



## Table of Contents

Table of Authorities .....	ii
I. Introduction and Summary .....	1
II. Objections to Plaintiffs’ Summary Judgment Evidence and Alleged “Uncontroverted Facts” .....	4
A. Objection to Alleged Beneficiary Designation. ....	5
B. Objection to Statements About the Alleged Beneficiary Designation . ....	6
C. Discussion of Objections .....	7
III. Defendant’s Evidence. ....	14
IV Statement of Opposition .....	20
Prayer .....	21
Certificate of Service .....	22

## Table of Authorities

### Cases:

<i>Blum v. Stenson</i> , 465 U.S. 886 (1984) .....	20-21
<i>Inskeep v. Caterpillar, Inc.</i> , 2006 U.S. Dist. Lexis 2909 (D.C.D. Ill. 2006) .....	10, 11
<i>R.R. Management Co. v. CFS La. Midstream Co.</i> , 428 F.3d 214 (5 <sup>th</sup> Cir. 2005) .....	8
<i>Servants of Paraclete, Inc. v. Great Am. Ins. Co.</i> , 857 F.Supp. 822 (D.N.M. 1994) .....	9-10
<i>Simpson &amp; Co. v. Dall</i> , 70 U.S. 18 (1866) .....	9, 10
<i>Wheeler v. Mental Health &amp; Mental Retardation Authority</i> , 752 F.2d 1063 (5 <sup>th</sup> Cir. 1985) .....	20

### Rules:

FED. R. CIV. P. 56(e) .....	7
FED. R. EVID. 801 .....	5, 7
FED. R. EVID. 901 .....	5, 7
FED. R. EVID. 902 .....	8
FED. R. EVID. 1002 .....	5, 7, 8
FED. R. EVID. 1003 .....	5, 7, 11
FED. R. EVID. 1004 .....	5, 7, 8, 9, 11

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

**PROVIDENT LIFE AND ACCIDENT  
INSURANCE COMPANY,**  
**Plaintiff,**

v.

**JILL CLEVELAND, Administrator of the  
Estate of Gerald L. Cleveland, II, deceased,  
and SHONA MARIE CLEVELAND,  
Individually and as Natural Parent and Next  
Friend of Her Minor Child, B. Doe, a Putative  
Heir of Gerald Levon Cleveland, II,  
Defendants.**

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**CIVIL ACTION NO.  
4:09-CV-00643-Y**

**BRIEF IN SUPPORT OF DEFENDANT JILL CLEVELAND’S RESPONSE TO  
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

**TO THE HONORABLE JUDGE OF SAID COURT:**

Defendant – Jill Cleveland, Administrator of the Estate of Gerald L. Cleveland, II,  
deceased Defendant – files this brief in support of her response to Plaintiff’s Motion for  
Summary Judgment, pursuant to Fed.R.Civ.P. 56 and Local Rule 56.4, and would respectfully  
show:

**I. Introduction & Summary**

Jill Cleveland does not oppose, and has never opposed, Provident’s request to interplead  
the insurance proceeds and walk away from this litigation, allowing Defendants to litigate among  
themselves their entitlement to the proceeds. The only thing Jill Cleveland opposes is Plaintiff’s  
claim for attorneys fees and costs.

Throughout the pendency of this litigation, Jill Cleveland has done everything possible to fully cooperate with Plaintiff and to keep all costs down. She agreed to waive service and answer. Her original answer and amended answer (as representative of the estate) both specifically plead that she does not oppose the interpleader relief. When requested, she signed off on Plaintiff's proposed order permitting the funds to be deposited. She never served Plaintiff with any discovery and never did anything to oppose Defendant simply walking away from the case.

The only request of Plaintiff which Defendant has refused is Plaintiff's request to sign a stipulation stating that Gerald Cleveland designated "Shona Cleveland, Ex-Spouse" as the beneficiary on his insurance application, and stipulating that Plaintiff will recover attorneys fees, which appear to Defendant to be excessive.

In this regard, although Defendant is willing to agree to the interpleader and release of Plaintiff from this case, Defendant cannot stipulate to a fact which has not been documented and is contrary to the evidence and her interests. Despite repeated requests, Plaintiff has never provided Defendant with any document by which Mr. Cleveland actually designated a beneficiary.

Instead, in response to Defendant's requests to see the signed beneficiary designation, Plaintiff has pointed to what appears to be a signed copy of the front and back of the policy application. On the front, in the beneficiary space, it states, "See Reverse." The copy of the reverse side of the page contains no beneficiary designation. Plaintiff has also provided a separate page – which appears to be some sort of computer print-out and which does not appear

to be any part of the signed application – which refers to “Shona Cleveland, Ex-Spouse” as a beneficiary. The page has no date. Unlike the pages of the application itself, it contains no insurance form reference number at the bottom. It does not reference any policy number. The type font on it is completely different from the font of the typed entries on the application. On its face, it does not appear to be any part of the application, but appears to simply be some sort of print-out from Provident’s computer system.

Moreover, the application itself was dated and signed on November 7, 2001, more than seven months prior to Mr. Cleveland’s divorce from Shona Cleveland. She was thus not his “ex-spouse” when he signed the application, making it even clearer that the computer print-out referring to her as such was not part of the signed application.

Plaintiff’s motion for summary judgment asserts that Mr. Cleveland designated “Shona Cleveland, Ex-Spouse” as his beneficiary, but the purported summary judgment evidence in such regard is objectionable and does not establish such fact as a matter of law. Instead, a genuine issue of fact exists.

Although Defendant Jill Cleveland does not oppose releasing Plaintiff from this case, Plaintiff’s failure to document and establish that Shona Cleveland actually has a legitimate competing claim demonstrates that Plaintiff is not truly an “innocent” stakeholder. Moreover, Plaintiff’s failure to produce the original, signed application or any clear documentation of exactly what was signed, has prevented this case from being resolved long ago. Accordingly, Plaintiff should not recover its attorneys fees.

Additionally, Jill Cleveland disputes the reasonableness and necessity of the amount of Defendant's claimed attorneys fees. Most of the over \$18,000.00 claimed by Plaintiff was apparently incurred solely because Defendants would not simply agree to pay all of Plaintiff's attorneys fees from Plaintiff's first notification that they totaled \$8,600.00. Since then, Plaintiff has repeatedly threatened that if Defendants would not sign the stipulation and agree to pay Plaintiffs fees, they would simply increase. Subsequently, although Jill Cleveland has not opposed any of Plaintiff's requested relief other than attorneys fees, the claim has increased to over \$18,000.00.

The total policy benefits at issue are only \$147,728.00. Mr. Cleveland purchased this insurance from Plaintiff to provide for his family in the event of his death, and it would be unreasonable and unfair for Plaintiff to deduct over 12% of these funds for filing an uncontested interpleader, particularly in a situation such as this where Plaintiff's own poor record-keeping practices and apparent inability to produce the original policy application have precluded a quicker resolution.

## **II. Objections to Plaintiffs' Summary Judgment Evidence and Alleged "Uncontroverted Facts"**

Jill Cleveland denies the allegation in paragraph 2 of Plaintiff's Motion that "Decedent named 'Shona Cleveland Ex-Spouse' as his primary beneficiary," and objects to the evidence cited in support of such allegation, to wit:

**A. Objection to Alleged Beneficiary Designation:**

Defendant objects to page 45 of the Appendix to Plaintiff's Motion<sup>1</sup> — which Plaintiff alleges to be the reverse side of an insurance policy application whereby Gerald Cleveland allegedly designated “Shona Cleveland Ex-Spouse” as the beneficiary.

Plaintiff has never produced Mr. Cleveland's original application for insurance; instead, it has produced five pages which it alleges to be a copy.<sup>2</sup> The fifth page<sup>3</sup> — apparently some sort of computer print-out — does not appear to be part of the original application. It certainly does not appear to be the reverse side of the first page, as Plaintiff suggests.<sup>4</sup> Indeed, Shona Cleveland was not even Mr. Cleveland's “ex-spouse” until seven months after the application was signed.<sup>5</sup>

Accordingly, as discussed more fully below, Defendant objects to such document based on hearsay<sup>6</sup>, lack of authentication<sup>7</sup>, and violation of the best evidence rule.<sup>8</sup>

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<sup>1</sup>The Appendix in Support of Plaintiff's Motion for Summary Judgment will be abbreviated herein as “P.App.”

<sup>2</sup>P.App. 41-45. A complete front-and-back copy would obviously have an even number of pages.

<sup>3</sup>P.App. 45.

<sup>4</sup>For example, the font is completely different and the page has no insurance form reference number or policy number like the other four pages have. Moreover, the second page (P.App. 42) clearly appears to be the reverse of the first page.

<sup>5</sup>Paragraph 7 of Plaintiff's Motion acknowledges they were divorced on June 26, 2002.

<sup>6</sup>FED. R. EVID. 801

<sup>7</sup>FED. R. EVID. 901

<sup>8</sup>FED. R. EVID. 1002, 1003, 1004.

**B. Objection to Statements About the Alleged Beneficiary Designation:**

Defendant objects to the statements contained in the declaration of Justin D. Stephens<sup>9</sup> which assert that P.App. 45 is part of the application on file with Provident and that such page is referenced by “See Reverse” on page one of the application, and which imply that such was attached to the application when Mr. Cleveland signed it.<sup>10</sup>

Plaintiff has never produced the original insurance application. In asserting there is actually an application on file at Provident’s home office, of which P.App. 45 is supposedly part, and in implying that such page was part of the application when Mr. Cleveland signed it, Mr. Stephens (who works for Provident’s parent corporation) does not set forth any factual basis showing that he has any personal knowledge of the contents of Provident’s files, or about what Mr. Cleveland allegedly signed in November of 2001. He does not claim to be a custodian of such records nor does he describe any other basis for personal knowledge. He does not address any part of the business records predicate with regard to such records. There is no indication he ever had any involvement whatsoever with Mr. Cleveland or his application for insurance or that he ever reviewed or saw the original application or any original beneficiary designation form. He may not have even worked for Provident’s parent corporation at the time. He simply makes unsubstantiated, conclusory assertions. Further, he does not explain why the original documents cannot be produced.

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<sup>9</sup>P.App. 1 and 2, paragraphs 2 and 3.

<sup>10</sup>Interestingly, the declaration does not actually directly assert that P.App. 45 was attached to, or part of, the application at the time Mr. Cleveland signed it.

Accordingly, as discussed in more detail below, Defendant objects to such assertions based on lack of personal knowledge, hearsay<sup>11</sup>, lack of authentication<sup>12</sup>, violation of the best evidence rule,<sup>13</sup> and violation of Fed. R. Civ. P. 56(e).

**C. Discussion of Objections:**

To the extent P.App. 45 itself is offered to prove that “Shona Cleveland, Ex-Spouse” was in fact designated by Mr. Cleveland as his beneficiary, the document is clearly hearsay under Fed. R. Civ. Evid 810. Accordingly, it would not be admissible in evidence and is not competent summary judgment evidence.

Furthermore, it is not properly authenticated, and is not rendered admissible by the declaration of Mr. Stephens. Contrary to FED. R. CIV. P. 56(e)<sup>14</sup>, the declaration of Mr. Stephens does not set forth any facts showing that he has personal knowledge and is competent to testify as to what is allegedly “on file at Provident’s home office” or as to whether the print-out was actually part of the application Mr. Cleveland signed. Mr. Stephens does not state that he is the custodian of the application, that he has reviewed the application allegedly on file at Provident’s home office, that he has compared the copy provided, or that he has any other sufficient basis to know what the document is. Nor does he set forth any of the facts required to authenticate the

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<sup>11</sup>FED. R. EVID. 801

<sup>12</sup>FED. R. EVID. 901

<sup>13</sup>FED. R. EVID. 1002, 1003, 1004.

<sup>14</sup>“A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated.”

document as a business record under Fed. R. Evid. 902(11).<sup>15</sup> He does not state that he was present when the original application was signed or that he ever saw or reviewed it. He does not indicate having any dealings with Mr. Cleveland or his application whatsoever. His statements, and the document itself, are hearsay.

In addition, such testimony and the alleged copy of the document violate the best evidence rule. As held by the Fifth Circuit Court of Appeals:

Federal Rule of Evidence 1002, commonly called the "best evidence rule", provides "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." But where the writing is not "closely related to a controlling issue," the Rules of Evidence deem the matter "collateral" and "other evidence of the contents of [the] writing" is admissible. FED.R.EVID. 1004(4)<sup>16</sup>

As the Fifth Circuit has explained, if evidence is being introduced to “prove the content” of the document — as is clearly the Plaintiff’s purpose of offering the alleged beneficiary designation and testimony about it in this case — as opposed to merely proving its existence, the original document is required. *Id.*<sup>17</sup>

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<sup>15</sup>Although the declaration attempts to state the elements of the business records predicate with regard to the *absence* of any “change of beneficiary” form in Provident’s files, there is no such predicate laid with respect to the alleged application. [See paragraph 3, P.App. 001-002]

<sup>16</sup>*R.R. Management Co. v. CFS La. Midstream Co.*, 428 F.3d 214, 217 (5<sup>th</sup> Cir. 2005).

<sup>17</sup>Accordingly, in *R.R. Management*, the Fifth Circuit held that an actual assignment agreement was required, and affidavits about its contents and excerpts were properly excluded, where factors such as “the centrality of the writing to the litigation, the importance of bringing the precise words of the writing before the trier, and the danger of mistransmission or imposition in the absence of the original” demonstrated it was the contents, rather than the existence, or the document which was at issue. *Id.*, 428 F.3d at 218-219.

In the case at bar, it is clearly the contents of the alleged application which are at issue. Was there actually something on the reverse side of the application Mr. Cleveland signed on November 7, 2001, stating that “Shona Cleveland, Ex-Spouse” was to be his primary beneficiary? Even though they divorced on June 26, 2002?<sup>18</sup>

The best-evidence rule is firmly and deeply entrenched in American jurisprudence, and for good reason. As the United States Supreme Court has explained, “the best evidence in the power of the parties must always be furnished” and a court is “not authorized to allow secondary evidence of the contents” of documents unless it is first shown they were either lost or destroyed.<sup>19</sup>

In order to show the loss of documents under the best evidence rule, it is “necessary to prove that a diligent search [has] been made for them where they were most likely to be found.” *Id.*, 70 U.S. at 27. “The party alleging the loss is expected to show ‘ that he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him.’” *Id.*

Under Rule 1004, “to be permitted to introduce [secondary] evidence, [movant] must make a threshold showing of (1) the loss or destruction of the original [document] and (2) the absence of bad faith. Loss or destruction of the original is most commonly shown through circumstantial evidence of a ‘diligent but unsuccessful search and inquiry for the missing document.’” *Servants of Paraclete, Inc. v. Great Am. Ins. Co.*, 857 F.Supp. 822, 282 (D.MN.M.

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<sup>18</sup>Paragraph 7 of Plaintiff’s Motion acknowledges they were divorced on June 26, 2002.

<sup>19</sup>*Simpson & Co. v. Dall*, 70 U.S. 18, 27 (1866). *See*, Fed. R. Evid. 1004(1) (An original is not required if all originals have been lost or destroyed, unless destroyed in bad faith.)

1994, *amended*, 866 F.Supp. 1560 (D.N.M. 1994).<sup>20</sup>

In the case at bar, there is no summary judgment evidence whatsoever that anyone made any attempt, diligent or otherwise, to locate the actual, original insurance policy application, including the alleged beneficiary designation. Such is not even alleged. With no such evidence of a diligent search, a court is not justified in inferring documents are lost. *Simpson*, 70 U.S. at 28.

An example of the type of evidence which is required to prove that an original life insurance beneficiary designation form has been lost, such that other evidence of its contents can be admitted under the best evidence rule, appears in *Inskip v. Caterpillar, Inc.*, 2006 U.S. Dist. Lexis 2909 (D. C.D. Ill. 2006), in which the United States District Court for the Central District of Illinois considered a case where a beneficiary designation form had allegedly been signed, but a signed copy was missing. The proponents submitted affidavits from employees who were personally involved in the process, including the individuals who had personally seen, reviewed, and filed the original form, and who had personally confirmed that the original form had been signed. The affidavits further explained how the original, signed, documents had been copied and filed by the employer then sent away sent away to the insurance company. The summary judgment evidence and statements of uncontested facts established that, when the insured died three years later, it was discovered that at the time the form had been copied, the bottom portion containing the signature had been cut off, and that the original sent to the insurance company had been lost. *Id.*, \*5 - \*7.

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<sup>20</sup>Cited and Quoted in *O'Connor's Federal Rules, Civil Trials*, 2010, p. 983.

The court ultimately refused to grant summary judgment in favor of the alleged beneficiary, holding that “the existence of a valid, signed change of beneficiary form is a genuine dispute of fact;” however, in addressing the evidentiary objections, the court concluded that the uncontradicted, sworn testimony establishing that the file containing the original document had been lost or destroyed permitted the partial copy and other evidence to be admissible in order to prove the original had been signed. *Id.* at \*9-10. The Court relied upon Fed. R. Evid. 1004(1), which provides that the original is not required if “all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith.”

In the instant case, there is no contention, let alone any evidence, that the original has been lost or destroyed, or that any inquiry has been made. Indeed, the evidence suggests the contrary. Although no basis for personal knowledge is shown, Mr. Stephan’s declaration refers to the application being on file at Provident Life’s home office. [P.App.001] If this is true, it is not lost, and should be produced. In addition, the bottom of the first page of the copy [P.App. 041] indicates there should be a “White - Home Office Copy” and a “Canary - Agent Copy.” None of these supposed original documents have been produced, and there is no evidence they are lost or destroyed.

Under FRE 1003, a duplicate is generally admissible to the same extent as an original unless a genuine question has been raised as to the authenticity or, under the circumstances, it would be unfair to admit the alleged duplicate in lieu of the original. In this case, both conditions render P.App. 045 inadmissible.

In this regard, a genuine question has been raised as to the authenticity of the original, and, under the circumstances, it would be highly unfair to admit the alleged duplicate in lieu of the original. Indeed, even co-defendant Shona Cleveland — the real party with the ultimate interest in proving the alleged designation was made — has acknowledged the probability that P.App. 045 was not actually part of the application Mr. Cleveland signed on November 7, 2001, but was based on a designation which occurred after their divorce, over seven months later. In Shona Cleveland’s brief in support of her response to Jill Cleveland’s motion for summary judgment, she candidly admits, “The words chosen by Decedent to designate his beneficiary suggests that he designated Shona after the divorce.”<sup>21</sup>

The words certainly do not suggest they were still married. The point is, absent any competent evidence, the parties and court are left to speculate as to any number of possibilities. One possibility is that P.App. 045 has nothing to do with this particular policy at all, but is referable to another policy, such as the one Provident apparently has pertaining to Mr. Cleveland’s son with Shona Cleveland. In this regard, other documents which Provident has produced in this case, representing them to be part of the claims file under this policy, actually refer to a different policy issued to Mr. Cleveland’s son, and indicate there was some confusion in that respect. An “Activity” report dated March 24, 2009, states, “Request: This claim needs to be set up under policy 08d6292415 which covers the deceased Gerald instead of 08d6292416 which covers his son. Also please change the death register.”<sup>22</sup> A “Claim Document” with the

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<sup>21</sup>Shona Cleveland’s Brief in Support of Response to Jill Cleveland’s Motion for Summary Judgment, p.2, on file herein.

<sup>22</sup>Defendant’s Appendix in support of this response [“Apx.”] page 9.

same date states, “Sent email to Anita to take policy 08d6292416 out of suspense as there will be no claim under that policy.”<sup>23</sup>

Unlike the four pages which appear to actually be the application [ P.App. 041-044], each of which reference policy number 08D6292415, the computer print-out [P.App. 045] contains no policy number. Is the print-out referring to the ex-spouse as beneficiary perhaps from a computer entry intended to reference the son’s policy, on which his mother is presumably the beneficiary? Such is obviously pure speculation, but seems more logical than assuming Mr. Cleveland designated an “ex-spouse” as beneficiary seven months before he was divorced. Or speculating that “SEE REVERSE” on the front of a form [P.App.041] does not really refer to the reverse of the form [P.App.042] but references a totally separate, undated document, with a completely different sort of printer font, with no matching document form reference numbers or any policy number reference.

Additionally, Shona Cleveland states in her affidavit that she was unaware that Mr. Cleveland had any life insurance naming her as beneficiary. Yet she acknowledges going through not only an agreed divorce settlement but a subsequent custody battle and contested motion to modify the decree.<sup>24</sup> It strains credulity to think her designation as his beneficiary would not have been disclosed in these context, had it actually existed.

Accordingly, a genuine issue certainly exists in this case as to the authenticity of the alleged beneficiary form. Given that such form is absolutely central to the issue in this case, it

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<sup>23</sup>Apx. 8.

<sup>24</sup>See the Appendix to Shona Cleveland’s Brief in Support of Response to Jill Cleveland’s Motion for Summary Judgment, p. 118 ( Affidavit of Shona Cleveland, p. 2.), on file herein.

would be extremely unfair to admit the alleged copy of the application, and Mr. Stephan's testimony about it, in lieu of the actual, original document. Particularly as there is no evidence the original was lost or destroyed.

### **III. Defendant's Evidence**

In support of this response, Defendant attaches the affidavit of her counsel, J. Mark Sudderth, and the documents attached thereto.<sup>25</sup> Such summary judgment evidence raises a genuine issue of fact as to whether Plaintiff is entitled to attorneys fees in this matter, and also places the amount and alleged reasonableness of such fees in dispute, precluding summary judgment in such regard. The affidavit shows the following:

On October 30, 2009, Plaintiff ("Provident") instituted this action by filing a complaint for interpleader. Defendant Jill Cleveland, received a copy of the complaint by mail, along with a request that she waive service of process, and return the waiver of process form by November 29. She executed the waiver form on November 17 and returned it to Plaintiff's counsel.

On November 23, 2009, Jill Cleveland filed her original answer. She did not, and never has, opposed Plaintiff's requested interpleader relief. The only thing she has ever questioned or opposed is Plaintiff's request for attorneys fees. Her original answer stated:

- (11) Defendant does not oppose Plaintiff's request that the Court adjudicate any conflicting claims and enforce the terms of the policy, through this interpleader action, as provided by law.
- (12) Defendant opposes Plaintiff's request for attorney's fees and court costs.

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<sup>25</sup>See Defendant's Appendix in support of this response.

On January 18, 2010, Plaintiff's counsel sent both Defendants' counsel a proposed Order Granting Motion for leave to Deposit Interpleaded Funds.

On January 25, 2010, Plaintiff's counsel sent both Defendants a proposed Stipulation for Interpleader and Dismissal with Prejudice of Plaintiff Provident Life & Accident Insurance Company, requesting that both Defendants execute it. The proposal included a stipulation to the effect that the decedent, Gerald Cleveland, had named Shona Cleveland, Ex-Spouse, as his primary beneficiary on his insurance application. The proposal also included a stipulation that Provident would recover its attorneys fees from the interpled funds.

The same day, January 25, 2010, Defendant Jill Cleveland's counsel responded to Plaintiff's counsel and notified him that Jill Cleveland does not oppose the interpleader, but needed to know how much the attorneys fees were that Plaintiff was requesting she stipulate to.

On January 26, 2010, Plaintiff's counsel responded that he would work up the fee and send it to Jill Cleveland's counsel before asking her to sign such stipulation. In the mean time, he asked that she sign off on the proposed Order Granting Motion for leave to Deposit Interpleaded Funds.

The same day, January 26, 2010, Jill Cleveland's counsel sent a written response to Plaintiff's attorney authorizing him to sign counsel's name to the proposed Order Granting Motion for leave to Deposit Interpleaded Funds. Plaintiff's attorney signed Jill Cleveland's counsel's name and presented the order to the Court, which signed the order on January 28, 2010.<sup>26</sup>

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<sup>26</sup>Thus, Plaintiff's motion is incorrect in stating, at paragraph 20, that neither party responded to the motion to deposit funds. Defendant agreed.

On February 2, 2010, Plaintiff's counsel notified Defendants that his attorneys fees totaled \$8,600.00, This was the first attorneys fee figure he had ever provided. Along with such notification, he demanded Defendants sign a stipulation agreeing to pay such fees, threatening the fees would otherwise continue to mount. The stipulation he demanded also included the assertion that Gerald Cleveland had named Shona Cleveland, Ex-Spouse, as his primary beneficiary on his insurance application.

On February 16, 2010, Defendant Jill Cleveland's counsel sent a latter to Plaintiff's counsel asking him to please provide a copy of the document whereby Mr. Cleveland had supposedly designated Shona Cleveland, Ex-Spouse, as his beneficiary. He sent a letter to Defendant Shona Cleveland's counsel asking the same thing.

On February 17, 2010, Jill Cleveland's counsel sent another letter to both counsel (for Plaintiff and co-Defendant) stating, "I need to see a copy of the front and back of Mr. Cleveland's application for life insurance. So far, no one has produced any document by which Mr. Cleveland designated a beneficiary."

The same day, February 17, 2010, counsel for co-Defendant Shona Cleveland responded to such request, stating that the only documents she was aware of were those already produced by Plaintiff. Plaintiff's counsel did not respond to either of Jill Cleveland's counsel's letters.

On March 4, 2010, having received no response from Plaintiff's counsel, Defendant's counsel again wrote to both attorneys, repeating the request for the front and back of the application signed by Mr. Cleveland and asking that it be provided at once.

On March 30, 2010, Plaintiff's counsel finally responded with a letter which stated that the application would have been attached to the policy when issued. Plaintiff's counsel stated he guessed it would have been in Mr. Cleveland's papers and asked where the original policy was. He further stated his understanding that the application was signed electronically. No additional documents were provided.

The same day, on March 30, 2010, Defendant's counsel responded to Plaintiff's counsel and asked him again to please point, specifically, to the document showing that Mr. Cleveland signed an application designating Shona Cleveland, Ex-Spouse, as his beneficiary. Defendant's counsel pointed out that the document Plaintiff had previously produced which appeared to be a copy of the application signed by Mr. Cleveland stated, in the box labeled "primary Beneficiary," simply "See Reverse." Counsel asked Plaintiff's attorney to please identify where the reverse side of the page was, if it had in fact been produced.

On March 31, 2010, Plaintiff's counsel responded with a letter stating that the page Bates numbered 29 [P.App. 45] is the reverse side of Bates number 25 [P.App. 41]. In the same letter, Plaintiff's counsel stated that his attorneys fees now totaled \$6,552.00 (He did not address or explain why they were now less than the \$8,600.00 figure he had stated on February 2, 2010.) He again demanded that Defendants sign the stipulation agreeing that the beneficiary designation had been made and agreeing to his attorneys fees.

On April 23, 2010, Plaintiff's counsel sent discovery requests to both Defendants requesting, among other items, production of the original insurance policy. Neither Defendant had or could produce it.

On April 29, 2010, Plaintiff's counsel again requested that Defendants sign a stipulation agreeing, among other things, that the beneficiary designation had been made, and agreeing that Plaintiff recover its attorneys fees.

On May 6, 2010, Plaintiff's counsel sent another letter to both Defendants, complaining the stipulation had not been signed and asserting that Plaintiff's attorneys fees were now \$10,000.00.

On September 14, 2010, having been formally appointed the administrator of Mr. Cleveland's estate, Defendant Jill Cleveland amended her answer. As in her original answer, she did not oppose the interpleader, merely Plaintiff's request for attorneys fees. She pled:

- (10) ... Defendant does not oppose Plaintiff's admission of liability on the Policy or its request that the Court adjudicate any conflicting claims and enforce the terms of the policy.
- (11) Defendant opposes Plaintiff's request for attorneys' fees and costs. In the alternative, Defendant states that any attorneys fees or costs awarded to Plaintiff should be taxed against Defendant Shona Marie Cleveland, not against Defendant.
- (12) Defendant does not oppose Plaintiff's request that the Court adjudicate any conflicting claims and enforce the terms of the policy, through this interpleader action, as provided by law.
- (13) Defendant opposes Defendant's request for attorney's fees and court costs.

Defendant Jill Cleveland has never opposed interpleader relief, only Plaintiff's claim to attorneys fees and costs. In addition, Defendant Jill Cleveland has always been prepared to stipulate to any and all facts upon proper proof and documentation; however, she cannot stipulate that Mr. Cleveland designed a beneficiary when no such proof has been presented, and it appears to her that he did not.

In addition to setting out the foregoing facts, the affidavit of Plaintiff's counsel discusses the Declaration of Doug K. Butler filed in support of Plaintiff's claim for attorneys fees, and opines that the requested attorneys fees are excessive. It confirms that Jill Cleveland does not and has never opposed Plaintiff's efforts to interplead the insurance proceeds, walk away from the case, and allow Defendants to litigate between themselves as to entitlement to the funds. The only thing she has have been unwilling to do is stipulate to disputed facts and to stipulate to an excessive and unfair attorneys fee.

The affidavit opines that it is not reasonable to incur over \$18,000.00 for filing an unopposed interpleader action involving only \$149,858.93, and that it is not reasonable and not necessary to run attorneys fees up from less than \$7000.00 to over \$18,000.00 where no relief, other than attorneys fees, is opposed. It states that Jill Cleveland has never opposed the substantive relief sought by Plaintiff, has never sent discovery to Plaintiff, and has done nothing intended to cause Plaintiff to incur any unnecessary attorneys fees herein.

The affidavit further opines that, because there is no evidence that Gerald Cleveland ever designated Shona Cleveland, Ex-Spouse, as his beneficiary, Plaintiff is not an innocent stakeholder and has no actual good faith basis to conclude there is a legitimate competing claim to the estate's right to the insurance proceeds, and although Jill Cleveland does not oppose interpleader relief, Plaintiff should not recover it's attorneys fees in such situation.

The affidavit also opines that, if it is determined that Plaintiff should recover attorneys fees herein, a reasonable fee for filing the uncontested pleadings and doing the other things Plaintiff has been required to do in this case is no more than \$5,000.00. It states that much of

the other time spent, as reflected in the records, does not appear to have been reasonably necessary, and appears to have been excessive in light of the lack of substantive opposition, the simplicity of the issues and matters involved, and the amount of insurance benefits at issue.

Finally, the affidavit states that, to the extent Defendant Jill Cleveland is the prevailing party in this litigation, she should recover her reasonable fees and costs from Plaintiff.

#### **IV. Statement of Opposition**

Pursuant to FED. R. CIV. P. 56, Plaintiff's motion for summary judgment as to attorneys fees and costs must be denied because the pleadings and materials on file do not show that there is no genuine issue as to any material fact and that Plaintiff is entitled to judgment as a matter of law.

For one thing, Plaintiff has not presented competent summary judgment evidence sufficient to establish that Shona Cleveland really has a legitimate competing claim to the policy benefits, and that Plaintiff is therefore an innocent stakeholder acting in good faith. The documents which would presumably show that to be the case, which are exclusively in Plaintiff's possession, have not been produced.

Furthermore, as addressed above, the attorneys fees sought by Plaintiff are excessive. As a matter of law, the Declaration of Doug K. Butler is not sufficient evidence, by itself, to prove what is a reasonable attorneys fee in this case, as he is an interested party.<sup>27</sup> Even if it were

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<sup>27</sup>*Wheeler v. Mental Health & Mental Retardation Authority*, 752 F.2d 1063 (5<sup>th</sup> Cir. 1985) ("To determine a reasonable hourly rate, the burden is on Wheeler to produce satisfactory evidence, **in addition to her attorney's affidavit**, that the requested rates are in line with those prevailing in the relevant community for similar services by lawyers of reasonably comparable skill, experience and reputation."); *Blum v. Stenson*, 465 U.S. 886, 896 (1984) ("[T]he burden is on the fee applicant to produce satisfactory evidence -- **in addition to the attorney's own**

sufficient evidence to raise a prima facia issue, the affidavit attached to this response clearly places such fees in issue. Such disputed issue should be resolved at trial, not by competing affidavits.

Moreover, when she becomes the prevailing party in this case, Defendant Jill Cleveland should be entitled to recover her fees and costs from Plaintiff and co-Defendant. The resolution of attorneys fee issues should all be addressed, at hearing, when the case is finally concluded.

Accordingly, while Defendant does not oppose interpleader, the summary judgment as to attorneys fees should be denied.

### **Prayer**

Wherefore, premises considered, Defendant respectfully prays that Plaintiff' s motion for summary judgment be granted in part (as to requiring Defendants to litigate among themselves their respective rights and claims to the interpleaded funds, while dismissing Plaintiff from these proceedings) and denied in part (as to Plaintiff' s request for attorneys fees and costs). Defendant prays for all other, further, alternative, and/or additional relief to which she may be justly entitled.

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*affidavits* -- that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.”) (Emphasis added)

Respectfully submitted,

s/ J. Mark Sudderth

J. Mark Sudderth

State Bar No. 19461500

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ATTORNEYS FOR DEFENDANT,

JILL CLEVELAND, Administrator of the

Estate of Gerald L. Cleveland, II, deceased

**CERTIFICATE OF SERVICE**

On November 22, 2010, I electronically submitted the foregoing document to the clerk of court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5 (b)(2).

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s/ J. Mark Sudderth

J. Mark Sudderth