11-23-2009

Climax v. Snake River Oncology Appellant's Brief Dckt. 36613

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * *

CLIMAX, LLC, an Idaho limited liability company, Plaintiff-Appellant,

v.

SNAKE RIVER ONCOLOGY OF EASTERN IDAHO, PLLC, and CHRISTIAN SHULL, M.D., Defendants-Respondents,

* * * * *

Supreme Court Docket No. 36613

* * * * *

APPELLANT'S BRIEF ON APPEAL

* * * * *

Appeal from the District Court of the Seventh Judicial District for Bonneville County. Honorable Jon J. Shindurling, District Judge, presiding.

* * * * *

B. J. Driscoll, Esq., residing at Idaho Falls, Idaho, for Appellant Climax, LLC.

Don Carey, Esq., and Jeremy Brown, Esq., residing at Idaho Falls, Idaho, for Respondents, Snake River Oncology of Eastern Idaho, PLLC, and Christian Shull, M.D.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 3
STATEMENT OF FACTS 3
COURSE OF PROCEEDINGS 8
ISSUES PRESENTED ON APPEAL 13
ARGUMENT 14
I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY REQUIRING CLIMAX TO SHOW SHULL COMMITTED FRAUD BEFORE GRANTING CLIMAX EQUITABLE RELIEF. 14
A. Standard of Review 14
B. The Trial Court Erroneously Imposed A Fraud Standard In Section 535(g) Where None Exists. 15
1. The plain language of Section 535(g) does not require a showing of fraud for a lessor to receive relief 15
2. The case law interpreting Section 535(g) does not require a showing of fraud in order for a lessor to receive equitable relief 16
3. Related cases applying the SCRA do not require a showing of fraud for a party to receive relief against a servicemember 19
4. This Court should remand this case with instructions for the trial court to consider the justice, equity, and fairness of Shull's lease termination based on the undisputed facts 21
II. THIS COURT SHOULD AWARD CLIMAX ITS ATTORNEY'S FEES AND COSTS 21
CONCLUSION 22

TABLE OF CASES AND AUTHORITIES

CASES: ***Pages***

Ada County Bd. of Equalization v. Highlands, Inc., 141 Idaho 202 (2005) 14
Adams v. Anderson, 142 Idaho 208 (2005) 14
Boone v. Lightner, 319 U.S. 561 (1943) 17, 19-21
Callies v. O'Neal, 147 Idaho 841 (2009) 14
Conroy v. Aniskoff, 507 U.S. 511 (1993) 10, 17, 18
Cristo Viene Pentecostal Church v. Paz, 144 Idaho 304 (2007) 14
Dietz v. Treupel, 184 A.D. 448 (NY 1918) 20
Esser Elec. v. Lost River Ballistics Technologies, Inc., 145 Idaho 912 (2008) 21
Franklin Soc. for Home-Building and Savings v. Flavin, 265 A.D. 720 (NY 1943) 20
Holscher v. James, 124 Idaho 443 (1993) 13, 15
Omega Industries, Inc. v. Raffaele, 894 F.Supp. 1425 (D.Nev. 1995) 16, 17, 18
Patrikes v. J.C.H. Service Stations, 180 Misc. 917, 41 N.Y.S.2d 158 (N.Y.City Ct.1943) 16-19
Pocatello v. State, 145 Idaho 497 (2008) 15
Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County, 136 Idaho 809 (2001)) 14

STATUTES AND RULES:

Idaho Appellate Rule 40 ..... 21, 22
Idaho Appellate Rule 41 21
Idaho Code Section 12-120(3) 13-14, 21-22
50 U.S.C. App. § 535(g) 3, 5, 10, 13-21

OTHER AUTHORITIES:

BLACK'S LAW DICTIONARY 540 (6th ed. 1990) 16
BLACK'S LAW DICTIONARY 864 (6th ed. 1990) 16

STATEMENT OF THE CASE

In 2007, the defendants-respondents, Snake River Oncology of Eastern Idaho, PLLC ("SRO") and Christian Shull, M.D. ("Shull"), terminated a commercial lease with the plaintiff-appellant, Climax, LLC ("Climax"), in reliance on the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. App. § 501, *et seq*. The SCRA permits servicemembers to terminate leases under certain circumstances when called to active duty. However, in balancing the special privileges to servicemembers against the legitimate rights of creditors, Section 535(g) of the SCRA specifically grants lessors the right to seek modification of a servicemember's lease termination "as justice and equity require." Here, Climax petitioned for relief, but the trial court denied Climax' petition on the grounds that Climax failed to prove fraud. Because nothing in Section 535(g), its legislative history, or in the cases that apply it requires that a lessor show fraud in order to obtain relief from a servicemember's lease termination, Climax now appeals the trial court's decision. The plain language of Section 535(g) authorizes relief as justice and equity require, nothing more.

As explained more fully below, this Court should reverse the trial court's grant of summary judgment to SRO and Shull and remand with instructions for the trial court to determine whether justice and equity require modification of Shull and SRO's lease termination.

STATEMENT OF FACTS

On November 18, 2004, SRO signed a lease agreement ("Lease") with Climax for a five-year term.[1] At that same time, Shull signed a personal guaranty of SRO's obligations under the

[1] Clerk's Exhibits, Exhibit "A" to the Affidavit of B. J. Driscoll filed November 3, 2008.

Lease.[2] Shull negotiated the terms of the Lease with David Collette ("Collette") of Climax.[3] Because Collette and Shull knew each other before signing the lease, Collette agreed that Climax would initially defer a portion of the rent payments from SRO "to make it easier" for Shull to lease the property "knowing that [Shull] was just starting [his] practice."[4] Collette did not request anything additional in the Lease in exchange for the reduced initial rent payments.[5]

At all times relevant to this action, Shull is a licensed physician and a member of the United States Army Reserves.[6] Sometime before October 2006, Shull received a telephone call from the United States Army notifying him that he would probably be called up to active duty.[7] In late January 2007, Shull received written orders for him to report to active duty in Fort Irwin, California in late February 2007.[8]

On February 23, 2007, the day before Shull left Idaho Falls to report to active duty,[9] he signed a contract to purchase a building approximately double the size of the building he was leasing from Climax[10] for a purchase price of $1,849,497.95[11] and to purchase equipment and supplies for an additional $300,000,[12] ***resulting in a total purchase of over $2.1 million the day before he left for active duty***. Shull purchased the building, equipment, and supplies from Dr. Kevin Mulvey, another oncologist in the Idaho Falls area. Shull made the purchase "primarily" to

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[2] Clerk's Exhibits, Exhibit "A" to the Affidavit of B. J. Driscoll filed November 3, 2008.
[3] R Vol. I, pp. 41-42.
[4] R Vol. I, pp. 41-42.
[5] R Vol. I, pp. 41-42.
[6] R Vol. I, p. 29.
[7] R Vol. I, pp. 30-31.
[8] R Vol. I, pp. 31-32.
[9] R Vol. I, p. 32.
[10] R Vol. I, p. 45.

prevent another oncologist from coming to the Idaho Falls market after Dr. Mulvey retired.[13] By purchasing the building, equipment, and supplies, Shull's monthly debt obligation went from between $7,000 to $8,000 per month for the remaining two and one-half years on the Climax lease[14] to $18,000 per month for 20 years on a loan from Wells Fargo.[15] Shull and Dr. Mulvey issued a joint statement to hospital staff announcing Dr. Mulvey's retirement and Shull's accepting the responsibility for the care of Dr. Mulvey's patients.[16]

During his period of active duty service in California from February 24 to approximately May 27, 2007, Shull provided Climax with written notice under 50 U.S.C. App. § 535 that he was terminating the Lease with Climax effective May 30, 2007.[17] Shull returned to Idaho Falls from his active duty service before Memorial Day (May 28, 2007).[18] Thus, Shull was back in Idaho Falls ***before the lease termination became effective*** on May 30, 2007.[19] SRO and Shull vacated the leased property on or about May 30, 2007.

Shull ***knew*** he would probably serve only three months on active duty[20] and had successfully hired a locum tenums physician to manage his practice during his absence.[21] Shull did not become interested in terminating his lease with Climax until ***after*** he became interested in purchasing the

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[11] R Vol. I, pp. 46-47.
[12] R Vol. I, p. 48.
[13] R Vol. I, pp. 44-45.
[14] R Vol. I, pp. 40-41.
[15] R Vol. I, pp. 56-57.
[16] Clerk's Exhibits, Exhibit "E" to the Affidavit of B. J. Driscoll filed November 3, 2008.
[17] Clerk's Exhibits, p. 4 of Brief in Support of Motion for Summary Judgment and Motion for Bench Trial filed November 3, 2008.
[18] R Vol. I, p. 33.
[19] Clerk's Exhibits, pp. 4-5 of Brief in Support of Motion for Summary Judgment and Motion for Bench Trial filed November 3, 2008.
[20] R Vol. I, p. 53.

new building.[22] At his deposition, Shull testified, "***During our discussions of me purchasing the building was when I first thought of terminating the lease with Climax.***"[23] Shull contracted to purchase the new building and equipment after receiving his orders and before he left for active duty knowing that the purchase would increase his financial burden even as he was leaving for Fort Irwin.[24]

Shull admits that he was able to meet all of his financial obligations despite his call to active duty[25] and the only financial burden from his call to active duty was lost profits[26] from a reduced number of new patient referrals.[27] This reduced cash flow from Shull's absence lasted only three months after his return and then the cash flow recovered.[28] From January 2004 though November 2007 (which included Shull's three-month absence from March through May 2007), Shull and SRO did not have to terminate or lay-off any employees for inability to pay them.[29] Although Shull claims that his business cash flow was "severely compromised" by his absence, he admits that he "can't quantify it."[30] When asked if he had any idea of how much money he or SRO lost as a result

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[21] R Vol. I, pp. 33-34 and p. 53.
[22] R Vol. I, p. 45.
[23] R Vol. I, p. 45 (emphasis added).
[24] R Vol. I, p. 53.
[25] R Vol. I, p. 54. Clerk's Exhibits, p. 141, ll. 9-20 of the transcript of the deposition of Christian Shull, M.D., Vol. II, taken July 11, 2008, a copy of which is attached as Exhibit "B" to the Affidavit of B. J. Driscoll filed November 3, 2008.
[26] R Vol. I, p. 55.
[27] Clerk's Exhibits, p. 143, l. 12 thru p. 144, l. 4 of the transcript of the deposition of Christian Shull, M.D, Vol. II, taken July 11, 2008, a copy of which is attached as Exhibit "B" to the Affidavit of B. J. Driscoll filed November 3, 2008.
[28] Clerk's Exhibits, p. 144, ll. 16-25 of the transcript of the deposition of Christian Shull, M.D, Vol. II, taken July 11, 2008, a copy of which is attached as Exhibit "B" to the Affidavit of B. J. Driscoll filed November 3, 2008.
[29] Clerk's Exhibits, p. 135, ll. 18-24 of the transcript of the deposition of Christian Shull, M.D, Vol. II, taken July 11, 2008, a copy of which is attached as Exhibit "B" to the Affidavit of B. J. Driscoll filed November 3, 2008.
[30] Clerk's Exhibits, p. 142, ll. 1-23 of the transcript of the deposition of Christian Shull, M.D, Vol. II, taken July 11, 2008, a copy of which is attached as Exhibit "B" to the Affidavit of B. J. Driscoll filed November 3, 2008.

of his three-month deployment, Shull testified, "I don't."[31] When asked whether SRO enjoyed a net loss or net gain during his absence, Shull was unsure but testified, "***I suspect that my company was profitable while I was gone.***"[32] Shull's 2007 federal tax return reports a net profit of $804,843.00 for SRO in 2007 despite Shull's three-month military absence that year.[33] Shull's 2007 federal tax return reports Shull's adjusted gross income was $886,986.00 despite his three-month military absence that year.[34] Shull keeps $250,000 of his business revenues in an account for SRO's operating expenses, and then takes the remaining revenue in a monthly draw.[35]

At his deposition, Shull testified that he was "primarily" interested in buying Dr. Mulvey's building, equipment, and supplies "to prevent [Dr. Mulvey] from selling it to somebody else" because "[Shull] did not want [Dr. Mulvey] to bring another competitor into the Idaho Falls market."[36] Despite Shull's concern about Dr. Mulvey bringing another oncologist to the Idaho Falls market, the May 11, 2008 edition of the Post Register's Medical Guide included a promotional advertisement from SRO announcing the addition of a new oncologist to SRO's staff. The advertisement states, "Dr. Christian Shull and the staff of Snake River Oncology would like to extend a warm welcome to Dr. Matthew Sweetser."[37] The advertisement concludes, "Dr. Sweetser

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[31]Clerk's Exhibits, p. 152, ll. 4-7 of the transcript of the deposition of Christian Shull, M.D, Vol. II, taken July 11, 2008, a copy of which is attached as Exhibit "B" to the Affidavit of B. J. Driscoll filed November 3, 2008.
[32] Clerk's Exhibits, p. 156, l. 17 thru p. 157, l. 4 of the transcript of the deposition of Christian Shull, M.D, Vol. II, taken July 11, 2008, a copy of which is attached as Exhibit "B" to the Affidavit of B. J. Driscoll filed November 3, 2008.
[33] Clerk's Exhibits, Exhibit "D" to the Affidavit of B. J. Driscoll filed November 3, 2008.
[34] Clerk's Exhibits, Exhibit "D" to the Affidavit of B. J. Driscoll filed November 3, 2008.
[35] Clerk's Exhibits, p. 157, l. 23 thru p. 158, l. 18 of the transcript of the deposition of Christian Shull, M.D, Vol. II, taken July 11, 2008, a copy of which is attached as Exhibit "B" to the Affidavit of B. J. Driscoll filed November 3, 2008
[36] R Vol. I, pp. 44-45.
[37] Clerk's Exhibits, Exhibit "C" to the Affidavit of B. J. Driscoll filed November 3, 2008.

is now accepting new patients."[38] The same advertisement from the May 11, 2008 edition of the Post Register's Medical Guide also appeared as a full-page advertisement in the July/August 2008 issue of Idaho Falls Magazine.[39]

As a result of SRO and Shull's termination of the Lease, Climax faced a total loss of $323,964.36 through the remainder of the original lease term. However, Climax avoided $249,648.36 of that loss by successfully reletting the property left vacant by SRO. By reletting the property, Climax has reduced the amount of its potential losses from the lease termination from $323,964.36 to actual losses of $74,316.00.[40] As part of its efforts to relet the property, Climax incurred advertising expenses of $741.97.[41] Climax' actual losses from the lease termination total $75,057.97.[42]

COURSE OF PROCEEDINGS

On May 23, 2007, Climax filed a complaint against SRO and Shull.[43] Subsequently, Climax filed an amended complaint.[44]

On November 3, 2008, after conducting discovery, Climax filed a motion for summary judgment.[45] Climax argued that there was no genuine issue of fact and that justice and equity required the district court to modify SRO and Shull's lease termination for several reasons. First, the SCRA, with its statutory history and case law, clearly vest courts with broad discretion to ensure

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[38] Clerk's Exhibits, Exhibit "C" to the Affidavit of B. J. Driscoll filed November 3, 2008.
[39] Clerk's Exhibits, Exhibit "C" to the Affidavit of B. J. Driscoll filed November 3, 2008.
[40] Clerk's Exhibits, Affidavit of Sue Landon filed November 3, 2008.
[41] Clerk's Exhibits, Affidavit of Sue Landon filed November 3, 2008.
[42] Clerk's Exhibits, Affidavit of Sue Landon filed November 3, 2008.
[43] R Vol. I, p. 9.
[44] R Vol. I, p. 60.

that servicemembers do not put the immunities and privileges of the SCRA to "unworthy use" against the rights of their creditors.[46] This judicial discretion includes "broad latitude and discretion in granting equitable remedies ***to lessors***."[47] The SCRA intends no unfair result. Second, the undisputed facts demonstrated that Shull terminated his lease with Climax not because of anticipated hardship or his inability to meet his obligations following his call to military service, but to expand his medical practice and prevent competition from other oncologists by purchasing a larger building and additional equipment.[48] Third, Shull did not terminate the lease with Climax to alleviate a financial burden from his military service. In fact, by terminating his lease and then expanding his practice, Shull increased his debt from $240,000 under the lease to approximately $4,300,000.[49] Fourth, Shull orchestrated the lease termination to be effective not before or during his deployment, but a few days ***after*** his return from active duty.[50] Fifth, despite his 3-month military absence, Shull hired a locum tenums physician to manage his practice during his absence. As a result and despite his absence, Shull's practice profited. Shull's adjusted gross income that year still reached nearly $900,000, plus the $250,000 that he keeps in SRO's business account.[51]

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[45] See Clerk's Certification of Exhibits (Sealed By Court Order) dated July 27, 2009, already on file with the court.
[46] Clerk's Exhibits, pp. 10-11 of Brief in Support of Motion for Summary Judgment and Motion for Bench Trial filed November 3, 2008.
[47] Clerk's Exhibits, p. 11 of Brief in Support of Motion for Summary Judgment and Motion for Bench Trial filed November 3, 2008. (Emphasis original in brief, added from case quoted.)
[48] Clerk's Exhibits, p. 12 of Brief in Support of Motion for Summary Judgment and Motion for Bench Trial filed November 3, 2008.
[49] Clerk's Exhibits, p. 13 of Brief in Support of Motion for Summary Judgment and Motion for Bench Trial filed November 3, 2008.
[50] Clerk's Exhibits, p. 13 of Brief in Support of Motion for Summary Judgment and Motion for Bench Trial filed November 3, 2008.
[51] Clerk's Exhibits, p. 14 of Brief in Support of Motion for Summary Judgment and Motion for Bench Trial filed November 3, 2008.

In opposition to the motion, SRO and Shull argued that Climax improperly sought to require the servicemember show an "undue hardship" before exercising the lease termination provisions of the SCRA.[52] SRO and Shull argued that the lease termination provisions of the SCRA intentionally omitted an "undue hardship" requirement to afford greater privileges to the servicemembers.[53] Importantly, SRO and Shull offered only legal arguments and did not dispute any material facts.[54]

In reply, Climax reiterated that SRO and Shull did not dispute the facts of the case and summary judgment was proper.[55] Climax responded to SRO and Shull's legal argument by pointing to the express language of Section 535(g) granting the court the right to modify Shull's lease termination "as justice and equity require."[56] Climax also distinguished *Conroy v. Aniskoff*, 507 U.S. 511 (1993), the legal authority SRO and Shull had relied on. The SCRA provision at issue in *Conroy* was Section 525 of the SCRA, which extended the time for a servicemember to exercise a right of redemption in real property. The defendants in *Conroy* argued that the servicemember should be required to show a hardship (an express prerequisite found in other provisions of the SCRA, but not in Section 525) before enjoying the extended redemption period. The United States Supreme Court rejected the defendants' argument, refusing to read a hardship requirement into Section 525 that did not exist. Climax explained that Section 525 at issue in *Conroy* did not include an exception to the servicemember's rights, but Section 535 did in subsection (g). Specifically, Section 535(g) expressly granted lessors the right to challenge a servicemember's lease termination

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[52] Clerk's Exhibits, p. 1 of Opposition to Plaintiff's Motion for Summary Judgment filed November 17, 2008.
[53] Clerk's Exhibits, pp. 2-7 of Opposition to Plaintiff's Motion for Summary Judgment filed November 17, 2008.
[54] Clerk's Exhibits, Opposition to Plaintiff's Motion for Summary Judgment filed November 17, 2008.
[55] Clerk's Exhibits, pp. 1-2 of Reply Brief in Support of Motion for Summary Judgment filed November 21, 2008.
[56] Clerk's Exhibits, pp. 2-5 of Reply Brief in Support of Motion for Summary Judgment filed November 21, 2008.

and for a court to modify that termination "as justice and equity require."[57] Climax also reminded the court of its successful mitigation efforts, having avoided over 77% of the $323,964.36 in total losses resulting from the lease termination.[58]

At the December 1, 2008 hearing on the motion for summary judgment, Climax reiterated its request for relief as follows:

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If I understand the defendants' argument correctly, he's saying that undue hardship is not a proper consideration for the court in this case. I

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think that's entirely incorrect. The standard is -- and we're not disputing it, and they don't dispute it -- does justice and equity require there be some modification? ***In other words, is it fair for my client to have to bear that whole burden or not?*** And I understand that. There is no legal entitlement to any particular amount. There's no magical formula for how to determine this. This is an equitable case.

The legislative history and the case law history is clear. The court has broad discretion. And that's clear. What we're asking the court to do -- and the case law supports this. And that is consider undue hardship as a factor when looking at the justice and equity of the situation. It's nothing more than that. It's nothing less than that. We think in this case it's proper, and given the history that it is a proper consideration. Again, they're trying to balance the rights of the soldier against the rights of his creditor. And an undue hardship to the soldier is a proper consideration.[59]

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[57] Clerk's Exhibits, pp. 2-5 of Reply Brief in Support of Motion for Summary Judgment filed November 21, 2008.
[58] Clerk's Exhibits, pp. 5-6 of Reply Brief in Support of Motion for Summary Judgment filed November 21, 2008.
[59] See Tr Vol. I, p. 17, l. 23 through p. 18, l. 20 (emphasis added).

Climax further explained that this case was not an attack on Shull, but a simple question of whether Climax should bear the entire burden from the lease termination so that Shull could expand his business as follows:

> 19
> 18 Dr. Shull, to his credit, made almost $900,000 in the
> 19 2007 year. Good for him. He had an additional
> 20 $250,000 tucked away in his business account in Snake
> 21 River Oncology. That's great. It sounds like he's
> 22 running a great business. And we're not criticizing
> 23 him as a business manager. ***What we are criticizing***
> ***24 him for is placing the burden of carrying the loss***
> ***25 from his lease termination on us, when he's entirely***
> ***20***
> ***1 capable of carrying it for himself. He could have***
> ***2 honored this lease. He's using the statute in a way***
> ***3 that was not intended, to try to avoid his just***
> ***4 liabilities. And that's what we think is not just and***
> ***5 that we think is not equitable.***
> . . . .
> 21
> 19 Dr. Shull was able to buy a new building, buy
> 20 additional equipment, expand his practice. And we
> 21 don't fault him for that. Again, this is not an
> 22 attack on Dr. Shull. He's not a bad guy. He's not a
> 23 bad doctor. We're not saying any of that. All we're
> 24 saying is that ***we need to look at whether justice and***
> ***25 equity would have my client foot the bill for his***
> ***22***
> ***1 business expansion, and we think that that's clearly***
> ***2 not the case.***[60]

On January 30, 2009, the court filed its Opinion, Decision, and Order on Plaintiff's Motion for Summary Judgment ("Order") denying Climax' motion for summary judgment and granting

[60] See Tr Vol. I, p. 19, l. 18 through p. 20, l. 5 and p. 21, l. 19 through p. 22, l. 2 (emphasis added).

summary judgment *sua sponte* to SRO and Shull.[61] The court erroneously referred to Climax' claim as one for breach of contract.[62] The court correctly noted that Section 535 does not include a provision requiring the servicemember to show hardship or prejudice to terminate a lease.[63] However, the court seemed to limit the available equitable relief to instances of "'mutual mistake, fraud, or impossibility.'"[64] The court then denied any relief to Climax because "[t]here are no allegations before the court of fraud, or that Shull entered the military in order to shirk his obligations."[65] In reaching its conclusion, the court did not cite to any facts supporting the "justice" or "equity" of its decision, but stated, "Plaintiff has not presented a compelling argument for this court to exercise its equitable discretion and withhold the protection of the Act."[66]

After granting summary judgment to SRO and Shull, the court entered a Final Judgment on May 15, 2009.[67] Subsequent to entry of judgment, the district court determined that this matter involved a commercial transaction and awarded SRO and Shull attorney's fees and costs pursuant to Idaho Code Section 12-120(3) and I.R.C.P. 54(d) and (e).[68]

On June 9, 2008, Climax timely filed its Notice of Appeal.[69]

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[61] R Vol. I, p. 111.
[62] R Vol. I, p. 113.
[63] R Vol. I, p. 117.
[64] R Vol. I, p. 118 (quoting *Holscher v. James*, 124 Idaho 443, 447 (1993).
[65] R Vol. I, p. 118.
[66] R Vol. I, p. 119.
[67] R Vol. I, p. 7. In preparing its appellate brief, Climax noted that the clerk's record did not include the Final Judgment. However, Climax understands that there is no dispute as to the date or content of the Final Judgment, and that the Final Judgment is not a pleading critical to the resolution of this appeal, and therefore does not seek to augment the record to include the Final Judgment.
[68] R Vol. I, p. 135.
[69] R Vol. I, p. 126.

ISSUES PRESENTED ON APPEAL

1. Did the district court commit reversible error by requiring Climax to show Shull committed fraud before granting Climax any relief under Section 535(g) of the Servicemembers Civil Relief Act?

2. Is Climax entitled to an award of its attorney's fees and costs on appeal under Idaho Code Section 12-120(3) and Idaho Appellate Rules 40 and 41?

ARGUMENT

I.

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY REQUIRING CLIMAX TO SHOW SHULL COMMITTED FRAUD BEFORE GRANTING CLIMAX EQUITABLE RELIEF.

A. Standard Of Review.

If there are "no disputed issues of material fact," then this Court "exercise[s] free review over all remaining questions of law." *Adams v. Anderson*, 142 Idaho 208, 210 (2005); *see also Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 307 (2007). "The interpretation and application of a statute are pure questions of law over which this Court exercises free review. *Roeder Holdings, L.L.C. v. Bd. of Equalization of Ada County*, 136 Idaho 809, 812 (2001), abrogated on other grounds by *Ada County Bd. of Equalization v. Highlands, Inc.*, 141 Idaho 202, 108 P.3d 349 (2005)." *Callies v. O'Neal*, 147 Idaho 841, --- (2009).

In the present case, there are no disputed issues of fact. The only issue on appeal is a question of law. As such, the standard of review is free review.

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B. The Trial Court Erroneously Imposed A Fraud Standard In Section 535(g) Where None Exists.

In its Order, the trial court correctly recited Section 535(g) of the SCRA that the court could modify Shull's lease termination "as justice and equity require."[70] Then, without providing any authority, the trial court erroneously imposed a much higher standard for relief, namely that Climax show Shull committed fraud. The trial court never discussed justice or equity. Rather, relying on an Idaho case involving a fire damage claim entirely unrelated to the SCRA, the trial court limited Section 535(g)'s concept of "equity" to cases of "'mutual mistake, fraud, or impossibility.'"[71] For the reasons set forth below, this Court should now correct the error.

1. The plain language of Section 535(g) does not require a showing of fraud for a lessor to receive relief.

As this Court explains, "When interpreting a statute, the Court begins with the plain language. '[I]f the statutory language is clear and unambiguous, the Court need merely apply the statute without engaging in any statutory construction.... Statutory interpretation begins with the words of the statute, giving the language its plain, obvious and rational meanings.'" *Pocatello v. State*, 145 Idaho 497, 501 (2008) (quotation omitted).

The plain language of Section 535(g) states, "Upon application by the lessor to a court before the termination date provided in the written notice, relief granted by this section to a servicemember may be modified ***as justice and equity require***." 50 U.S.C. App. § 535(g) (emphasis added). The language of the statute is clear and unambiguous. "Justice" may be defined

[70] R Vol. I, p. 114.
[71] R Vol. I, p. 118 (quoting *Holscher v. James*, 124 Idaho 443, 447 (1993).

as "the constant and perpetual disposition of legal matters or disputes to render every man his due." BLACK'S LAW DICTIONARY 864 (6th ed. 1990). "Equity" may be defined as "[j]ustice administered according to fairness as contrasted with the strictly formulated rules of common law. . . The term 'equity' denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men." BLACK'S LAW DICTIONARY 540 (6th ed. 1990). Importantly, Section 535(g) makes no mention of fraud, impossibility, or mutual mistake, or any other particular equitable theory as a prerequisite for a lessor to obtain relief. In the common vernacular, Section 535(g) provides that a court can modify a servicemember's lease termination "to make it fair."

Here, the trial court erred by ignoring the plain language of the statute and instead reading a fraud requirement into Section 535(g) where none exists. Nothing in the statute requires the court to consider anything other than "justice and equity," i.e., what is just and fair.

2. The case law interpreting Section 535(g) does not require a showing of fraud in order for a lessor to receive equitable relief.

Research produced only two reported case involving Section 535(g) or its predecessors, namely *Omega Industries, Inc. v. Raffaele*, 894 F.Supp. 1425 (D.Nev. 1995), and *Patrikes v. J.C.H. Service Stations,* 180 Misc. 917, 41 N.Y.S.2d 158 (N.Y.City Ct.1943).

The *Omega* case never discusses fraud or any other particular equitable theory a lessor must prove to obtain relief under Section 535(g). In a thorough and thoughtful opinion, the *Omega* court discussed the statutory language, legislative history, and case law of the SCRA in reviewing the predecessor to Section 535(g) as follows:

Turning first to the statutory language, subsection 304(2) [now Section 535(g)[72]] allows military personnel to terminate their leasehold agreements which exist at the time they enter the service. Subsection 304(2) also provides that military personnel may receive a refund of any unpaid rent or security deposit. *See Patrikes v. J.C.H. Service Stations,* 180 Misc. 917, 41 N.Y.S.2d 158 (N.Y.City Ct.1943). However, the statutory language provides that this leasehold relief "shall be subject to such modifications or restrictions as in the opinion of the court ***justice and equity may in the circumstances require.***" This language provides the court with ***broad latitude in granting equitable remedies.*** Thus, if termination of a lease pursuant to subsection 304(2) causes damages in excess of a military person's monthly rental obligations and security deposit, ***the court may, if equity and justice require, grant an equitable remedy that fully compensates a lessor for those damages.*** For example, if a military person-who knows that he or she will soon be invoking subsection 304(2) to terminate an existing lease-wrongfully induces a lessor to make tenant improvements, a court may find that equity requires that an equitable remedy be granted in an amount equal to both the cost of those improvements and the monthly rental obligations of that military person. The court finds no language in subsection 304(2) which would limit its authority to grant such an equitable remedy.

The legislative history accompanying the Soldiers' and Sailors' Civil Relief Act also reveals that ***Congress did not intend to limit the court's authority to award an equitable remedy under subsection 304(2).*** This history reveals that ***"'the very heart of the policy of the Act' was to provide 'judicial discretion ... instead of rigid and undiscriminating suspension of civil proceedings.'"*** *Conroy v. Aniskoff,* 507 U.S. 511, ----, 113 S.Ct. 1562, 1568, 123 L.Ed.2d 229 (1993) (Scalia, J., concurring). Indeed, when Congress initially enacted the Soldiers' and Sailors' Civil Relief Act at the end of the First World War [FN4], it stated that ***courts were to be given full discretion to ensure that the Act would be applied in accordance with the principles of equity.***

> FN4. The Soldiers' and Sailors' Act of 1940 is substantially identical to the Soldiers' and Sailors' Act of 1918 (40 Stat. 440). Therefore, the legislative intent history of the 1918 Act may be examined to determine the intent of the 1940 Act. *Boone v. Lightner,* 319 U.S. 561, 565, 63 S.Ct. 1223, 1226, 87 L.Ed. 1587 (1943).

> "Instead of the bill we are now considering being arbitrary, inelastic, inflexible, the ***discretion as to dealing out even-handed justice between the creditor and the soldier***, taking into consideration the fact

[72] Section 304(2) is the predecessor to Section 535(g). *Omega* quotes Section 304(2), which reveals no substantive difference with Section 535(g).

> that the soldier has been called to his country's cause, rests largely, and in some cases, in the breast of the judge who tries the case."
>
> *Conroy,* 507 U.S. at ----, 113 S.Ct. at 1568, quoting 55 Cong.Rec. 7787 (1917) (statement of Rep. Webb, Chairman of House Judiciary Committee).
>
> The ***plain language*** of subsection 304(2) and its accompanying ***legislative history*** clearly indicate that ***courts have broad latitude and discretion in granting equitable remedies to lessors.***

Id. at 1430-1431 (emphasis added).

The *Omega* opinion makes several principles clear. Courts have "broad latitude in granting equitable remedies," including the discretion to grant relief "that fully compensates a lessor." This discretion is "'the very heart of the policy of the Act'" so that the Act "would be applied in accordance with the principles of equity." The objective of the Act is to "deal[] out even-handed justice between the creditor and the soldier, taking into consideration the fact that the solder has been called to his country's cause." The *Omega* court correctly noted the primary purpose of the SCRA is to help those called to serve our country. However, if the facts of the case show the servicemember acted "wrongfully," i.e., unjustly or inequitably, then the court has discretion and authority to grant relief against the servicemember.

Like *Omega*, the *Patrikes* case never discusses fraud or any other particular equitable theory a lessor must prove to obtain relief under Section 535(g). The *Patrikes* court instructs, "[T]he court should give heed to the particular evil which the statute sought to remedy. The presumption [in interpreting the SCRA] is always that ***no unjust or unreasonable result was intended*** . . ." *Id.*, 41

N.Y.S.2d at 164 (emphasis added). In reviewing the legislative history and purpose of the SCRA, the *Patrikes* court elaborated as follows:

> . . . [I]t is readily ascertained that the primary desire of Congress is to give protection to the soldier first (Secs. 100, 201, 204, 302), and to his dependents next (Secs. 303, 306), ***to prevent or remedy any undue hardship resulting to them***, and this accentuates the aim of Congress. The object is to relieve the soldier from the consequences of his ***handicap*** in meeting financial and other obligations incurred prior to his call to duty, so that his energies may be devoted to his military duties, unhampered by mental distress occasioned by the consequences to him or to his dependents flowing from his ***inability to meet his obligations***. . . . . [T]hough they are remedial in character, they ***may not be invoked for any 'needless or unwarranted purpose'***, but must be administered to accomplish substantial justice.

41 N.Y.S.2d at 165 (quotations omitted) (emphasis added).

Neither the court nor Shull produced any authority that Climax must prove fraud in order to obtain equitable relief under Section 535(g). Rather, judicial discretion to deal out justice and fairness is paramount. The trial court erred by applying a fraud standard.

3. Related cases applying the SCRA do not require a showing of fraud for a party to receive relief against a servicemember.

Although not directly discussing Section 535(g), several other cases involving the SCRA help to illustrate the overall purpose and intent of the Act. The United States Supreme Court notes the SCRA's principal intent to protect those that serve our country, but nevertheless explains that this intent is tempered by principle of justice and equity, granting courts discretion "***to see that the immunities of the Act*** [i.e., the Act as a whole, as opposed to just one specific subsection] are ***not put to such unworthy use***." *Boone v. Lightner*, 319 U.S. 561, 574 (1943) (emphasis and bracketed portions added). The Court explained how the post-Civil War amendments to legislation like the SCRA sought to provide more balance between the protections to the soldier and the rights of creditors as follows:

> Accompanying 'Notes as to the Provisions of the Bill' stated that a 'sweeping exemption' such as that provided by most States in Civil War days, was 'too broad, for ***there are many cases where the financial ability of soldiers and sailors to meet obligations in some way is not materially impaired by their entrance into service.***' Hearings and Memoranda before Senate Judiciary Committee on S. 2859 and H.R. 6361, 65th Cong., 1st and 2d Sess., p. 27.
>
> Major John H. Wigmore, one of the drafters of the bill, stated at the Senate hearings, that 'a universal stay against soldiers is wasteful, because ***hundreds of them are men of affairs and men of assets, and they have agents back here looking after their affairs***. There is no earthly reason why the court proceedings should stay against them. ***It is the small man, or perhaps I should say the humble man, who has just himself and no agent and no outside assets, that we do not want to forget. He is the man we are thinking of. These other people can take care of themselves***, and the court would say to them, 'No; your affair is a going concern; go ahead with the lawsuit, You have a lawyer, you have an agent, you have a corporation manager, and other things.'
>
> . . . .
>
> ***There are many men now in the Army who can and should pay their obligations in full.***

Boone v. Lightner, 319 U.S. 561, 569 n.2 (1943) (emphasis added).

Another court emphasized that the SCRA "may not be employed as a means of enabling one who has ***flouted his obligations*** in civilian life to obtain indefinite delay or to cancel his just liabilities." *Franklin Soc. for Home-Building and Savings v. Flavin*, 265 A.D. 720, 721 (NY 1943) (emphasis added). An earlier case explained the principle in similar fashion as follows:

> While the courts will protect men engaged in the service of the nation from loss in legal proceedings brought about by their absence in service, the papers should show that the ***threatened injury is due to their service and consequent inability to protect their interests***, and this is the plain direction of the act of Congress.

Dietz v. Treupel, 184 A.D. 448, 448-450 (NY 1918) (emphasis added).

In general, the SCRA does not require a showing of fraud to limit the relief granted to servicemembers. In particular, Section 535(g) does not require a lessor prove fraud in order to obtain relief from the servicemember's lease termination, particularly in cases involving "men of

affairs and men of assets . . . . who can and should pay their obligations in full." *Boone, supra*, 319 U.S. at 569 n.2. The trial court erred in requiring Climax prove more than the law requires.

4. This Court should remand this case with instructions for the trial court to consider the justice, equity, and fairness of Shull's lease termination based on the undisputed facts.

Clearly, the trial court erred by applying a fraud standard to Section 535(g) where none exists. To remedy this error, this Court should remand the case with instructions for the trial court to apply the correct legal standard to the undisputed facts of the case. The correct standard is taken from the plain language of Section 535(g) *itself, namely whether "justice and equity require"* modification of Shull's lease termination. In other words, the trial court should look at the undisputed facts to determine whether it is fair for Climax to bear the full $75,057.97 cost of Shull's lease termination so that Shull can expand his business and where SRO has $250,000 sitting in the bank and Shull earned $886,986.00 that year despite his 3-month military absence.

Some equity cases require proof of fraud. This case does not. Sometimes the duty to do equity just means the duty to do what is fair. This is what Section 535(g) calls for. This is what Climax petitions for. This is what the Court should instruct the trial court to do.

II.

THIS COURT SHOULD AWARD CLIMAX ITS ATTORNEY'S FEES AND COSTS.

Idaho Code Section 12-120(3) mandates an award of attorney's fees in actions arising from a commercial transaction both at the trial level and on appeal. I.C. § 12-120(3); *Esser Elec. v. Lost River Ballistics Technologies, Inc.*, 145 Idaho 912, 921 (2008); I.A.R. 41. Idaho Appellate Rule 40 allows at award of costs "as a matter of course to the prevailing party unless otherwise provided by

law or order of the Court." I.A.R. 40(a). The trial court already determined the prevailing party is entitled to recover attorney's fees pursuant to Idaho Code Section 12-120(3). Neither party appealed this decision. As such, the Court should award Climax its attorney's fees and costs.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order granting summary judgment to Shull and SRO and remand this case with instructions for the district court to determine whether justice and equity require modification of Shull and SRO's lease termination given the undisputed facts of the case. This Court should also award Climax its costs and attorney's fees in this regard.

RESPECTIVELY SUBMITTED this 20 day of November, 2009.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: _____
B. J. Driscoll
Attorneys for Appellant, Climax, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20 day of November, 2009, I caused a true and correct copy of the foregoing **APPELLANT'S BRIEF ON APPEAL** to be served, by placing the same in a sealed envelope and depositing it in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

[✓] U.S. Mail
[ ] Facsimile Transmission
[ ] Overnight Delivery
[ ] Hand Delivery
[ ] Courthouse Mail Box

Donald F. Carey, Esq
Carey Perkins, LLP
2325 West Broadway, Suite B
Idaho Falls, Idaho 83405

B. J. Driscoll