

March 31, 2010  
2:00 pm.  
Judge Gray

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

FEB 22 2010

PATRICIA PRESLEY, COURT CLERK

By \_\_\_\_\_  
DEPUTY

Oklahoma Department of Securities )  
*ex rel.* Irving L. Faight, )  
Administrator, )

Plaintiff, )

v. )

Case No. CJ-2009-6989

Bothwell Consulting, LLC, an Oklahoma )  
LLC; Lawrence G. Bothwell, an individual; )  
Christopher S. VonWerder, an individual; )  
and Tommy L. Richardson, an individual, )

Defendants. )

and )

Amy J. Richardson, an individual, )

Defendant Solely For )

Purposes of Equitable Relief. )

**MOTION FOR NEW TRIAL OF DEFENDANTS BOTHWELL  
CONSULTING, AN OKLAHOMA LLC AND LAWRENCE G. BOTHWELL, AN  
INDIVIDUAL**

The Defendants Bothwell Consulting, LLC and Lawrence G. Bothwell herewith move the Court pursuant to 12 Okla. Stat. § 652 *et seq.* for a new trial in this action and as grounds therefor would show the Court as follows.

12 Okla. Stat. § 652 *et seq* provides in full:

A new trial is a reexamination in the same court, of an issue of fact or of law or both, after a verdict by a jury, the approval of the report of a referee, or a decision by the court. The former verdict, report, or decision shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of the party:

1. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial;
2. Misconduct of the jury or a prevailing party;
3. Accident or surprise, which ordinary prudence could not have guarded against;
4. Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

5. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property;
6. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law;
7. Newly discovered evidence, material for the party applying, which could not, with reasonable diligence, have been discovered and produced at the trial;
8. Error of law occurring at the trial, and objected to by the party making the application; or
9. When, without fault of the complaining party, it becomes impossible to prepare a record for an appeal.

Defendants seek a new trial based upon paragraphs 1, 2, 5, 6, and 8.

Deeply rooted in the common law is the concept that trial courts retain for a limited period plenary control over their terminal decisions. This power was historically inviolable at any time during the term of court in which the judgment was rendered; the authority hence came to be known as "term-time." Although terms of court have been abolished in Oklahoma, the common-law term-time power survived and came to be codified in 12 O.S. 1981 § 1031.1 ; the time limit for invoking this ancient control is now fixed at thirty days from the decision. Once timely invoked, the trial court's term-time power may be exercised after the thirty-day period. The common-law term-time authority, now statutorily reconfirmed by the terms of § 1031.1, remains undiminished and may not be abridged by case law. The power so reposed in the trial bench is entirely unrestricted either by the §§ 651, 1031 or any other statutory grounds. Neither the terms of § 1031.1 nor those of its common-law antecedents restrict the exercise of term-time power to any specific grounds. Trial judges enjoy plenary term-time control with "a very wide and extended discretion" that has been described as "almost unlimited." *Schepp v. Hess* 1989 OK 28, 770 P.2d34 (Okla. 1989). While the power to entertain a new-trial motion is limited to § 651 grounds, the § 1031.1 term-time power is coextensive with the common law and hence remains unfettered by statutory grounds. The common law's test in force in this state for measuring the legal correctness of a trial court's response to a timely § 1031.1 plea is whether sound discretion was exercised upon sufficient cause shown to vacate, modify, open or correct the earlier decision, or to refuse the relief sought.

**I. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial**

As shown in the affidavit of J. David Ogle, an agreement for an extension of time was reached in person between himself and Jennifer Shaw, counsel for the prevailing party, on February 4, 2010. Ogle sent a proposed order to Ms. Shaw one week later, on February 10, 2010. The next day, February 11, 2010, Ms. Shaw sent an email denying any agreement and refused to approve the order. Later that day she filed an application for summary judgment without a hearing, in which she stated to the Court "Defendants are establishing a pattern of failing to respond in this matter" and proceeded to cite to the fact that no answer had been filed by these defendants despite Ogle's agreement with co-counsel. At no point did Ms. Shaw advise

the Court of the proposed order extending time and the fact that she had a strong disagreement with Defendants' counsel over the issue of continuance. Upon receipt of Plaintiff's motion, Defendants' counsel filed an answer and response to the motion for summary judgment and delivered these personally to the Court on February 12. These pleadings set forth that virtually all facts and mixed questions of law and fact alleged by Plaintiff were disputed by these Defendants. Defendants were not afforded a hearing on the Application. The Application filed on February 11 was ruled upon without hearing or notice to these Defendants.

## **II. Misconduct of the jury or a prevailing party**

As shown in the affidavit of J. David Ogle, an agreement for an extension of time was reached in person between himself and Jennifer Shaw, counsel for the prevailing party, on February 4, 2010. Ogle sent a proposed order to Ms. Shaw one week later, on February 10, 2010. The next day, February 11, 2010, Ms. Shaw sent an email denying any agreement and refused to approve the order. Later that day she filed an application for summary judgment without a hearing, in which she stated to the Court "Defendants are establishing a pattern of failing to respond in this matter" and proceeded to cite to the fact that no answer had been filed by these defendants despite Ogle's agreement with counsel. At no point did Ms. Shaw advise the Court of the proposed order extending time and the fact that she had a strong disagreement with Defendants' counsel over the issue of continuance. Upon receipt of Plaintiff's motion, Defendants' counsel filed an answer and response to the motion for summary judgment and delivered these personally to the Court on February 12<sup>th</sup>. These pleadings set forth that virtually all facts and mixed questions of law and fact alleged by Plaintiff were disputed by these Defendants. Defendants were not afforded a hearing on the Application. The Application filed on February 11<sup>th</sup> was ruled upon without hearing or notice to these Defendants. There was misconduct of Ms. Shaw in renegeing on her February 4<sup>th</sup> agreement for extension of time, her failure to advise the Court of this known disagreement, at the presentation of a motion to the Court that states misleading that these Defendants had not responded to any pleading in this action.

## **III. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property;**

By its Order, the Court found that these Defendants sold unregistered debentures in the state of Oklahoma in violation of its statutes. This issue is vigorously contested by these Defendants. The Court proceeded to enjoin and restrain these Defendants forever from offering or selling securities in Oklahoma and ordered them to make restitution in the amount of \$640,000.00. For the reasons set forth below this is an erroneous assessment.

## **IV. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law;**

Summary judgment is wholly improper where there are disputed issues of material fact. The following is the Defendant's statement of disputed facts presented to the Court:

- Defendants deny that Bothwell conducted business as Bothwell Consulting. The company operated as an Oklahoma limited liability company.
- Defendants deny that Bothwell controlled Bothwell Consulting. The company operated as an Oklahoma limited liability company.
- Defendants deny that they accepted money from investors for “so-called debentures.” Defendant Bothwell Consulting entered into various note transactions with individual lenders.
- Defendants deny that Bothwell Consulting promised any return on investments. Bothwell Consulting entered into various note transactions with individual lenders at specific interest rates.
- Defendants deny that Bothwell Consulting promised any return on investments. Bothwell Consulting entered into various note transactions with individual lenders at specific interest rates.
- Defendants deny that Bothwell Consulting ever had “investors” which is a securities term of art. Plaintiff’s employee is merely reciting erroneous “facts” in order to reach a legal conclusion which is inappropriate for summary judgment. Bothwell Consulting promised no return on investments. Bothwell Consulting entered into various note transactions with individual lenders at specific interest rates.
- Defendants deny that Bothwell controlled any bank accounts of Bothwell Consulting and that there were any “investor funds”. Bothwell Consulting entered into various note transactions with individual lenders at specific interest rates.
- Defendants deny that they received any money from any investor. Bothwell Consulting entered into various note transactions with individual lenders at specific interest rates.
- Defendants deny receipt of any “investor funds” or that any monies were used to pay Bothwell’s personal expenses. Defendants did not offer or sell any debentures.

Rule 13 of the Rules For District Courts in Oklahoma states that a party may move for summary judgment on the ground that the evidentiary material filed with the motion shows that there is no substantial controversy as to any material fact. In *Prudential Ins. Co. of America v. Glass*, 1998 OK 52 , ¶ 3, 959 P.2d 586 , the review standard was further delineated as follows: a summary judgment ruling must be made on the record actually presented by the litigants, not on a record potentially possible. If the summary judgment submissions disclose either controverted material facts, or, reasonable minds might reach different conclusions even if the material facts are undisputed, summary judgment should be denied. Finally, only if the movant for summary adjudication satisfies the initial burden to show entitlement to summary judgment is it incumbent on the non-movant to demonstrate by its own submissions the existence of a substantial dispute as to some material fact. If the summary judgment submissions disclose either controverted material facts, or, reasonable minds might reach different conclusions even if the material facts are undisputed, summary judgment should be denied. *Perry v. Green*, 1970 OK 70, 468 P.2d 483, 488-489. Neither an appellate court nor a trial court weighs the evidence on a motion for summary judgment and it is not the purpose of such procedure to substitute a trial by affidavit for a trial according to law. *Stuckey v. Young Exploration Co.*, 1978 OK 128, 586 P.2d 726, 730. Weighing of evidence is a function for the jury. Finally, only if the dispute as to some material fact. *McMullen v. City of Del City*, 1996 OK CIV APP 46, 920 P.2d 528; *Spirgis v. Circle K Stores, Inc.*, 1987 OK CIV APP 45, 743 P.2d 682. It was made clear in *Spirgis v. Circle K*

*Stores, Inc.*, that even when an opposing party fails to respond to a summary judgment motion the trial judge still must insure the motion is meritorious. 743 P.2d at 685. Thus, if a moving party has not addressed all material facts, or one or more such facts are not appropriately supported by the evidentiary materials submitted, summary judgment for the movant is not proper. *Id.*

For a party to be entitled to summary judgment in its favor, the record must show that party entitled to judgment as a matter of law. The court may consider evidentiary materials submitted by the parties such as depositions, affidavits, admissions, and answers to interrogatories, viewing all evidentiary inferences in the light most favorable to the opposing nonmovant. *Hargrave v. Canadian Valley Electric Cooperative, Inc.*, 1990 OK43, 729 P.2d 50, 55. In the final analysis, summary judgment process is properly invoked only when it serves to eliminate a useless trial. Plaintiff presented no evidence of undisputed facts other than the affidavits of its own employees, employees of the Oklahoma Department of Securities. There has been no discovery initiated by the Plaintiff in this action. There are no admissions, interrogatory responses, deposition testimony excerpts, and, most importantly, documents to support Plaintiff's conclusory statements. Of the twelve (12) numbered paragraphs in the statement of undisputed facts submitted by Plaintiff, ten (10) are disputed by these Defendants. The purpose of summary adjudications is not to substitute a trial by affidavit for one by jury, but rather to afford a method of summarily terminating a case when only questions of law remain. *Bowers v. Wimberly*, 1997 OK 24, ¶ 18, 933 P.2d 312, 316; *Stuckey v. Young Exploration Co.*, 1978 OK 128, 586 P.2d 726, 730. "[W]hen uncontroverted proof lends support to conflicting inferences, the choice to be made between the opposite alternatives does not present an issue of law but rather one for the trier of fact." *Walters v. J.C.Penney Co., Inc.*, 2003 OK 100, ¶ 13, 82 P.3d 578, 584. Plaintiff cannot prove the nature of the erroneously designated "investments" without reference to some document. The main purpose of summary judgment is to avoid useless trials and at the same time achieve a final determination on the merits. *J. Friedenthal, M. Kane & A. Miller, Civil Procedure, 434-35 (1985)*. The standard for granting summary judgment is if the evidence is so clearly preponderant that it reasonably admits of but one conclusion. If the record was sufficiently developed after adversarial testing such that, when taken together with the stipulations of the parties and the applicable statutes, no issue of fact existed to submit to the jury, the disposition of the case becomes a question of law for the court. *Id.* at 273. Here, in contrast, the most significant feature of the record is its paucity. The record in support of summary judgment reasonably supports differing conclusions; therefore, summary judgment is inappropriate.

Plaintiff cannot in fact demonstrate that the instruments in question were not notes. The Oklahoma Securities Act provides in 71 O.S. 1971 § 301 [71-301], that, "It is unlawful for any person to offer or sell any security in this state unless (1) it is registered under this act or (2) the security or transaction is exempted under section 401. Section 2 of the Act defines a security as "any note" "unless the context otherwise requires." There are no Oklahoma cases construing the

meaning of the definition of security as "any note," but the United States Supreme Court recently quoted *Securities & Exch. Com. v. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946), in a case construing the definition of security as an investment contract. In *Howey*, the United States Supreme Court stated that the Federal Securities Acts embody a "flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." 328 U.S. at 299, 66 S.Ct. at 1103. So is it with the Oklahoma Securities Act. Largely because of the language "unless the context otherwise requires," or similar language in other acts, it has been held that the phrase "any note" does not really mean any note. See, *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564, 569 (1967), in which the United States Supreme Court said that, "in searching for the meaning and scope of the word 'security' in the [Securities Exchange] Act [of 1934], form should be disregarded for substance and the emphasis should be on economic reality. . . ." (Citation omitted) Considering the concept of substance over form and the fact that there are other statutory systems to deal with usual commercial and consumer transactions, other jurisdictions have drawn the distinction between commercial notes and investment notes in determining whether or not a note shall be treated as a security. If proceeds are used to purchase consumer goods or services, then the note clearly has a commercial character. See, *Zabriskie v. Lewis*, 507 F.2d 546 (10<sup>th</sup> Cir. 1974), in which the test used was whether or not a transaction is of a kind for which stock is often actually given. Whether or not a note is a commercial note or an investment note must be determined on the basis of the facts of each individual case. Clearly, the Plaintiff offered no facts to sustain its motion for summary judgment and the motion should have been denied.

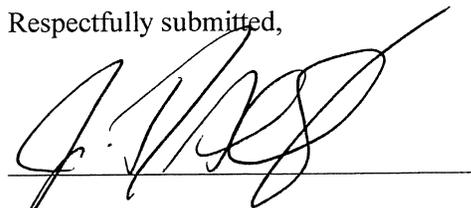
**V. Error of law occurring at the trial, and objected to by the party making the application;**

Defendants have set forth the errors of law to which they objected in paragraphs one through four above. The Court's error of law is in granting the Plaintiff's motions without a hearing or notice to these Defendants. The granting of summary judgment ultimately depends upon a determination by the trial court of whether there is a substantial controversy as to any material fact. Even when no counter statement has been filed, it is still incumbent upon the trial court to insure that the motion is meritorious. The trial court must examine the evidentiary materials supporting the motion and if all the material facts are addressed and are supported by admissible evidence, those facts are admitted and judgment for the movant is proper. However, if the movant has not addressed all material facts, or if one or more such facts is not supported by admissible evidence, judgment for the movant is not proper. The burden of producing admissible evidence to support every material fact is on the movant, and the trial court has the burden "to insure that the motion is meritorious." *Spirgis v. Circle K Stores, Inc.*, supra, at 685. The granting of summary judgment ultimately depends upon a determination by the trial court of whether there is a substantial controversy as to any material fact. Even when no counter statement has been filed, it is still incumbent upon the trial court to insure that the motion is

meritorious. The trial court must examine the evidentiary materials supporting the motion and if all the material facts are addressed and are supported by admissible evidence, those facts are admitted and judgment for the movant is proper. However, if the movant has not addressed all material facts, or if one or more such facts is not supported by admissible evidence, judgment for the movant is not proper. Every civil case subject to summary proceedings must be grounded and considered upon its own peculiar pleadings, affidavits, exhibits, admissions, depositions, and the like, and if reasonable men in the exercise of fair and impartial judgment might reach different conclusions upon consideration of same, summary judgment must be denied. *Northrup v. Montgomery Ward & Co.*, 529 P.2d 489 (Okla. 1974).

WHEREFORE, PREMISES CONSIDERED, Defendants Bothwell Consulting, LLC and Lawrence G. Bothwell pray that The Court grant their motion for new trial and for such other and further relief to which the Court may deem these Defendants entitled.

Respectfully submitted,



J. David Ogle, OBA #17476  
100 Park Ave, Suite 500  
Oklahoma City, OK 73102  
(405) 605-6644  
*Attorney for Bothwell Consulting,  
LLC, and Lawrence G. Bothwell,  
an individual.*

**CERTIFICATE OF MAILING**

I hereby certify that on the 22<sup>nd</sup> day of February, 2010, I mailed a true and correct copy of the above and foregoing, postage prepaid, to:

Amanda Cornmesser, Esq.  
Jennifer Shaw, Esq.  
Oklahoma Department of Securities  
120 N. Robinson, Suite 860  
Oklahoma City, OK 73102



PATRICIA PRESLEY, Court Clerk for Oklahoma County, Okla., hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of record in the District Court Clerk's Office of Oklahoma County, Okla. this 22 day of Feb, 2010.  
PATRICIA PRESLEY, Court Clerk  
Deputy

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA**

Oklahoma Department of Securities )  
*ex rel.* Irving L. Faught, )  
Administrator, )  
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Plaintiff, )  
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v. )  
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Bothwell Consulting, LLC, an Oklahoma )  
LLC; Lawrence G. Bothwell, an individual; )  
Christopher S. VonWerder, an individual; )  
and Tommy L. Richardson, an individual, )  
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Defendants, )  
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and )  
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Amy J. Richardson, an individual, )  
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Defendant Solely For )  
Purposes of Equitable Relief. )

Case No. CJ-2009-6989

**AFFIDAVIT OF J. DAVID OGLE, ESQUIRE**

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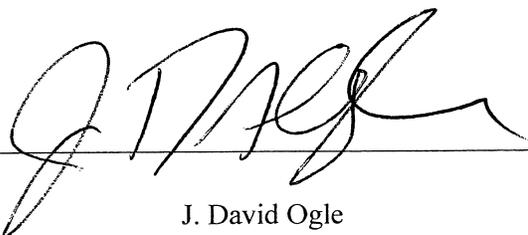
The undersigned, being duly sworn, avers and states as follows:

1. The undersigned is counsel for Bothwell Consulting LLC and Lawrence G. Bothwell. I make this affidavit based upon facts of which I have personal knowledge.
2. Immediately, after this action was filed, I contacted the Plaintiff's counsel, Ms. Cornmesser and negotiated the terms of a temporary injunction against my clients. I had been negotiating the terms of a permanent injunction until the filing of Plaintiff's motion to enter. Inasmuch as my clients did not wish to be adversarial and wanted to cooperate in a resolution of this misunderstanding, in

the spirit of the cooperation discussions were had regarding the lack of need to file an answer.

3. On January 21, 2010 Counsel appeared for a scheduling conference. Plaintiff's Counsel, Ms. Shaw, never raised the issue of no answer having been filed either with me or with the Court.
4. Plaintiff, Oklahoma Department of Securities, filed a Motion for Summary Judgment herein on January 21, 2010 and set the matter for hearing for February 17, 2010.
5. On February 4, 2010, I physically went to the Office of the Department of Securities to advise Plaintiff's counsel, Ms. Shaw, of the importance my commitment to serve as a counselor/chaperon for my son's fifth grade class trip to Camp Goddard, my conflict with these dates, and the need for extension of time. Ms. Shaw advised that she had no objection to the extension of time. On February 10, 2010, I forwarded a proposed Order of Continuance to Ms. Shaw by email. On the morning of the 11<sup>th</sup>, Ms. Shaw sent me an email advising that Plaintiff did not agree to the continuance.
6. There is no doubt in my mind that Ms. Shaw agreed to the continuance and thereafter reneged on this commitment in order to obtain a judgment. This judgement was entered without full information and discussion to the Court.

Further affiant sayeth not.

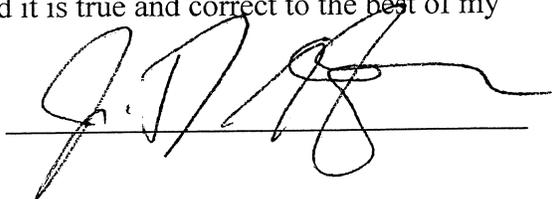


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J. David Ogle

**AFFIDAVIT**

I, J. David Ogle state that I have read the above and forgoing Motion and Affidavit in Support of Defendant's Request for Continuance and it is true and correct to the best of my knowledge and belief.

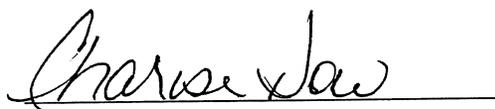


COUNTY OF OKLAHOMA )

) SS

STATE OF OKLAHOMA )

SUBSCRIBED AND SWORN TO before me, this 2<sup>nd</sup> day of FEBRUARY 2010



Notary Public

Commission No.

07004657

My Commission expires May 11, 2011

