

FILED

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

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STEPHEN R. LUDWIG, CLERK
U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF INDIANA

JAMES A. SIMON, Individually)
and as Father and Legal and)
Natural Guardian of R.S.;)
ESTATE OF DENISE J SIMON,)
James Simon, Personal)
Representative of Estate,)
)
Plaintiffs,)
)
v.)
)
United States of America,)
)
Defendant.)

Cause No. 10-10CV058 RL

COMPLAINT FOR DAMAGES

Plaintiffs, by counsel, for their Complaint against the Defendant, United States of America, state as follows:

JURISDICTION AND VENUE

1. This action arises under the Federal Tort Claims Act, §2671-2680 of Title 28 of the United States Code. 28 U.S.C. §2671-2680.
2. This Court is vested with jurisdiction and venue pursuant to §1346(b) of Title 28 of the United States Code. 28 U.S.C. §1346(b).
3. The acts and/or omissions complained of occurred within the Northern District of Indiana, Fort Wayne, Indiana.

PARTIES

4. Plaintiff, James A. Simon ("Simon") is a citizen of the United States of America and was at all times relevant to this Complaint a resident of Allen County, State of Indiana.

5. Denise J. Simon (the "Decedent"), prior to her death on November 9, 2007, was a citizen of the United States of America and a resident of Allen County, State of Indiana.

6. Plaintiff, the Estate of Denise J. Simon (the "Estate"), is an estate opened in Allen County, Indiana on February 11, 2008 on behalf of Decedent. Simon, for purposes of this action, is the Personal Representative of the Estate.

7. R.S., a minor child of Decedent, is a citizen of the United States of America and was at all times relevant to this Complaint a resident of Allen County, State of Indiana. Simon is the father and legal guardian of R.S.

8. The Internal Revenue Service is an agency of the Defendant.

9. The United States of America is a defendant in this action under the Federal Tort Claims Act, Title 28 U.S.C. 1346(b) and 2671(b).

10. Plaintiff, James Simon on behalf of the Estate of Denise Simon, filed a Wrongful Death Federal Tort Claim Notice to the Internal Revenue Service on March 27, 2009 and it was received by the Internal Revenue Service on March 30, 2009.

11. Plaintiff, James Simon on behalf of himself, filed the following Federal Tort Claim Notices to the Internal Revenue Service on April 24, 2009 and were received by the Internal Revenue Service on April 25, 2009:

- 11.1. Intentional Infliction of Emotional Distress;
- 11.2. Negligent Infliction of Emotional Distress;
- 11.3. Negligence in executing the Warrant;
- 11.4. Negligence in obtaining the Warrant;
- 11.5. Trespass; and,
- 11.6. Invasion of Privacy.

12. Plaintiff, James Simon on behalf of the Estate of Denise Simon, filed the following Federal Tort Claim Notices to the Internal Revenue Service on April 24, 2009 and were received by the Internal Revenue Service on April 27, 2009:

- 12.1. Intentional Infliction of Emotional Distress;
- 12.2. Negligent Infliction of Emotional Distress;
- 12.3. Negligence in executing the Warrant;
- 12.4. Negligence in obtaining the Warrant;
- 12.5. Trespass; and,
- 12.6. Invasion of Privacy.

13. Plaintiff, James Simon on behalf of R.S, filed the following Federal Tort Claim Notices to the Internal Revenue Service on April 24, 2009 and were received by the Internal Revenue Service on April 27, 2009:

- 13.1. Intentional Infliction of Emotional Distress;
- 13.2. Negligent Infliction of Emotional Distress;
- 13.3. Negligence in executing the Warrant;
- 13.4. Negligence in obtaining the Warrant; and,

13.5. Invasion of Privacy.

14. All Federal Tort Claim Notices were denied by the IRS on September 22, 2009.

CLAIM FOR RELIEF

Background

15. At least as early as January 2007, the Internal Revenue Service (“IRS”) began investigating Simon (the “Investigation”) for possible violations of the Internal Revenue Code (the “IRC”).

16. Plaintiffs do not know the true names of all the employees and agents of the IRS or other governmental agencies involved in the Investigation and search of the home of James and Denise Simon located at 10607 Monte Vista Court, Fort Wayne, Indiana (“Simon Residence”).

17. Upon information and belief, the Investigation was performed by Agent Paul Muschell (“Muschell”) and other unknown agents and employees of the IRS.

18. Upon information and belief, Defendant, by Muschell, signed a probable cause affidavit (the “Affidavit”) on or about November 2, 2007, in support of a request for a search warrant to authorize IRS agents to enter and search the Simon Residence.

19. In order for the IRS to obtain a warrant, it must demonstrate that there is probable cause to believe evidence supporting the commission of a crime is located on the property to be searched.

20. On November 2, 2007, the United States District Court, Northern District of Indiana, Fort Wayne Division ("Court"), by the Honorable Theresa Springmann ("Approving Judge) reviewed the Affidavit and issued a search warrant ("Warrant") to allow the IRS to search the Simon Residence.

21. Defendant negligently and/or intentionally made false and/or misleading statements in its Affidavit in support of a request for search warrant, and omitted facts known and available to him that would be relevant to a judicial determination as to whether or not to issue the Warrant.

22. Such false and misleading statements and omissions misled the Court. Some of Defendant's false statements and omissions are as follows:

22.1. Muschell portrayed the Simon case as a tax shelter case.

22.2. Upon information and belief, Muschell knew, or should have known, most tax shelter cases involve persons who live and work in the United States, and who do not have any legitimate reason or need to have foreign bank accounts, to be involved with foreign corporations or to have trusts.

22.3. Muschell did not mention in the affidavit that Simon worked outside of the United States, maintained a secondary residence in the Ukraine, and that the case was not a tax shelter.

22.4. Muschell stated in the Affidavit that countries that do not have treaties with the United States are often referred to as "tax havens" and later states that Cyprus is a "tax haven." Muschell misled the Court into believing that Cyprus does not have treaty with the United States when in fact it does have a comprehensive income tax treaty.

22.5. Muschell stated that William R. Simon Farms, Inc. did not file certain federal tax forms, and that James and Denise Simon received federal farm subsidies. Muschell did not tell the Court in the Affidavit that the farm subsidies were less than \$3,000 a year, or that the William R. Simon Farms, Inc. tax returns filed

in previous years showed mainly losses which generated significant carry forwards which would likely lead to a conclusion that no tax was due.

- 22.6. Muschell stated in his Affidavit that James and Denise Simon personally received the federal farm subsidies; however, they did not personally receive any federal farm subsidies.
- 22.7. Muschell stated in the Affidavit that the Simon Family Trust did not file certain federal tax returns, but he does not state, though as a CPA he knew or should have known, that filing the returns was in fact the responsibility of the trustee, not James Simon. Muschell by failing to inform the Approving Judge that Simon was not responsible for the filing of the Trust returns mislead the Court.
- 22.8. Muschell's misstatements and failure to present all the relative facts regarding the Simon Family Trust and William R. Simon Farms mislead to the Court.
- 22.9. Muschell declared in his Affidavit that the Simon Family Trust ("Trust") is a foreign trust established in the Cook Islands, and that federal "foreign trust" tax returns were required to be filed and were not filed for the Simon Family Trust. But Muschell failed to mention that the Simon Family Trust was classified as a domestic trust under the Internal Revenue Code for federal tax purposes and that no "foreign trusts" returns were required to be filed.
- 22.10. Muschell failed to mention that the income received by the trust was passed through to and reported on the personal tax returns for James and Denise Simon leaving the Court to believe that Trust income was not reported for income taxation. However, the Trust income was clearly marked "SF TRUST" on over forty locations on their returns,
- 22.11. Muschell, having reviewed James and Denise Simon's tax returns, was aware of the reporting of Trust income by James and Denise Simon on their personal return and well knew, as a CPA, that no foreign trust returns were due and that the method of reporting the trust's income on the Simons return was a proper and correct method to report the Trust's income.

22.12. Upon information and belief, IRS procedure requires Muschell to demonstrate in the Affidavit a likelihood that there was criminal activity. This would require Muschell to establish a likely source of taxable income in the Affidavit which he failed to demonstrate to the Court.

22.13. Muschell listed in the Affidavit, a number of what he refers to as tax offender characteristics, such as sham transactions; assigned income; shell corporations; concealing income; artificial business losses; and artificial investments, but failed to show that any of these are present in the Simon case. Failure to show how the stated tax offender characteristics were present in the case misled the Court.

22.14. Muschell stated in his Affidavit that tax returns were not filed for JS Elekta Limited, Elekta Limited or ICHUA Limited. Such allegations imply that these entities violated the Internal Revenue Code. However, these allegations are misleading because foreign corporations such as JS Elekta, Elekta, and ICHUA (the "Foreign Entities") are not required to file United States tax returns. Muschell does not mention that the Foreign Entities are indeed foreign entities and as such were not and are not required to file United States tax returns. Muschell knew, or should have known as a CPA, these Foreign Entities did not have a United States tax return filing requirement.

23. Upon information and belief, Defendant, by Muschell and other IRS agents and employees, negligently reviewed and/or approved the Affidavit prior to it being submitted to the Court in support of a request for a search warrant.

24. The Affidavit's conclusion is one long, incomplete sentence which does not reach a conclusion and failed to say what probable cause existed to search the Simon Residence.

25. The Affidavit should have been reviewed for completeness and accuracy by a number of offices, including the IRS Group Manager Offices, the Special Agent in Charge, the Criminal Tax Office, and other government officials.

Upon information and belief, these offices failed to review the Affidavit for completeness and accuracy.

26. Upon information and belief, Defendant improperly, unlawfully, and negligently tendered the Affidavit to the Court and procured the issuance of the Warrant when it knew or should have known that there was no probable cause for the issuance of said Warrant.

27. Upon information and belief, Defendant failed to follow and/or enforce IRS policies in obtaining and executing the Warrant. For example:

- 27.1. Internal Revenue Manual (the "Manual") section 9.4.9.2 states that "CID will employ the least intrusive means necessary to acquire evidence in tax and tax-related Title 18 investigations." Search warrants are to be used when crucial evidence "cannot be obtained by any other means."
- 27.2. Muschell could have used traditional and less intrusive methods of obtaining records such as IRS and Grand Jury summons and subpoenas, as opposed to use of a search warrant.
- 27.3. Upon information and belief, Muschell had already reviewed bank records, including the Simon's personal domestic bank accounts and other bank accounts used by the entities associated with Simon, prior to obtaining the Warrant.
- 27.4. Furthermore, to secure the Warrant, Defendant needed to show in his Affidavit pursuant to the Manual that:
 - a. There was "objective evidence of the subject's attempt to obstruct the investigation"; or,
 - b. There was "objective evidence indicating the subject may destroy the evidence"; or,
 - c. There was "facts that establish that other attempts to acquire the records were ineffective."

28. Defendant made no such showings in the Affidavit as stated in paragraph 27. Defendant's omissions and failure to provide the required information disregarded IRS procedures.

29. On November 6, 2007, Defendant, by Muschell and other IRS agents and employees, using the wrongfully obtained Warrant, searched the Simon Residence (the "Search").

30. Defendant negligently obtained the Affidavit and Warrant which resulted in: (i) a violation of the Plaintiffs' right of privacy, (ii) trespassed on Plaintiffs' property, (iii) intentional infliction of emotional distress, (iv) negligent infliction of emotional distress, and (v) a violation of Defendants duty to use reasonable care in executing search warrants.

31. At the initiation of the Search, Decedent and R.S. were the only individuals present with Defendant. Simon was not even in the United States, which left Decedent alone to deal with the horror of Defendant's armed federal agents executing the wrongfully obtained Warrant in her home in the presence of her minor child, R.S.

32. At all relevant times, neither James nor Denise Simon ever had a weapon.

33. Upon information and belief, more than one agent of Defendant conducted the Search in bullet proof vests and with guns visible.

34. Upon information and belief, Defendant violated IRS procedures by creating an unsafe operation. Defendant's IRS agents are directed in the Manual

that a warrant “involves extensive preplanning and background work to ensure a safe and efficient operation” in executing a search warrant. Defendant knew R.S. was a 10 year old (minor) female child who was in the Simon Residence when agents executed the Warrant with at least ten or more bullet proof vested and visibly armed agents. Defendant’s acts clearly and unnecessarily placed R.S., an innocent child, in harm’s way and could have, and should have, been avoided with effective planning.

35. Upon information and belief, during the Search, IRS agent Linda Porter (“Porter”) made improper comments to the Decedent by implying violations of law not specified or addressed in the Affidavit or Warrant causing unnecessary emotional stress and harm to Decedent. Porter’s comments were condoned by Muschell.

36. Defendant improperly, unlawfully, and negligently obtained the Warrant which resulted in a violation of Defendant’s duty to use reasonable care in obtaining search warrants.

37. Defendant improperly, unlawfully, and negligently executed the wrongfully obtained Warrant which resulted in: (i) a violation of the Plaintiffs’ right of privacy, (ii) trespass on Plaintiffs’ property, (iii) intentional infliction of emotional distress, (iv) negligent infliction of emotional distress, and (v) a violation Defendants duty to use reasonable care in executing search warrants.

38. On November 9, 2007, just three days after the Search, Decedent committed suicide.

39. Several hours prior to Decedent's death, Decedent wrote a letter expressing her deep concern over armed IRS agents of Defendant coming to her home, her inability to keep her children safe in light of such actions by the IRS, and her now overall fear and distrust of the federal government.

40. Upon information and belief, the IRS has institutional practices, customs and policies of procuring search warrants in criminal tax cases by omitting relevant information, and making false and/or misleading statements in warrant application affidavits in violation of the constitutional rights of taxpayers.

41. Upon information and belief, the IRS has a history of not monitoring, documenting, and/or enforcing its own policy of using the least intrusive procedures for obtaining information prior to resorting to a search warrant.

42. Upon information and belief, IRS agents and employees have knowledge of or acquiescence in such practices, customs and policies and such constitutional rights violations because they have adopted and maintained practices, customs and/or policies that contribute to the violations.

43. Upon information and belief, Defendant's agent Alvin Patton ("Patton") was the Special Agent in Charge of Muschell during the Investigation, at the time the Affidavit was procured, and at the time the Search was executed.

44. Upon information and believe, Defendant, by Patton, acted recklessly and/or negligently in the following ways:

44.1. Failing to properly supervise Muschell during the Investigation, obtaining the Affidavit, and during the Search;

44.2. Approving the Affidavit;

44.3. Failing to adequately train Muschell; and,

44.4. Failing to remove and replace Muschell after Decedent's death.

Count I – Intentional Infliction of Emotional Distress

45. Plaintiffs incorporate by reference rhetorical paragraphs 1-44 as if fully set forth in this paragraph.

46. Defendant's conduct in obtaining the Affidavit and Warrant, and executing the Search was extreme and outrageous.

47. Defendant's extreme and outrageous conduct was intentionally or recklessly directed towards the Plaintiffs.

48. The Defendant's extreme and outrageous conduct proximately caused the Plaintiffs to suffer severe emotional distress.

WHEREFORE, Plaintiffs, by counsel, respectfully request that the Court grant judgment against the Defendant in an amount provided by law and for an amount which will fairly, fully, and adequately compensate Plaintiffs for their damages; for Plaintiffs' cost of this action; and, for such other and further relief to which Plaintiffs may be entitled.

Count II – Negligent Infliction of Emotional Distress

49. Plaintiffs incorporate by reference rhetorical paragraphs 1-48 as if fully set forth in this paragraph.

50. During the execution of the Warrant, Defendant's conduct in obtaining the Affidavit and Warrant, and executing the Search was extreme and outrageous.

51. Plaintiffs were directly impacted by the Defendant's conduct.

52. As a direct and proximate result of Defendant's conduct, Decedent suffered severe emotional distress, which caused her death three days after the execution of the Warrant.

53. As a direct and proximate result of Defendant's conduct, R.S. suffered severe emotional distress when she came upon the scene of her mother's body shortly after the Decedent's death.

54. As a direct and proximate result of Defendant's conduct, Simon suffered severe emotional distress, in part, since he was on the telephone when the Decedent's body was discovered.

55. As a direct and proximate cause of the Defendant's conduct, Plaintiffs have suffered severe emotional distress.

WHEREFORE, Plaintiffs, by counsel, respectfully request the Court grant judgment against the Defendant in an amount provided by law and for an amount which will fairly, fully, and adequately compensate Plaintiffs for their damages; for Plaintiffs' cost of this action; and, such other and further relief to which Plaintiffs may be entitled.

Count III – Negligence in Obtaining the Search Warrant

56. Plaintiffs incorporate by reference rhetorical paragraphs 1-55 as if fully set forth in this paragraph.

57. Defendant had a duty to exercise reasonable care in obtaining the Warrant.

58. Defendant negligently breached its duty to exercise reasonable care in obtaining the Warrant by failing to follow the IRS's procedures for obtaining a search warrant; using false and misleading information in the Affidavit; and by failing to review the Affidavit for accuracy and completeness.

59. As a direct and proximate result of the Defendant's negligence in obtaining the Warrant, Plaintiffs have suffered harm.

WHEREFORE, Plaintiffs, by counsel, respectfully request that the Court grant judgment against the Defendant in an amount provided by law and for an amount which will fairly, fully, and adequately compensate Plaintiffs for their damages; for Plaintiffs' cost of this action; and, such other and further relief to which Plaintiffs may be entitled.

Count IV – Negligence in Executing the Search Warrant

60. Plaintiffs incorporate by reference rhetorical paragraphs 1-59 as if fully set forth in this paragraph.

61. Defendant had a duty to exercise reasonable care in executing the Search of the Simon Residence.

62. Defendant negligently breached its duty to exercise reasonable care in executing the Search by failing to ensure that a complete and unbiased investigation was conducted that resulted in sufficient facts to constitute probable cause for a search of the residence.

63. As a direct and proximate result of the Defendant's negligence in executing the Search Warrant, Plaintiffs have suffered harm.

WHEREFORE, Plaintiffs, James Simon and the Estate of Denise Simon, by counsel, respectfully requests the Court grant judgment against the Defendant in an amount provided by law and for an amount which will fairly, fully, and adequately compensate Plaintiffs for their damages; for Plaintiffs' cost of this action; and, such other and further relief to which Plaintiffs may be entitled.

Count V – Trespass

64. Plaintiffs incorporate by reference rhetorical paragraphs 1-63 as if fully set forth in this paragraph.

65. Defendant entered the Simon Residence with an invalid Warrant.

66. Defendant's entry on the Simon Residence was unlawful.

67. As a direct and proximate result of the Defendant's trespass, Plaintiffs, Simon and the Estate, have suffered harm.

WHEREFORE, Plaintiffs, by counsel, respectfully request that the Court grant judgment against the Defendant in an amount provided by law and for an amount which will fairly, fully, and adequately compensate Plaintiffs for their damages; for Plaintiffs' cost of this action; and, such other and further relief to which Plaintiffs may be entitled.

Count VI - Invasion of Privacy

68. Plaintiffs incorporate by reference rhetorical paragraphs 1-67 as if fully set forth in this paragraph.

69. Defendant entered the Simon Residence with an invalid Search Warrant.

70. Plaintiffs have the right to be free from unwanted interference in their home.

71. Defendant's entry on the Simon Residence was unlawful.

72. As a direct and proximate result of the Defendant's invasion of Plaintiffs' privacy, Plaintiffs have suffered harm.

WHEREFORE, Plaintiffs, by counsel, respectfully request that the Court grant judgment against the Defendant in an amount provided by law and for an amount which will fairly, fully, and adequately compensate Plaintiffs for their damages; for Plaintiffs' cost of this action; and, such other and further relief to which Plaintiffs may be entitled.

Count VII - Wrongful Death

73. Plaintiffs incorporate by reference rhetorical paragraphs 1-72 as if fully set forth in this paragraph.

74. Simon is the surviving spouse of the Decedent and R.S. is the minor child of Decedent.

75. Defendant negligently conducted the Investigation pertaining to the Simons.

76. Defendant negligently obtained a Warrant on the Simon Residence.

77. Defendant wrongfully searched the Simon Residence in the presence of the Decedent with an invalid Warrant.

78. Decedent committed suicide three days after the Search.

79. Decedent wrote a letter prior to her death expressing her concern over the Search and the safety of her children, including R.S.

80. Upon information and belief, Defendant's foregoing negligent and wrongful acts were the proximate cause of the Decedent's death.

81. As a direct and proximate result of the foregoing and the death of the Decedent, Plaintiff, Simon, has been deprived of a kind and loving spouse and of her care, comfort, society, protection, love, companionship, affection, solace, moral support, protection, loss of marital consortium, physical assistance in the operation and maintenance of the home, and financial support.

82. As a further direct and proximate result of the foregoing death of the Decedent, Plaintiff, R.S. has been deprived of a kind and loving parent and of her care, comfort, love, protection, advice, society, physical assistance, loss of parental training and guidance, and financial support.

83. As a further direct and proximate result of the death of Decedent, Plaintiffs have incurred reasonable and necessary expenses for Decedent's funeral, burial, and memorial services in an amount uncertain at this time.

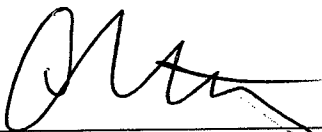
84. As a further direct and proximate result of the death of the Decedent, Plaintiffs have suffered damages in an amount to be established under Indiana law.

WHEREFORE, Plaintiffs, by counsel, respectfully request that the Court grant judgment against the Defendant in an amount provided by law and for an amount which will fairly, fully, and adequately compensate Plaintiffs for their

damages; for Plaintiffs' cost of this action; and, such other and further relief to which Plaintiffs may be entitled.

Respectfully submitted,

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