to the inauguration. According to Defendants, Mr. Muniz explained that Plaintiff may have received an invitation from an evangelical church in Guatemala, but even if he had, it would not have been an invitation from the government. Based upon Mr. Muniz's testimony, Defendants contend their statement that Plaintiff was not invited to the inauguration by the president of Guatemala was true.

Plaintiff, in response, argues that Defendants' statement that he was not invited to the inauguration was false. Plaintiff contends that he did receive an official invitation to the inauguration ceremony. He states that the invitation came from Harold Caballeros, who had obtained the invitation from one of the five groups that had given out invitations to the ceremony in addition to the president and congress of Guatemala. According to Plaintiff, he never claimed that the president invited him to the

inauguration or that the president was his friend. Plaintiff maintains that the Church magazine article at issue, which Defendants had a copy of prior to the broadcast, only stated the "government" was so appreciative of Robert Tilton Ministries' contribution to the Guatemalan people that it sent an official invitation to Plaintiff. Plaintiff contends that Defendants' interview with Mr. Muniz solely focused on whether the president invited Plaintiff, whether he knew Plaintiff's work personally and whether he appreciated Plaintiff's work. Plaintiff further states that Mr. Muniz indicated to Defendants in the interview that it was probable that some international official of the president's party may have begun a relationship with Plaintiff.

The Court, upon review of the evidentiary materials, finds that even under the preponderance of the evidence standard, Plaintiff has not raised a genuine issue of fact as to the falsity of the report. Irrespective of the fact that the Church magazine article reported the government had invited Plaintiff and not the president, Plaintiff has failed to dispute the fact that he did not receive an invitation by either the government or the president. The evidence merely shows that he received an invitation from a religious minister. That minister, as Mr. Muniz testified and Plaintiff has not disputed, was not a part of the Guatemalan government.

In addition, the Court finds that Plaintiff has not presented sufficient evidence to raise a genuine issue of fact as to whether Defendants knew the challenged segment was false or had serious

doubts as to its truth. Although Plaintiff suggests that Defendants' possession of the magazine article which stated that the "government" had invited him and their decision to focus solely on whether an invitation was received from the Guatemalan president shows actual malice, the Court finds that such facts do not support a finding with convincing clarity that Defendants knew or were aware their statements in the broadcast were false.

### India Crusade

PrimeTime II reported the following:

"SAWYER: [voice-over] And something else about Tilton the missionary. Repeatedly, he tells his viewers that their donations enable him to win souls around the world.

TILTON: [television broadcast] And we totally - Word of Faith Ministries, you the Family Church, underwrites totally this particular evangelism unit.

SAWYER: [voice over] Tilton tells followers they finance crusades in countries too poor to pay themselves.

INDIAN TRANSLATOR: [Speaking Tamil]

DAN MORALES: He's come all the way from America!

SAWYER: [voice-over] So PT decided to follow Robert Tilton to India this past March.

TILTON: Do you want to please God tonight?

INDIAN TRANSLATOR: [Speaking Tamil]

SAWYER: [voice-over] Well, there was Tilton, passing the collection plates nightly.

[Visual of Tilton preaching, then a woman taking up an offering while Tilton was preaching, and then Tilton preaching]

If each of these people gave just a few pennies, Tilton would get back hundreds of thousands of dollars--

TILTON: . . . Hallelujah!

CONGREGATION: [Yelling in Tamil] . . . Hallelujah!

SAWYER: [voice-over] -- money taken from the people he himself calls 'the poorest people on earth.'

INDIAN MAN: [through interpreter] Tilton said, 'Please donate money. Please donate money,' so everybody got disappointed and then everybody whispered, 'This is not a crusade, it's a business.'"

In his motion and in response to Defendants' motion, Plaintiff claims Defendants falsely stated that he passed collection plates during the crusade in India. According to Plaintiff, ABC's cameraman's dope sheet for the taping of the India crusade, which provides the time sequence of the contents of the tapes, shows that the offering was actually taken up by a lady worker with a green bag. Plaintiff states that the offering was taken up at the request of Jack Harris, the coordinator for the India Crusade, before Plaintiff arrived to preach. Plaintiff also asserts that ABC's raw footage of Plaintiff shows that he did not pass a collection basket and was not present when the collection plates were passed among the crowd. He claims that ABC's raw footage instead shows another person preaching as the offering was taken by the lady worker. Moreover, Plaintiff asserts that the offering was not taken up for Plaintiff and his Church. Rather, it was taken up for the benefit of local pastors in India.

Plaintiff contends that Defendants had full knowledge of their own raw footage and cameraman's dope sheets and were therefore aware that no collection was taken while Plaintiff was present, as portrayed by the broadcasts. Plaintiff argues that Defendants had no evidence that any collection of money was taken up by Plaintiff and Defendants had no evidence that any of the money collected went

to Plaintiff. Plaintiff argues that Defendants' editing of the broadcast videotape to include Plaintiff's voice while the woman was passing the collection basket as well as Defendants' failure to investigate obvious sources who would have had knowledge of what happened in India demonstrates Defendants acted with actual malice.

Defendants, in response and in support of their summary judgment motion, argue that the evidence fails to establish that Defendants knew the alleged falsity of the report or had serious doubt about its truth. Defendants contend that they obtained their information about the India crusade from J.N. Sharma, an Indian journalist who covered the India crusade as an independent contractor for ABC News Intercontinental, Inc. According to Defendants, Mr. Sharma reported that he had personally attended Plaintiff's crusade, advertised in Madras as the Robert Tilton India Crusade. Mr. Sharma also reported that he personally observed Mr. Harris, a person whom he understood to be a representative of Plaintiff, ask the crowd at the crusade to donate money. Mr. Sharma reported that he observed Plaintiff on stage while the collection was taken up and observed many people contributing. According to Defendants, Mr. Sharma sent taped interviews of individuals who had been present at the India crusade. One of those interviewed stated that Plaintiff had asked for the money and another stated that the followers of Plaintiff had begged for money.

In regard to Defendant, Diane Sawyer's statement that "if each of these people gave just a few pennies, Tilton would get back

hundreds of thousands of dollars, money taken from the people he himself calls 'the poorest people on earth,' " Defendants argue that Plaintiff cannot dispute that the crowds attending were poor and that money was collected from them. Defendants also state that Plaintiff cannot dispute that if each of the people had given just a few pennies that hundreds of thousands of dollars would have been collected. Defendants assert that the statement does not remark as to what was to be done with the funds after they were collected. According to Defendants, the gist of the report was that Robert Tilton India Crusade took collections from the masses of the desperately poor who attended the crusade.

Upon review of the record, the Court finds that Plaintiff has failed to submit sufficient evidence to raise a genuine issue of fact as to whether Defendants knew the alleged libelous statements were false or had serious doubts as to their truth. Plaintiff's only evidence in support of actual malice is that ABC's raw footage did not have a picture of Plaintiff on stage during the collection of the offering, that the footage was edited to show Plaintiff preaching when the collection basket was passed and Plaintiff's and other persons' testimony that Plaintiff was not on stage. Such evidence, however, does not establish with convincing clarity that Defendants knew the alleged falsity of the statements or had serious doubts as to the truth of these statements. Plaintiff has failed to offer any evidence to dispute the evidence that Mr. Sharma reported to Defendants that Plaintiff was on stage at the time the offering was collected and that he sent Defendants taped

interviews with persons attending the India crusade stating Plaintiff or his followers collected an offering.<sup>24</sup> Moreover, Plaintiff has failed to dispute that the crusade was the Robert Tilton India crusade and that offerings were collected during the crusade. Plaintiff has argued that if Defendants had interviewed Jack Harris and Reverend Dayanandhan, the assistant coordinator of the India crusade, they would have discovered the truth of the statements. However, a failure to investigate is not sufficient to establish actual malice. St. Amant, 390 U.S. at 732.

In his briefing, Plaintiff asserts that Mr. Sharma was acting within the scope of his employment with ABC and therefore actual malice can be imputed to ABC. The Court, however, disagrees. Plaintiff, in support of his assertion, relies upon Mr. Sharma's affidavit. Yet the affidavit does not establish Mr. Sharma was an employee of ABC or was acting within his employment when reporting on the India crusade. Indeed, the affidavit as well as the contract attached thereto indicates that Mr. Sharma was an independent contractor for ABC. Plaintiff has not presented any evidence to show to the contrary. Therefore, the Court finds Plaintiff's assertion not compelling.<sup>25</sup>

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<sup>24</sup>Plaintiff argues, in his response to Defendants' motion, that Mr. Sharma's credibility is at issue. However, Plaintiff has failed to show that Defendants had reason to doubt Mr. Sharma's credibility or the veracity of Mr. Sharma's reporting.

<sup>25</sup>Even if the evidence were adequate to establish Mr. Sharma was an employee of ABC, the Court finds that Plaintiff has failed to proffer sufficient evidence to show that Mr. Sharma knew what he reported was false or that he had serious doubts as to the truth of the report.

### Other Missions

In PrimeTime II, Defendants reported (while showing names of five of missions):

"SAWYER: And Tilton creates the impression that after he pays for his overhead and all that expensive air time, the money goes to good works like these his missions around the world. But we tracked down every charitable contribution of Tilton and we calculate he spends more in a year on billboards around Dallas than he does on all these missions combined."

Defendants, in their motion, contend that summary judgment is appropriate as the statements made in the above-quoted segment were true. Defendants assert that, during their investigation, they attempted to obtain information from the Church in regard to its missions, but the Church denied access to any information. Defendants contend the above-quoted segment of PrimeTime II was based upon the information they were able to gather from their investigation. According to that investigation, \$180,000 per year was spent on billboards and \$150,000 on missions. In addition, Defendants state that discovery has revealed that in 1991 Plaintiff spent \$325,000 on leasing billboards and gave \$177,272 to the five missions. Defendants thus argue that Plaintiff cannot establish falsity of the segment. Furthermore, Defendants argue that Plaintiff cannot establish actual malice in regard to the segment as Plaintiff has no evidence to show Defendants deliberately selected missions which received less contributions and has not shown that they had knowledge of the alleged falsity of their report or serious doubts as to the truth of the broadcast.

In response, Plaintiff concedes that the Church spent more on billboards than the five missions shown on the broadcast. However,

Plaintiff contends that the gist of the report was to accuse Plaintiff of misleading his followers concerning support of missions and denigrate the amount of his support. Plaintiff asserts that Defendants knew the gist was false.

Even if the Court were to apply the preponderance of the evidence standard to the issue of falsity, the Court finds that Plaintiff has failed to raise a genuine issue of material fact that the challenged segment or the gist of that segment was false. In regard to the issue of actual malice, the Court finds that Plaintiff has failed to present any proof with convincing clarity to raise a genuine issue of fact that Defendants knew the alleged falsity of the statements or that they published the statements with a high degree of awareness of the probable falsity.

PrimeTime II also reported:

"SAWYER: [voice over] Also after our broadcast, Tilton attacked us for what we said about his missions, the ones he implies are his own, like this one. Here's how he promotes it on his TV show.

ANNOUNCER: And Wings of Mercy, a center sponsored by Robert Tilton Ministries --

SAWYER: [voice-over] The promotion makes you think it is Tilton's center, but listen to his deposition.

ATTORNEY: Know what Wings of Mercy is?

PLAINTIFF: Not really.

SAWYER: No wonder, since PrimeTime has learned that Tilton's contribution to that mission is just \$300 a month."

In his motion and in response to Defendants' motion, Plaintiff contends that Defendants knowingly created a context in their broadcast whereby the viewer would understand that Plaintiff's

contribution to his missions, such as Wings of Mercy, was "meager, paltry and insignificant." Plaintiff claims that he did contribute \$300 a month to the Wings of Mercy shelter and that this amount was the amount needed by the shelter. Plaintiff contends that he provided support to the mission when no one else would. Thus, his contribution was not negligible as the broadcast implied.

Defendants, in response and in support of their motion, contend that their broadcast was true. Defendants state that it is undisputed Plaintiff did promote on his television program that Wings of Mercy was a center sponsored by Robert Tilton Ministries; that his contribution was only \$300 per month and that he did not recall in his deposition what Wings of Mercy was. Defendants state they believed the information to be true.

Having reviewed the challenged segment and the evidence related thereto, the Court finds that Plaintiff has failed to raise a genuine issue, under a preponderance of the evidence standard of proof, that the broadcast was false. Moreover, the Court finds that Plaintiff has failed to raise a genuine issue of fact as to whether Defendants knew the report was false as alleged or entertained serious doubts as to the truth of the broadcast.

#### **Additional Incidents of Alleged Actual Malice**

The last three paragraphs of Plaintiff's statement of material facts in his partial summary judgment motion set forth facts addressing the issue of "malice." The first paragraph refers to a July 1992 newspaper article purporting to quote Defendant, Diane Sawyer, as saying "[w]hen I saw Tilton on TV and what he was doing,

I was appalled, . . . . He needs to be stopped." The second paragraph refers to affidavit testimony from Plaintiff that prior to PrimeTime I, he directed the Church's attorney to respond to Defendant, Kelly Sutherland's request for an interview and decline such an interview; that at his direction, the Church offered to review any broadcast to inform PrimeTime Live of errors, if any, and to furnish any documents necessary to prove the errors; that at his direction, the Church advised PrimeTime Live that the Church would enter into a contract with PrimeTime Live that the Church would not seek in any manner prior restraint of the planned broadcast if allowed to review the broadcast; but that ABC would not allow the Church to know the planned content of the broadcast to correct errors, if any. The third and final paragraph refers to handwritten notes of Defendant, Kelly Sutherland, taken during a telephone conversation with Defendant, Robbie Gordon, which state "no fraud to be had on this guy -- can have fun with him though."

Defendants responded to Plaintiff's statement of facts believing the paragraphs pertained to the issue of actual malice. Defendants addressed each of the paragraphs and argued that none of the facts stated proved actual malice. In reply to Defendants' response, Plaintiff states that the paragraphs have nothing to do with knowledge of falsity or publication with reckless disregard as to truth or falsity. He states they are concerned with malice, which is a prerequisite for punitive damages under Oklahoma law. Nonetheless, Plaintiff goes on to state that "evidence of ill will or ulterior motive, 'malice,' can bolster the inference of "actual

malice," citing to Harte-Hanks, 491 U.S. at 667 ("a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence . . . and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.") (Plaintiff's Reply to Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment, p. 7).

Because of Plaintiff's latter statement that evidence of malice may bolster the inference of actual malice, the Court has reviewed the evidence in regard to the issue of actual malice.<sup>26</sup> The Court initially opines that the July 1992 newspaper article is not proper evidence for submission on summary judgment as it is inadmissible hearsay and Plaintiff has not shown that the author of the article will be available for cross-examination at trial. Fed.R.Evid. 802; Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919, 924 (2d Cir. 1985) (inadmissible hearsay may not be considered on summary judgment motion absent a showing that admissible evidence will be available at trial). However, even if the evidence were admissible and proper for submission, the Court finds that the newspaper article as well as the other evidence cited by Plaintiff in his statement of material facts are not sufficient alone or in combination with all other evidence presented by Plaintiff to establish with convincing clarity that

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<sup>26</sup>In regard to the issue of "malice," the Court finds that the evidence cited by Plaintiff is irrelevant since the Court has found that Plaintiff is not entitled to summary judgment on his claims.

Defendants had knowledge the alleged defamatory statements in PrimeTime I and PrimeTime II were false or that they entertained serious doubts as to the truth of those statements.

Based upon the foregoing, the Motion for Summary Judgment (Docket Entry #244) filed by Defendants, American Broadcasting Companies, Inc., Robbie Gordon, Diane Sawyer and Kelly Sutherland is **GRANTED** and the Motion for Partial Summary Judgment (Docket Entry #257) filed by Plaintiff, Robert G. Tilton, is **DENIED**. Judgment shall issue forthwith.

ENTERED this 19<sup>th</sup> day of June, 1995.

  
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MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 16 1995 *RL*

RUSSELL GORDON WOODS )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 DENISE SPEARS (WARDEN) and )  
 the ATTORNEY GENERAL OF THE )  
 STATE OF OKLAHOMA, )  
 )  
 Respondents. )

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT

Case No. 95-C-308-H ✓

ENTERED ON DOCKET  
DATE JUN 19 1995

REPORT AND RECOMMENDATION OF U. S. MAGISTRATE JUDGE

This report and recommendation pertains to Petitioner's Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Docket #1),<sup>1</sup> the Response to Petition for Writ of Habeas Corpus (Docket #6), and the Traverse to Respondent's Response to Writ of Habeas Corpus (Docket #7). Petitioner pled guilty in Tulsa County District Court, Case No. CRF-93-5420, to the crime of larceny of merchandise from a retailer over \$50.00 and under \$500.00 after former conviction of a felony and was sentenced to ten years imprisonment. Petitioner did not appeal, but he sought post-conviction relief in the District Court of Tulsa County, raising the same claims raised in the petition for habeas corpus relief. The application for post-conviction relief was denied on October 27, 1994, and the Oklahoma Court of Criminal Appeals affirmed the denial on January 3, 1995.

In the Tulsa County District Court's decision denying the application for post-conviction relief, the court found that petitioner was not denied effective assistance of counsel, that he was not denied his right to appeal, that his plea was voluntarily and

<sup>1</sup> "Docket numbers" refer to numerical designations assigned sequentially to each pleading, motion, order, or other filing and are included for purposes of record keeping only. "Docket numbers" have no independent legal significance and are to be used in conjunction with the docket sheet prepared and maintained by the United States Court Clerk, Northern District of Oklahoma.

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knowingly made, and that his failure to file a timely appeal waived all issues which could have been raised on appeal, since no sufficient reason was offered for the failure to do so.

In Harris v. Reed, 489 U.S. 255 (1989), the Supreme Court concluded that an adequate and independent finding of procedural default by a state court reviewing a prisoner's application for post-conviction relief will bar federal habeas review of the federal habeas claim, unless the petitioner can show "cause and prejudice" or that failure to consider the federal claim will result in a fundamental miscarriage of justice. The petitioner's procedural default precludes habeas review, like direct review, only if the last state court rendering a judgment "clearly and expressly" states that the judgment rests on a state procedural bar. The Court was curtailing reconsideration of the federal issue on federal habeas as long as the state court explicitly invoked a state procedural bar rule as a separate basis for decision. The decision in Coleman v. Thompson, 501 U.S. 722 (1991), reiterated that federal courts must recognize state procedural laws.

In its Order of January 3, 1995, affirming denial of post-conviction relief to Petitioner, the Oklahoma Court of Criminal Appeals found that Petitioner waived any issues remaining by his failure to appeal. Therefore this court is barred from consideration of the petitioner's claims by his procedural default under state law, unless he can show both cause excusing his procedural default and actual prejudice resulting therefrom. Petitioner contends that counsel did not tell Petitioner the proper minimum sentence for the crime when he recommended pleading guilty and refused to come to the jail to talk about challenging the plea and thus no appeal was filed. Petitioner claims that his mother and another inmate can confirm his story.

The Supreme Court has held that an ineffective assistance of counsel claim may be brought for the first time collaterally. Kimmelman v. Morrison, 477 U.S. 365 (1986). The Kimmelman Court explained its rationale as follows:

Because collateral review will frequently be the only means through which an accused can effectuate the right to counsel, restricting the litigation of some Sixth Amendment claims to trial and direct review would seriously interfere with an accused's right to effective representation. A layman will ordinarily be unable to recognize counsel's errors and to evaluate counsel's professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal. (Citations omitted).

Id. at 378.

The Tenth Circuit has adopted a general policy that claims of ineffective assistance of counsel are best addressed on collateral attack where a complete evidentiary record can be established. United States v. McIntyre, 997 F.2d 687, 711 (10th Cir. 1993), cert. denied, \_\_\_ U.S. \_\_\_, 114 S.Ct. 736, 126 L.Ed.2d 699 (1994); Beaulieu v. United States, 930 F.2d 805, 806-07 (10th Cir. 1991); Osborn v. Shillinger, 861 F.2d 612, 622-23 (10th Cir. 1988). "[I]neffective claims are ordinarily inappropriate to raise on direct appeal because they require additional fact-finding." Id. at 623.

A defendant making an ineffectiveness claim on a counseled guilty plea must identify particular acts and omissions of counsel tending to prove that counsel's advice was not within the wide range of professional competence. Hill v. Lockhart, 474 U.S. 52, 56-57 (1985); Strickland v. Washington, 466 U.S. 668, 687 (1984). The defendant must also show prejudice, "a reasonable probability that, but for counsel's errors, he would not have

pleaded guilty and would have insisted on going to trial." 474 U.S. at 59. The performance inquiry is made with deference to counsel's assistance, but in recognition that the validity of a guilty plea depends upon a defendant's knowing and voluntary choice among alternatives. 474 U.S. at 56. Ineffective assistance of counsel claims frequently are raised by collateral attack as the implications of trial counsel's performance are realized. 861 F.2d at 622-23. Some ineffectiveness claims cannot be resolved with sole reference to the record including regular plea proceedings. 930 F.2d at 807-08.

This court may properly consider petitioner's claim of ineffective assistance of counsel at this time and if petitioner succeeds in establishing that he received ineffective assistance of his attorney, he may be able to show cause excusing his procedural default at the state level and actual prejudice resulting therefrom. In such event, this court could properly consider his other claims at that time.

Petitioner claims his attorney advised him "to plead guilty to a prison offense when the offense is a county jail offense" and failed to come see Petitioner after he was sentenced to discuss an appeal (Docket #1, pg. 6). He contends that another inmate told him the offense was "no longer a prison offense but a county jail offense" (Docket #1, pg. 6).

Petitioner plead guilty to larceny of merchandise over \$50.00 and under \$500.00. Under Okla. Stat. tit. 21 §1704, grand larceny is defined as taking property of value exceeding fifty dollars. Prior to September 1, 1993, under §1705 the punishment for grand larceny was "imprisonment in the penitentiary not exceeding five years" and under §1706, the punishment for petit larceny was a fine or "imprisonment in the county jail not to exceed thirty days."

However, §§1705 and 1706 were amended on September 1, 1993. Section 1705 now states: "[g]rand larceny is a felony punishable by imprisonment in the State Penitentiary not exceeding five (5) years if the value of the property is Five Hundred Dollars (\$500.00) or more and if the value of the property is less than Five Hundred Dollars (\$500.00) punishable by incarceration in the county jail for not more than one (1) year or by incarceration in the county jail one or more nights or weekends. . . , at the option of the court. . ." Under the new statute, if the crime is larceny of merchandise valued at less than five hundred dollars, it cannot be enhanced under Okla. Stat. tit. 21 §51, which only applies to "second and subsequent offenses after conviction of offense punishable by imprisonment in the state penitentiary" if the second and subsequent offense is punishable by imprisonment in the penitentiary or is for petit larceny<sup>2</sup>. Petitioner pled guilty on March 24, 1994.

Petitioner has identified particular acts and omissions of counsel tending to show that counsel's advice was not within the range of professional competence and a reasonable probability that, but for counsel's error, he would not have plead guilty. There are factual issues requiring the court to consider extra-record facts concerning counsel's representation of petitioner. Factual disputes and inconsistencies beyond the record exist; thus, an evidentiary hearing is needed.

The district court should proceed in accordance with § 2254 and Rule 8 of the Rules Governing § 2254 Cases in the United States District Courts, and conduct an evidentiary

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<sup>2</sup>The Court notes that Okla. Stat. tit. 21 §51 has not been amended since §§1705 and 1706 were amended, so it does not adequately reflect those amendments and provide for enhancement if the subsequent offense is larceny of property valued at fifty to five hundred dollars.

hearing.<sup>3</sup> Prior to that hearing, the court should consider appointing counsel to represent Petitioner pursuant to Rule 8(c) of the Rules Governing § 2254 Cases, and 18 U.S.C. § 3006A. At the evidentiary hearing, the court should consider (1) whether petitioner received ineffective assistance of counsel, and if so, (2) whether petitioner made a valid waiver of his right to appeal.

Dated this 16<sup>th</sup> day of June, 1995.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

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<sup>3</sup>Alternatively, the court could refer the evidentiary hearing to the magistrate judge as permitted by Rule 8(b) of the Rules Governing § 2254 Cases, and Local Rule 72.1(A)(3), designating this as a function that magistrate judges are authorized to perform.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 14 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

LEONARD NASH,  
Plaintiff,

vs.

CHRIS TINSLEY, OFFICER WAYNE,  
JOHN PIERCE, DEPUTY ROBERT  
LUCAS, et al.,

Defendants.

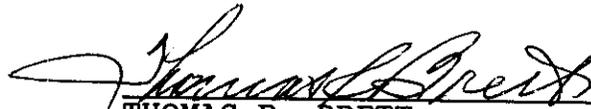
Case No. 94-C-850-B

ENTERED IN DOCKET  
DATE JUN 16 1995

J U D G M E N T

In accord with the Order filed this date sustaining the Defendants' Motion for Summary Judgment, the Court hereby enters judgment in favor of the Defendants, Chris Tinsley, Officer Wayne, John Pierce, Deputy Robert Lucas and various John Does, and against the Plaintiff, Leonard Nash. Plaintiff shall take nothing of his claim. Each side shall pay its own costs and attorneys fees.

Dated, this 14<sup>th</sup> day of June, 1995.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 14 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

LEONARD NASH,  
Plaintiff,

vs.

CHRIS TINSLEY, OFFICER WAYNE,  
JOHN PIERCE, DEPUTY ROBERT  
LUCAS, et al.,

Defendants.

Case No. 94-C-850-B

ENTERED ON DOCKET

JUN 16 1995

ORDER

Before the Court are Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim and 28 U.S.C. § 1915(d) for filing a frivolous claim; in the alternative, Defendants move for Summary Judgment pursuant to Fed. R. Civ. P. 56. Defendants also seek attorney's fees (Docket #6). Also before the Court are a Motion to Amend (Docket #14) and a Motion for Summary Judgment (Docket #12) filed by Plaintiff Leonard Nash ("Nash").

Nash was incarcerated at the Tulsa City/County Jail ("Tulsa Jail") from December 19, 1993, to April 29, 1994. Defendants, employees of the Tulsa County Sheriff's Department, are Chris Tinsley, Officer Wayne (whose full name is not in the record), John Pierce and several John Does. Nash filed a Motion to Amend his Complaint to name one of the John Does as being Deputy Robert Lucas. Nash's Motion to Amend is hereby granted.

While at the Tulsa Jail, Nash had a separate civil rights lawsuit, filed in Tulsa County District Court, pending against members of the Tulsa Police Department and Tulsa County Sheriff's

Department.<sup>1</sup> Nash alleges that his incoming legal mail, pertaining to his state case, was improperly handled by Defendants, who delayed one letter and opened another. On April 8, 1994, Defendant Chris Tinsley delivered to Nash a certified letter,<sup>2</sup> postmarked March 31, 1994, from the Tulsa Police Department. The return receipt, signaling delivery of the letter to the Tulsa Jail, was signed on April 4, 1994. Secondly, on April 22, 1994, Defendant Officer Wayne delivered to Nash a certified letter<sup>3</sup> postmarked April 19, 1994, from the attorney representing the defendants in Nash's state-court action. The second letter, Nash alleges, was cut open and documents were missing.

Nash then filed this lawsuit pursuant to 42 U.S.C. § 1983, alleging that Defendants violated his First and Fourteenth Amendment rights of access to attorneys and access to the courts. He requests \$450,000 in compensatory and punitive damages.

#### I. MOTION TO DISMISS

Defendants move to dismiss Nash's claim pursuant to 42 U.S.C. § 1915(d), which states that the court may "dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." However, the Court declines to dismiss the claim as frivolous; therefore, Defendants' Motion for

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<sup>1</sup>Defendants in the state court case, No. CJ-94-789, are John W. Tipton, Nolito A. Osea, Karen Cruse, Tulsa Police Chief Ron Palmer and Tulsa County Sheriff Stanley Glanz.

<sup>2</sup>The number of the first certified letter is P 064 379 267.

<sup>3</sup> The number of the second certified letter is Z 695 761 935.

Attorney's Fees is denied.

The Court next turns to Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6). To dismiss a complaint and action for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to dismiss under Rule 12(b)(6) admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of the plaintiff. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

Nash alleges in his Complaint that Defendants delayed delivering legal mail to him, thereby violating his right of access to the courts and to attorneys. Accepting Nash's allegations as true for the purposes of this Motion to Dismiss, the Court holds that Nash has sufficiently stated a cognizable claim. Bolding v. Holshouser, 575 F.2d 461 (4th Cir. 1978). Therefore, Defendants' Motion to Dismiss is denied as to this issue.<sup>4</sup>

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<sup>4</sup>Nash did not allege a violation of his free speech rights under the First Amendment. See Brewer v. Wilkinson, 3 F.3d 816, 821 (5th Cir. 1993), *cert. den.* 114 S.Ct. 1081 (1994) ("A prisoner's claim that interference with his legal mail violated his right of access to the courts is distinct from his claim that such conduct violated his right to free speech"). Nash focuses primarily on the delay in receiving his first letter and the denial of his right of access to the courts and the attorneys, rather than on the fact that some pages were missing from the defendants' Application to File Amended Answer. Moreover, Nash requested the state court to order the

## II. MOTIONS FOR SUMMARY JUDGMENT

The parties have filed cross-Motions for Summary Judgment on the issue of whether Nash's constitutional rights were violated by Defendants.

### A. Summary Judgment Standard

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Widon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, the court stated:

The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 317 (1986). To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." and "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988).

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defendants to send him a second copy of the Application (Complaint, Attachment 5, 7).

Unless the movant can demonstrate entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals stated:

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination . . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be "merely colorable" or anything short of "significantly probative."

\* \* \*

A movant is not required to provide evidence negating an opponent's claim . . . [r]ather, the burden is on the nonmovant, who "must present affirmative evidence in order to defeat a properly supported motion for summary judgment." . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (Citations omitted.)

Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1521 (10th Cir. 1992).

#### B. Access to the Courts

The First and Fourteenth Amendments protect a prisoner's right to correspond with people outside prison, and to adequate and meaningful access to the courts. See Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); Wolff v. McDonnell, 418 U.S. 817, 97 S.Ct. 2963, 52 L.Ed.2d 72 (1977). While observing that the

"precise contours of a prisoner's right of access to the courts remain somewhat obscure", the Fifth Circuit Court of Appeals noted that the U.S. Supreme Court has not extended the right beyond protecting an inmate's ability to prepare and transmit a necessary legal document to a court. Brewer v. Wilkinson, 3 F.3d 816, 821 (5th Cir. 1993), *cert. den.* 114 S.Ct. 1081, 127 L.Ed.2d 397 (1994). See also Wolff, 418 U.S. 817.

Further, before a constitutional claim may arise, the inmate must suffer prejudice due to prison officials' actions. See Twyman v. Crisp, 584 F.2d 352, 357 (10th Cir. 1978) ("If appellant could show that he has somehow been prejudiced in any of his various lawsuits, he might perhaps have a legitimate claim"); Grady v. Wilken, 735 F.2d 303, 306 (8th Cir. 1984) (The plaintiff's "twenty day mail hiatus did not prejudice his lawsuit: during this period no time limits expired and no mail was sent from the district court"); Walker v. Navarro County Jail, 4 F.3d 410 (5th Cir. 1993) ("In order for [the plaintiff's] claim to rise to the level of a constitutional violation of his right of access to the courts, he must allege that his position as a litigant was prejudiced by the mail tampering"); Mitchell v. Carlson, 404 F. Supp. 1220, 1225 (D. Kan. 1975) ("[A] delay in the delivery of a prisoner's mail is not a denial of his right of free access to the courts so long as the delay is neither material or prejudicial"); Watson v. Cain, 846 F. Supp. 621 (N.D. Ill. 1993) (The plaintiff "has not demonstrated that any delay in receiving court mail prejudiced any pending litigation").

While prisoners have a constitutional right to access to the courts, prison officials have broad discretion in regulating the entry of mail into a prison. See Thornburgh v. Abbott, 490 U.S. 401, 109 S.Ct. 1874, 1878, 104 L.Ed.2d 459 (1989). The U.S. Supreme Court has acknowledged that prison officials are "better equipped than the judiciary to deal with the security implications of interactions between prisoners and the outside world, and emphasized that broad deference should be accorded their efforts." Smith v. Maschner, 899 F.2d 940, 944 (10th Cir. 1993), citing Thornburgh, 490 U.S. 401. Therefore, the prevailing test as to whether a prisoner's constitutional rights have been violated is a determination of whether the actions taken by prison officials are "reasonably related to a legitimate penological interest." Thornburgh, 490 U.S. at 419, citing Turner v. Safley, 482 U.S. 78, 89, 107 S.Ct. 2254, 2261, 96 L.Ed.2d 64 (1987). With these principles in mind, the Court evaluates Nash's two claims.

### C. Legal Mail

The first question before the Court is whether both letters to Nash can be considered "legal mail" and, therefore, the basis for a constitutional claim of denial of access to the courts.

The Tulsa Jail's policy regarding prisoner mail states:

3. All incoming mail is opened and checked for contraband....
4. Incoming mail from attorneys or the Courts is only opened when the jail administration has a justifiable reason for suspecting that it poses a real threat to the safety and security of the jail facility, public

officials or the general public.

**NOTE:** When mail from attorneys or the Courts is opened, it is only opened in the presence of the inmate. [emphasis in original]

(Defendant's Motion for Summary Judgment, Exh. D)

The Court believes that both letters should be considered "legal mail" in this case. The return address on the first envelope was the Tulsa Police Department. (See Complaint, Attachment 2) The return address on the second envelope was the Law Office of Foliart, Huff, Ottaway & Caldwell. (See Complaint, Attachment 4) The Tulsa Jail policy apparently treats all attorney mail as legal mail, and the Tenth Circuit Court of Appeals, in upholding the invalidation of a strict definition of "legal mail", stated that "[t]he protection afforded to legal correspondence applies equally to criminal and civil matters, and privileged correspondence with counsel, public officials, and agencies cannot be thus confined." Ramos v. Lamm, 639 F.2d 559, 582 (10th Cir. 1980). Therefore, the Court believes that both letters should be considered "legal mail".

#### D. Nash's First Letter

Nash alleges that he received the first letter on April 8, 1994, although the return receipt was signed on April 4 and the postmark was March 31. Therefore, construing all facts in Nash's favor for the purposes of Defendants' Motion for Summary Judgment, there was a four-day delay in delivering the letter, which violates the Tulsa Jail mail policy. The question, however, is whether the delay also violates Nash's right of access to the courts.

The Court first notes that delay of the letter did not affect Nash's "ability to prepare and transmit a necessary legal document to a court". See Brewer, 3 F.3d at 821. Rather, it only delayed Nash's receipt of the defendants' answer to his state-court claim.

Further, the Court finds as a matter of law that Nash was not prejudiced by the delay. Construing Nash's pro se petition liberally, he alleges prejudice because on April 1, 1994, he erroneously filed for default judgment in the state-court case, due to the fact that the defendants' answer was due on March 31 and he had not received it. However, the return receipt indicates that the letter was not received by the Tulsa Jail until April 4. Even if Nash had received the letter promptly on April 5, pursuant to the Tulsa Jail policy, he already had filed for default judgment. Also, there is no evidence before the Court to indicate that Nash's state-court claim was dismissed or otherwise adversely affected by the delay. Assuming, arguendo, that prejudice occurred, such prejudice was not due to the delay between the time the Tulsa Jail received the letter and the time it was delivered to Nash. Therefore, Defendants' Motion for Summary Judgment as to Nash's first claim is granted. Conversely, Nash's Motion for Summary Judgment is denied as to this issue.

#### **E. Nash's Second Letter**

On April 22, 1994, Defendant Officer Wayne delivered to Nash a certified letter postmarked April 19, 1994, from the law firm representing the defendants in Nash's state-court action. Nash

alleges that the letter, which contained a copy of an Application to File Amended Answer, had been cut open and pages were missing from the document.

The question is whether opening Nash's legal mail outside his presence violates his constitutional rights. Clearly, such an occurrence, if true, violates the Tulsa Jail mail policy. However, the Fifth Circuit has held that "the violation of the prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights." Brewer, 3 F.3d at 825. The Brewer court held that, in light of the U.S. Supreme Court's holdings in Turner and Thornburgh, opening a prisoner's legal mail to search for contraband is a "legitimate penological objective", as required by Thornburgh. Several circuit courts of appeals, including the Tenth Circuit, previously have held that a prisoner has a valid § 1983 claim when prison officials open legal mail outside the inmate's presence. See, e.g., Ramos, 639 F.2d at 582; Jensen v. Klecker, 648 F.2d 1179 (8th Cir. 1981); Bach v. Illinois, 504 F.2d 1100 (7th Cir. 1974). These cases were based on the heightened scrutiny test required by Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974).<sup>5</sup> In Thornburgh, however, the Supreme Court expressly limited the Procunier test to

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<sup>5</sup>Procunier held that any prison regulation restricting inmate mail (both incoming and outgoing) must be based on an "important or substantial governmental interest unrelated to the suppression of expression" and could not limit First Amendment freedoms any greater than necessary to protect the particular governmental interest involved. Id. at 413, 94 S.Ct. at 1811.

outgoing prisoner mail only. The Court believes that Brewer, which considers the effect of Thornburgh's lesser "legitimate penological objective" test on the opening of incoming legal mail, is the better view and more in line with current Supreme Court case law.

Nor has Nash shown a denial of access to the courts. Opening the letter and removing contents did not interfere with Nash's "ability to prepare and transmit a necessary legal document". Brewer, 3 F.3d at 821. It also did not prejudice Nash, in that he requested the state court to order the defendants to send him another copy. (Complaint, Attachment 5, 7) See Mitchell, 404 F. Supp. at 1225 ("[N]o prejudice has resulted from the delay ... even assuming that the document was removed from the pleadings by an official of the ... penitentiary ..."). Therefore, Defendants' Motion for Summary Judgment is granted on this issue; Nash's Motion for Summary Judgment is denied.

In summary, Nash's Motion to Amend (Docket #14) is granted. Defendants' Motion to Dismiss (Docket #6) is denied. Defendants' Motion for Attorney's Fees (Docket #6) is denied. Defendants' Motion for Summary Judgment (Docket #6) is granted. Plaintiff's Motion for Summary Judgment (Docket #12) is denied.

IT IS SO ORDERED, this 14<sup>th</sup> day of June, 1995.

  
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THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE JUN 16 1995

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SUN COMPANY, INC., (R & M), a Delaware corporation, )  
and TEXACO INC., a Delaware corporation, )

Plaintiffs, )

vs. )

Case No. 94-C-820-K

BROWNING-FERRIS, INC., a Delaware corporation, et al., )

Defendants. )

**F I L E D**

JUN 16 1995

**ORDER**

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Upon motion of Plaintiffs and for good cause shown,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion for  
Voluntary Dismissal Without Prejudice of Defendant, Stallings, Inc. only is granted.

Dated this 14 day of June, 1995.

s/ **TERRY C. KERN**

JUDGE OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ARTHUR GERALD GRAVES,

Petitioner,

vs.

RONALD J. CHAMPION,

Respondent.

No. 94-C-1008-K ✓

FILED  
ENTERED ON DOCKET

DATE JUN 15 1995 JUN 14 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections, challenges the judgment and sentence of Tulsa County District Court in Case No. CF-92-184. Petitioner also challenges the acceleration of his deferred sentence in CF-90-3629 on the basis of his conviction in CRF-92-184. Respondent has filed a Rule 5 response to which Petitioner has replied. As more fully set out below, the Court concludes that the petition for a writ of habeas corpus should be denied.

**I. BACKGROUND**

On April 30, 1992, Petitioner pled guilty to Possession of a Firearm in the Commission of a Felony (Count I) and Possession of a Controlled Drug with Intent to Distribute, After a Prior Conviction for Possession of a Controlled Substance (Count II), in Case No. CF-92-184. On August 13, 1992, he received a sentence of ten years on Count I and twenty-two years on Count II, with the sentences to run concurrently with each other, and with a ten-year

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sentence in CF-90-3629. Neither Petitioner nor his retained counsel, James Beckert, timely appealed the convictions although the state judge advised Petitioner of his right to file a motion to withdraw his guilty pleas and then file a certiorari appeal.

Thereafter, Petitioner filed two applications for post-conviction relief. The Tulsa County District Court denied Petitioner's first application, concluding that Petitioner failed to demonstrate a sufficient reason for his failure to file a timely direct appeal and, as such, he had waived all issues which could have been raised on direct appeal.<sup>1</sup> The Oklahoma Court of Criminal Appeals affirmed. (Exs. A and C attached to Respondent's Response, docket #4.)

In his second application, Petitioner alleged that he was denied an appeal through no fault of his own due to the trial court's failure to advise him of his appeal rights and ineffective assistance of counsel (grounds 1 and 2). He also alleged that the trial court was without jurisdiction because Petitioner did not personally enter his guilty pleas and because the trial court failed to administer an oath or affirmation before taking the pleas (grounds 3 and 4). In support of his first and second grounds, Petitioner attested as follows:

On August 15, 1992, Mr. James Beckert came to see me at the Tulsa County Jail and he asked me was I doing ok.

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<sup>1</sup>In his first application, Petitioner alleged (1) that his guilty plea was invalid, (2) that the trial court failed to establish a factual basis for his plea, (3) that his counsel was ineffective for failing to withdraw his guilty plea and that the trial court failed to advise him of his right to withdraw his guilty plea; and (4) that the sentence imposed was excessive.

I told him how could the D.A. give me 22 years for something that got dismissed and he told me he could. I told him that I wanted to withdraw my plea and he said that I should not because the D.A. might refile my other charges and not to worry I should be out in 3 years and he would come down to visit me when I got where I was going. On or about August 18, 1992, Mrs. Reed called my attorney on the three way and I advised him again that I wanted to withdraw my plea and he said he would take care of it. I paid Mr. Beckert 5,000 dollars to represent me on my case and he said 200 . . . dollars was for transcripts. I have made many attempts to obtain my transcripts from him but he will not respond to any of my letter[s]. I had Mrs. Reed to go up to Mr. Beckert's office to try to obtain my transcript and he told Mrs. Reed that he would send them to me. Mr. Beckert has lied to me for about 4 1/2 months about my transcripts now. He advised me during my court hearing that I had a good chance to beat my case on appeal. I made it very clear to Mr. Beckert that I wanted to withdraw my plea and appeal my conviction.

(Ex. D attached to Petitioner's reply.)

Petitioner also submitted an affidavit of Kathy Reed in which she attested follows:

Statement to verify conversation between Arthur Graves and Mr. James Beckert, on or about the 8-18-92. Mr. Graves asked Mr. Beckert to withdraw his guilty plea and that he (Mr. Graves) wanted to get back in court on the charges. He didn't want to accept the plea. Mr. Graves also asked Mr. Beckert to send him copies of the court transcripts for his case. Mr. Beckert said he would take care of it that week, and to stay calm and not to worry. Several times after that conversation Mr. Graves requested copies of the transcripts from Mr. Beckert and never rec[e]ived them. I Kathy Reed tried numerous times to get the transcripts from Mr. Beckert without success.

(Ex. E attached to Petitioner's reply.)

The Tulsa County District Court denied Petitioner's request for post-conviction relief. The court found Petitioner's first and second claims barred by the doctrine of res judicata as they had been determined in Petitioner's prior application for post-

conviction relief, and Petitioner's third and fourth claims procedurally barred because Petitioner had failed to raise them in his first application for post-conviction relief. On February 14, 1995, the Oklahoma Court of Criminal Appeals remanded "for further findings of fact and conclusions of law, particularly addressing whether Petitioner was denied an appeal through no fault of his own in light of the record and affidavit provided." The Court of Criminal Appeals was under the impression that Kathy Reed was a DOC employee. (Ex. F attached to Respondent's Response, docket #4.)

On remand, the Tulsa County District Court obtained the following affidavit of Petitioner's retained counsel:

- I, James A. Becker, of lawful age, being duly sworn, upon oath, state:
1. I am an attorney practicing in Tulsa County, Oklahoma.
  2. I represented petitioner in the above styled cases through his pleas of guilty, and sentencing.
  3. There was no agreement between the petition and myself that his convictions would be appealed. Furthermore, I have no recollection of any conversations with petitioner about the withdrawal of his plea in this matter.
  4. I do not recall having any conversations with petitioner either in person or on the telephone during the ten days following his sentencing.
  5. The only conversations I recall having with the petitioner after his sentencing were regarding a Seizure and Forfeiture action of a Ford Mustang automobile owned by Kathy Reed. Furthermore, petitioner called me several times after that complaining about his accumulation of "points" which would adversely impact his confinement status as well as his release date, and that he needed certain documents for him to file a pro se appeal based upon what a David Lee Brown filed regarding cap time and length of sentence.
  6. To the best of my recollection, all of these conversations occurred some time after the petitioner had arrived at the Lexington facility.

The Tulsa County District Court found that the affiant upon

which Petitioner relied was not an employee of the Oklahoma Department of Corrections but was instead Petitioner's girlfriend and that

other than the self-serving statements of the petitioner, and the affidavit of petitioner's girl-friend, there is nothing to support petitioner's claim that petitioner was denied an appeal through no fault of his own. Petitioner's claims about requesting his attorney to withdraw his pleas is directly refuted by the affidavit of his Attorney which is attached to the State's Supplemental Response. And, this Court to a large extent discounts the affidavit of Ms. Reed because of her relationship with petitioner. Further, the only other evidence offered is a copy of a letter addressed to petitioner's attorney purportedly mailed on January 21, 1993, some five months after his sentencing. This delay in beginning to provide any written record of his desire to [appeal] depreciates petitioner's claim that he wanted to appeal within two days after his sentencing. Clearly there are no facts present in petitioner's case which would invoke the holdings of Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991).

Therefore, the court finds that petitioner was advised of the right to appeal, yet, during the ten-day period following sentencing, petitioner made no verifiable indications that he wanted to contact counsel so as to discuss the possibility and/or perfect an appeal of petitioner's conviction.

(Ex. G attached to Respondent's Response, docket #4.) On May 18, 1994, the Court of Criminal Appeals affirmed. (Ex. I attached to Respondent's Response, docket #4.)

Petitioner then sought federal habeas relief in this Court, raising the same grounds which he had alleged in his second application for post-conviction relief. Respondent argues that Petitioner's third and fourth grounds are procedurally barred due to Petitioner's failure to raise those issues in his first application for post-conviction relief. Respondent further argues that Petitioner was advised of his right to appeal his guilty pleas

and that he received effective assistance of counsel during the guilty plea and sentencing proceedings.

## II. ANALYSIS

As a preliminary matter, the Court determines that Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509, 510 (1982). The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 501 U.S. 1 (1992).

### A. Denial of Right to Appeal

Petitioner's claim of denial of his right to appeal has two parts: (1) he alleges that the trial court failed to inform him of his right to appointed counsel on appeal and the right to an appeal free of cost, and (2) that counsel failed to give notice and perfect a direct appeal during the ten-day period following sentencing although Petitioner requested him to do so. (Petition at 5 and 7.) In support, of the latter claim Petitioner relies on his affidavit and the affidavit of Kathy Reed, his girlfriend.

The Court declines to review Petitioner's first claim--that the state court had a duty to advise him of his right to appointed counsel on appeal and to an appeal free of cost--because it is

based solely on the alleged violation of state law.<sup>2</sup> See Hardiman v. Reynolds, 971 F.2d 500, 505 n.9 (10th Cir. 1992) (where court liberally construed the petition to assert a claim of ineffective assistance of counsel because petitioner's claim that the state court should have notified him of his right to an appeal free of cost was grounded only on Oklahoma law). It is well established that in a federal habeas corpus action, this Court is only concerned with whether a federal constitutional right was violated. 28 U.S.C. § 2254.

The standard governing Petitioner's claim of ineffective assistance of counsel is well established. Under Strickland v. Washington, 466 U.S. 668 (1984), to establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Id. at 687; Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). That standard applies to appellate counsel as well as trial counsel. United States v. Cook, 45 F.3d 388, 392 (10th Cir. 1995).

Petitioner does not dispute that the trial court informed him of his right to withdraw his guilty pleas. He argues, however, that he twice asked counsel to file a motion to withdraw his guilty pleas, but that counsel failed to do so. Petitioner alleges that on August 15, 1992, he informed his attorney at the Tulsa County

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<sup>2</sup>Petitioner relies on Copenhaver v. State, 431 P.2d 669 (Okla. Crim. App. 1968); Jewel v. Tulsa County, 450 P.2d 833, 835 (Okla. Crim. App. 1967); and Rule 4.1 of the Rules of the Court of Criminal Appeals. (Petitioner's reply brief, doc. #7, at 2-3; see also Petitioner brief, doc. #2, at 7-8.)

Jail, that he "desire[d] to withdraw the guilty pleas." (Reply at 6, docket #6.) Petitioner also alleges that on August 18, 1992, after he had been transferred to the Oklahoma Department of Corrections at Lexington Assessment and Reception Center (LARC), he placed a three-way telephone call, with the help of Kathy Reed, and again conveyed to counsel his desire to withdraw his pleas. (Id.) In the alternative, Petitioner argues that, even assuming that the conversations with his counsel did not occur, counsel was ineffective for failing to advise him of the pros and cons of withdrawing his guilty pleas and appealing his convictions. (Id. at 6-7.) In support of the latter argument, Petitioner relies on Baker v. Kaiser, 929 F.2d 1495 (10th Cir. 1991), Jones v. Cowley, 28 F.3d 1067 (10th Cir. 1994), Abels v. Kaiser, 913 F.2d 821 (10th Cir. 1990), and Anders v. California, 386 U.S. 738 (1967).

An attorney has no absolute duty in every case to advise a defendant of his appeal rights or to file an appeal following a guilty plea conviction. Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d 525, 527 (9th Cir. 1985); Carey v. Laverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); see also Hardiman, 971 F.2d at 506; Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Only "[i]f a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the

defendant inquires about an appeal right" does counsel have a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1188; see also Shaw v. Cody, No. 94-6172, 1995 WL 20425, \*2 (10th Cir. Jan. 20, 1995) (unpublished opinion); Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (counsel's failure to file a requested appellate brief, when he had not yet been relieved of his duties through a successful withdrawal, amounted to constitutionally ineffective assistance). "This duty arises when 'counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim.'" Hardiman, 971 F.2d at 506 (quoting Marrow v. United States, 772 F.2d 525, 529 (9th Cir. 1985)).

Petitioner has offered essentially the same testimony as he gave below in a state court "hearing" by affidavits. The state court judge found that Ms. Reed's affidavit was not credible because she was Petitioner's girlfriend and that Petitioner's claims that he asked counsel to file a motion to withdraw guilty pleas were directly refuted by his lawyer's affidavit. Although the ultimate question of whether or not counsel's performance was deficient is a mixed question of law and fact to be considered de novo, state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of 28 U.S.C. § 2254(d). Dever v. Kansas State Penitentiary, 36 F.3d 1531, 1536 (10th Cir. 1994). Therefore, these findings are entitled to a presumption of correctness under section 2254(d) unless Petitioner demonstrates that any of the seven exceptions to

the presumption of correctness apply. See Jones v. Cowley, 28 F.3d 1067, 1069 (10th Cir. 1994) ("State court factual findings, with specified exceptions, carry a presumption of correctness"); Case v. Mondragon, 887 F.2d 1388, 1392-93 (10th Cir. 1989); cert. denied, 494 U.S. 1035 (1990).

Petitioner has not demonstrated that any of the seven exceptions to the presumption of correctness set forth in section 2254(d)(1)-(7) apply to this case, or that the factual determinations made by the state district court, and adopted by the Oklahoma Court of Criminal Appeals, are not fairly supported by the evidence in the state court record. Petitioner merely argues that the state district court should not have discounted Ms. Reed's affidavit without an evidentiary hearing. (Reply at 6, docket #6.) This Court disagrees. A state court need not conduct a live evidentiary hearing to be entitled to the presumption of correctness under section 2254(d). May v. Collins, 955 F.2d 299, 310-15 (5th Cir.), cert. denied, 504 U.S. 901 (1992); see also Sumner v. Mata, 449 U.S. 539, 546-47 (1981) (appellate level factfinding, based as it was solely on the written record before the appellate court, qualified as a "hearing"). It remains possible, however, that under certain circumstances, findings of fact made on a paper record will satisfy the section 2254(d)(2) exception--i.e., that the state fact finding procedure employed by the State court was not adequate to afford a full and fair hearing. Id. at 311. Petitioner has not alleged any such circumstances. Therefore, this Court concludes that the state court could

determine the credibility of Petitioner, his girlfriend, and his retained counsel by comparing their respective affidavits. See Smith v. Estelle, 711 F.2d 677, 681 (5th Cir. 1983) (where court evaluated petitioner's ineffective assistance of counsel claim based on the affidavits of petitioner and his attorney), cert. denied, 466 U.S. 906 (1984).

Based on the state court findings, this Court concludes that the record does not support Petitioner's claim that he asked counsel to file a motion to withdraw his guilty pleas within ten days of sentencing and that counsel failed to do so. The Court also notes that, at sentencing, Petitioner expressed his desire to begin serving his sentences immediately, although the court advised him that he could choose to remain in the county jail during the pertinent ten-day period following the entry of the Judgment and Sentence.

Nor has Petitioner alleged a constitutional claim of error which could result in setting aside his guilty pleas. See Hardiman, 971 F.2d at 506. Even assuming Petitioner alleged ineffective assistance of counsel as a ground to set aside his guilty pleas, the Court concludes that Petitioner would not be entitled to relief. Petitioner does not allege that during the pertinent time period counsel knew or had reason to know that Petitioner believed his assistance had been constitutionally inadequate. As noted above, counsel's duty to inform his client of his right to appeal a guilty plea arises only when "counsel either knows or should have learned of his client's claim or of the

relevant facts giving rise to that claim." Hardiman, 971 F.2d at 506. Therefore, counsel had no duty to advise Petitioner of his right to appeal the guilty pleas absent any evidence demonstrating that counsel knew or should have known Petitioner believed his assistance was constitutionally inadequate. Laycock, 880 F.2d at 1188.

Petitioner's alternative argument that his counsel should have advised him of the pro and cons of appealing his guilty pleas fares no better. As noted above, counsel had no duty to advise Petitioner about his appeal rights and of the pros and cons of appealing his guilty pleas unless counsel was aware that a claim of error could result in setting aside the guilty pleas. Petitioner's reliance on Baker v. Kaiser, 929 F.2d 1495, and Jones v. Cowley, 28 F.3d 1067, is misplaced. In Baker and Jones, unlike the case at hand, the defendants were convicted following a jury trial. Therefore, counsel had the duty to "explain the advantages and disadvantages of an appeal[,] . . . provide the defendant with advice about whether there are meritorious grounds for appeal and about the probabilities of success [and] . . . inquire whether the defendant wants to appeal the conviction." Baker, 929 F.2d at 1499. Since Baker, the Tenth Circuit Court of Appeals has clarified that Baker applies only in situations where the defendant has not pled guilty. See Hardiman, 971 F.2d 500, 506 (implicitly accepting the state's argument that Baker applies in situations where the defendant has not pled guilty); see also Romero v. Tansy, 46 F.3d 1024, 1031 (10th Cir. 1995) (applying Baker to a claim of

ineffectiveness in not pursuing appeal following conviction after trial). Accordingly, this Court declines to apply the Baker analysis to the case at hand in which Petitioner has not challenged the voluntary and intelligent nature of his guilty pleas. But see United States v. Youngblood, 14 F.3d 38, 40 (10th Cir. 1994) (applying Baker analysis to situation where defendant pled guilty, but finding effective assistance where defendant received the proper explanations from his lawyer, and "the transcript of the hearing makes it clear that [the defendant] never affirmatively indicated any desire to appeal to his counsel or to the district judge).

Petitioner's reliance on Abels v. Kaiser, 913 F.2d 821 (10th Cir. 1990), and Anders v. California, 386 U.S. 738 (1967), is equally misplaced. Unlike the case at hand, the defendants in Abels and Anders instructed their counsel to appeal their conviction, but counsel refused to file the brief on appeal. In Abels, 913 F.2d at 822, the time for perfecting the appeal expired with no brief being filed by retained counsel because Abels had failed to pay counsel for the services already performed. The Tenth Circuit Court of Appeals construed the filing of the notice of intent to appeal as "an appearance sufficient to bind [counsel] to his duty" and held that "[c]ounsel's failure . . . [to file the necessary brief to perfect the appeal], when he had not been relieved of his duties through a successful withdrawal, was a violation of Abel's constitutional right to effective assistance of counsel on his appeal as of right." Id. at 823. In Anders, 386

U.S. at 740-41, counsel notified the court of appeals that there was no merit to the appeal and the defendant was forced to proceed pro se. The Supreme Court held that "if counsel finds [the appeal] to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." Id. at 744.

Accordingly, the Court concludes that Petitioner's counsel did not provide ineffective assistance of counsel when he failed to file a motion to withdraw the guilty pleas and/or appeal Petitioner's convictions.

#### **B. Procedural Default**

Next the Court addresses Respondent's argument that Petitioner is procedurally barred from asserting his third and fourth claims-- i.e., that the trial court lacked jurisdiction because Petitioner did not personally enter his guilty pleas and because the trial court failed to administer an oath or affirmation before taking the pleas. The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the state highest court declined to reach the merits of that claim on state procedural grounds, unless a petitioner "demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of

justice." Coleman v. Thompson, 501 U.S. 722, 749-750 (1991); see also Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). The "cause and prejudice" standard applies to pro se prisoners just as it applies to prisoners represented by counsel. Rodriguez v. Maynard, 948 F.2d 684, 687 (10th Cir. 1991).

The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Although Petitioner does not dispute that he failed to raise his third and fourth claims in his first application for post-conviction relief, he maintains that these claims are jurisdictional defects which cannot be waived and therefore are always subject to collateral attack. (Reply at 9-12, docket #6.) This Court does not agree. The doctrine of procedural default is applicable to all claims, even federal claims, as long as the highest state court who considered the claims has held them barred on the basis of an adequate and independent state ground. Coleman

v. Thompson, 501 U.S. 722, 749-50 (1991); Breechen v. Reynolds, 41 F.3d 1343, 1353 (10th Cir. 1994). Therefore, Petitioner's third and fourth claims are procedurally defaulted, unless he can show cause and prejudice for his default or that a fundamental miscarriage of justice will result if the Court fails to consider them. Because Petitioner has established neither cause and prejudice nor a fundamental miscarriage of justice, this Court must conclude that Petitioner's third and fourth claims are procedurally barred.<sup>3</sup>

### III. CONCLUSION

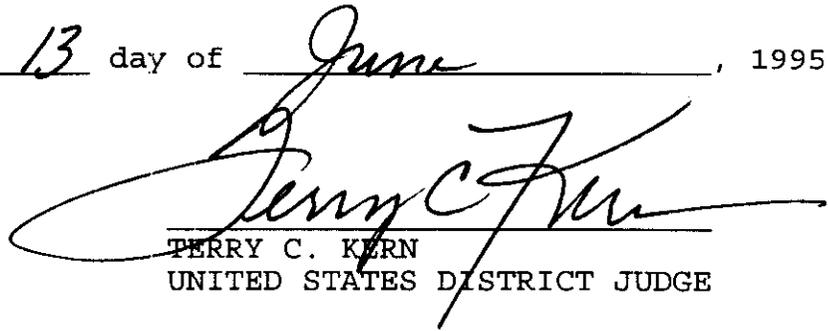
After carefully reviewing the record in this case, the Court finds that Petitioner's counsel provided effective assistance of counsel and therefore that Petitioner is not entitled to an out-of-time appeal. The Court also finds that Petitioner has failed to show cause and prejudice or a fundamental miscarriage of justice to excuse his procedural default of his third and fourth grounds for relief.

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<sup>3</sup>In any event, the Court notes that federal habeas relief is available only for errors of "the Constitution, laws, or treaties of the United States," Estelle v. McGuire, 502 U.S. 62, 68 (1991); Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir. 1994), petition for cert. filed (U.S. Jan. 26, 1995) (No. 94-7904), and, therefore, it would not be available for errors of state law as alleged in Petitioner's third and fourth grounds.

The petition for a writ of habeas corpus (docket #1) is hereby denied.

SO ORDERED THIS 13 day of June, 1995.



TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 14 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

No. 93-C-00713

ENTERED ON DOCKET

DATE JUN 15 1995

CECILIA STANSILL,  
Plaintiff,

v.

CITY OF TULSA, OKLAHOMA, a municipal  
corporation; and LEONARD SMITH and  
JIM MURRAY, individuals.

Defendants.

JOURNAL ENTRY OF JUDGMENT

NOW, on this 13 day of ~~May~~ June, 1995, this matter comes before this Court pursuant to the request of the parties. This Court having examined the pleadings filed herein, having heard statements of counsel and being fully apprised in the premises finds as follows:

1. This Court has jurisdiction of parties and the subject matter of this action.
2. Parties have entered into an agreed settlement of all Plaintiff's claims against the Defendants herein.
3. Pursuant to said agreement, the Plaintiff shall have judgment against the City of Tulsa for Forty Thousand Dollars (\$40,000.00).
4. The Plaintiff has dismissed all of his claims against the individual defendants Jim Murray and Leonard Smith.
5. Said judgment against the City of Tulsa represents all of Plaintiff's claims as of the date of this judgment. Said claims include but are not limited to any claim against the defendants based on federal law and state law whether claims are known or not known.

*MW*  
*12*

*LC*

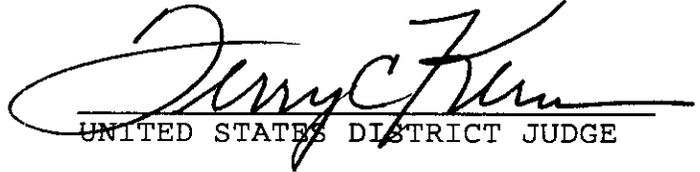
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6. Said judgment does not include any amount as wages to the Plaintiff but includes personal injury, accidental injury, interests, costs and attorney fees.
7. The Mayor of the City of Tulsa has approved this settlement as Executive Officer for the City of Tulsa.
8. Plaintiff also agrees she is barred from seeking any future employment with the City of Tulsa.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Cecilia Stansill, has judgment against the Defendant City of Tulsa, in the amount of Forty Thousand Dollars (\$40,000.00).

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff is barred from future employment with the City of Tulsa.

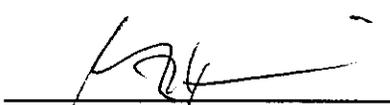
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the suit of the Plaintiff against the individual Defendants Jim Murray, Leonard Smith and the City of Tulsa is hereby dismissed with prejudice, each party to bear its own costs and attorney fees.

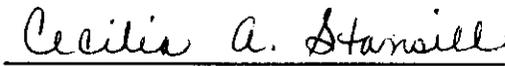
  
UNITED STATES DISTRICT JUDGE

Approved:

FRASIER & FRASIER

CECILIA STANSILL

  
\_\_\_\_\_  
Steven R. Hickman, OBA # 4172  
1700 Southwest Blvd., Suite 100  
P. O. Box 799  
Tulsa, OK 74101  
(918)584-4724

  
\_\_\_\_\_  
Cecilia A. Stansill  
Plaintiff

Attorney for Plaintiff

CITY OF TULSA, OKLAHOMA,  
a municipal corporation,  
DAVID L. PAULING,  
City Attorney



Charles R. Fisher, OBA # 2933  
Senior Assistant City Attorney  
200 Civic Center, Room 316  
Tulsa, OK 74103  
(918) 596-7717

Attorneys for Defendants  
Leonard Smith, Jim Murray  
and City of Tulsa

LEONARD SMITH

  
Defendant

JIM MURRAY

  
Defendant

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 13 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

MARCUS W. ENGLISH, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
STANLEY GLANZ, et al., )  
 )  
Defendants. )

No. 93-C-1142-E

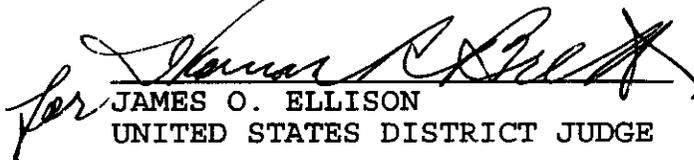
ENTERED ON DOCKET  
DATE 6-14-95

ORDER

On February 27, 1995, the Court concluded (1) that Plaintiff's assault and denial of medical care claims were barred by the statute of limitations, (2) that Plaintiff's claims against Defendant Stanley Glanz for failure to protect from January through December of 1992 survived the statute of limitations, and (3) that Defendant Dr. Margaret Stripling was entitled to judgment as a matter of law. The Court then entered judgment in favor of Dr. Stripling and ordered Glanz to file a dispositive motion addressing Plaintiff's remaining claims. (Docket #19 and #20.)

Having determined that there remains no just reason for delay, the Court hereby **enters** final judgment in favor of Dr. Margaret Stripling and against Plaintiff Marcus W. English. See Fed. R. Civ. P. 54(b).

SO ORDERED THIS 13<sup>th</sup> day of June, 1995.

*for*   
JAMES O. ELLISON  
UNITED STATES DISTRICT JUDGE

COPY

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUN 13 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

IDELL WARD, et al., )  
 )  
 PLAINTIFFS, )  
 )  
 vs. )  
 )  
 SUN COMPANY, INC. (R&M), a Pennsyl- )  
 vania corporation; and SUN COMPANY, )  
 INC., a Pennsylvania corporation, )  
 )  
 DEFENDANTS. )

CASE NO. 94-C-1059-H

ENTERED ON DOCKET

DATE JUN 14 1995

STIPULATION OF DISMISSAL WITHOUT PREJUDICE

COME NOW the Parties, through their respective counsel, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, and stipulate to the dismissal of the claim of Shirley Swank only, in the above-styled and numbered action in its entirety, without prejudice to the filing of a future action, with each party to bear its own costs, reserving all rights to proceed on behalf of all other plaintiffs.



JOHN M. MERRITT - OBA #6146  
MERRITT & ROONEY, INC.  
P O BOX 60708  
OKLAHOMA CITY, OKLAHOMA 73146

(405) 236-2222  
ATTORNEY FOR PLAINTIFF(S)

A handwritten signature in cursive script that reads "Robert P. Redemann". The signature is written in black ink and is positioned above a horizontal line.

ROBERT P. REDEMANN - OBA #7454  
POST OFFICE BOX 21100  
TULSA, OKLAHOMA 74121-1100  
(405) 528-1173  
ATTORNEY FOR DEFENDANT(S),  
SUN COMPANY, INC. (R&M), and  
SUN COMPANY, INC.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JUN 12 1995

MIKE FINNELL,  
an individual,  
  
Plaintiff,  
  
vs.  
  
CRESTAR MORTGAGE CORPORATION,  
a Virginia corporation,  
  
Defendant/  
Third-Party Plaintiff,  
  
vs.  
  
FEDERAL DEPOSIT INSURANCE  
CORPORATION, in its Corporate  
Capacity and as Receiver for  
Victor Federal Savings and  
Loan Association,  
  
Third-Party Defendant.

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

No. 95-C-287-BU

ENTERED ON DOCKET

DATE JUN 13 1995

FILED

JUN 12 1995

Richard M. Lawrence, Clerk  
U. S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ORDER

This matter comes before the Court upon the Motion to Vacate Interlocutory Order and Motion to Remand filed by Defendant and Third-Party Plaintiff, Crestar Mortgage Corporation, pursuant to Fed.R.Civ.P. 60, requesting that the Court vacate the interlocutory Order filed June 7, 1995, and, pursuant to 28 U.S.C. § 1447(c), requesting that the Court remand this case to the District Court in and for Mayes County, State of Oklahoma. Without objection of Plaintiff, Mike Finnell, or Third-Party Defendant, Federal Deposit Insurance Corporation, and the Court, finding that good cause exists for granting Plaintiff's motion,

IT IS HEREBY ORDERED that the Order, filed June 7, 1995, granting the Third-Party Defendant's Motion for Summary Judgment is VACATED.

IT IS FURTHER ORDERED, in light of the dismissal of Third-Party Defendant, Federal Deposit Insurance Corporation, pursuant to the Joint Stipulation of Dismissal filed June 7, 1995, that the above-captioned case is REMANDED to the District Court in and for Mayes County, State of Oklahoma.

ENTERED this 12<sup>th</sup> day of June, 1995.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE JUN 13 1995

John R. Linn,  
Plaintiff,

vs.

Developmental Services of  
Tulsa, Inc., an Oklahoma  
Corporation,

Defendant.

Case No. 94-C-460K

FILED

JUN 13 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA  
Order of Dismissal With Prejudice and  
Order of Confidentiality

NOW ON this 12 day of June, 1995, the above styled and numbered matter comes on before this Court pursuant to the Joint Stipulation for Order of Dismissal filed herein by the parties hereto. Upon consideration of such Joint Stipulation for Dismissal, the Court finds that the above styled and numbered matter should be dismissed with prejudice to the refiling of same. Further, the Court, based upon such Joint Stipulation of Dismissal, finds that effective May 22, 1995, an Order of Confidentiality should be entered whereby both parties to this proceeding are to keep the terms of resolution confidential, and when referring to the resolution of this proceeding shall state only "The matter has been mutually resolved."

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the foregoing findings be and same hereby are made Orders of this Court as if fully set forth hereinafter.

**s/ TERRY C. KERN**

THE HONORABLE TERRY KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

GILBERT R. SUITER, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MITCHELL MOTOR COACH SALES, )  
INC., ROBERT E. DESBIEN, )  
and NORMA J. DESBIEN, )  
 )  
Defendants, )  
 )  
v. )  
 )  
BLUE BIRD BODY COMPANY, INC., )  
 )  
Third-Party Defendant. )

Case No. 93-C-815-H

ENTERED ON DOCKET

DATE JUN 12 1995

**FILED**

JUN 8 1995

Richard M. Lawrence, Court Clerk  
U.S. DISTRICT COURT

O R D E R

This matter comes before the Court pursuant to the discussions among counsel at the status conference held on June 8, 1995. The Court has decided to treat those discussions as a motion to reconsider the granting of a judgment to Third-Party Defendant Blue Bird Body Company, Inc. ("Blue Bird"). On April 25, 1995, the Court granted Blue Bird's motion for summary judgment. Two days later, Blue Bird moved for the entry of a final judgment in its favor under Rule 54(d) of the Federal Rules of Civil Procedure. The trial of this action was scheduled to begin on May 15, 1995.

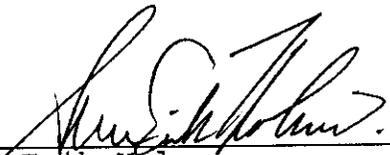
The Court granted Blue Bird's motion for a final judgment. Due to the mental health of Defendant Norma Desbien, the trial has been continued. In light of this unforeseeable change in the trial schedule, the Court hereby grants the motion to reconsider. The

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order granting a judgment to Blue Bird under Rule 54(d) is therefore suspended until after the trial of this case.

IT IS SO ORDERED.

This 8TH day of JUNE, 1995.

  
\_\_\_\_\_  
Sven Erik Holmes  
United States District Judge

ENTERED ON DOCKET

DATE JUN 12 1995

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

PAUL FLOYD and DIANA FLOYD )

Plaintiffs, )

vs. )

THE TOWN OF SKIATOOK; LEE )  
WERT, individually and )  
in his representative capacity, )  
et al., )

Defendants. )

JUN 9 1995

Richard M. Lawrence, Clerk  
U.S. DISTRICT COURT  
Case No. 94-C-138-K

ORDER

For good cause shown, upon Joint Application of the Parties, the Fourth Cause of Action of Plaintiffs' Amended Complaint, which is an assault and battery claim against Defendant Wert, is remanded to State Court for further adjudication.

**/s/ JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE**

\_\_\_\_\_  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE