

MOTION FOR LEAVE TO SERVE BY PUBLICATION

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Restricted Delivery Fee (Endorsement Required)	\$ 00.00	
<b>Total Postage &amp; Fees</b>	<b>\$ 04.12</b>	<b>05/30/2008</b>

Sent To Paul J. Cleary  
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<b>Total Postage &amp; Fees</b>	<b>\$ 04.12</b>	<b>05/30/2008</b>

Sent To Phil Lombardi  
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<b>Total Postage &amp; Fees</b>	<b>\$ 04.12</b>	<b>05/30/2008</b>

Sent To Elisabeth Skamata  
 Street, Apt. No.,  
 or PO Box No. General Delivery  
 City, State, ZIP+4 Denver CO 80203

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In the 5<sup>th</sup> District Court of Clarke County  
State of Iowa

Jerry DeWayne Mercer and )  
 Eddie Leon Andrews )  
 )  
 )  
 Vs. )  
 )  
 Terence C. Kern, an individual, and )  
 Paul J. Cleary, an individual and )  
 Phil Lombardi, an individual and )  
 Elisabeth A. Shumaker, an individual )  
 \_\_\_\_\_ )

Case Number EQCV010968

2008 MAR 30 11:29:21  
 DISTRICT COURT OF CLARKE COUNTY IOWA

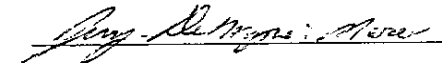
Motion for leave to serve defendant Terence C. Kern, an individual, and Paul J. Cleary, an individual and Phil Lombardi, an individual and Elisabeth A. Shumaker, an individual by publication (IRCP 1.313).

Jerry DeWayne Mercer move this Court for leave to service Terence C. Kern, an individual, and Paul J. Cleary, an individual and Phil Lombardi, an individual and Elisabeth A. Shumaker, an individual by publication.

Affidavit

I, Jerry DeWayne Mercer, of age and competent to testify, state as follows based on my own personal knowledge:

I have been unsuccessful in personally serving Terence C. Kern, and Paul J. Cleary, and Phil Lombardi, and Elisabeth A. Shumaker to the Court's satisfaction despite all due diligence.

  
 Jerry DeWayne Mercer

STATE OF IOWA

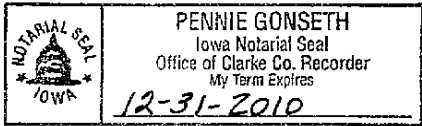
INDIVIDUAL ACKNOWLEDGMENT

COUNTY OF CLARKE

Before me, the undersigned, a Notary Public in and for said County and State on this 30<sup>th</sup> day of MAY, 2008, personally appeared Jerry DeWayne Mercer to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he/she executed the same as his/her free and voluntary act.

Given under my hand and seal the day and year last above written.

My commission expires 12-31-2010



Pennie Gonseth Notary Public

Conclusion

The causes of justice and judicial economy shall be served by this Court granting this motion for leave to serve Terence C. Kern, and Paul J. Cleary, and Phil Lombardi, and Elisabeth A. Shumaker by publication.

Prepared and submitted by: Jerry DeWayne Mercer  
Jerry DeWayne Mercer  
General Delivery  
Osceola, Iowa [ 50213-9999 ]

Certificate of mailing

I, Jerry DeWayne Mercer, certify that ~~April~~<sup>May</sup> 30, 2008, I mailed a true and correct copy of the above and foregoing motion for "Motion for leave to serve defendant by publication" to:

- Terence C. Kern, Tulsa, Oklahoma
- Paul J. Cleary, Tulsa, Oklahoma
- Phil Lombardi, Tulsa, Oklahoma
- Elisabeth A. Shumaker, Denver, Colorado

Jerry DeWayne Mercer  
Jerry DeWayne Mercer

Notice of Service by Publication

1. A petition has been filed in the 5<sup>th</sup> District Court in and for Clarke County, State of Iowa, case numbered as EQCV010968. The plaintiffs to the action are: Jerry DeWayne Mercer and Eddie Leon Andrews. The parties to be served by publication are: Terence C. Kern an individual, and Paul J. Cleary, an individual and Phil Lombardi, an individual and Elisabeth A. Shumaker, an individual.

2. The individual named defendants, Terence C. Kern, and Paul J. Cleary, and Phil Lombardi, and Elisabeth A. Shumaker, have been sued and must answer the petition within a reasonable time thereafter the first publication of this notice (IRCP 1.303, 1.306).

3. As a money judgment is sought, no separate property items perceived to belong to Terence C. Kern, and Paul J. Cleary, and Phil Lombardi, and Elisabeth A. Shumaker, have been articulated.

4. The Court has made inquiry prior to this notice and has determined that the plaintiffs made a distinct and meaningful search of all reasonably available sources to ascertain the whereabouts of Terence C. Kern, and Paul J. Cleary, and Phil Lombardi, and Elisabeth A. Shumaker.

5/30/08  
Date

Julia A. Cottrell  
Clerk of the 5<sup>th</sup> District Court of Iowa *Julia A. Cottrell*

MOTION FOR SUMMARY JUD'T (PACKAGE)

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Return Receipt Fee (Endorsement Required)	\$2.20		
Restricted Delivery Fee (Endorsement Required)	\$0.00		
Total Postage & Fees	\$ 5.32	07/03/2008	

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 or PO Box No. General Delivery  
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 PS Form 3800, August 2006 See Reverse for Instructions

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Return Receipt Fee (Endorsement Required)	\$2.20		
Restricted Delivery Fee (Endorsement Required)	\$0.00		
Total Postage & Fees	\$ 5.32	07/03/2008	

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 City, State, ZIP+4 Tulsa, OK 74103  
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DENVER CO 80203

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Return Receipt Fee (Endorsement Required)	\$2.20		
Restricted Delivery Fee (Endorsement Required)	\$0.00		
Total Postage & Fees	\$ 5.32	07/03/2008	

Sent To Elizabeth A. Shumaker  
 Street, Apt. No.,  
 or PO Box No. General Delivery  
 City, State, ZIP+4 Denver, CO 80203  
 PS Form 3800, August 2006 See Reverse for Instructions

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TULSA OK 74103

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Certified Fee	\$2.70		
Return Receipt Fee (Endorsement Required)	\$2.20		
Restricted Delivery Fee (Endorsement Required)	\$0.00		
Total Postage & Fees	\$ 5.32	07/03/2008	

Sent To Terrence C. Ken  
 Street, Apt. No.,  
 or PO Box No. General Delivery  
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 PS Form 3800, August 2006 See Reverse for Instructions

Returned/Signal Green Cards

MOTION FOR SUMMARY JUDT PACKAGE

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete Item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	A. Signature <i>Johanna Miller</i> <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee	
	B. Received by (Printed Name) <i>Johanna Miller</i>	G. Date of Delivery <i>7-8-08</i>
1. Article Addressed to:  <i>Testence C. Ren</i> <i>General Delivery</i> <i>Tulsa, OK 74103</i>	D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If YES, enter delivery address below:	
3. Service Type <input checked="" type="checkbox"/> Certified Mail <input 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.		
4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes		
2. Article Number (Transfer from service label)	<i>7007 0220 0002 9806 9974</i>	
PS Form 3811, February 2004	Domestic Return Receipt	102595-02-M-1540

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	A. Signature <i>Johanna Miller</i> <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee	
	B. Received by (Printed Name) <i>Johanna Miller</i>	G. Date of Delivery <i>7-8-08</i>
1. Article Addressed to:  <i>Phil Lombardi</i> <i>General Delivery</i> <i>Tulsa, OK 74103</i>	D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If YES, enter delivery address below:	
3. Service Type <input checked="" type="checkbox"/> Certified Mail <input 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.		
4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes		
2. Article Number (Transfer from service label)	<i>7007 0220 0002 9806 9950</i>	
PS Form 3811, February 2004	Domestic Return Receipt	102595-02-M-1540

In the 5<sup>th</sup> District Court of Clarke County  
State of Iowa

Jerry DeWayne Mercer, )  
and )  
Eddie Leon Andrews, )  
Vs. )  
Paul J. Cleary, an individual, and )  
Phil Lombardi, an individual and )  
Elisabeth A. Shumaker, an individual and )  
Terence C. Kern, an individual )

Case Number EQCV010968

Memorandum of Law in Support of Motion for Summary Judgment

When Summary Judgment Motion Supported by Affidavits, Adverse Party May Not Rest on Pleadings Alone. When the summary judgment movant carries its initial burden, the burden of going forward then switches to the opponent, who may not oppose summary judgment on the mere basis of the allegations of the pleadings nor on conclusory statements that a fact issue exists. See *Rand v. CF Indus.*, 42 F.3d 1139 (7<sup>th</sup> Cir. 1994). Statements of opinion or belief are not factual, and so do not raise an issue of fact sufficient to resist summary judgment. *Rand, supra*.

It is not the function of the trial court at summary judgment hearing to resolve any genuine factual issue, Moore's Federal Practice ¶ 56.15[1],[3].

The trial court should not resolve a genuine issue of credibility at the hearing on the motion for summary judgment. Moore's Federal Practice ¶ 56.15[4]. In *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905 (6<sup>th</sup> Cir. 1982), the district judge granted summary judgment only after viewing the demeanor of several witnesses. Reversing, the court of appeals held that while oral testimony is permitted on a motion for summary judgment, if credibility must be weighed to decide factual disputes, summary judgment is inappropriate. See also, *Summerlin v. Edgar*, 809 F.2d 1034 (4<sup>th</sup> Cir. 1987).

The sound principle is that allegations in unverified pleadings may be pierced by affidavits that measure up to the evidentiary requirements of Rule 56(e). Moore's Federal Practice ¶ 56.11.

#### Summary Judgment

##### **(a) For Claimant.**

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, **at any time after the expiration of 20 days from the commencement of the action** or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

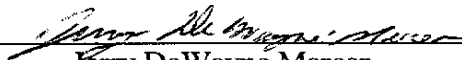
##### **(e) Form of Affidavits; Further Testimony; Defense Required.**

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

**When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.**

If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Prepared and submitted by:

  
Jerry DeWayne Mercer  
General Delivery  
Osceola, Iowa [ 50213-9999 ]

Certificate of mailing

I, Jerry DeWayne Mercer, certify that July 3, 2008, I mailed a true and correct copy of the above and foregoing Memorandum in Support of the Motion for Summary Judgment to: Ms. or Mr. Paul J. Cleary, Phil Lombardi, Terence C. Kern, Elisabeth A. Shumaker, General Delivery, Tulsa, OK, General Delivery, Denver, Co.

  
Jerry DeWayne Mercer

In the 5<sup>th</sup> District Court of Clarke County  
State of Iowa

Jerry DeWayne Mercer, )  
and )  
Eddie Leon Andrews, )  
Vs. )  
Paul J. Cleary, an individual, and )  
Phil Lombardi, an individual and )  
Elisabeth A. Shumaker, an individual and )  
Terence C. Kern, an individual )

Case Number EQCV010968

Motion for Summary Judgment

Brief in Support

Triable issues of fact to which there is no dispute

1. Paul J. Cleary, Phil Lombardi, Terence C. Kern, from a location in the vicinity of Tulsa, Oklahoma and Elisabeth A. Shumaker, from a location in the vicinity of Denver, Colorado visited into Clarke County Iowa via the United States Mail Service, committed mail fraud, on or before April 12<sup>th</sup> 2008. Mr. Paul J. Cleary, Phil Lombardi, Terence C. Kern and Ms Elisabeth A. Shumaker, prepared and uttered false and material misrepresentations as a positive assertion which are now known to be false and made recklessly without regard for the truth, with the intention that it be relied upon by Jerry DeWayne Mercer. Jerry DeWayne Mercer and Eddie Leon Andrews, and uttered by Mr. Paul J. Cleary, Phil Lombardi, Terence C. Kern and Ms Elisabeth A. Shumaker, false assertions to the detriment of Jerry DeWayne Mercer and Eddie Leon Andrews losing in excess of \$ 25,579.84.

2. Mr. Paul J. Cleary, Phil Lombardi, Terence C. Kern and Ms Elisabeth A. Shumaker acts are violative of Iowa's and Oklahoma doctrine of *common law fraud* articulated by the Iowa Supreme Court Case's and Oklahoma Supreme Court, *inter alia*, in *Worsham v. Nix*, 83 P.3d 879, 2004 OK CIV APP 2 ( 06/03/2003).

Affidavit

I, Jerry DeWayne Mercer, of age and competent to testify, state as follows based on my own personal knowledge:

(1). On or before April 12<sup>th</sup> 2008, Mr. Paul J. Cleary, Phil Lombardi, Terence C. Kern, from a location in the vicinity of Tulsa, Oklahoma, and Ms Elisabeth A. Shumaker, from a location in the vicinity of Denver, Colorado used the United States Mail Service to demand that they be paid money,  $5,256.04 + 20,323.80 = \$ 25,579.84$  .

(2). I, Jerry DeWayne Mercer and Eddie Leon Andrews relied on Mr. Paul J. Cleary, Phil Lombardi, Terence C. Kern and Ms Elisabeth A. Shumaker representations to the detriment of Jerry DeWayne Mercer and Eddie Leon Andrews, I giving up in excess of  $5,256.04 + 20,323.80 = \$ 25,579.84$  .

(3). I have since learned that the representations of Mr. Paul J. Cleary, Phil Lombardi, Terence C. Kern and Ms Elisabeth A. Shumaker, were false.



Jerry DeWayne Mercer

STATE OF IOWA

INDIVIDUAL ACKNOWLEDGMENT

COUNTY OF CLARKE

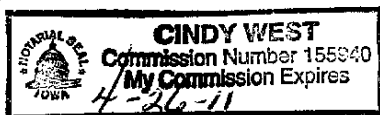
Iowa Form

Before me, the undersigned, a Notary Public in and for said County and State on this 3 day of July, 2008, personally appeared, Jerry DeWayne Mercer, to me, known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as his free and voluntary act.

Given under my hand and seal the day and year last above written.


My commission expires 4-26-11

Cindy West Notary Public



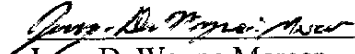
Conclusion

Whereas the material facts of this petition are not in dispute and Jerry DeWayne Mercer and Eddie Leon Andrews are entitled to judgment as a matter of law, this Court should grant judgment for and in favor of Jerry DeWayne Mercer and Eddie Leon Andrews

Prepared and submitted by:   
Jerry DeWayne Mercer  
General Delivery  
Osceola, Iowa [ 50213-9999 ]

Certificate of mailing

I, Jerry DeWayne Mercer, certify that July 3, 2008, I mailed a true and correct copy of the above and foregoing Motion for Summary Judgment attached to: Mr. Paul J. Cleary, Phil Lombardi, Terence C. Kern, Ms Elisabeth A. Shumaker, General Delivery, Tulsa, OK, General Delivery, Denver, CO.

  
Jeffry DeWayne Mercer

In the 5<sup>th</sup> District Court of Clarke County  
State of Iowa

Jerry DeWayne Mercer, )  
and )  
Eddie Leon Andrews, )  
Vs. )  
Paul J. Cleary, an individual, and )  
Phil Lombardi, an individual and )  
Elisabeth A. Shumaker, an individual and )  
Terence C. Kern, an individual )

Case Number EQCV010968

Order and Judgment

Today, July \_\_\_\_ 2008, this Court considers Jerry DeWayne Mercer and Eddie Leon Andrews prove-up of damages. Jerry DeWayne Mercer and Eddie Leon Andrews appear pro se: Mr. Paul J. Cleary, Phil Lombardi, Terence C. Kern, Ms Elisabeth A. Shumaker, is not in appearance and has passed on the opportunity to challenge damages. As judgment has been entered for and in favor of Jerry DeWayne Mercer and Eddie Leon Andrews and damages in fact have been supported by sworn testimony and documents which are authenticated by Jerry DeWayne Mercer and Eddie Leon Andrews this Court finds that Jerry DeWayne Mercer and Eddie Leon Andrews are entitled to money judgment in the sum of **5,256.04 + 20,323.80 = \$ 25,579.84**, **Twenty Five Thousand Five Hundred Seventy Nine Dollars and Eighty Four Cents** plus the costs of bringing this action amounting to \$ 763.00.

This Court rules, determines, and decrees that Jerry DeWayne Mercer and Eddie Leon Andrews are entitled to judgment in the total amount of \$ 26,342.84 to be collected by execution.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge of the District Court

### AFFIDAVIT OF PUBLICATION

#### Jerry Mercer Notice of Service by Publication

Prepared by Osceola Sentinel -Tribune, 111 E. Washington St., Osceola, IA 50213

I, Richard E. Paulsen, depose and say that I am publisher of the Osceola Sentinel-Tribune, a newspaper published in Osceola, Clarke County, Iowa, that the annexed printed notice in the above entitled action was published on:

- 1. June 5, 2008
- 2. June 12, 2008
- 3. June 19, 2008

Publication cost: \$ 11.55

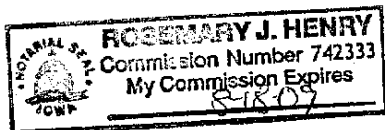
*Richard E. Paulsen*

Richard E. Paulsen

Sworn to before me and subscribed in my presence by the said Richard E. Paulsen this 15th day of June 2008.

*Rosemary J. Henry*

Rosemary J. Henry  
Notary Public



LEGAL NOTICE is lawful notification of Notice of service by publication, that Original Notice has been filed for Jerry DeWayne Mercer, Eddie Leon Andrews Vs. Terence C. Kern, Paul J. Cleary, Phil Lombardi, Elisabeth A. Shumaker, In the 5th District Court in and for Clarke County, State of Iowa, case numbered as EQCV010968 Mail Fraud. Published in the Osceola Sentinel-Tribune June 5, June 12 and June 19, 2008. S1470