

**ORIGINAL**

**IN THE SUPERIOR COURT OF DEKALB COUNTY  
STATE OF GEORGIA**

**HEERY INTERNATIONAL, INC., a Georgia Corporation, E.R. MITCHELL & COMPANY**  
A Georgia Corporation, D/B/A  
**HEERY/MITCHELL, A JOINT VENTURE,**

Civil Action No. 07CV2532-3

Plaintiffs,

v.

**DEKALB COUNTY SCHOOL DISTRICT,  
GEORGIA,**

Defendant

**BRIEF IN SUPPORT OF  
PLAINTIFFS' MOTION TO COMPEL TESTIMONY**

COME NOW Plaintiffs in the above-styled case and file this their Brief in Support of their Motion to Compel Testimony as follows:

**I.**

**STATEMENT OF FACTS**

On November 13, 2007, Plaintiffs began taking the deposition of Patricia A. Pope, who is currently employed by the Defendant, DeKalb County School District ("DCSD") in the capacity of Chief Operations Officer. At the deposition, Ms. Pope was represented by her personal attorney, David J. Larson.

As is customary in most discovery depositions, Plaintiffs sought to obtain information concerning Ms. Pope's background history. In this context, she was asked questions concerning her education, her prior employment, and her marital status. She testified that she was currently

married to Mr. Anthony V. Pope, and had been so married since 2005. She also testified that she married Mr. Sulyaman Clark in 1999 and that she was divorced from him in 2001.

As to her divorce from Mr. Clark, Ms. Pope testified that the petition had been filed in DeKalb County and there was a paperwork mix up. In explaining the "paperwork mix up," Ms. Pope testified that she had a final judgment, but the Court did not have it, so she had to take her paperwork back in and it was all "straightened out" in 2006. She testified further that the Clerk's office lost the first decree and that it was very fortunate that she had kept her own paperwork.

Plaintiffs marked for identification deposition Exhibit 56 which is a certified copy of the original civil proceedings in DeKalb Superior Court Case No. 01-CV-9409-3, an action for divorce brought by Patricia A. Reid against Sulyaman Clark filed on September 25, 2001. In addition, Plaintiffs marked for identification deposition Exhibit 57 which is a certified copy of the original civil proceedings in DeKalb Superior Court Case No. 06-CV-2150-3, an action for divorce brought by Patricia A. Reid against Sulyaman Clark filed on February 1, 2006. When these exhibits were presented to Ms. Pope, her counsel objected to each exhibit and instructed Ms. Pope not to answer any further questions regarding the information contained in those exhibits.

In correspondence dated November 19, 2007, counsel for Ms. Pope informed Plaintiffs that after having reviewed the matter further, he will object to any additional questioning of Ms. Pope as to her divorce and marital status when her deposition resumes, and that "absent an order from the court, I will direct her not to any question on that subject." Accordingly, the matter is now before this Court, to determine whether or not further questioning will be permitted.

## II.

### ARGUMENT AND CITATION OF AUTHORITY

The certified record in Case No. 01-CV-9409-3 (Exhibit 56), shows that a final judgment and decree of divorce was never entered of record in that case. In fact, the record shows that on December 15, 2002, the civil action for divorce filed by Patricia A. Reid was dismissed for want of prosecution.

In the verified Complaint for Divorce filed by Patricia A. Reid on February 1, 2006, in Case No. 06-CV-2150-3 (Exhibit 57), it is alleged in paragraph 3 that "Plaintiff and Defendant were married on or about August 21, 1999, and lived together as Husband and Wife until on or about April 29, 2001, when they separated, and they have remained in a bona fide state of separation since that date." Nowhere in the Complaint did Ms. Reid allege that she had a previous final judgment of divorce, or that there was any kind of paperwork mix up. Subsequently, a final judgment and decree of divorce was entered on July 17, 2006.

On February 28, 2006, an Answer to Complaint for Divorce was filed by the defendant, Sulyaman Clark. In paragraph 2 of the Answer, Mr. Clark correctly recited that Case No. 01-CV-9409-3 was dismissed for want of prosecution on December 16, 2002. In addition, in paragraph 4 of the Answer, Mr. Clark states that he had been informed that "Ms. Patricia A. Reid was in fact **already re-married** to Mr. Anthony Vincent Pope in DeKalb County on **February 14, 2005**; License # 229040." (Emphasis in original). Mr. Clark also alleged that Ms. Reid had previously asked him to sign a divorce document, apparently to be conditioned on her returning to him certain property and money.

According to the above-mentioned court records, Ms. Pope had a prior undissolved marriage when she married Mr. Pope in 2005. Clearly, there is a conflict in the testimony of Ms.

Pope when she testified under oath she was actually divorced in 2001. It was Plaintiffs' intention to ask Ms. Pope why the certified court records in the two divorce actions conflict with her testimony concerning a clerical error leading to the loss of a final decree of divorce.

Unfortunately, Ms. Pope was not permitted by her counsel to answer questions on that subject.

The certified records from the DeKalb County Clerk's Office speak for themselves, and therefore, until proven to be inaccurate, the information concerning the two civil actions must be deemed to be correct. On that basis the marriage of Ms. Pope to Mr. Pope in 2005 is void. In *Gearllach v. Odum*, 200 Ga. 350 (1946) the Georgia Supreme Court stated:

The petition shows that the petitioner, an unmarried man, went through a marriage ceremony with the defendant, who at the time had a living husband, and that her previous marriage was undissolved. The civil statute (Code § 53-102), plainly declares that the previously undissolved marriage of defendant rendered her incapable of making a marriage contract with this petitioner. This court has uniformly held that such an attempted bigamous marriage is utterly void... We may also at this point accept as the indisputable law that the ceremony of marriage here was bigamous and completely void, and, hence, confers no right upon either of the parties or anyone else.

(id at p. 185-186).

In Georgia, a marriage license is issued based upon a written application made by the applicants, and verified by the oath of the applicants. Among the legal requirements for obtaining a marriage license is that the parties must have no living spouse from an undissolved prior marriage. On February 8, 2005, Anthony Vincent Pope and Patricia A. Reid submitted an Application For Marriage License in the Probate Court of DeKalb County, and based thereon,

marriage license No. 229040 was issued. (see Exhibit D). Both parties provided answers, under oath, to the various portions of the application. In her answer to question 7A, Ms. Reid swore that she had one (1) previous marriage. In her response to question 7B, Ms. Reid swore that her previous marriage had been dissolved by divorce. In her response to question 7C, Ms. Reid swore that the grounds for her divorce were "mutual consent." Finally, in her answer to question 7D, Ms. Reid swore that her divorce was granted in 2003, in Atlanta, Ga.

The information furnished by Ms. Reid in the Application for her marriage license is not only in conflict with her deposition testimony, but also conflicts with the two civil actions for divorce filed by her in DeKalb Superior Court. This raises an issue as to whether false swearing occurred in the obtaining of the marriage license that was issued on February 8, 2005.

The criminal offense of "False Swearing" is defined in OCGA § 16-10-71 as follows:

- (a) A person to whom a lawful oath or affirmation has been administered or who executes a document knowing that it purports to be an acknowledgement of a lawful oath or affirmation commits the offense of false swearing when, in any matter or thing other than a judicial proceeding, he knowingly and willfully makes a false statement.
- (b) A person convicted of the offense of false swearing shall be punished by a fine of not more than \$1,000.00 or by imprisonment for not less than one nor more than five years, or both.

In the case of *Smith, alias Choice v. The State*, 66 Ga. App. 669 (1942), the defendant married a woman who had a living undivorced husband, which was a fact unknown to the

defendant. When he discovered this, he separated from her and treated the marriage as void. Subsequently he married another woman, and, in making the application to marry the second woman he stated under oath that he had never been married before. He was later charged with and convicted of the offense of false swearing. The conviction, however, was reversed on appeal, on the basis that the first marriage had been bigamous, and, as such, was void, and a decree was not required in order to avoid it. Accordingly, in the marriage application he had answered truthfully.

The *Smith* case illustrates that if a marriage license is obtained by concealing the existence of a prior undissolved marriage, the applicant is subject to being charged with the offense of false swearing.

Notwithstanding the existence of the existence of conflicts in the deposition testimony of Ms. Pope, plus the fact that she may also have given false statements in her application for a marriage license, her counsel, and undoubtedly counsel for the Defendant, will argue that issues respecting Ms. Pope's divorce, the application for her marriage license, and her subsequent marriage to Mr. Pope, are not relevant in this case, and are being asserted as a means of harassing her. Plaintiffs, however, contend otherwise. Ms. Pope's credibility, like that of any other witness, is a matter of great importance.

"The credibility of a witness is a matter to be determined by a jury under proper instructions from the court." (O.C.G.A. §24-9-80). "Where there are conflicts in the testimony of witnesses, it is the duty of the jury to reconcile these conflicts if possible, so as to make every witness speak the truth." See, Felker v. State, 252 Ga. 351 (1984); and Cotton v. State, 81 Ga. App. 753, 755 (1950).

The relevance of this testimony begins when Ms. Pope applied for and ultimately obtained, a contract of employment with the DeKalb County School District. The hiring process began in September, 2005. A resume of Ms. Pope's qualifications was submitted to the DCSD. In addition, Ms. Pope represented herself to be married to Anthony V. Pope, an architect who had a contractual relationship with the DCSD as to a SPLOST II project, and had been the architect of record in prior SPLOST projects. The position for which Ms. Pope was ultimately hired encompassed her direct involvement in the overall SPLOST II program. Her duties included inter-action with architects. In the negotiations leading to her hiring there were discussions concerning the existence of a conflict of interest due to her purported marriage to Mr. Pope. The issue was the subject of considerable debate, and was ultimately "resolved" by the Superintendent and the School Board on the basis that Mr. Pope would be allowed to complete the project on which he was working prior to the hiring of Ms. Pope; however, he would not be permitted to subsequently bid for additional projects. The process of resolving what may not have even been a 'conflict' was time consuming, and undoubtedly was a matter that the DCSD would have preferred not to deal with.

Ultimately, Ms. Pope was hired under the terms of a contract of employment with a one-year term, that was renewable on an annual basis. As a result of her hiring, Ms. Pope became an employee having a contract of employment for a definite term with a governmental entity engaged in the field of public education.

As pointed out in *Gearllach v. Odum*, supra, if a marriage is void due to a prior undissolved marriage no rights accrue to either party. Thus, benefits obtained by persons who represents themselves as being married, when, in fact they are not, have been improperly, if not illegally, obtained. For example, an employee who is married is entitled to certain benefits that

would not otherwise be available to a single person, such as dependent medical coverage. Did Ms. Pope apply for, and receive dependent medical coverage? As a married person, was the amount of her annual cost of living allowance (COLA) enhanced? From the standpoint of federal and state income tax withholding, did Ms. Pope obtain a benefit? In addition, did Mr. and Ms. Pope file a joint tax return, and thereby receive a favorable tax benefit? In the final analysis, was Ms. Pope's employment with the DCSD obtained under false pretenses? Would she have been hired to such a high and responsible position if the DCSD knew of her prior undissolved marriage and the procurement of a marriage license based on false information? When the issue involving a potential conflict of interest arose, did Ms. Pope have a legal, as well as a moral, obligation to either reveal the true circumstances surrounding her marriage, or, simply withdraw her application for employment?

Persons who are employed in the field of public education are required to meet certain standards, and are subject to termination for non-compliance with these standards. O.C.G.A. § 20-2-940, specifies the grounds for termination or suspension of an employee in the field of public education who possesses a contract of employment for a definite term. Among the enumerated grounds for termination are: "incompetence"; "insubordination"; "willful neglect of duties"; "immorality"; and "any other good and sufficient cause." Accordingly, if a person applies for employment with a public education entity, misrepresents her marital status, remains silent when an issue respecting her marital status becomes a matter of a conflict of interest, ultimately secures the employment, and thereafter receives salary and benefits paid with public funds one whose credibility is not subject to scrutiny? Was the employment lawfully obtained? Should the continuation of such employment not be subject to termination under O.C.G.A. § 20-2-940 at least on the basis of "any other good and sufficient cause?"

Submitting an employment application where there is a material misrepresentation is a matter that cannot be taken lightly. For example, in a workers' compensation setting, the accuracy of the employment application becomes extremely important when benefits are sought by an employee. O.C.G.A. §34-9-19 subjects a person who willfully makes a false or misleading statement or representation for the purpose of obtaining a benefit or payment, to misdemeanor prosecution. In addition, in regard to occupational disease claims, O.C.G.A. §34-9-291 provides:

“No compensation shall be payable for an occupational disease if the employee, in the course of entering into the employment of the employer by whom the compensation would otherwise be payable, falsely represented himself in writing to such employer as not having previously been disabled, laid off, or compensated in damages or otherwise because of such disease.”

In the case of Georgia Electric Co., et al. v. Rycroft, 259 Ga. 155 (1989), the Court adopted what has become known as the “false representation defense” as to claims for an occupational injury, as opposed to an occupational disease. In Rycroft, the Court held that workers' compensation benefits for an occupational injury cannot be awarded if the employee knowingly and willfully made a false representation as to his physical condition; that the employer relied upon the false representation and such reliance was a substantial factor in the hiring; and that there existed a causal connection between the false representation and the injury.

The “false representation defense” in the Rycroft case was re-affirmed, and found to be completely consistent with the American's with Disabilities Act. (ADA) [ Caldwell v. Aarlin/Holcombe Armature Co., et al., 267 Ga. 613 (1997)].

In both the Rycroft case, and the Caldwell case, the Supreme Court emphasized the factors that support the rationale for the false representation defense. In Rycroft, for example, the Court stated:

“There are several factors in the rationale of this defense. We have already mentioned our public policy in favor of truthfulness in employment applications. Additionally, it is a historically sound principle of law that a contractual relationship procured through fraud makes the contract voidable at the behest of the injured party. O.C.G.A. §13-5-5. Since there is a presumption that an employer takes an employee as he finds him, the court’s cited above have found it persuasive that an employer be able to rely on the employee’s description of his physical injury. Thus, the defrauding employee cannot hide behind the argument that the employer has not engaged in extensive and expensive physical examinations and investigations in order to ascertain the potential employee’s health history.”

(Id. at p. 159).

Indeed, the present case does not involve a claim for workers’ compensation benefits based upon a concealed pre-existing injury or condition. There is, however, an important analogy applicable to this case in respect of the rationale supporting the false representation defense. When an individual applies for employment, particularly when the salary and benefits are payable with public funds, the employment application should be true and correct in all material respects. Public policy favors truthfulness in employment applications. Contracts of

employment that are secured with false or misleading representations are certainly not favored, and are voidable in the presence of actual fraud.

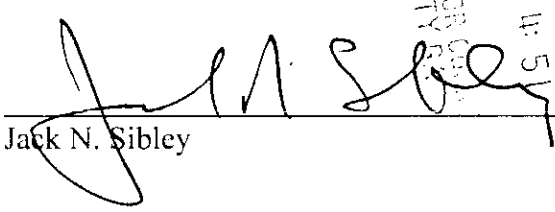
III.

CONCLUSION

Ms. Pope was hired to fill a position of significant responsibility. She became the "Owners' Representative" under the SPLOST II Program, and assumed the duties and responsibilities previously exercised by Dr. Pritchett. As a witness in this case, her credibility is indeed an important factor. The jury is entitled to know if she is one who is entitled to belief. Would a trustworthy person submit under oath a false application for a marriage license? Would such a person submit an application for employment in which her marital status was misrepresented? Would such a person allow an application for employment to be processed *after* the issue of her marital status has become the subject of a conflict of interest examination? Why would such a person testify that she was divorced, if, in fact she was not? Why would such a person be willing to testify that persons in another sector of the DeKalb County Government, "misplaced" court records regarding her 'divorce' in 2001? Why would she testify that a final judgment was rendered in the very court where this case is pending, when, in fact, such judgment may not have existed at all? The trier of fact is entitled to this information, and will give it such weight and credibility as is deemed appropriate.

This 11 day of December, 2007.

HAWKINS & PARNELL, LLP

  
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