

amount, and nature (i.e. check, wire transfer, cash) each sum of money Marsha Schubert and/or Schubert and Associates paid to him, or to a third party for his benefit, during the period of time in question. Defendants objected to this interrogatory on various grounds including overly broad, ambiguous, and unduly burdensome but admitted "amounts paid to third parties are unknown." See Excerpt of Defendants' responses to Plaintiff's first set of discovery requests, attached as Exhibit B. In Interrogatory Number 19 of Plaintiff's first set of discovery requests, Defendants were asked to list by date, amount, and nature each sum of money they paid or gave to Marsha Schubert and/or Schubert and Associates during the period of time in question. Defendants objected to this interrogatory on various grounds including overly broad, ambiguous, unduly burdensome but admitted they were "unable to determine the exact amount of money entrusted to Marsha Schubert." See Excerpt of Defendants' responses to Plaintiff's first set of discovery requests, attached as Exhibit B.

At no time did Defendants ever provide evidentiary material to dispute receipt or disbursement of the funds listed in the accounting provided by Plaintiff. Plaintiff is now learning through Defendants' response to Plaintiff's Motion for Summary Judgment what should have been in Defendants' discovery responses.

3. Defendants were first mailed a copy of their accounting and backup documentation in August of 2005. See letter from Receiver's office, Exhibit C. Defendants were asked by the Receiver to notify his office should they dispute the accounting and provide any materials to support their position. At no time did the Receiver's office receive a reply from the Defendants. Plaintiff subsequently sent additional copies of the accounting and backup documentation to the Defendants. See letter to Defendants' counsel, Exhibit D.

ARGUMENT AND AUTHORITIES

Pursuant to Section 3226(E) of the Oklahoma Discovery Code, the Defendants have an ongoing obligation to supplement their discovery responses. Defendants never identified David Morley (Morley) as anyone who would have information regarding the claims of the Defendants or as an expert witness. At no time during the last year did Defendants supplement their answers to Plaintiff's discovery requests specifically relating to the Defendants' accounting. These omissions prevented the Plaintiff from serving additional discovery requests and/or taking David Morley's deposition.

Defendants rely upon the mere conclusions of Morley in attempting to establish the existence of fact questions in this matter. Under Rule 13(c) of the District Court Rules, the "admissibility of other evidentiary material filed by either party shall be governed by the rules of evidence." In his affidavit, Morley presents as facts oral statements purportedly made by Marsha Schubert to Defendants. Morley's affidavit does not provide independent evidentiary support for such statements. The statements made by Marsha Schubert to the Defendants as recounted in the affidavit are inadmissible hearsay and speculative rather than factual. "Rule 13(c) requires that affidavits supporting, or in opposition to a motion for summary judgment, 'shall be made on personal knowledge' and 'shall set forth matters that are admissible in evidence.'" *Elledge v. Staring*, 939 P.2d 1163, 1996 OK CIV APP 161 (Oklahoma Court of Civil Appeals held that hearsay statements in an affidavit would be inadmissible at trial and that the affidavit failed to comply with Rule 13).

Morley attached to his affidavit a one page summary of deposits to and disbursements from unidentified accounts purportedly held by the Defendants. The deposits total in excess of \$700,000 and the disbursements total in excess of \$600,000. Morley did not attach copies of any

checks, deposits, tax documentation, bills of sale, calculations or other evidentiary material to support the annualized lump sum figures listed in the summary. Unlike Plaintiff's accounting, the summary is unsupported by backup documentation and therefore is without foundation. See Exhibit A to Morley's affidavit.

Morley also attached to his affidavit a second summary) suggesting what he thought would be reasonable rates of return had the Defendants' money been legitimately invested. See Exhibit B to Morley's affidavit. Since Plaintiff asserts the money was not invested and Defendants present no evidence to the contrary, Morley's Exhibit B is purely speculative. Conjecture on what might have been expected does not equate to evidentiary material. In *Butler v. Oklahoma City Public School System*, 871 P.2d 444, 446, 90 Ed. Law Rep. 815, 1994 OK CIV APP 22, the court found in his summary judgment response that the Appellant failed to produce evidence to support his affidavit which was based upon speculation or conjecture. The *Butler* court ruled that the assertions in the affidavit failed to "establish the 'substantial controversy' required by Rule 13 to defeat a motion for summary judgment."

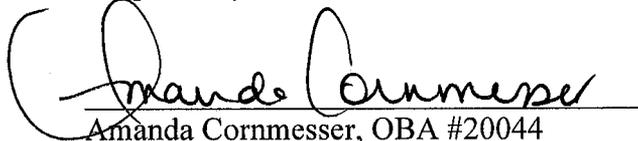
Conclusory affidavits of witnesses are insufficient to defeat summary judgment motions. See *Weeks v. Wedgewood Village, Inc.*, 554 P.2d 780, 785, 1976 OK 72, citing *First Federal Savings & Loan Ass'n. of Philadelphia v. Damnco Corp.*, 310 A.2d 880 (Del.Super.1973), and *Coro, Inc. v. R. N. Koch, Inc.*, 112 R.I. 371, 310 A.2d 662 (1973). "[T]o qualify for consideration under the motion for summary judgment, affidavits must set forth such facts as would be admissible in evidence rather than allege mere conclusory statements." *Id.*

CONCLUSION

The affidavit of Morley is not supported by facts that would be admissible as evidence. Further, the affidavit is based, in part, on mere speculation which is insufficient to defeat

Plaintiff's Motion for Summary Judgment. Plaintiff requests that the Court strike the affidavit of David Morley in accordance with Rule 13(c) of the District Court Rules.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Amanda Cornmesser", is written over a horizontal line. The signature is cursive and somewhat stylized.

Amanda Cornmesser, OBA #20044

Gerri Stuckey, OBA #16732

Melanie Hall, OBA #1209

Oklahoma Department of Securities

120 N. Robinson, Suite 860

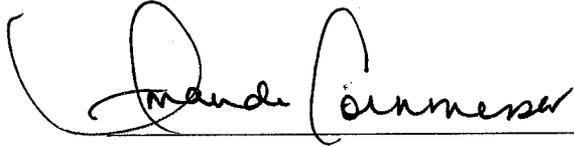
Oklahoma City, OK 73120

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June 2007, I mailed a true and correct copy of the above and foregoing instrument, postage pre-paid to:

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Mandy Conners