UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID SCHIED, an individual

Plaintiff,

vs.

Case No. 2:15-cv-11840
Hon. Avern Cohn
Magistrate Judge Michael Hluchaniuk

KAREN KHALIL; CATHLEEN DUNN; JOSEPH BOMMARITO; JAMES TURNER; DAVID HOLT; JONATHAN STRONG; POLICE OFFICER BUTLER; JOHN SCHIPANI; REDFORD TOWNSHIP POLICE DEPARTMENT; REDFORD TOWNSHIP 17TH DISTRICT COURT; TRACEY SCHULTZ-KOBYLARZ; CHARTER TOWNSHIP OF REDFORD; CHARTER COUNTY OF WAYNE, MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY; THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; AMERICAN INTERNATIONAL GROUP, INC; DOES 1-10.

Defendants.

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MMRMA'S MOTION TO STRIKE PLAINTIFF'S "REPLACEMENT" RESPONSES (DOCKET NUMBERS 81, 82, 83, 84, AND 85) FOR PLAINTIFF'S FAILURE TO COMPLY WITH THIS COURT'S ORDER AND THE LOCAL RULES OF COURT AND TO DISMISS

NOW COMES Defendant MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY ("MMRMA"), by and through its attorneys, Mellon Pries P.C., and for its Motion to Strike Plaintiff's "Replacement" Responses (Docket Numbers 81, 82, 83, 84, and 85) and to Dismiss, states as follows:

1. On September 30, 2015, this Court struck Plaintiff's filings, Docket Numbers 36, 38, 58, and 63, for failure to comply with this Court's Local Rules, particularly, the page limitations. (**Dkt. #78**, Pg ID 6399) (**Exhibit A**).

2. Plaintiff was specifically instructed:

> The Court suggests that Plaintiff review the Federal Rules of Civil procedure, which can be found on the United States Courts' website and the Local Rules for the Eastern District of Michigan, which can be found on this Court's website, before filing any further motions in this matter. Plaintiff should also review the information on the Court's website regarding proceeding in federal court without counsel: http://www.mied.uscourts.gov/index.cfm?pageFunction=proSe, which includes links to the Federal Rules and the Local Rules.
>
> ... **In addition, should plaintiff's responses to the motions to dismiss fail to comply with the Federal Rules and the Local Rules, the court will recommend dismissal of this lawsuit in its entirety.**

(**Exhibit A**, Pg ID 6399-6400) (underline emphasis added, bold emphasis by Court).

3. Plaintiff responded by filing 5 "replacement" documents for the 4 documents stricken by the Court. (**Dkt. ## 81, 82, 83, 84, 85**).

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4. Plaintiff's "replacement" responses fail to conform with this Court's Local Rules, specifically, L.R. 5.1(a)(3), which requires that briefs in proportional font, such as the Times New Roman font used by Plaintiff, be 14 point.

5. MMRMA submits as an example, Plaintiff **Dkt. #85**, Pg ID 7416 as filed electronically by the Court (**Exhibit B**), and to ensure that the size computation is correct, the printed hard copy mailed by Plaintiff to Counsel for MMRMA (**Exhibit C**).

6. Looking to the underlined text at the end of paragraphs 1 and 2 (**Exhibit A**, Pg ID 7416; **Exhibit B**, p. vi), it is apparent that Plaintiff has utilized 13-point font, instead of 14-point font, as required, an alteration which would permit Plaintiff to include more information in his brief than the page limitations permit, by making the print smaller.

7. Plaintiff's use of the incorrect font is deliberate, as there is no point-and-click selection for 13 point font, and one must manually enter that size. (**Exhibit E**).

8. As Plaintiff's "replacement" filings violate this Court's Order and the Local Rules, they should be stricken, and this case dismissed, as the Court has previously warned Plaintiff.

9. The United States Court of Appeals for the Sixth Circuit has concluded:

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> [W]hile pro se litigants may be entitled to some latitude when dealing with sophisticated legal issues, acknowledging their lack of formal training, there is no cause for extending this margin to straightforward procedural requirements that a layperson can comprehend as easily as a lawyer.

Jourdan v. Jabe, 951 F.2d 108, 109 (6th Cir. 1991)

10. L.R. 5.1(a)(3) is a rule of procedural requirements that any layperson can comprehend as easily as a lawyer.

11. Pursuant to L.R. 83.20(a)(1), "A person practicing in this court must know these rules, including the provisions for sanctions for violating the rules."

12. Concurrence was sought in the relief requested in this motion via telephone by way of a voicemail message left on November 30, 2015.

WHEREFORE, for all these reasons, and for those in the accompanying Brief, MMRMA requests this Honorable Court enter an Order striking Plaintiff's "Replacement" Responses (Docket Numbers 81, 82, 83, 84, and 85) for failure to comply with the Local Rules of this Court and this Court's Order, and, further, dismissing the action pursuant to this Court's Order (**Dkt. #78**).

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/s/ James T. Mellon (P23876)
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DATED: November 30, 2015

BRIEF IN SUPPORT OF MMRMA'S MOTION TO STRIKE PLAINTIFF'S "REPLACEMENT" RESPONSES (DOCKET NUMBERS 81, 82, 83, 84, AND 85) FOR PLAINTIFF'S FAILURE TO COMPLY WITH THIS COURT'S ORDER AND THE LOCAL RULES OF COURT AND TO DISMISS

TABLE OF CONTENTS i

CONCISE STATEMENT OF ISSUES PRESENTED ii

CONTROLLING OR MOST APPROPRIATE AUTHORITY ii

STATEMENT OF FACTS 1

ARGUMENT 3

CONCLUSION 5

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CONCISE STATEMENT OF ISSUES PRESENTED

I. Whether Plaintiff's "replacement" filings should be stricken for failure to comply with this Court's Local Rules, and the action dismissed?

MMRMA States: "Yes."

Plaintiff Will State: "No."

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Abner v. Scott Mem'l Hosp., 634 F.3d 962 (7th Cir. 2011)

Gilleland v. Schanhals, 55 Fed. Appx. 257 (6th Cir. Jan. 7, 2003) (unpublished) **(Exhibit B)**

Jourdan v. Jabe, 951 F.2d 108 (6th Cir. 1991)

Fed. R. Civ. P. 12(f)

L.R. 5.1(a)(3)

L.R. 83.20

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STATEMENT OF FACTS

On September 30, 2015, this Court struck Plaintiff's filings, Docket Numbers 36, 38, 58, and 63, for failure to comply with this Court's Local Rules, particularly, the page limitations. (**Dkt. #78**, Pg ID 6399) (**Exhibit A**). Plaintiff was specifically instructed:

> The Court suggests that Plaintiff review the Federal Rules of Civil procedure, which can be found on the United States Courts' website and the Local Rules for the Eastern District of Michigan, which can be found on this Court's website, before filing any further motions in this matter. Plaintiff should also review the information on the Court's website regarding proceeding in federal court without counsel: http://www.mied.uscourts.gov/index.cfm?pageFunction=proSe, which includes links to the Federal Rules and the Local Rules.

(*Id.* at Pg ID 6399-6400) (emphasis added). Further, Plaintiff was specifically cautioned:

> ... **In addition, should plaintiff's responses to the motions to dismiss fail to comply with the Federal Rules and the Local Rules, the court will recommend dismissal of this lawsuit in its entirety.**

(*Id.* at Pg ID 6400) (underline emphasis added, bold emphasis by Court). Plaintiff responded by filing 5 "replacement" documents for the 4 documents stricken by the Court. (**Dkt. ## 81, 82, 83, 84, 85**).

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As an example, MMRMA will utilize Plaintiff's response to MMRMA's Motion to Dismiss, **Dkt. #85**, Pg ID 7416 (**Exhibit B**). MMRMA also includes

a copy of the same page, as mailed by Plaintiff, to ensure that any issues are not the result of any re-sizing which may have occurred when the Court converted the document to an electronic filing. (**Exhibit C**, p. vi). MMRMA draws the Court's attention to the underlined text in the last line of Paragraph 1 and the second line of Paragraph 2. (**Exhibit B**, Pg ID 7416; **Exhibit C**, p. vi.). Through some literal copying-and-pasting, MMRMA has determined that Plaintiff's "replacement" responses are typed in 13-point font. (**Exhibit D**). The portions cut-and-paste from the brief mailed to MMRMA (and filed with the Court) are marked with asterisks, while the non-marked portions were printed directly from Microsoft Word. (***Id.***).

The net effect of reducing the font size is to enable a person to fit more text within the same page limitations, thereby skirting the page limitations of requirements of L.R. 7.1(d)(3), by permitting Plaintiff to include more text in his 25 pages than would otherwise be permitted. <u>The alteration of the font size does not appear accidental, as the drop-down font size selector in Microsoft Word goes from 12-point to 14-point, and one must manually type "13" to use 13-point font.</u> (**Exhibit E**).

In short, it appears that Plaintiff has willfully violated this Court's Local Rules, using a tactic commonly seen in term papers of high school or college students, in manipulating font size to comply with page limitations.

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ARGUMENT

Plaintiff's "replacement" filings were specifically instructed to comply with the Local Rules, and dismissal was provided as the remedy, if Plaintiff failed to comply. (**Exhibit A**, Pg ID 6399-6400). L.R. 5.3(a)(3) provides: "**Type Size.** Except for standard preprinted forms that are in general use, type size of all text and footnotes must be no smaller than 10-1/2 characters per inch (non-proportional) or 14 point (proportional)." (emphasis added). Plaintiff has used Times New Roman, a proportional font. (**Exhibit F**). However, Plaintiff has written his "replacement" filings in 13-point font. (**Exhibit B**, Pg Id 7416; **Exhibit C**, p. vi; **Exhibit D**). L.R. 7.1(d)(3) provides:

> (A) The text of a brief supporting a motion or response, including footnotes and signatures, may not exceed 25 pages. A person seeking to file a longer brief may apply ex parte in writing setting forth the reasons.
>
> (B) The text of a reply brief, including footnotes and signatures, may not exceed 7 pages.

(emphasis added). Using a smaller font than that permitted by the Local Rules permits Plaintiff to include more text in his 25 page briefs than he would be able to include had he followed the Local Rules.

The United States Court of Appeals for the Sixth Circuit has concluded:

> [W]hile pro se litigants may be entitled to some latitude when dealing with sophisticated legal issues, acknowledging their lack of formal training, there is no cause for extending this margin to straightforward

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> procedural requirements that a layperson can comprehend as easily as a lawyer.

Jourdan v. Jabe, 951 F.2d 108, 109 (6th Cir. 1991). L.R. 5.3(a)(3) is a rule of procedural requirement that any layperson can comprehend as easily as a lawyer. Furthermore, pursuant to L.R. 83.20(a)(1), "A person practicing in this court must know these rules, including the provisions for sanctions for violating the rules." Thus, in choosing to represent himself, Plaintiff has agreed to be bound by this Court's rules.

This Court has already informed Plaintiff that deviation from the Local Rules would not be permitted, and would result in a recommendation of dismissal. (**Exhibit A,** Pg ID 6400). In response, Plaintiff willfully manipulated the font size in an effort to fit more text in his briefs than the Local Rules permit. Failure to comply to briefing requirements frequently results in the brief being stricken, or even harsher sanctions. *E.g.*, *Abner v. Scott Mem'l Hosp.*, 634 F.3d 962, 964 (7th Cir. 2011).

Fed. R. Civ. P. 12(f) provides that material which is "redundant, immaterial, impertinent, or scandalous" is subject to being stricken. While it is true that Fed. R. Civ. P. 12(f) references "pleadings" and the Combined Response Brief is not a "pleading," the U.S. Court of Appeals has stated that the rule can apply to briefing as well. *Gilleland v. Schanhals*, 55 Fed. Appx. 257, 261 (6th Cir. Jan. 7, 2003) (unpublished) (**Exhibit G**).

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Plaintiff's "replacement" responses are non-conforming, and deliberately so, in an effort to manipulate the page limitations of L.R. 7.1(d)(3). As Plaintiff has failed to heed this Court's warning, and, indeed, has attempted deceive the Court, this entire case should be dismissed.

CONCLUSION

For all these reasons, and for those in the accompanying Motion, MMRMA requests this Honorable Court enter an Order striking Plaintiff's "Replacement" Responses (Docket Numbers 81, 82, 83, 84, and 85) for failure to comply with the Local Rules of this Court and this Court's Order, and, further, dismissing the action pursuant to this Court's Order (**Dkt. #78**).

MELLON PRIES P.C.

/s/ James T. Mellon (P23876)
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DATED: November 30, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015, I electronically filed the preceding **MMRMA'S MOTION TO STRIKE PLAINTIFF'S "REPLACEMENT" RESPONSES (DOCKET NUMBERS 81, 82, 83, 84, AND 85) FOR PLAINTIFF'S FAILURE TO COMPLY WITH THIS COURT'S ORDER AND THE LOCAL RULES OF COURT AND TO DISMISS** using the ECF system, which will electronically serve all counsel of record. I have further mailed a copy of **MMRMA'S MOTION TO STRIKE PLAINTIFF'S "REPLACEMENT" RESPONSES (DOCKET NUMBERS 81, 82, 83, 84, AND 85) FOR PLAINTIFF'S FAILURE TO COMPLY WITH THIS COURT'S ORDER AND THE LOCAL RULES OF COURT AND TO DISMISS** to Plaintiff via United States Post Office, First Class Mail at the following address:

P.O. Box 1378
Novi, MI 48376
(248) 974-7703

MELLON PRIES, P.C.

/s/ James T. Mellon (P23876)
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DATED: November 30, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID SCHIED, an individual

Plaintiff,

Case No. 2:15-cv-11840
Hon. Avern Cohn
Magistrate Judge Michael Hluchaniuk

vs.

KAREN KHALIL; CATHLEEN DUNN; JOSEPH BOMMARITO; JAMES TURNER; DAVID HOLT; JONATHAN STRONG; POLICE OFFICER BUTLER; JOHN SCHIPANI; REDFORD TOWNSHIP POLICE DEPARTMENT; REDFORD TOWNSHIP 17TH DISTRICT COURT; TRACEY SCHULTZ-KOBYLARZ; CHARTER TOWNSHIP OF REDFORD; CHARTER COUNTY OF WAYNE, MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY; THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; AMERICAN INTERNATIONAL GROUP, INC; DOES 1-10.

Defendants.

INDEX OF EXHIBITS

Exhibit	Description
A	Docket #78, Amended Order Striking Responses and Motions (Dkt. 36, 58, 63), Granting Motion to Strike (Dkt. 57), Granting Motion to Stay (Dkt. 75), and Setting Deadlines
B	Docket #85, Excerpts of Plaintiff's Response to MMRMA's Motion to Dismiss (Pg ID 7416)
C	Excerpts of Plaintiff's Response to MMRMA's Motion to Dismiss which was mailed to Counsel for MMRMA (Page vi, corresponding to Pg ID7416)

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D	Font size Comparison
E	Microsoft Word font drop-down box
F	Supreme Court of the State of New York Appellate Division: Second Judicial Department, A Glossary of Terms for Formatting Computer-Generated Briefs, with Examples
G	*Gilleland v. Schanhals*, 55 Fed. Appx. 257 (6th Cir. Jan. 7, 2003) (unpublished)

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EXHIBIT A

2:15-cv-11840-A MJH Doc # 78 Filed 09/30/15 Pg 1 of 4 Pg ID 6398

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID SCHIED,

Plaintiff,

v.

KAREN KHALIL, *et. al.*,

Defendants.

Case No. 15-11840

Avern Cohn
United States District Judge

Michael Hluchaniuk
United States Magistrate Judge

AMENDED ORDER STRIKING RESPONSES AND MOTIONS (Dkt. 36, 38, 58, 63), GRANTING MOTION TO STRIKE (Dkt. 57), GRANTING MOTION TO STAY (Dkt. 75), AND SETTING DEADLINES

Plaintiff filed this pro se civil rights and tort action against a variety of defendants on May 21, 2015. (Dkt. 1). This matter was referred to the undersigned for all pretrial proceedings. (Dkt. 56). Two defendants have filed motions to dismiss (Dkt. 24, 27). Plaintiff has filed responses to these dispositive motions. (Dkt. 36, 38). Plaintiff has also filed a motion for summary judgment and a petition for writ of mandamus. (Dkt. 58, 63). Defendant Michigan Municipal Risk Management Authority has also filed a motion to strike plaintiff's response to its motion to dismiss, pointing out that plaintiff's response does not comply with Local Rule 7.1, in that it well exceeds the page limitations found in that rule. (Dkt. 57). In response, plaintiff accuses defendant of "domestic terrorism," but acknowledges that his filing does not comply with Local Rule 7.1.

(Dkt. 62). Plaintiff appears to argue that the Local Rule is somehow trumped by the Supremacy Clause of the Constitution, although the basis for this assertion is not entirely clear.

Defendant correctly points out that plaintiff's response of 115 pages, exclusive of exhibits, well exceeds the 25 page limitation set forth in Local Rule 7.1. (Dkt. 38). The Court takes note that several of plaintiff's other responses and motions also violate Local Rule 7.1. His response to defendant Wayne County's motion to dismiss is over 50 pages, exclusive of exhibits (Dkt. 36); plaintiff's motion for summary judgment is over 100 pages, exclusive of exhibits (Dkt. 58); and plaintiff's petition for mandamus is over 80 pages, exclusive of exhibits (Dkt. 63). Plaintiff's responses (Dkt. 36 and 38), his motion for summary judgment (Dkt. 58), and his petition for mandamus (Dkt. 63) are, therefore, **STRICKEN** for failure to comply with the local rules governing the format and page limitation of motions and briefs. Merely because plaintiff is *pro se* does not mean he is not bound by the Federal Rules of Civil Procedure and Local Rules for the Eastern District of Michigan. *See e.g.*, *Fields v. Cnty. of Lapeer*, 2000 WL 1720727 (6th Cir. 2000) ("It is incumbent on litigants, even those proceeding pro se, to follow ... rules of procedure.").

The Court suggests that plaintiff review the Federal Rules of Civil procedure, which can be found on the United States Courts' website and the Local

Rules for the Eastern District of Michigan, which can be found on this Court's website, before filing any further motions in this matter. Plaintiff should also review the information on the Court's website regarding proceeding in federal court without counsel:

http://www.mied.uscourts.gov/index.cfm?pageFunction=proSe, which includes links to the Federal Rules and the Local Rules.

Plaintiff has separately asked for a stay of 30 days in this matter. (Dkt. 75). This motion is **GRANTED** and this matter is **STAYED** until October 21, 2015. Plaintiff will have until **November 18, 2015** to file proper responses to the two pending motions to dismiss. The Court will allow plaintiff to re-file his motion for summary judgment and his petition for mandamus by **November 18, 2015**. However, any significant failure to comply with the Federal Rules or Local Rules will be met with sanctions, including the striking of any non-compliant motion and brief and precluding plaintiff from filing any further motions for summary judgment or other motions. **In addition, should plaintiff's responses to the motions to dismiss fail to comply with the Federal Rules and the Local Rules, the court will recommend dismissal of this lawsuit in its entirety.**

IT IS SO ORDERED.

The parties to this action may object to and seek review of this Order, but are required to file any objections within 14 days of service as provided for in

Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). A party may not assign as error any defect in this Order to which timely objection was not made. Fed.R.Civ.P. 72(a). Any objections are required to specify the part of the Order to which the party objects and state the basis of the objection. When an objection is filed to a magistrate judge's ruling on a non-dispositive motion, the ruling remains in full force and effect unless and until it is stayed by the magistrate judge or a district judge. E.D. Mich. Local Rule 72.2.

Date: September 30, 2015

s/Michael Hluchaniuk
Michael Hluchaniuk
United States Magistrate Judge

CERTIFICATE OF SERVICE

I certify that on September 30, 2015 , I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send electronic notification to all counsel of record and that I have mailed by United States Postal Service to the following non-ECF participant: David Schied at P.O. Box 1378, Novi, MI 48378.

s/Tammy Hallwood
Case Manager
(810) 341-7887
tammy_hallwood@mied.uscourts.gov

EXHIBIT B

GENERAL DENIAL TO THE ENTIRETY OF DEFENDANTS' "*MMRMA's* MOTION TO DISMISS IN LIEU OF ANSWER" *BASED ON PROVEN HISTORY OF CORRUPTION BY THEIR BUSINESS PARTNERS, THEIR CLIENTS, AND THEIR "REPRESENTATIVE" ATTORNEYS*

1. DENIED. James Mellon is well aware that what was filed was both a "*common law tort complaint*" and a "*claim of damages*" for "*malicious trespass*" and "*false imprisonment*". He is also aware that one copy of such filing was reported as having been STOLEN by a federal court employee; and that he first called Grievant Schied on 6/2/15 with such copy in his own hand PRIOR TO being formally served. Mellon's statement, as also shown below, are full of **gross omissions and misrepresentations of facts**; therefore they must be *stricken.* **(See "EXHIBIT A" attached to this instant filing.)**
2. DENIED. Attorney Mellon's assertion that he was "*served on June 10, 2015*" is fraud on its face. Per the recorded phone conversation that took place between Mellon and Grievant on 6/2/15, as well as the transcript of that recorded audio of that conversation, it is clear that Mellon was otherwise "*served*" by *Special Assistant Attorney General* John Clark, who purportedly received a copy through a chain of document-passing stemming from the THEFT by one or more of the federal court clerks of the original 17 copies of the "*Complaint/Claim of Damages*" that Grievant was compelled to surrender to the federal court for processing along with his filing for "*forma pauperis*"

EXHIBIT C

GENERAL DENIAL TO THE ENTIRETY OF DEFENDANTS' "*MMRMA's* MOTION TO DISMISS IN LIEU OF ANSWER" *BASED ON PROVEN HISTORY OF CORRUPTION BY THEIR BUSINESS PARTNERS, THEIR CLIENTS, AND THEIR "REPRESENTATIVE" ATTORNEYS*

1. DENIED. James Mellon is well aware that what was filed was both a "*common law tort complaint*" and a "*claim of damages*" for "*malicious trespass*" and "*false imprisonment*". He is also aware that one copy of such filing was reported as having been STOLEN by a federal court employee; and that he first called Grievant Schied on 6/2/15 with such copy in his own hand PRIOR TO being formally served. Mellon's statement, as also shown below, are full of **gross omissions and misrepresentations of facts**; therefore they must be *stricken*. **(See "EXHIBIT A" attached to this instant filing.)**
2. DENIED. Attorney Mellon's assertion that he was "*served on June 10, 2015*" is fraud on its face. Per the recorded phone conversation that took place between Mellon and Grievant on 6/2/15, as well as the transcript of that recorded audio of that conversation, it is clear that Mellon was otherwise "*served*" by *Special Assistant Attorney General* John Clark, who purportedly received a copy through a chain of document-passing stemming from the THEFT by one or more of the federal court clerks of the original 17 copies of the "*Complaint/Claim of Damages*" that Grievant was compelled to surrender to the federal court for processing along with his filing for "*forma pauperis*"

EXHIBIT D

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EXHIBIT E

Document1 - Microsoft Word

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"Exhibit A"

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"Exhibit A"

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EXHIBIT F

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

A GLOSSARY OF TERMS FOR FORMATTING COMPUTER-GENERATED BRIEFS, WITH EXAMPLES

The rules concerning the formatting of briefs are contained in CPLR 5529 and in §§ 670.10.1 and 670.10.3 of the rules of this court. Those rules cover technical matters and therefore use certain technical terms which may be unfamiliar to attorneys and litigants. The following glossary is offered as an aid to the understanding of the rules.

Typeface: A typeface is a complete set of characters of a particular and consistent design for the composition of text, and is also called a font. Typefaces often come in sets which usually include a **bold** and an *italic* version in addition to the basic design.

Proportionally Spaced Typeface: Proportionally spaced type is designed so that the amount of horizontal space each letter occupies on a line of text is proportional to the design of each letter, the letter i, for example, being narrower than the letter w. More text of the same type size fits on a horizontal line of proportionally spaced type than a horizontal line of the same length of monospaced type. This sentence is set in Times New Roman, which is a proportionally spaced typeface.

Monospaced Typeface: In a monospaced typeface, each letter occupies the same amount of space on a horizontal line of text. `This sentence is set in Courier, which is a monospaced typeface.`

Point Size: A point is a unit of measurement used by printers equal to approximately 1/72 of an inch. The vertical height of type is measured in points. The measurement is somewhat complicated and requires a special ruler. The process of measurement is well explained in *The Chicago Manual of Style* (14th ed.) § 19.43. Suffice it to say that an attorney or litigant may rely on the type size setting of the word processing program used to create the brief. A brief utilizing a proportionally spaced typeface must use 14-point type for the body of the text, but 12-point type may be used for footnotes. A brief utilizing a monospaced typeface must use 12-point type for the body of the text, but 10-point type may be used for footnotes.

Double Spacing: Double spaced text has a blank line between successive lines of type. The space between lines is called leading and is measured in points from the bottom of one line of text to the bottom of the next. Double spaced text should have leading of at least the height of the type. Thus double spaced 14-point type must have at least 14 points of leading, for a total line spacing of 28 points. An attorney or litigant may rely on the line spacing setting of the word processing program used to create the brief.

Serif: A serif is not an angel (a seraph), but rather is a fine cross-stroke at the end of the principal stroke of a letter. Serifs enable the eye to move easily from letter to letter of a line of text and hence improve the readability of a document set in a serifed typeface. Sans serif typefaces lack serifs. Times Roman is a serifed typeface and Arial is a sans serif typeface. In the following examples, the serifs are the fine lines at the ends of the s, r, i, and f in the word serif, which is set in Times New Roman, and which are missing from the same letters in the words sans serif, which are set in Arial:

Serif Sans Serif

The rules require the use of a serifed typeface to enhance the readability of the brief (22 NYCRR 670.10.3[a]). The use of sans serif fonts is prohibited.

EXHIBIT G

55 Fed.Appx. 257
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals, Sixth Circuit.

J.B. GILLELAND, D.O., Plaintiff-Appellant,
v.
Richard SCHANHALS, et al., Defendants-Appellees.

No. 01-1839. | Jan. 7, 2003.

Plaintiff brought action seeking declaratory judgment that he was co-owner of copyright to software program. The United States District Court for the Western District of Michigan entered summary judgment in favor of defendants, and plaintiff appealed. The Court of Appeals, Gilman, Circuit Judge, held that: (1) district court properly considered defendants' summary judgment affidavit, and (2) parol evidence rule did not bar use of affidavit.

Affirmed.

West Headnotes (2)

[1] **Federal Civil Procedure**
Affidavits

District court properly considered defendants' summary judgment affidavit in copyright dispute, even though affidavit was filed along with defendants' reply memorandum, as opposed to accompanying their initial memorandum, where plaintiff contended that summary judgment was not warranted because record was silent as to reason why license agreement was entered into by parties, affidavit directly addressed issue, and plaintiff had opportunity to respond to affidavit or to file motion to strike affidavit, but failed to do so.

8 Cases that cite this headnote

[2] **Evidence**
Identification of Parties

Under Michigan law, parol evidence rule did not preclude use of software licensor's president's affidavit regarding reason why superseding license agreement was signed by consultant in his individual capacity; agreement was ambiguous as to why consultant also signed agreement as co-grantor, and affidavit clarified that licensor's largest customer insisted that parties sign new licensing agreement indicating that consultant had no individual ownership interest in software.

1 Cases that cite this headnote

*257 On Appeal from the United States District Court for the Western District of Michigan.

258 Before KENNEDY and GILMAN, Circuit Judges; and SARGUS, District Judge.

* The Honorable Edmund A. Sargus Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

GILMAN, Circuit Judge.

**1 Douglas Carson, Richard Schanhals, and J.B. Gilleland are the sole shareholders of MedTrak Systems, Inc. MedTrak Systems is the licensee of the MedTrak Program, a software program that tracks medical patient care. Micom Systems of Michigan, Inc., a corporation owned solely by Carson and Schanhals, is the licensor. In January of 1994, Micom and MedTrak Systems entered into a license agreement providing that "Micom hereby grants to MedTrak an exclusive license to use [the MedTrak program].... Title to all intellectual property rights [in the MedTrak Program] ... is, and shall remain, in Micom." Carson, Schanhals, and Gilleland adopted nearly identical language in a 1997 agreement that completely superseded the 1994 agreement. The 1997 agreement, however, stated that "Micom *and Gilleland* hereby grant to MedTrak an exclusive license to use and license the [MedTrak Program]" (emphasis added).

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Gilleland filed a complaint on March 31, 2000, asserting state-law claims against Carson and Schanhals, among others, and seeking a declaratory judgment that Gilleland is the co-owner of the copyright to the MedTrak Program. Carson and Schanhals moved for summary judgment on the copyright claim, which the district court granted. Gilleland has timely appealed, contending that the district court erred in (1) applying § 204(a) of the Copyright Act, (2) misconstruing the language in the two licensing agreements regarding the parties' intent to transfer ownership to Micom, (3) granting summary judgment based on ambiguous agreements that contravened the intent of the parties, and (4) considering Schanhals's affidavit. For the reasons set forth below, we AFFIRM the judgment of the district court.

I. BACKGROUND

A. Factual background

Micom originally sold computer software programs to law firms throughout the country. In the early 1990s, however, Carson and Schanhals decided to expand the scope of Micom's business. They contacted Gilleland to discuss the prospect of marketing a computer program for occupational health and urgent care clinics.

Carson, Schanhals, and Gilleland agreed in 1991 to form a new company, MedTrak Systems, to market the MedTrak Program. They executed an agreement later that year, pursuant to which each of them contributed $75,000 to fund MedTrak Systems. As part of the agreement, they became equal shareholders.

On January 7, 1994, Micom and MedTrak Systems entered into an agreement granting MedTrak Systems an exclusive license to use the MedTrak Program for five years, with MedTrak Systems having an option to purchase the software at the expiration of the agreement. The licensing agreement provided in pertinent part as follows:

> Micom and ... Gilleland have developed the MedTrak [Program] ("Software') for use in the medical field which MedTrak [Systems] desires to market to the medical field.

Micom hereby grants to MedTrak [Systems] an exclusive license to use the Soft *259 ware.... The license granted hereby transfers neither title nor any proprietary rights to the Software. Title to all intellectual property rights, including patent, trademark, copyright, and trade secret rights ... is, and shall remain, in Micom until such time, if ever, that the Software is sold. Gilleland signed this agreement as the Vice-President of MedTrak Systems.

**2 Micom and MedTrak Systems entered into a nearly identical licensing agreement on August 8, 1997. The 1997 agreement stated that it "supersedes all prior agreements and understanding[s] ... with respect to the [MedTrak Program]." Aside from lengthening the term of MedTrak System's license from 5 to 15 years, the two most significant differences between the 1994 and 1997 agreements was that (1) Gilleland signed the 1997 agreement in his individual capacity in addition to signing as the Vice President of MedTrak Systems, and (2) Gilleland was listed as a co-grantor of the license along with Micom.

B. Procedural background

The relationship between the parties deteriorated sometime after they executed the 1997 agreement. Unable to resolve their differences, Gilleland sued Carson, Schanhals, MedTrak Systems, and Micom, asserting various state-law claims and seeking a declaration that he owned an interest in the copyright in the MedTrak Program.

The defendants filed a motion for summary judgment, contending that Gilleland does not have an ownership interest in the MedTrak Program. In support of their motion, the defendants submitted the 1994 and 1997 agreements, and, in conjunction with their reply brief, the defendants submitted an affidavit by Schanhals. The Schanhals affidavit states that the parties signed the 1997 agreement because U.S. Health Works, Inc., which had entered into an agreement with MedTrak Systems to use the MedTrak Program, insisted that Gilleland acknowledge in writing that he had no *individual* ownership interest in the software. Although Gilleland filed a memorandum in opposition to the motion, he did not proffer any evidence in support of his position.

On May 25, 2001, the district court granted the defendants' motion for summary judgment on Gilleland's federal claim. It then declined to exercise pendant jurisdiction over his state-law claims. This timely appeal followed.

II. ANALYSIS

A. Standard of review

We review the district court's grant of summary judgment de novo. *Sperle v. Mich. Dep't of Corr.*, 297 F.3d 483, 490 (6th Cir.2002). Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering such a motion, the court construes all reasonable factual inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

B. Defendants' motion for summary judgment

1. Application of the Copyright Act to the 1997 Agreement

Section 201(d) of the Copyright Act provides that "ownership of a copyright may be transferred in whole or in part by any *260 means of conveyance." 17 U.S.C. § 201(d) (2002). The Copyright Act also delineates the parameters by which a party may convey a copyright: "A transfer of copyright ownership ... is not valid unless an instrument of conveyance ... is in writing and signed by the owner of the rights conveyed...." 17 U.S.C. § 204(a). These provisions accomplish "Congress's paramount goal ... of enhancing predictability and certainty of copyright ownership." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989).

**3 So long as the parties' intent is clear, a transfer of copyright need not include any particular language. *Radio Television Espanola S.A. v. New World Entm't, Ltd.*, 183 F.3d 922, 927 (9th Cir.1999) ("No magic words must be included in a document to satisfy § 204(a)."). *Cf.* 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, § 10.03[A][2] (Rel. 53 2000) ("As with all matters of contract law, the essence of the inquiry here is to effectuate the intent of the parties."). As such, "Section 204(a)'s requirement is not unduly burdensome. The rule is really quite simple: If the copyright holder agrees to transfer ownership to another party, that party must get the copyright holder to sign a piece of paper saying so. It doesn't have to be the Magna Carta; a one-line pro forma statement will do." *Radio Television Espanola*, 183 F.3d at 927 (internal quotation marks omitted) (ellipsis omitted).

Because the 1997 agreement by its own terms completely supersedes the 1994 agreement, we need interpret only the 1997 agreement. *See* 1997 agreement, at ¶ 6 ("This agreement constitutes the entire agreement and supersedes all prior agreements and understanding[s], both written and oral, with respect to the subject matter hereof."). Gilleland does not contend to the contrary.

The 1997 agreement is, as the district court found, ambiguous and inconsistent on its face. On the one hand, it declares that it does not transfer any rights to the MedTrak Program and that the copyright to the MedTrak Program "is, and shall remain, in Micom." On the other hand, Gilleland signed the agreement as a co-grantor, which indicates that he possessed an ownership interest in the MedTrak Program at the time he signed the agreement.

As the defendants contend and the district court found, Schanhals's affidavit clears up the apparent inconsistency. The affidavit explains that U.S. HealthWorks, Inc., MedTrak's largest customer, insisted that the parties sign a new licensing agreement and that Gilleland "execute the new agreement individually, stating that he had no individual ownership interest in the software." While the 1997 agreement is not a model of clarity, the affidavit establishes the parties' intent that Gilleland, to the extent that he had previously possessed an ownership interest in the copyright of the MedTrak Program, was relinquishing such rights in the 1997 agreement. With this clarification, the 1997 agreement satisfied the Copyright Act, so long as the district court did not err in considering Schanhals's affidavit.

2. Schanhals's affidavit

Gilleland maintains that the district court's consideration of the affidavit was improper because it "essentially reopened the record after it had been closed." He also claims that the district court erred by considering Schanhals's affidavit because the affidavit allegedly violated the parol evidence rule and contained hearsay, conclusory statements, and information about which Schanhals had no personal knowledge.

*261 **4 [1] Gilleland's first argument is premised on the fact that the affidavit was filed along with the defendants' reply memorandum, as opposed to accompanying their initial memorandum. But this court has explicitly approved of such filings, provided that two conditions are satisfied: (1) the affidavit responds only to the nonmoving party's

opposition memorandum, and (2) the nonmoving party has an opportunity to respond. *Peters v. Lincoln Elec. Co.*, 285 F.3d 456, 476 (6th Cir.2002) (affirming the district court's consideration of an affidavit filed with a reply memorandum in support of a motion for summary judgment); *see also Fisher v. Trinova Corp.*, No. 96-3918, 1998 WL 774111, *8 (6th Cir. Oct.13, 1998) (affirming the district court's consideration of affidavits filed with a reply memorandum in support of a motion for summary judgment because the nonmoving party "had ... time available to respond to the reply-brief affidavits"). Here, there is no question that Schanhals's affidavit responded to Gilleland's memorandum opposing the motion for summary judgment. Gilleland's opposition memorandum argued that the motion should be denied because "the record is silent as to the reason why the 1997 License Agreement was entered into by the parties or why Dr. Gilleland's signature now appears but did not appear in the 1994 agreement."

In addition, Gilleland had an opportunity to respond to Schanhals's affidavit. The defendants filed the affidavit on March 30, 2001, and the district court did not issue its order granting the motion until May 21, 2001. More than seven weeks thus elapsed between the filing of the affidavit and the issuance of the order. In that time, Gilleland could have sought leave to file a response or could have filed a motion to strike the affidavit pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. He also could have filed a motion for reconsideration pursuant to Rules 59(e) and 60(b) of the Federal Rules of Civil Procedure in light of the alleged late filing of the affidavit. Instead, Gilleland sat on his hands and did not raise the issue prior to filing this appeal. We thus conclude that there was no procedural deficiency concerning the filing of the affidavit.

[2] Regarding Gilleland's challenge to the admissibility of the affidavit, we find his arguments to be without merit. Affidavits submitted in support of a motion for summary judgment must "set forth such facts as would be admissible in evidence." Fed.R.Civ.P. 56(e). Contrary to Gilleland's contentions, however, the affidavit contains no inadmissible facts. Schanhals, as the President of MedTrak, certainly had personal knowledge of U.S. Healthworks' conditions for entering into a contract with MedTrak. Moreover, the parol evidence rule does not bar the consideration of the affidavit because, under Michigan law, the parol evidence rule does not preclude the consideration of a document that "indicate[s] the actual intent of the parties where an actual ambiguity exists." *Wonderland Shopping Ctr. Venture, Ltd. P'ship v. CDC Mortgage Capital, Inc.*, 274 F.3d 1085, 1095 (6th Cir.2001) ("Michigan permits the use of extrinsic evidence to dispose of a potential ambiguity ... or to indicate the actual intent of the parties where an actual ambiguity exists.").

5 The affidavit similarly contains no conclusory statements. *See, e.g.*, Schanhals affidavit, at ¶ 4 ("As a condition of execution of a contract with Medtrak Systems, Inc., U.S. HealthWorks, Inc. insisted that a new licensing agreement ... be executed by all the principals. U.S. HealthWorks, Inc. also insisted that [Gilleland] execute the agreement individually, stating that he had no individual ownership interest in the software."). Finally, the affidavit does not contain hearsay statements because the ***262 alleged motivations of U.S. HealthWorks were not submitted for the truth of the matter asserted, but rather to establish why the parties entered into the 1997 agreement.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court.

All Citations

55 Fed.Appx. 257, 2003 WL 68145

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November 30, 2015

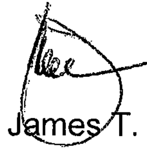
David S. Schied
P.O. Box 1378
Novi, MI 48376

RE: David Schied v MMRMA, et al
Case No: 2:15-cv-11840
Our File: 1-1368-22870

Dear Mr. Schied:

Enclosed please find MMRMA's Motion to Strike Plaintiff's "Replacement" Responses (Docket Numbers 81, 82, 83, 84 and 85) for Plaintiff's Failure to Comply With This Court's Order and the Local Rules of Court and to Dismiss, which has been electronically filed in this matter.

Sincerely,



James T. Mellon

JTM/smr
Enclosure