12-22-2009

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

CLIMAX, LLC,

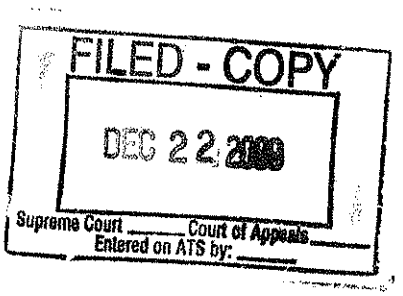
Plaintiff-Appellant,

vs.

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

Defendants-Respondents.

Supreme Court Docket No. 36613



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

RESPONDENTS SNAKE RIVER ONCOLOGY OF EASTERN IDAHO, PLLC AND CHRISTIAN SHULL, M.D. BRIEF ON APPEAL

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STATEMENT OF CASE

Dr. Christian Shull is a reservist in the United States Army.[1] In late January 2007, he was called to active duty for a period of 365 days beginning on February 26, 2007.[2] At the time of his deployment Dr. Shull's medical practice, Snake River Oncology (SRO), leased space from Climax, LLC. The Servicemember's Civil Relief Act (SCRA), allows service members to terminate a lease, at their option, any time after receipt of orders to deploy with a military unit for a period of not less than ninety (90) days.[3] It is undisputed that Defendants, Dr. Shull and SRO, properly gave notice of their lease termination on April 26, 2007. The effective date of the termination was May 30, 2007.

The SCRA allows that termination of the lease may be modified as justice and equity require, if the lessor applies for such relief before the termination date provided in the written notice.[4] The Plaintiff, filed breach of contract claims and a request for a declaratory judgment on May 27, 2009. On November 19, 2007 Plaintiff filed an Amended Complaint petitioning for a modification of the lease termination under the SCRA .

Plaintiff's Amended Complaint alleged as the basis for a modification of the lease that Dr. Shull Suffered no "undue hardship" as a result of his call to military service.[5] Thereafter, Plaintiff

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[1] Clerk's Exhibits, Affidavit of Counsel in Support of Opposition to Plaintiff's Motion for Summary Judgment, November 17, 2008,. Ex. A. Deposition of Christian Shull, M.D., October 5, 2007, 13:6 - 14:21.

[2] Shull Oct. Depo., 19:10 - 23:3.

[3] 50 App. U.S.C. § 535

[4] *Id.* 535(g)

[5] R. Vol. I, pp. 63-4, ¶¶ 24-31.

pursued a course of discovery and litigation focused solely on the finances of Defendants prior to and after invoking their right to terminate the lease.

Plaintiff moved for summary judgment on October 31, 2009, arguing that Defendants had suffered no undue hardship due to the call to duty and that Defendants had adequate income to pay their expenses.[6] Defendants responded that a service member's lack of "undue hardship" is not a proper factor for equitable relief and that they invoked protection under the Act to prevent business competitors from taking advantage of Dr. Shull's deployment to Dr. Shull's detriment.

The trial court issued its Opinion, Decision, and Order on Plaintiff's Motion for Summary Judgment on June 30, 2009.[7] The court determined that: 1) the SCRA does not require that service member's show undue hardship to enjoy the benefit of § 535, 2) a court of equity must exercise extreme caution in withholding the protection of the Act, 3) the Act intends to benefit service members even if some harm occurs to lessors and this alone did not create a basis for equitable relief,[8] and 4) Plaintiff had not presented otherwise sufficient grounds to invoke equity, such as mutual mistake, fraud, or impossibility. On May 15, 2009, the district court issued its Final Judgment clarifying that its opinion on Plaintiff's motion for summary judgment addressed all legal and factual issues and intended to dispose of the entirety of the case.

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[6]Clerk's Exhibits, Brief in Support of Motion for Summary Judgment, October 31, 2008, pp. 12-15.
[7]R. Vol. I, pp. 111-121.
[8]*Id.*

Plaintiff now appeals the Court's finding and argues that the Court required a showing of fraud as a basis for equitable relief.[9]

STATEMENT OF FACTS

Dr. Shull, an oncologist practicing in Idaho Falls, Idaho, is also a reservist with the United States Army and has been called to active duty two times between 2004 and 2007.[10] Each call to active duty required that Dr. Shull deploy to a military facility and provide medical care to service members.[11] During his 2004 call to duty, Dr. Shull was employed by another Idaho Falls, oncologist, Dr. Kevin P. Mulvey.[12] On the day following his return from active duty in Germany, Dr. Shull was released from his employment with Dr. Mulvey. Dr. Shull believed that his termination was directly related to his call to active duty.[13]

Dr. Shull thereafter began his own practice, SRO, co-defendant here.[14] SRO entered a five year lease, personally gauranteed by Dr. Shull, with Plaintiff, on November 18, 2004.[15] The monthly rent for the facility was $5,408.50 per month, but the lease called for reduced payments between December 2004 and November 2005.[16] Between November 2005 and November 2006 the

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[9]Appellant's Brief, p. 15
[10]Shull Oct. Depo.,15:9 - 25:14.
[11]*Id.*
[12]Shull Oct. Depo., 33:6 - 36:7
[13]*Id.*
[14]Shull Oct. Depo, 36:5 - 13.
[15]Clerk's Exhibits, Affidavit of B.J. Driscoll, Ex. A, Lease Agreement.
[16]Clerk's Exhibits, Affidavit of B.J. Driscoll, Ex. A, Lease Agreement, Exhibit F, Optional Rent Payment Schedule.

previously reduced amounts were repaid to Plaintiff in the form of additional rental payments.[17] Thereafter lease payments returned to the base figure.[18]

In October 2006, Dr. Shull received notice for his second call to duty.[19] Dr. Shull attempted to find another doctor to join his practice during the call to duty.[20] Dr. Shull was not able to recruit another physician, but was able to postpone his call to service.[21]

Soon after January 26, 2007, Dr. Shull received another call to duty, this time requiring that he report by February 26, 2007.[22] Dr. Shull then successfully recruited Dr. Ed Wos to join his practice.[23] Although, Plaintiff refers to Dr. Wos as a pro tem physician, Dr. Wos was given a contract for one year with the expectation that Dr. Wos would remain with the practice.[24]

After bringing a third oncologist, Dr. Wos, into the Idaho Falls market, Dr. Shull was approached by his former employer Dr. Mulvey.[25] Dr. Mulvey asserted that Dr. Shull had altered the market share for oncologists in Idaho Falls hastening Dr. Mulvey's desire to sell his practice.[26] Dr. Mulvey represented that if Dr. Shull did not purchase his practice, that Dr. Mulvey would recruit a fourth oncologist to the market to grow into Dr. Mulvey's practice until that fourth oncologist was

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[17] *Id.*
[18] *Id.*
[19] Shull Oct. Depo, 18:11 - 19:9.
[20] *Id.*
[21] *Id.*
[22] *Id.*, 19:10 - 23:3.
[23] *Id.*, 29:15 - 32:5.
[24] *Id.*
[25] Clerk's Exhibits, Affidavit of Counsel in Support of Opposition to Plaintiff's Motion for Summary Judgment, November 17, 2008,. Ex. B. Deposition of Christian Shull, M.D., July 11, 2008, 162:17 - 167:18.
[26] *Id.*

in a position to purchase the practice outright.[27] Dr. Shull testified that he believed the market limit for oncologists in Idaho Falls was two, that three oncologist strained the market, and that if it expanded to four, at least one would fail.[28] Dr. Shull therefore agreed to purchase Dr. Mulvey's practice.

On April 26, 2007, Dr. Shull provided Climax notice of his intent to vacate the lease with Climax effective May, 30, 2007. On May 23, 2007, Climax filed suit claiming breach of contract and requested damages equal to the remaining lease payments.[29]

STANDARD OF REVIEW

Idaho applies an abuse of discretion standard to cases in equity. This standard was recently discussed by this Court in the case *Justad v. Ward*, 2009 Ida. LEXIS 97, 211 P.3d 118, (June 2009). In *Justad*, this Court determined,

> Imposition of an equitable remedy requires a balancing of the equities, which is inherently a factual determination; therefore, the district court's imposition of such a remedy should be reviewed for an abuse of discretion. *West Wood Invs., Inc. v. Acord*, 141 Idaho 75, 82, 106 P.3d 401, 408 (2005). A trial court does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason. *Id.* (citing *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 768, 86 P.3d 475, 482 (2004)).
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> Review of a trial court's conclusions from a bench trial is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *Benninger v. Derifield*, 142 Idaho 486, 488-89, 129

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[27] *Id.*
[28] *Id.* 168:12 - 170:18.
[29] R. Vol. I, pp. 9 - 13.

P.3d 1235, 1237-38 (2006) (citing *Alumet v. Bear Lake Grazing Co.*, 119 Idaho 946, 949, 812 P.2d 253, 256 (1991)). Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered. *Rowley v. Fuhrman*, 133 Idaho 105, 107, 982 P.2d 940, 942 (1999). This Court will not set aside a trial court's findings of fact unless the findings are clearly erroneous. *Ransom v. Topaz Mktg., L.P.*, 143 Idaho 641, 643, 152 P.3d 2, 4 (2006); I.R.C.P. 52(a). If the trial court based its findings on substantial evidence, even if the evidence is conflicting, this Court will not overturn those findings on appeal. *Benninger*, 142 Idaho at 489, 129 P.3d at 1238. This Court will not substitute its view of the facts for that of the trial court. *Ransom*, 143 Idaho at 643, 152 P.3d at 4. However, this Court exercises free review over matters of law*Bolger v. Lance*, 137 Idaho 792, 794, 53 P.3d 1211, 1213 (2002) (citing *Bouten Constr. Co. v. H.F. Magnuson Co.*, 133 Idaho 756, 760, 992 P.2d 751, 755 (1999)).

ADDITIONAL ISSUES PRESENTED UPON APPEAL

1. Whether Plaintiff failed to appeal a finding of the trial court?

2. Whether the trial court abused its discretion in denying equitable relief?

3. Are Defendants entitled to attorney fees on appeal?

ARGUMENT

1. Whether Plaintiff failed to appeal a finding of the trial court?

Plaintiff posits an inaccurate issue for appeal, stating "the Trial Court erroneously imposed a fraud standard where none existed."[30] The trial court did not impose any single standard for equitable relief, but instead noted that Plaintiff failed to present "a compelling argument for this court to exercise its equitable protection and withhold the protection of the Act."[31] It appears that

[30]Appellant's Brief, p. 15.
[31]R. Vol. I, p. 119.

Plaintiff misreads the trial court's ruling to infer a requirement of fraud. This, however, was not the case.

The only basis for "justice and equity" presented to the trial court was whether a service member's financial health, or lack of hardship, provided sufficient grounds for equitable relief.[32] The trial court considered and rejected this argument, finding that a benefit to the service member or a loss to the lessor, is not a sufficient basis for equitable modification as that will always be the outcome when § 535 is invoked.[33] Because the trial court found that the financial gain or loss that necessarily flows from an invocation of § 535 was not a sufficient basis for equitable relief, the court looked at other potential factors, specifically noting that, "equitable remedies are not dependent on contractual or statutory schemes, but exist because no remedy is available at law 'and because sufficient grounds to invoke equity such as mutual mistake, fraud, or impossibility exist.'"[34]

The trial court did not, contrary to Plaintiff's contentions, require an affirmative showing of fraud. To the contrary, the court merely noted additional factors which could be considered. Having ruled on Plaintiff's sole contention, the court clarified that there were no allegations which might otherwise form the basis of an equitable claim, such as fraud or that Dr. Shull entered the military service for the sole purpose of shirking his obligations under the lease.[35] Because the trial court did require a showing of fraud, Plaintiff does not present an issue for appeal.

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[32]Clerk's Exhibits, Brief in Support of Motion for Summary Judgment, October 31, 2008, pp. 12-15.
[33]R. Vol. I, p. 118.
[34]Opinion at 8 (citing *Holscher v. James,* 124 Idaho 443, 447 (1993)).
[35]R. Vol. I, p. 118.

2. Whether the trial court abused its discretion in denying equitable relief.

On its face, Plaintiff's brief appears to have misstated the order of the Court and fails to raise a valid issue for appeal. In an exercise of caution, Defendants supply the following arguments in the event that Plaintiff's brief is interpreted to challenge the Court's equitable findings.

Only rarely have appellate courts interpreted the SCRA, particularly § 535. In fact, although § 535 was enacted in 1942, neither party has identified a single case where a service members' right to lease termination was modified. A decision by this court, which for the first time limits a service members ability to terminate his lease upon a call to service, will be reviewed exhaustively by sister jurisdictions.

Service members face the constant threat of a call to duty. Many, like Dr. Shull, endure multiple deployments within a few years. These service members, poor and rich alike, rely on § 535 for certainty in their lives. Some will choose to terminate their leases, and all that do, will do so because it benefits them. That is the purpose of the SCRA, to relieve service members so that their "energies may be devoted to [their] military duties, unhampered by mental distress."[36] Denying protection under the Act, based solely on a Defendants' financial means, would establish precedent encouraging needless litigation by landlords unhappy with the Acts protections. Such precedent would be contrary to the plain and unambiguous language of the Act.

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[36]R. Vol. I, p. 118 (citing *Omega industries Inc. v. Raffaele,* 894 R. Supp. 1425, 1434 (1995); *see also, Patrikes v. J.C.H. Service Stations, Inc.*, 41 N.Y.S. 2d 158, 165 (1943)).

The trial court recognized the SCRA's benefit to service members generally, and the benefit to Dr. Shull in particular, in applying its equitable discretion to deny a modification of the lease termination. The trial court first recognized that "SCRA § 535 does allow the court to modify any relief granted under the section as equity and justice require."[37] Recognizing its equitable power, the court also noted that "'[b]ecause this policy is to be liberally construed, a court of equity must exercise extreme caution in withholding the protection of [of the Act].'"[38] The trial court then addressed the only basis for equitable relief presented by Plaintiff, that Plaintiff did not recover the lease payments which it alleges Defendants were financially able to pay. The court noted that "this reality reflects the very nature and purpose of the Act. As the *Omega* and *Patrikes* courts noted, the purpose of this legislation was to relieve servicemembers of the mental strain of financial frustrations so that their 'energies may be devoted to [their] military duties, unhampered by mental distress.'"[39]

Having weighed the equitable considerations, including the loss of resources to Plaintiff and the benefit to Dr. Shull in allowing "him to focus his attention on treating ill service members in a time of war," the trial court determined that Plaintiff had "not presented a compelling argument for this court to exercise its **equitable discretion** and withhold the protection of the Act."[40] Thus, the trial court(1) correctly perceived the issue as discretionary, (2) acted within the bounds of discretion

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[37]R. Vol. I, p. 117.

[38]R. Vol. I, p. 118 (citing *Omega*, 894 F. Supp. at 1434 (*citing Virginia Railway Co. v. System Federation No. 40, 300 U.S. 515, 552 (1937)*).

[39]R. Vol. I, p. 118 (*Omega,* 894 F. Supp. at 1434, *(Patrikes,* 41 N.Y.S. at 165).

[40]R. Vol. I, p. 119 (emphasis added).

and applied the correct legal standards, and (3) reached the decision through an exercise of reason. The trial court properly acted within its equitable discretion and should be upheld upon appeal.[41]

A. Plaintiff's theory would deny reviewing courts discretion to invoke or withhold equity, and require that a lease be modified whenever a service member benefits from the lease termination.

Plaintiff alleges no wrongful act by Defendants other than receiving the benefit afforded to them by § 535. As noted by the trial court, Plaintiff made no allegation of fraud, mutual mistake, or impossibility.[42] Plaintiff presented no evidence in furtherance of any established doctrine of equitable relief. Nor did Plaintiff allege that Dr. Shull entered military service for the purpose of invoking the lease termination statute or that he induced Plaintiff's reliance, to Plaintiff's detriment, knowing that he intended to invoke the Act. Simply put, Dr. Shull was called to service on the orders of the United States Army. Defendants were then forced to make a series of business decisions, and realized a benefit by invoking protections under the Act. Plaintiff seeks to deny Defendants that benefit on the allegation that Defendants did not suffer severe financial harm prior to invoking their right.[43]

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[41] *West Wood Invs., Inc. v. Acord*, 141 Idaho 75, 82, 106 P.3d 401, 408 (2005) (citing *Sun Valley Potato Growers, Inc. v. Texas Refinery Corp.*, 139 Idaho 761, 768, 86 P.3d 475, 482 (2004)).

[42] R. Vol. I, p. 118.

[43] Plaintiff acknowledged in its Brief in Support of Motion for Summary Judgment that Defendants suffered lost profits from a reduced number of new patient referrals, and that this reduced cash flow lasted at least three months. Clerk's Exhibits, Brief Sup. Sum. Judg., 6.

At summary judgment, Plaintiff acknowledged Defendants' absolute right to terminate the lease under the SCRA.[44] Plaintiff also acknowledged that the right to termination was not conditioned on a showing of material effect.[45] In other words, Defendants had a right to cancel the lease whether or not Dr. Shull suffered an undue hardship from his call to service. Yet, Plaintiff repeatedly argued that the lease termination should be modified based solely on whether the Defendants suffered an undue hardship caused by Dr. Shull's call to service.[46] Plaintiff closed its brief for summary judgment by stating, "Shull did not employ the lease termination provision of the SCRA 'to prevent or remedy any undue hardship resulting to [him]' or from 'his inability to meet his obligations.'"[47] Plaintiff argues that if a service member does not suffer "undue hardship" then equity should deny him his legal protection. [48] Such a standard does not free a service member to

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[44]Clerk's Exhibits, Reply Brief in Support of Motion for Summary Judgment and Motion for Bench Trial, November 21, 2008, p. 3.

[45]*Id.*

[46]Clerks Exhibits, Brief, Sup. Sum Judg, pp. 12-15.

[47]Clerk's Exhibits, Brief Sup. Sum. Judg. 15, citing *Patrikes v. J.C.H. Service Stations, Inc.*, 41 N.Y.S. 2d 158, 165 (1943).

[48]Plaintiff's reliance upon this single basis for recovery is set forth in briefing in support of Plaintiff's Motion for Protective Order. In its motion for protective order, Plaintiff argued, "Climax' financial information is irrelevant to the determination of the main issue in this case, namely whether Defendants suffered any undue hardship from Christian Shull, M.D.'s three month absence for military service. If the Defendants suffered no undue hardship, then this court should grant Climax relief from the lease termination as justice and equity require." (R. Vol. I, pp. 82-83), Appellant again stated their view of the relevant evidence in Appellant's Reply Brief in Support of Motion for Protective order. Therein Appellant stated, "[t]he issue this court must decide is whether the defendants suffered undue hardship from Shull's three-month military absence. If Defendants suffered an undue hardship from Shull's absence, then justice and equity may not require any modification of the lease termination. However if the Defendants suffered no undue hardship from Shull's absence, then justice and equity will not condone the avoidance of defendants' obligations under the lease just so that Shull could expand his medical practice and leave Climax with the unpaid debt." (R. Vol. I, p. 92)

concentrate on his call to duty but requires that he not settle his affairs until the wolves are at the door.

SERVICEMEMBERS CIVIL RELIEF ACT.

Plaintiff's theory for equitable relief is based upon a series of cases applying an entirely different statutory scheme.

The first enactment of what is now the SCRA was entitled the Soldier and Sailor Relief Act of 1918.[49] It was therafter re-enacted in 1940 and 1942 and titled the Soldier and Sailor's Civil Relief Act (SSCRA).[50] In many respects the 1940 enactment followed the Soldier and Sailor Relief Act of 1918.[51]

Sections of the SSCRA first enacted in 1918 and interpreted in Appellant's Brief on Appeal, contained a "material effect" provision. Material effect provisions required a showing that the service member's call to duty effected his ability to meet his obligations. Plaintiff cites to the cases *Boone v. Lightner*, 319 U.S. 561 (1943), *Franklin Soc. for Home-Building and Savings v. Flavin*, 265 A.D. 720 (NY 1943) and *Dietz v. Truepel*, 184 A.D. 448 (NY 1918).[52] Each of these cases interprets a section of the then SSCRA that contained a material effect provision.[53] In those sections

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[49] *Boone v. Lightner*, 319 U.S. 561, 568-69 (1943).
[50] *Id.*
[51] *Id.*
[52] Appellants' Brief on Appeal, pp. 19-20.
[53] *Boone*, 319 U.S. at 565 (interpreting then 50 U.S.C. App. 520); *Franklin*, 25 A.D. at 721 (interpreting then 50 U.S.C. App. 521, 532); *Dietz v. Truepel*, 184 A.D. 448 (NY 1918) (interpreting then 50 U.S.C. App. 532)

"material effect" is a precondition, and failure to show that it has been met denies all benefit under that section. For instance, former § 521 was quoted in *Boone* as follows:

> At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, **unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.**[54]

In its brief to this Court, Plaintiff quotes liberally from the legislative history cited in the *Boone* case.[55] The legislative history is irrelevant to the proceedings here as the *Boone* Court's stated purpose was to interpret the section's "material effect" provision.[56] The *Boone* Court noted,

> Canons of statutory construction admonish us that we should not needlessly render as meaningless the language which, after authorizing stays, says "unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not **materially affected** by reason of his military service.
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> The Act of 1940 was a substantial reenactment of that of 1918. The legislative history of its antecedent shows that **this clause was deliberately chosen** and that judicial discretion thereby conferred on the trial court instead of rigid and undiscriminating suspension of civil proceedings was the very heart of the policy of the Act.[57]

The *Boone* Court continued, "The clause 'unless, in the opinion of the court, the ability of the defendant to comply with the judgment or order sought, is not materially affected by reason of his

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[54] *Boone*, 319 U.S. at 564-65.
[55] Appellants' Brief, pp. 19-20.
[56] *Boone*, 319 U.S. at 569
[57] *Id.* at 568-69 .

military service,' is the key to the whole scheme of the bill."[58] The Supreme Court noted, "The Act . . . *requires only* that the court be of opinion that ability to defend is not materially affected by military service."[59] Simply put, the Court required a finding of hardship because that is what the language of those sections of the Act required.

Plaintiff also cites to *Dietz v. Truepel*, for what it presents as general propositions regarding the then SSCRA. However, the court in *Dietz* also interpreted, and was bound by, a section of the SSCRA containing a "material effect" provision.[60] The *Dietz* court expressly stated, "That is the criterion under the Act of Congress. The stay shall be granted 'unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service.'"[61] The *Dietz* court then denied the service member relief based upon the statutory requirement to show "material effect" to obtain relief under the Act.[62] "While the courts will protect the 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.**"[63] The hardship requirement was the "plain direction" of Congress simply because Congress had inserted a "material effect" provision in the section at issue.

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[58] *Id.* at 569
[59] *Id.* at 571.
[60] Interpreting then 50, App., § 532
[61] *Dietz v. Truepel*, 184 A.D. 448 (NY 1918).
[62] *Id.* at 450.
[63] *Id.*

Section 535 has a separate legislative history and statutory purpose than the provisions cited by Plaintiff.

The SSCRA was enacted in October 1940.[64] In many respects it followed the Soldier and Sailor Relief Act of 1918.[65] In 1942, Congress formed a special committee in response to several bills seeking to amend the 1940 Act.[66] The committee was assisted by Maj. William D. Partlow, Jr. of the Judge Advocate General's Department of the Army.[67] The special committee held numerous hearings with interested parties prior to presenting its draft to the full Committee on Military Affairs.[68]

At the time of the 1942 amendments, Congress was very familiar with the "materially affected" provisions and knew to include that language where it intended to condition protection under the Act on a showing of hardship. As Major Partlow testified before the full committee:

> You left it in such a way, sir, which I have tried to follow out in drafting these amendments, of limiting nearly all of them to the ability of the person to discharge the obligation; whether or not his ability to pay has been impaired materially by reason of his military service. Except in this section, as Mr. Elston has mentioned, there is no limitation there as to the impairment of his ability to discharge the obligation, with reference to his right of cancellation of the lease. And the theory behind it, as I just stated, is that he still not able to enjoy that property.
> **The Chairman**. That is right.
> **Major Partlow**. And therefore this would give him the right to cancel the lease.[69]

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[64] 77 Cong. Rec. 5363(1942).
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *A Bill to Amend The Soldiers' and Sailors' Civil Relief Act of 1940 to Extend the Relief and Benefits Provided Therein to Certain Persons, to Include Certain Additional Proceedings and Transactions Therein, To Provide Further Relief for Persons in Military Service, to Change Certain Insurance Provisions Thereof, and for*

Committee members specifically debated situations in which the service member suffered no hardship prior to invoking the Act.[70] Had congress intended the service members relief be conditioned upon a sharing of hardship, it would have drafted § 535 with a material effect provision.

Following debate within the committee, the lease termination provision was enacted as one of the few SSCRA provisions without a "material affect" requirement.

Plaintiff's arguments were rejected by the United States Supreme Court in *Conroy v. Aniskoff*, 507 U.S. 511 (1993).

Plaintiff's argument that a service member must suffer undue hardship to be entitled to protection under sections of the SCRA not containing a "material effect" provision was rejected by the United States Supreme Court in *Conroy v. Aniskoff*, 507 U.S. 511 (1993). In *Conroy*, the Court was asked to read a hardship provision into then § 525 of the SSCRA. The respondent in *Conroy* argued that when § 525 was read in the context of the entire statute, it implicitly conditioned its protections on a demonstration of hardship or prejudice resulting from military service.[71] The respondent in *Conroy* argued this interpretation based upon: (1) the legislative history of the Act; (2) that other provisions of the Act were expressly conditioned on a showing of prejudice; and (3) that a literal interpretation of the Act, allowing invocation without a showing of hardship, produced an illogical or absurd result.[72]

Other Purposes; Hearings on H.R. 7029 Before the Committee on Military Affairs House of Representatives, 77th Cong., 2nd Sess. (1942).

[70] *Id.* at 24-25

[71] *Conroy*, 507 U.S. at 514

[72] *Id.*

The Supreme Court rejected a reading of the Act that interjected the prejudice requirement into all of the SSCRA's provisions.[73] The Court noted that as early as 1925, in *Ebert v. Poston*, 266 U.S. 548 (1925), it had interpreted and applied each provision of the Act separately.[74] The Court went on to recognize that the statutory framework of the SSCRA, which contained a prejudice requirement in some sections and not in others, demonstrated that Congress meant what it said in the individual sections.[75] The Court stated,

> [T]he context of this statute actually supports the conclusion that Congress meant what § 525 says. Several provisions of the statute condition the protection they offer on a showing that military service adversely affected the ability to assert or protect a legal right. To choose one of many examples, § 532(2) authorizes a stay of enforcement of secured obligations unless 'the ability of the defendant to comply with the terms of the obligation is not materially affected by reasons of his military service.' **The comprehensive character of the entire statute indicates that Congress included a prejudice requirement whenever it considered it appropriate to do so, and that its ommission of any such requirement in § 525 was deliberate.**[76]

Thus, Congress has clearly indicated, in the individual sections of the SCRA, whether the sections protections are conditioned upon a showing of undue hardship.

Section 535 provides that, "the lessee on a lease . . . may, at the lessee's option, terminate the lease at any time after, (1) the lessee's entry into military service; or (2) the date of the lessee's military orders..."[77] There is no language within § 535 limiting the right to termination upon a

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[73] *Id.* at 515-16.
[74] *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993); (*Ebert v. Poston, 266 U.S. 548 (1925)*.
[75] *Id.* at 515-16.
[76] *Id.* (emphasis added).
[77] 50 App. U.S.C. § 535(a)

showing that the service member's ability to fulfill the lease had been materially effected by his military service.

The trial court recognized that undue hardship is not a controlling consideration under § 535 and engaged in analysis of the equities before it. In reaching its decision the trial court relied upon language in *Omega Industries, Inc. v. Raffaele*, 894 F. Supp. 1425 (D. Nev. 1995) for the broad propositions that the SCRA is "always to be liberally construed" and applied in a "'broad spirit of gratitude'" towards service personnel.[78] And although the *Omega* case is a closer call (in *Omega* the Plaintiff's alleged equitable estoppel and that the defendant joined the service solely to take advantage of the SCRA) the trial court followed *Omega*'s example of weighing equitable considerations in favor of service members. The trial court took the proper considerations into account and reached a judgment within its equitable discretion. The trial court's judgment should be upheld on appeal.

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[78] *Omega*, 894 F. Supp. at 1434, *quoting Patrikes*, 41 N.Y.S.2d at 166.

ATTORNEY FEES AND COSTS

This Court should award Defendants their attorney fees and costs.

Defendants were awarded attorney fees and costs at the trial court level pursuant to Idaho Code § 12-120(3). Plaintiff has not appealed this award and § 12-120(3) mandates the award of attorney fees at both the trial level and on appeal.[79] Costs are awardable to the prevailing party pursuant to Idaho R. App. Pro. 40(a).

CONCLUSION

The trial court did not condition its denial of equitable relief upon a showing of fraud. The court acted within its equitable discretion in protecting Plaintiff's rights under Section 535 of the Servicemembers Civil Relief Act. Plaintiffs appeal should be denied and Defendants awarded their costs and attorney fees.

RESPECTFULLY SUBMITTED this 21st day of December, 2009.

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By: _____
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[79] *Esser Elec v. Lost River Ballistic Technologies, Inc.*, 145 Idaho 912, 921 (2008).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of December, 2009, I served a true and correct copy of the foregoing *Respondent's Brief on Appeal* on:

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