

Paula McKnight

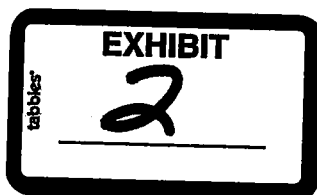
From: Paula McKnight
Sent: Wednesday, August 26, 2009 4:11 PM
To: 'DPJ@RRBLAWOK.COM'
Cc: Bo Rainey
Subject: Sisney v. Broken Arrow School District; Case No. 09-CV-253-TCK-PJC, N.D. OKLA
Attachments: L-Denise James (8.26.08) Regarding Plaintiff's Deficient initial disclosures.pdf

Attached please find Mr. Kent B. Rainey's letter dated 8/26/09 along with the enclosure.

If you have any questions, please do not hesitate to contact our office.

Paula McKnight
Legal Secretary
Rosenstein, Fist & Ringold
525 S. Main Ste 700
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8/26/2009

Paula McKnight

From: System Administrator
To: Denise James
Sent: Wednesday, August 26, 2009 4:11 PM
Subject: Delivered: Sisney v. Broken Arrow School District; Case No. 09-CV-253-TCK-PJC, N.D. OKLA

Your message

To: DPJ@RRBLAWOK.COM
Cc: Bo Rainey
Subject: Sisney v. Broken Arrow School District; Case No. 09-CV-253-TCK-PJC, N.D. OKLA
Sent: 8/26/2009 4:11 PM

was delivered to the following recipient(s):

Denise James on 8/26/2009 4:13 PM

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August 26, 2009

VIA E-MAIL & US MAIL

Ms. Denise P. James
Richardson Richardson Boudreaux
6450 South Lewis Ave, Suite 300
Tulsa, OK 74136

Re: Sisney v. Broken Arrow School District
Case No. 09-CV-253-TCK-PJC, N.D. OKLA

Dear Ms. James:

Pursuant to the Court's *Order for Joint Status Report* dated July 15, 2009, the parties are under an affirmative duty to comply with the mandatory disclosure requirements and notify the court of any non-disclosure so that the issue can be promptly referred to a Magistrate Judge for resolution. This letter is to advise you that we believe that the plaintiff has failed to comply with the mandatory disclosure requirements of FRCP 26.

In the plaintiff's initial disclosures and with regard to the computation of damages and supporting documents, the plaintiff provided no information and stated simply:

"Pursuant to Rule 26(a)(1)(A)(iii), Plaintiff is unable to calculate or provide Plaintiff's damages at this time."

Rule 26(a)(1)(A)(iii), however, requires a party, without awaiting a discovery request, to provide to the other parties:

a computation of each category of damages claimed by the disclosing party – who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from

Ms. Denise P. James
August 26, 2009
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disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered[.]


Accordingly, we do not believe that the plaintiff has complied with either the letter or spirit of Rule 26(a)(1)(A)(iii).

At this time, we are requesting that the plaintiff provide the information required by Rule 26(a)(1)(A)(iii) by the close of business on Monday, August 31, 2009. We would also refer you to the 2006 opinion by Judge White, *McKinney v. Reassure America Life Ins. Co.*, 2006 WL 3228791 (E.D. Okla. 2006), which we believe is instructive on the issue of proper compliance with Rule 26(a)(1)(A)(iii). For your convenience, a copy is attached.


Please be advised that should the plaintiff not comply within the requested time frame, we will proceed to notify the court of the plaintiff's non-disclosure, as required by the Court's July 15, 2009 Order, so that the issue can be promptly referred to a Magistrate Judge for resolution.

Should you wish to discuss this matter, please feel free to contact me.

Sincerely,



Kent B. Rainey
for Rosenstien, Fist & Ringold

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 		A. Signature  <input type="checkbox"/> Agent <input type="checkbox"/> Addressee B. Received by (Printed Name) <u>K. ZIEGLER</u> C. Date of Delivery <u>8/28/09</u> D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
1. Article Addressed to:		3. Service Type	
Ms. Denise P. James Richardson Richardson Boudreaux 6450 South Lewis Ave., Suite 300 Tulsa, OK 74136		<input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
Article Number (Transfer from service label)		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
Form 3811, February 2004		7007 2680 0001 1073 4365	
Domestic Return Receipt		102595-02-M-1540	



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(Cite as: 2006 WL 3228791 (E.D.Okla.))

C
Only the Westlaw citation is currently available.

United States District Court,
E.D. Oklahoma.
Robert M. MCKINNEY, Plaintiff,
v.
REASSURE AMERICA LIFE INSURANCE
COMPANY, Defendant.
No. 06-CIV-271-RAW.

Nov. 2, 2006.

Mike Jones, Jones Law Office, Bristow, OK, Stephen Q. Peters, Harris McMahan Peters Thompson & Stall, Tulsa, OK, for Plaintiff.

Bryce Quine, Edwin R. Deyoung, Roger B. Cowie, Locke Liddell & Sapp, Dallas, TX, Michael S. Linscott, Scott R. Helton, Linscott & Luna, Tulsa, OK, for Defendant.

ORDER

WHITE, J.

*1 Before the Court is Plaintiff's Amended Initial Disclosures [Docket No. 33]. On October 23, 2006, this Court entered an Order directing the Plaintiff to supplement his Initial Disclosures by October 31, 2006 [Docket No. 32]. The problem with Plaintiff's first attempt was that he failed to provide a computation of his claimed damages. Plaintiff timely filed his Amended Disclosures; however, his second attempt at providing proper disclosures is not a great improvement and results in the Court contemplating the inclusion of the phrase "and we mean it" at the conclusion of all future orders regarding disclosures.

Rule 26 mandates a party disclose and provide the following information:

a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered.

Fed.R.Civ.P. 26(a)(1)(C). On Page 3 of Plaintiff's Amended Initial Disclosures, Paragraph 2, Non-Economic Damages, the Plaintiff states as follows: Plaintiff may be entitled to "emotional distress" types of damages based on his claims for negligence, common law fraud, breach of fiduciary duty and/or bad faith, and conversion. Non-economic damages such as emotional distress damages, pursuant to Oklahoma law, are peculiarly with [sic] the province of the jury. Based upon current knowledge, and without further discovery, Plaintiff anticipates requesting emotional distress damages in the range of \$500,000 to \$2,000,000.

The Court does not accuse Plaintiff or his counsel of disrespect or recalcitrance. Instead, "what we've got here is failure to communicate." FN*

FN* *Cool Hand Luke* (1967) See <http://www.youtube.com/watch?v=1u-10D9Reql>.

The Court finds (again) that this disclosure is inadequate, as Plaintiff has merely provided a very broad range of the potential amount of his damages. Without citation to any authority, Plaintiff blithely asserts that non-economic damages "are peculiarly with [sic] the province of the jury." That may be true, yet Plaintiff does not explain what relevance that truism has with regard to his obligations under Rule 26(a)(1)(C). Plaintiff does not explain why that rule does not state, "except, of course, non-

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economic damages." Plaintiff does not explain the incongruity of the assertion that a jury can and must calculate such non-economic damages, yet the person claiming them is excused from doing so.

As stated in the Court's previous Order of October 23, 2006, the purpose of Rule 26 is to "accelerate the exchange of basic information" that is "needed in most cases to prepare for trial or make an informed decision about settlement." *Sender v. Mann*, 225 F.R.D. 645, 650 (D.Colo., 2004). Early disclosure also assists the parties "in focusing and prioritizing their organization of discovery." *City and County of San Francisco, et al. v. Tutor-Saliba Corporation, et al.*, 218 F.R.D. 219, 221 (N.D.Cal.2003).

*2 The court in *City and County of San Francisco* also addressed the issue of the Plaintiff providing a calculation of damages:

Given these purposes, the plaintiff should provide more than a lump sum statement of the damages allegedly sustained. As one treatise explained:

The meaning of "category" of damages is not clear. Presumably, however, it requires more than merely the broad types of damages ("wrongful death," or "property damage," "bodily injury," etc.). To make the disclosure obligation meaningful, a more detailed specification of damages is apparently required: For example, in a personal injury case, the nature and extent of any injuries suffered must be disclosed, including amounts claimed for "general" damages (pain, suffering or disfigurement) as well as "special" damages (medical bills, lost wages, cost of repairing damaged property, etc.).

Rutter Group, Fed. Civ. Proc. Before Trial § 11:166 (2001). Moreover, the "computation" of damages required by Rule 26(a)(1)(C) contemplates some analysis; for instance, in a claim for lost wages, there should be some information relating to

hours worked and pay rate. See *Bullard v. Roadway Exp.*, 3 Fed.Appx. 418, 420 (6th Cir.2001) (unpublished). See also *U.S. v. Rempel*, 2001 WL 1572190 (D.Alaska 2001) at *2 (government required to disclose computation of tax liability, the functional equivalent of damages calculation in a tort case).

Id. Additionally, a "discovery request calling for the calculation of damages requires more than merely setting forth the figure demanded...." *First Nat. Bank of Chicago v. Ackerley Communications, Inc.*, No. 94 CIV. 7539, 2001 WL 15693, at *6 n. 6 (S.D.N.Y. Jan.8, 2001).

Furthermore, as stated in the Court's previous Order, the Court believes that due process requires a plaintiff to specify *how much* they are requesting in damages. It is simply unfair for any defendant to remain in forced ignorance regarding this number until the rebuttal portion of a plaintiff's closing argument. Cf. *American Realty Trust, Inc. v. Matisse Partners, L.L.C.*, No. CIV.A.3:00-CV-1801-G, 2002 WL 1489543 (N.D.Tex. Jul.10, 2002) (the tactic of "trial by ambush" will not be condoned). Additionally, failure to specify a number for the jury arguably results in standardless discretion, which in some contexts is inconsistent with due process. Cf. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88, 108 S.Ct. 1645, 100 L.Ed.2d 62 (1988) (O'Connor, J., concurring in part and concurring in the judgment).

Rule 26 disclosures are "designed to accelerate the exchange of basic information and 'help focus the discovery that is needed, and facilitate preparation for trial or settlement.'" *Sender*, 225 F.R.D. at 650 (citation omitted). "Counsel who make the mistake of treating Rule 26(a)(1) disclosures as a technical formality, rather than as an efficient start to relevant discovery, do their clients no service and necessarily risk the imposition of sanctions." *Id.*

*3 The Court is optimistic about the capabilities of

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Plaintiff's counsel. Certainly the third time will be the proverbial charm. Plaintiff is again ordered to supplement his disclosures to provide a calculation of damages pursuant to Rule 26 no later than November 8, 2006.

Failure to do so will necessarily result in foreclosure of Plaintiff's claim for non-economic damages.

E.D.Okla.,2006.
McKinney v. Reassure America Life Ins. Co.
Not Reported in F.Supp.2d, 2006 WL 3228791
(E.D.Okla.)

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