

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

2009 OCT 29 PM 2:40

STATE OF INDIANA  
CLERK OF DISTRICT COURT  
FOR 09 CW 301 JTM

JAMES A. SIMON, Individually and as )  
Father and Legal and Natural Guardian of ) Cause No.  
R.S.; ESTATE OF DENISE J SIMON, )  
James Simon, Personal Representative of Estate, )  
Plaintiffs, )  
v. )  
SPECIAL AGENT PAUL MUSCHELL; )  
SPECIAL AGENT IN CHARGE ALVIN )  
PATTON; SPECIAL AGENT LINDA PORTER; )  
UNKNOWN AGENTS OF THE INTERNAL )  
REVENUE SERVICE; and UNKNOWN )  
INDIVIDUALS JOHN DOES AND )  
JANE DOES, each in his or her individual capacity, )  
Defendants. )

**COMPLAINT**

Plaintiffs, by counsel, for their Complaint against Defendants, state as follows:

**PARTIES**

1. 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.
2. 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.
3. Plaintiff, the Estate of Denise J. Simon (the "Estate"), is an estate that was 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.

4. 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.

5. Upon information and belief, Defendant Paul Muschell (“Muschell”) is a Special Agent with the Internal Revenue Service (“IRS”), Criminal Investigation Division (the “CID”), and has been employed in this capacity since November 2001. In his employment with the IRS, Muschell is responsible for investigating possible Internal Revenue Code (the “IRC”) violations. Muschell is being sued in his individual capacity.

6. Upon information and belief, Defendant Linda Porter (“Porter”) is a Special Agent with the IRS, responsible for executing search warrants on behalf of the IRS. Porter is being sued in her individual capacity.

7. Upon information and belief, Defendant Alvin Patton (“Patton”) is the Special Agent in Charge of Defendant Muschell, responsible for the training and supervision of Muschell. Upon information and belief, Patton was in charge of Muschell at all relevant times. The Special Agent in Charge of Muschell is being sued in his individual capacity.

8. Defendants Unknown Agents of the Internal Revenue Service (“Unknown Agents”) are believed to be agents, in-house legal counsel or any other employee with the IRS involved in the process of supervising IRS personnel; reviewing and approving requests for search warrants; and/or responsible for processing and/or executing search warrants; and are involved in setting policies regarding search warrants; and/or in training IRS agents on behalf of the IRS. On or about November 2007, Unknown Agents were involved in the ultimate approval and the execution of a search warrant on Simon’s residence located at 10607 Monte Vista Court, Fort Wayne, Allen County, Indiana (“Simon Residence”). The number of Unknown Agents

involved in the ultimate warrant approval and in the Search is unknown at this time. Unknown Agents are being sued in their individual capacities.

9. Unknown Individuals John Does and Jane Does (“Unknown Individuals”) are non-IRS employees whose identity is unknown and who provided information and/or otherwise influenced the IRS and/or any other governmental entity or participated in the process of reviewing and approving any request for a search warrant with regard to Simon and Decedent. The names of the Unknown Individuals are unknown at this time. The number of Unknown Individuals is unknown at this time. Unknown Individuals are being sued in their individual capacities.

#### **JURISDICTION AND VENUE**

10. This is a civil action brought pursuant to *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

11. Venue is proper in the Northern District of Indiana, Fort Wayne Division under 28 U.S.C. §1391(b), which allows for an action to be brought in the district where the Defendants reside or in which the cause of action arose. This cause of action arose in Allen County, State of Indiana, which is in the Northern District of Indiana.

12. Defendants, other than Unknown Individuals, are employees of the IRS and their offices are located at 201 East Rudisill Boulevard, Fort Wayne, IN 46808, which is in the Northern District of Indiana, as well as locations at: 230 S. Dearborn Street, Chicago, IL 60604 and 500 N. Capitol Street, NW Washington DC, 20221.

#### **BACKGROUND**

13. At least as early January 2007, the IRS began investigating Simon (the “Investigation”) for possible violations of the IRC.

14. Upon information and belief, Unknown Individuals provided inaccurate and/or misleading information to the U.S. government and/or the IRS. Upon information and belief, the Unknown Individuals influenced the IRS to conduct an investigation which resulted in a search warrant being issued.

15. Upon information and belief, the Investigation was performed by Muschell and other Unknown Agents.

16. Upon information and belief, 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.

17. 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.

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

19. Muschell intentionally willfully and/or recklessly made false and/or misleading statements in his 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.

20. Such false and misleading statements and omissions misled the Court and obstructed justice. Some of his false statements and omissions are as follows:

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

- 20.2 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.
- 20.3 Muschell did not state in the Affidavit that Simon worked outside of the United States and maintained a secondary residence in Ukraine, and that the case was not a tax shelter case. Muschell's portrayal of the Simon investigation being a tax shelter case was misleading to the Court.
- 20.4 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 a treaty with the United States when in fact it did and does have a comprehensive income tax treaty.
- 20.5 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 advise the Court in the Affidavit that the farm subsidies were less than \$3,000 a year, that the William R. Simon Farms, Inc. tax returns that had been filed in previous years showed mainly losses which generated significant carry forward losses leading to a conclusion that no tax was due and owing.
- 20.6 Upon information and belief, Muschell previously obtained documents on William R. Simon Farms, Inc. from the United States Department of Agriculture and/or court filings.
- 20.7 Muschell stated in his Affidavit that James and Denise Simon personally received federal farm subsidies when they did not personally receive any federal farm subsidies.
- 20.8 Muschell's misstatements and failure to provide the full picture of William R. Simon Farms and its tax matters was misleading to the Court.
- 20.9 Muschell declared in his Affidavit that the Simon Family Trust ("Trust") was 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 Trust. Muschell failed to mention that the Trust was classified as a domestic trust under the Internal Revenue Code for federal tax purposes and that no "foreign trust" returns were required to be filed.
- 20.10 Muschell failed to state in the affidavit that the income received by the Trust was passed through and reported on the personal tax returns for James and Denise Simon and was clearly marked "**SF TRUST**" on over forty locations on their returns, leaving the Court to wrongly believe that Trust income was not reported for income tax purposes.

- 20.11 Muschell, having reviewed James and Denise Simon's tax returns, certainly was aware of the reporting of trust income by James and Denise Simon on their personal returns 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 Simon's returns was a proper and correct method to report the Trust's income.
- 20.12 Muschell stated in the Affidavit that the Trust did not file certain federal tax returns, but as a CPA he knew or should have known that filing the returns was in fact the responsibility of the trustee, not James Simon. Failing to inform the Approving Judge that Simon was not responsible for the filing of the trust returns misled the Court.
- 20.13 Muschell's misstatements and failure to present all the relative facts regarding the Trust was misleading to the Court.
- 20.14 Upon information and belief, IRS procedure requires Muschell to demonstrate in the Affidavit a likelihood that there was criminal activity. This would have required Muschell to establish a likely source of taxable income in the Affidavit which he failed to do.
- 20.15 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. Muschell failed to show that any of these characteristics were present in the Simon case. Failure to show how these "tax offender characteristics" were present in the case misled the Court.
- 20.16 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.
- 20.17 Muschell, a CPA, knew or should have known that foreign corporations JS Elekta Limited, Elekta Limited, and ICHUA Limited did not have a United States tax return filing requirement. Muschell's failure to disclose this fact misled the Court.

21. 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.

22. Upon information and belief, Muschell, Patton, and Unknown Agents improperly reviewed and/or approved the Affidavit prior to it being submitted to the Court in support of a request for a search warrant.

23. The Affidavit should have been reviewed for completeness and accuracy by the Group Manager, the Special Agent in Charge, and the Criminal Tax Office. Defendants failed to review the Affidavit for completeness and accuracy.

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

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

25.1 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."

25.2 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.

25.3 Upon information and belief, Muschell had already obtained and reviewed bank records, including the Simon's personal bank accounts and other bank accounts used by entities associated with Simon, prior to obtaining the Warrant.

26. Furthermore, to secure the Warrant, Muschell needed to show in his Affidavit pursuant to the Manual that:

26.1 There was "objective evidence indicating the subject may destroy the evidence";

26.2 There was "objective evidence of the subject's attempt to obstruct the investigation"; or,

26.3 There were “facts that establish that other attempts to acquire the records were ineffective.”

27. Muschell made no such showings in his Affidavit. Muschell’s omissions and failure to provide the required information misled the Court.

28. Defendants failed to inform the Court that they were not following IRS regulations and procedures in obtaining the Warrant.

29. Neither James nor Denise Simon had any history of IRS conflict, and neither had ever been involved in any kind of tax protest activity.

30. On November 6, 2007, Muschell and Unknown Agents, using the wrongfully obtained Warrant, searched the Simon Residence (the “Search”).

31. The Defendants’ execution of the wrongfully obtained Warrant resulted in an improper and unlawful search of the Simon Residence in violation of the Plaintiffs’ Fourth and Fifth Amendment rights under the United States Constitution.

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

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

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

35. Upon information and belief, Defendants violated IRS procedures by creating an unsafe operation. 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. Defendants knew R.S. was an 11 year old female child who was in the Simon Residence when they executed the Warrant shortly after 7:00 a.m. on a school day.

36. Upon information and belief, during the Search, there were at least ten or more bullet proof vested and visibly armed IRS agents and/or employees present. Their 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.

37. Upon information and belief, during the Search, Porter made comments to the Decedent that were improper 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.

38. The Defendants improperly and unlawfully executed the wrongfully obtained Warrant in violation of the Plaintiffs' Fourth and Fifth Amendment rights under the United States Constitution.

39. The Defendants unauthorized search resulted in a violation of Decedent's Fourth and Fifth Amendment due process rights.

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

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

42. 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.

43. Upon information and belief, Muschell, Patton, Porter, and Unknown Agents within the IRS 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.

44. Upon information and belief, Patton was the Special Agent in Charge of Muschell during the Investigation, at the time the Affidavit was prepared, and at the time the Search was executed.

45. Upon information and belief, Patton acted willfully and/or recklessly in the following ways:

- 45.1 Failing to properly supervise Muschell during the Investigation, preparing the Affidavit, obtaining the Affidavit, and during the Search;
- 45.2 Approving the Affidavit;
- 45.3 Failing to adequately train Muschell; and,
- 45.4 Failing to replace Muschell as the lead investigative agent after Decedent's death.

### **BIVENS ACTION**

### **COUNT I - FOURTH AMENDMENT VIOLATION IN OBTAINING SEARCH WARRANT**

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

47. Muschell unlawfully and improperly executed the Affidavit and violated the Plaintiffs' clearly established constitutional rights.

48. The Affidavit contains false and misleading information regarding the IRS's investigation of Simon.

49. The false and misleading information was intended to and resulted in the Court granting the Warrant.

50. There was no good faith basis for the Defendants reviewing and approving the Affidavit to determine that probable cause existed to issue the Warrant.

51. Unknown Agents and Patton acting in a supervisory capacity had actual knowledge of and acquiesced in Muschell's conduct by adopting and maintaining a practice, custom and/or policy that contributed to the violation of Plaintiffs' constitutional rights.

52. As a direct and proximate result of Defendants' actions, Plaintiffs have suffered mental anguish, emotional harm, fright, shock, humiliation, embarrassment, deprivation of their liberty, violation of their constitutional rights, loss of life, and other damages and injuries for which they seek compensatory damages.

53. Additionally, Defendants acted in reckless disregard to Plaintiffs' constitutional rights.

54. Pursuant to *Bivens*, Plaintiffs are entitled to money damages for the violation of their clearly established constitutional rights.

WHEREFORE, Plaintiffs, by counsel, respectfully request that the Court grant the following relief against the Defendants:

- a) Award compensatory damages to Plaintiffs for their injuries, including, but not limited to, deprivation of their liberty, mental anguish, emotional harm, fright, shock, humiliation, embarrassment, loss of life, and violation of constitutional rights; and,
- b) Grant such other and further relief to which Plaintiffs may be entitled.

**COUNT II - FOURTH AMENDMENT VIOLATION IN EXECUTING  
IMPROPER SEARCH WARRANT**

55. Plaintiffs incorporate by reference rhetorical paragraphs 1-54 as if fully set forth in this paragraph.

56. Defendants Muschell, Patton, Porter, and Unknown Agents failed to take reasonable efforts to determine if the Affidavit was accurate and supported by probable cause.

57. Defendants Muschell, Porter, and Unknown Agents used excessive force in executing the Warrant and thereby violated Plaintiffs' constitutional rights.

58. Defendants Muschell, Patton, Porter, and Unknown Agents, unlawfully and improperly executed, or caused to be executed, the improper Warrant and thereby violated Plaintiffs' constitutional rights.

59. Defendants Muschell, Patton, Porter, and Unknown Agents, knew or should have known there was no good faith basis to execute the Warrant and thereby violated Plaintiffs' clearly established constitutional rights.

60. The Defendants knew or should have known that there was no good faith basis for the issuance of the Warrant, and thereby violated the Plaintiffs' clearly established constitutional rights.

61. Unknown Agents and Patton acting in a supervisory capacity had actual knowledge of and acquiescence in Muschell's, Porter's, and Unknown Agents' conduct by adopting and maintaining a practice, custom or policy that contributed to the violation of Plaintiffs' constitutional rights.

62. As a direct and proximate result of Defendants' actions, Plaintiffs have suffered mental anguish, emotional harm, fright, shock, humiliation, embarrassment, deprivation of their

liberty, violation of their constitutional rights, loss of life, and other damages and injuries for which they seek compensatory damages.

63. Additionally, Defendants acted in reckless disregard to Plaintiffs' clearly established constitutional rights.

64. Pursuant to *Bivens*, Plaintiffs are entitled to money damages for the violation of their constitutional rights.

WHEREFORE, Plaintiffs, by counsel, respectfully request that the Court grant the following relief against the Defendants:

- a) Award compensatory damages to Plaintiffs for their injuries, including, but not limited to, deprivation of their liberty, mental anguish, emotional harm, fright, shock, humiliation, embarrassment, loss of life, and violation of constitutional rights; and,
- b) Grant such other and further relief to which Plaintiffs may be entitled.

**COUNT III – FOURTH AND FIFTH AMENDMENT DUE PROCESS VIOLATION**

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

66. Defendants violated Decedent's Fourth and Fifth Amendment due process rights by obtaining and executing an improper search warrant.

67. As a result of the search, Decedent took her life out of fear for her family's well-being because of the armed officers that were in her home and falsely accused her of criminal acts.

68. Decedent was deprived of her life as a result of the search in violation of her Fourth and Fifth Amendment constitutional rights.

69. Unknown Agents and Patton acting in a supervisory capacity had actual knowledge of and acquiescence in Muschell's, Porter's, and/or Unknown Agents' conduct by

adopting and maintaining a practice, custom or policy that contributed to the violation of Decedent's constitutional rights.

70. As a direct and proximate result of Defendants' actions, Decedent was deprived of her life, a violation of her constitutional rights, and other damages and injuries for which the Estate seeks compensatory damages.

71. Additionally, Defendants acted in reckless disregard to Decedent's clearly established constitutional rights.

72. Pursuant to *Bivens*, Decedent is entitled to money damages for the violation of their constitutional rights.

WHEREFORE, Plaintiffs, by counsel, respectfully request that the Court grant the following relief against the Defendants:

- a) Award compensatory damages to Plaintiffs for their injuries, including, but not limited to, deprivation of their liberty, mental anguish, emotional harm, fright, shock, humiliation, embarrassment, loss of life, and violation of constitutional rights; and,
- b) Grant such other and further relief to which Plaintiffs may be entitled.

Respectfully submitted,

BECKMAN LAWSON, LLP

By

  
Craig R. Patterson, #18104-02

cpatterson@beckmanlawson.com

Ashley N. Law, #27925-32

alaw@beckmanlawson.com

200 East Main Street, Suite 800

Fort Wayne, Indiana 46802

Telephone – 260.422.0800

Facsimile – 260.420.1013

ATTORNEYS FOR PLAINTIFFS