

1993

William V. Penney v. E-Systems Inc., a Delaware corporation doing business in Utah, David A. Williams and Alfred B. Buchanan : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

David A. Anderson; Paul E.Dame; Parsons, Behle and Latimer; Attorneys for Defendants/Appellees. William V. Penney; Plaintiff/Appellant Appearing Pro Se.

Recommended Citation

Reply Brief, *Penney v. E-Systems*, No. 930368 (Utah Court of Appeals, 1993).
https://digitalcommons.law.byu.edu/byu_ca1/5290

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS
BRIEF

UTAH
DOCUMENT
KFU
50
.A10
DOCKET NO. 930368

IN THE COURT OF APPEALS

WILLIAM V. PENNEY,

Plaintiff/Appellant,

vs.

E-SYSTEMS, INC., a Delaware
corporation doing business in
Utah, DAVID A. WILLIAMS and
ALFRED B. BUCHANAN,

Defendants/Appellees.

Case No. 930368-CA

Priority No. 15

REPLY BRIEF OF PLAINTIFF/APPELLANT

APPEAL FROM SEVEN (7) ORDERS, RULINGS, OR REFUSALS TO RULE OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH,
GRANTING DEFENDANTS'/APPELLEES' MOTIONS FOR SUMMARY JUDGMENT

District Court Civil No. 900903522CV

HONORABLE FRANK G. NOEL, DISTRICT COURT JUDGE

WILLIAM V. PENNEY
709 West Rusk, Suite "A"
Rockwall, TX 75087
Telephone: 214/771-8383

DAVID A. ANDERSON, Esq. (0081)
PAUL E. DAME, Esq. (5683)
Parsons Behle & Latimer
Attorneys for Defendants
201 South Main St., Suite 1800
P.O. Box 11898
Salt Lake City, UT 84147-0898
Telephone: 801/532-1234

Plaintiff/Appellant
Appearing Pro Se

Attorneys for
Defendants/Appellees

FILED

SEP 17 1993

COURT OF APPEALS

IN THE COURT OF APPEALS

WILLIAM V. PENNEY, Plaintiff/Appellant, vs. E-SYSTEMS, INC., a Delaware corporation doing business in Utah, DAVID A. WILLIAMS and ALFRED B. BUCHANAN, Defendants/Appellees.	Case No. 930368-CA Priority No. 15
--	---

REPLY BRIEF OF PLAINTIFF/APPELLANT

APPEAL FROM SEVEN (7) ORDERS, RULINGS, OR REFUSALS TO RULE OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH,
GRANTING DEFENDANTS'/APPELLEES' MOTIONS FOR SUMMARY JUDGMENT

District Court Civil No. 900903522CV

HONORABLE FRANK G. NOEL, DISTRICT COURT JUDGE

WILLIAM V. PENNEY
709 West Rusk, Suite "A"
Rockwall, TX 75087
Telephone: 214/771-8383

DAVID A. ANDERSON, Esq. (0081)
PAUL E. DAME, Esq. (5683)
Parsons Behle & Latimer
Attorneys for Defendants
201 South Main St., Suite 1800
P.O. Box 11898
Salt Lake City, UT 84147-0898
Telephone: 801/532-1234

Plaintiff/Appellant
Appearing Pro Se

Attorneys for
Defendants/Appellees

TABLE OF CONTENTS

	<u>Page</u>
DISPUTED FACTS	1
SUMMARY OF REPLY ARGUMENTS	10
REPLY ARGUMENTS	12
I. <u>The district court erred when it resolved the factual dispute of whether or not plaintiff was constructively terminated in violation of public policy.</u>	12
II. <u>The district court erred when it (1) ruled that defendants had proven the absence of a genuine issue concerning any material fact, and (2) failed to construe that complaint in the light most favorable to plaintiff or indulge all reasonable inferences in plaintiff's favor.</u>	14
III. <u>The district court erred in ruling that the ERISA statute bars the instant case from its jurisdiction.</u>	16
IV. <u>The district court should have found that defendants' pattern of conduct rises to a level which reasonable minds could conclude was sufficiently outrageous to support a claim for intentional infliction of emotional distress.</u>	18
V. <u>The district court should have considered Penney's extraordinary circumstances, and the court erred when it prejudiced Penney's case by prematurely cutting off discovery.</u>	21
CONCLUSIONS	23
EXHIBITS	

TABLE OF AUTHORITIES

Page

<u>Adickes v. S.H. Kress & Co.</u> , 398 U.S. 144	16, 23
<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242, 249 (1986) . .	18
<u>Corwin v. Los Angeles Newspaper Serv. Bur. Inc.</u> , 484 P.2d 953, 958 (1971)	23
<u>Ingersoll-Rand Co. v. McClendon</u> , 498 U.S. 133 (1990)	17
<u>Jenks v. Mountain States T&T Co.</u> , 53 FEP 1709, 1714 n.5 (1989)	12, 13, 18, & 19
<u>Lebaron & Assoc. v. Rebel Enterprises</u> , 823 P. 2d 479, 482-84 (Utah Ct. App. 1991)	15
<u>Mounteer v. Utah power & Light Co.</u> , 823, P.2d 1055, 1058 (Utah 1991)	15 & 20
<u>Pilot Life Ins. Co. v. Dedeaux</u> , 481 U.S. 41, 45 (1987) . . .	17
<u>Shaw v. Delta Airlines</u> , 463 U.S. 85, 90 (1983)	17
<u>State v. Castner</u> , 825 P.2d 699, 705 n.4 (Utah Ct. App. 1992)	15
<u>Turtle Management, Inc. v. Haggis Management</u> , 645 P.2d 667, 671 (Utah 1982)	15

RULES

Federal Rules of Civil Procedure, Rule 56(c)	16
--	----

STATUTES

Utah Workers' Compensation Act	20
--	----

EXHIBITS

<u>E-SYSTEMS, INC./MONTEK DIVISION v. HAZELTINE CORPORATION</u> , Civil No. C-89-0904469 CV, filed JULY 20, 1989, in the THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH	<u>Exhibit "A"</u>
PLAINTIFF'S OBJECTION TO DISTRICT COURT'S ORDER AND STATEMENT ALLOWING FILING OR USE OF PLAINTIFF'S DEPOSITION BY DEFENDANTS	<u>Exhibit "B"</u>
The Affidavit of Allen J. Meril, M.D. (R.564-572) .	<u>Exhibit "C"</u>

Plaintiff/Appellant William V. Penney ("Penney") hereby submits the following REPLY BRIEF OF PLAINTIFF/APPELLANT. All references "R." are to the district court record.

DISPUTED FACTS

1. Penney disagrees with defendants' repeated assertion¹ that it is undisputed that Penney voluntarily resigned. However, a prima facie case has been made by sworn affidavits of Penney and of the defendants and by the defendants' express written admissions that a) Penney never resigned but only threatened to, which threat was **NEVER** accompanied by any specific date on which any such termination would be effective; b) defendant Williams considered and discussed with defendant E-Systems' management firing Penney **before** the issue of resignation was ever raised; c) defendant Williams had already decided to fire Penney **before** the issue of resignation was ever raised; d) that defendants Williams and Buchanan, together with Penney's immediate supervisor Mr. Cocke, determined the firing date of Penney and Penney's immediate supervisor Mr. Cocke "filled in '18 June 1986' as the effective date of ..." Penney's termination.²

¹ See BRIEF OF APPELLEES, p. 27, ¶ 2.

² Penney testified under oath that, after he had firmly pled his position in the June 18, 1986 meeting (**before** the issue of resignation ever came up), defendant Williams immediately fired Penney, saying, "It's all over. You're out of here." See Verified Complaint, R.2-20, ¶ 33. Penney further testified that "[he] NEVER indicated to any of Defendants any DATE on which [Penney] would resign nor did [Penney] ever have any intention to resign. The 'effective date of ... resignation' listed on the Letter of Resignation was NOT filled in by nor at the request of [Penney] BUT rather was filled in by [Penney]'s supervisor Mr. J. G. Cocke, contrary to the desire of [Penney]. ... Defendant Williams [had]

2. Penney disagrees with defendants' assertion³ that Penney had no written employment contract with defendant E-Systems. However, Penney testified and defendants have admitted that there was an employment contract between Penney and defendant E-Systems with specific express written terms and conditions by which defendants considered Penney legally bound.⁴

... 'frequently threaten[ed] to fire [Penney] if every goal was not met and schedules not met.' First Affidavit of William V. Penney, R.576 ¶¶ 13-15.

Defendants admit: "... the termination of [Penney]'s employment was discussed by management prior to his resignation. Shortly after the meeting on June 18, 1986, ... Mr. Williams and Mr. Cocke had discussions about what disciplinary action to take as a result of [Penney]'s unacceptable and insubordinate conduct. After deliberation, Mr. Cocke recommended to Mr. Williams that [Penney] be terminated. Mr. Williams concurred ... Mr. Cocke also consulted with Mr. Buchanan, who likewise thought that termination would be the appropriate disciplinary action." See Addendum to Brief of Plaintiff/Appellant, Exhibit "A", pp. 38-39, Response No. 54.

Defendant Williams testified: "After the meeting was terminated (before the issue of resignation was raised), Jim Cocke and I had a separate meeting to consider alternatives and appropriate action in response to the actions of Mr. Penney in the meeting. During that (second) meeting, we discussed possible alternatives including termination of Mr. Penney for rules violations (refusing to follow instructions and insubordination) ..." Affidavit of David A. Williams, R.481, ¶ 7.

Defendants further admit: "Also in anticipation of the June 18 meeting, [Penney] drafted a letter of resignation, and left the date of resignation space blank. ... Cocke, [Penney's] boss, filled in '18 June 1986' as the effective date of [Penney's]" termination. Defendants' Memorandum In Support Of Their Motion For Summary Judgment, R.437-471, ¶¶ 9 & 11; Brief of Appellees, p. 29, ¶ 2.

³ See BRIEF OF APPELLEES, p. 8, ¶ 1, line 4.

⁴ Penney gave uncontroverted testimony that defendant E-Systems had a specific policy on exempt overtime and "was not complying with its own policy on exempt overtime" with respect to Penney. Verified Complaint, R.2-20, ¶ 19. Penney testified

3. Penney disagrees with defendants' assertion that "plaintiff, while represented by counsel, conducted extensive discovery."⁵ Penney's former attorney L. Zane Gill commenced discovery with Plaintiff's 1st Set of Interrogatories & Request for Production of Documents on July 11, 1990 (R.21-23) and also served on 10/2/1990 a Notice of Taking of Deposition of defendants Williams and Buchanan (R.70-71). When defendants finally responded to Penney's Interrogatories on 9/26/1990, the responses were riddled with objections, incomplete responses, and filled with promises to produce documents which Penney has never received⁶.

(Verified Complaint R.2-20, ¶ 17) and defendants admitted (Answer R.33-45, ¶ 17) that "As a director, [Penney] received annual physicals."

Defendants admit (Brief of Appellees, p. 19 n 12, 14) that defendant E-Systems had a specific and express "procedure for converting [E-Systems' insurance] to an individual life insurance policy upon termination [which was] set forth in E-Systems' PRU-OPT Plan ...". Defendants admitted (Addendum to Brief of Plaintiff/Appellant, Exhibit "A", Responses No. 31, 32, 44, 46, 47, 49 & 52) that E-Systems had written corporate directives for "terminations" (Directive No. 200.4), for "performance appraisals" and "merit increases" (Directive No. 200.6), for "severance pay" (Directive No. 200.3), for "treatment of disabled" (Directive No. 200.42), for "business conduct and ethics" (Directive No. 200.46). Indeed, defendants admitted that E-Systems has a "Corporate Policy Manual" which they promised "to produce ... at a time and place mutually convenient to counsel." Id., Response No. 23.

It is **NOTEWORTHY** that there does NOT exist and that defendants have not produced any statement by Penney or other evidence that demonstrates that Penney was an "at-will" employee of defendant E-Systems or that there was no written employment contract.

⁵ Brief of Appellees, p. 13, n 4.

⁶ Defendants promised: "Defendants will produce a copy of the E-Systems Corporate Policy Manual at a time and place mutually convenient to counsel." Addendum to Brief of Plaintiff/Appellant, Exhibit "A", Response No. 23. Penney has not received said manual from Defendants.

Shortly after serving the Notice of Taking of Deposition of defendants Williams and Buchanan, said depositions were continued to accommodate the schedules of defendants and/or their counsel and defendants have utterly failed to make defendants Williams or Buchanan available for deposition. Shortly thereafter, Mr. L. Zane Gill, Esq. withdrew as counsel for Penney (R.156-157), leaving him to represent himself Pro Se (R.158-163).⁷

4. Penney disagrees with defendants' assertion⁸ that Penney has failed to point to any admissible evidence which would allow a reasonable fact finder to conclude that defendants engaged in outrageous conduct, and, thus, Penney has failed to raise any genuine issue of fact re Penney's claim for intentional infliction of emotional distress. However, Penney made a prima facie case⁹ as

⁷ Defendants's saying "while represented by counsel" is misleading. While Penney was living in Texas, was not represented by counsel and was recovering from major surgery, defendants, over the objections of Penney, scheduled a hearing of Defendants' Motion for Partial Summary Judgment of which defendants state: "The trial court went ahead with the hearing on June 19, 1992 ... at which it granted defendants' Motion for Partial Summary Judgment and dismissed plaintiff's first, third, fourth, and fifth causes of action with prejudice. R.416, 420-22. Plaintiff did not participate in the hearing in person or via telephone. R.416. (See Brief of Appellees, p. 13, n 4.)

⁸ See Brief of Appellees, p. 22 ¶ 2, p. 23 ¶ 3.

⁹ Penney testified that "on May 9, 1986 [he] was run off the road in a hit and run accident", Verified Complaint, R.2-20, that "As a result of the accident, [Penney] was in extreme pain." *Id.*, R.2-20, ¶¶ 27 & 28; First Affidavit of William V. Penney, R.573-585, ¶ 11.

Penney further testified that "Williams had never shown any toleration for health problems. Williams would make fun of those with health problems including [Penney]. On one occasion Williams had commented regarding an employee down with back trouble, "Well

follows:

- a. Defendant Williams, acting individually and on behalf of defendant E-Systems as the general manager of its Montek Division, intentionally, wilfully, and maliciously acted repeatedly and over a prolonged period of time toward Penney so as to cause him the maximum emotional stress possible.
- b. The intentional, wilful, and malicious conduct of defendant Williams was outrageous in the extreme.
- c. Penney suffered severe emotional distress and substantial physical suffering as a direct and proximate result of the intentional, wilful, and malicious conduct of

hell, there's nothing wrong with his hands. Send the work over there and make him do it in bed." Verified Complaint, R.2-20, ¶ 16; First Affidavit of William V. Penney, R.573-585, ¶ 11.

Penney testified that in response to his request for sick leave or vacation time off to have medical treatment for injuries sustained in a June 18, 1986 automobile accident, defendant "Williams enumerated the projects upon [Penney] was working at that time and informed [Penney] that he had the option of completing the projects or losing his jobs." Verified Complaint, R.2-20, ¶ 30.

"[Penney] (was forced to) continue to work for the next five or six weeks in extreme pain." Id., ¶ 31.

Penney testified that "The [defendant E-Systems] was not complying with its own policy on exempt overtime." Id., ¶ 19. Penney further testified that he was forced by Williams to "work extremely long hours" (Id., ¶ 14), "to work ... tremendous number of hours" (Id., ¶ 17), that Penney told defendant Williams that Penney's health "was deteriorating due to the vast number of overtime hours Williams was forcing [Penney] to work." Id., ¶ 21.

Penney testified that "In 1986 [Penney's physical showed skipped heartbeats and other signs of stress induced by the tremendous number of hours he had be [forced to work]" and that Penney's health "was deteriorating due to the vast number of overtime hours Williams was forcing [Penney] to work." Id., ¶¶ 17 & 21.

Defendants admitted that "[Penney] may have sometimes worked long hours". Answer, R.33-45, ¶ 14. Defendants also admitted that, when they fired Penney, he had "accrued approximately 40.04 hours of vacation leave and approximately 240 hours of sick leave." Addendum to Brief of Plaintiff/Appellant, Exhibit "A", ¶ 63.

defendant Williams.

Defendants intentional, wilful, and malicious acts in denying an injured and suffering employee (Penney) any opportunity to seek medical treatment upon penalty of losing his job, and in attempting to coerce and intimidate Penney into resigning by forcing him in his injured and painful state work tremendous numbers of hours of overtime to the point of deteriorating his health, all the while mocking and making fun of him for his disability, injury and pain, certainly is outrageous conduct sufficient to make out a prima facie case of intentional infliction of emotional distress.

5. Penney disagrees with defendants' assertion¹⁰ that Penney does not even claim he was asked to do or participate in anything fraudulent in connection with the General Electric contract and that the events leading up to Penney's resignation had nothing to do with the General Electric Contract. Penney testified and defendants admit¹¹ that "GE agreed to [and did] pay for" certain nuclear certified material. Penney testified that these nuclear certified materials, which were then "owned by General Electric",¹² were being illegally sold by defendant E-Systems to third parties. Penney was terminated by defendants, at least in part, because defendant E-Systems' management, including defendant David A. Williams, became aware that Penney knew of these illegal

¹⁰ See Brief of Appellees, p. 31, n. 22; p. 35 ¶ 1.

¹¹ See BRIEF OF APPELLANTS, p. 34 ¶ 3.

¹² See Verified Complaint, R. 2-20, ¶ 59.a.

activities, was likely to expose defendants' illegal activities, AND WOULD REFUSE TO PARTICIPATE IN ANY CONCEALMENT OR COVERUP OF THESE ILLEGAL ACTS.

6. Penney disagrees with defendants' assertion¹³ that Northrup was fully aware of all sourcing changes made under the Northrup contract and, implicitly, agreed with and was not deceived by defendant E-Systems deceptive and illegal acts in charging Northrup for tools which defendant E-Systems was supposed to make but never did. Penney was fired, in part, because he protested to defendants' management that defendants were improperly and illegally billing for and receiving payments for tooling and because Penney refused David A. Williams' demand to doctor vendor purchase orders to allow [defendant E-Systems] to receive payment for nonexistent work.¹⁴

7. Penney disagrees with defendants' assertion¹⁵ that no triable issue of fact existed in connection with the Hazletine Contract. Defendants are attempting to perpetrate a fraud on this Court of Appeals and on the district court by asserting that "There was no change in the scope of the work to be performed under the

¹³ See Brief of Appellee, p. 38, ¶ 1.

¹⁴ See Verified Complaint, R. 2-20, ¶ 59.6. **NOTE:** Defendants' assertions at Brief of Appellees p. 38 that Northrup "in approx March 1987" audited costs, "in July 1988, E-Systems properly invoiced Northrup ...", and "Northrups' Property Administrator have audited and signed off on E-Systems' tooling list every year since 1986" is TOTALLY MEANINGLESS AND IRRELEVANT because if it happened at all (it is not verified by any Northrup employee), it happened after Penney was fired.

¹⁵ See Brief of Appellees, p. 39, Caption #3.

[Hazeltine] contract. There was no changes in the scope of the work to be performed under the contract" and that "[Penney]'s allegations also do not make sense in the light of the fact that the Hazeltine contract was a firm fixed price contract."¹⁶ Contrast these fraudulent assertions with defendant E-Systems' own allegations made in its own Complaint in E-SYSTEMS, INC./MONTEK DIVISION v. HAZELTINE CORPORATION, Civil No. C-89-0904469 CV, filed JULY 20, 1989, in the THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, (a copy of which is attached as Exhibit "A" hereto) in which E-Systems sued Hazeltine over the VERY SAME contract about which Penney complained. E-Systems sued Hazeltine for "not less than \$20,000,000", alleging that Hazeltine had "refused to reimburse E-Systems for the added costs and expenses reasonably incurred by it in order to perform these changes." See Exhibit "A", p. 18, ¶ 46, and p. 8, ¶ 17.

8. Penney disagrees with defendants' assertion¹⁷ they have a right to rely on the improperly taken and never-timely published Deposition of Penney for purposes of this appeal. See PLAINTIFF'S OBJECTION TO DISTRICT COURT'S ORDER AND STATEMENT ALLOWING FILING OR USE OF PLAINTIFF'S DEPOSITION BY DEFENDANTS, a copy of which is attached as Exhibit "B" hereto, which was served on the district court and this Court of Appeals on August 19, 1993, and which sets forth the improper circumstances evidencing that Penney's deposition was improperly taken in breach of an express written

¹⁶ See Brief of Appellees, p. 40 & 41.

¹⁷ See Brief of Appellees, p. 26, 43.

agreement by defendants' counsel and was never filed and published with the district court until after judgment was already entered in the above case, meaning that the district court judge **NEVER** had access to a copy of Penney's deposition until after judgment was entered.

9. Penney disagrees with defendants' assertion¹⁸ that Penney's allegation that he had no had adequate opportunity to complete discovery is untrue. Defendants admit¹⁹ that Penney was without any representation from March 22, 1992 forward, when Penney's last attorney David K. Isom withdrew. The Affidavit of Allen J. Meril, M.D. (R.564-572), a copy of which is attached as Exhibit "C" hereto, incontrovertibly proves that Penney underwent major surgery on March 10, 1992, just before attorney Isom withdrew, and again on August 19, 1992. Hence, Penney was without counsel and recovering from the debilitating effects of two major surgeries when the district court held its June 19, 1992 hearing on defendants' MOTION FOR PARTIAL SUMMARY JUDGMENT, when the district court held its August 3, 1992 Scheduling Conference, and when the defendants made and the district court ruled upon the MOTION FOR SUMMARY JUDGMENT.

10. Penney disagrees with defendants' assertion²⁰ that errors in the Court's August 3, 1992 scheduling order were harmless error.

¹⁸ See Brief of Appellees, p. 44, ¶ 4.

¹⁹ See Brief of Appellees, p. 3 ¶ 1).

²⁰ See Brief of Appellees, p. 6, n. 1.

11. Penney disagrees with defendants' assertion²¹ that Penney maintains a local address and spends "a significant amount of time in the Salt Lake City area." Defendants offer no evidence to support this assertion and there is none. Penney has a brother who lives in Sandy, Utah, who has previously received some mail for Penney. However, Penney resides in Texas and, since 1986, has only come to Utah when required to do so by the district court in the above case.

12. Penney disagrees with defendants' assertion²² that Penney has never claimed to have been incapacitated "at all times since the date he commenced this lawsuit or since the date of the scheduling conference." See Disputed Facts number 9.

SUMMARY OF REPLY ARGUMENTS

Plaintiff Penney rejects defendants' assertion that there are no genuine issues of material fact disputed by the parties in this case. In reply to defendants' brief, Penney presents the following arguments:

1. The material fact of whether or not Penny was terminated is not only in dispute, Penney has produced case law and other factual evidence necessary to proffer a prima facie case on this issue. Therefore, the trial court erred in deciding the issue of termination as a matter of law.

2. Penney believes that contrary to public policy he was fired because: (a) he refused to commit or condone wrongful acts,

²¹ See Brief of Appellees, p. 45, ¶ 2.

²² See Brief of Appellees, p. 46, top.

(b) he attempted to exercise his legal right to take sick leave, and (c) defendants feared he might disclose certain of defendants' illegal activities.

3. Plaintiff Penney asserts that defendants erroneously rely on three summary judgment cases that are factually distinguishable from the instant case. Penney cites case law and statute supporting his belief that defendants did not meet their initial burden of proving there are no issues of material fact to be determined in the instant case.

4. Penney cites case law supporting his assertion that the instant case is not governed by the ERISA statute. Penney proffers legal argument demonstrating that the ERISA statute has no material bearing on the outcome or the damages in the instant case. Therefore, it would be inappropriate for the court to say that the case before it somehow relates to ERISA.

5. Penney asserts that defendants intentionally engaged in an on-going, complex pattern of conduct that, considered all together, rises to the threshold level required to allege a prima facie showing of outrageous conduct. There is a genuine issue here for trial where reasonable people could find that plaintiff's allegations (if taken as true) support his claim of intentional infliction of emotional distress.

6. Penney provides factual evidence supporting his assertion that his case was unfairly damaged by:

(a) defendants' lack of cooperation with his discovery efforts, (b) the district court's disregard of his severe medical problems, and

(c) defendants obtaining unfair advantage through being the only party to complete discovery. Plaintiff further asserts that the district court's cutting off the discovery process in spite of Plaintiff's extenuating circumstances was premature and unfairly prejudiced his case.

REPLY ARGUMENTS

I. The district court erred when it resolved the factual dispute of whether or not plaintiff was constructively terminated in violation of public policy.

Defendants continue to erroneously aver that it is undisputed fact that Penney resigned from his employment. From the outset of this litigation Penney has asserted that defendants either actively and constructively terminated his employment with them. In fact, there has never been agreement on this issue, nor has there been agreement on the facts and interpretation of the facts surrounding Penney's termination.

Defendants recite their own version of the facts as support for their faulty contention that Penney indisputably resigned. However, by disputing Penney's version of the facts, defendants, themselves, have created a triable issue of fact²³.

In Jenks v. Mountain States T&T Co., 53 FEP Cases 1709, 1714 n.5 (1989), the court addressed a similar dispute over whether the

²³ Defendant Williams admits Penney did NOT resign but that Williams discussed firing Penney with his immediate supervisor Mr. Cocke before Penney ever raised the issue of resignation. Defendant Williams determined the date to fire Penney, instructed Mr. Cocke to specify the date in writing and inform Penney that he was terminated effective immediately. See Affidavit of Williams.

plaintiff had resigned or whether she had been fired. The Jenks court reached the following conclusion:

Jenks has alleged and testified that she was terminated. Consequently, at this juncture the court does not need to determine whether plaintiff has made a showing of constructive discharge. Mountain Bell's evidence that Jenks quit only creates a factual dispute. It does not increase plaintiff's prima facie burden.

Like the plaintiff in Jenks, Penney has presented evidence that his employment with defendants had been involuntarily terminated.²⁴ And, similar to defendant Mountain Bell in Jenks, defendants in the instant case have insisted that Penney resigned.

This disagreement creates a factual dispute. However, as the court found in Jenks, it neither increases plaintiff's prima facie burden nor demands the court's attention as to whether there has been a showing of constructive discharge.

In reply to defendants' argument claiming that plaintiff did not identify the basis for any substantial and important public policy implicated by his alleged termination, please see plaintiff's arguments previously presented in Brief of Plaintiff pages 17-24.

Penney believes that there are substantial and important public policy concerns that were violated when E-Systems fired him. In his brief, plaintiff argues that it is contrary to public policy

²⁴ Penney has established a prima facie case by affidavit supporting his claim that he was fired or constructively terminated. For example, in Penney's First Affidavit par. 11, Penney testified that defendants had threatened to fire him on numerous occasions and that they had tried to coerce and intimidate him into resigning. However, Penney also testified that he would not resign because he could not afford to lose his insurance.

for E-Systems to fire Penney because: (1) he refused to commit or condone wrongful acts, (2) Penney attempted to exercise his legal right to take sick leave, and (3) Penney might disclose certain of defendants' illegal activities.²⁵

II. The district court erred when it (1) ruled that defendants had proven the absence of a genuine issue concerning any material fact, and (2) failed to construe that complaint in the light most favorable to plaintiff or indulge all reasonable inferences in plaintiff's favor.

In defendants' brief, (p. 6, N. 1) defendants admit that in its scheduling order the district court erroneously entered the cut-off date for dispositive motions as January 4, 1992. However, plaintiff - as a PRO SE litigant - relied to his detriment, on the court's written scheduling order.

Consequently, Penney was completely surprised and unprepared for defendants' summary judgment motion, relying on the court's erroneous document stating that the time for all such motions had long passed.

The court, therefore, unfairly accepted defendants' motion after causing Penney to rely on an erroneous scheduling order.

Defendants erroneously argue that the appellate court cannot consider Penney's case because the issues were not clearly defined prior to summary judgment.

²⁵ See Plaintiff's Response to Defendants' Motion for Summary Judgment for specific, factual details regarding some of defendants' illegal and wrongful acts and their material bearing on Penney's termination.(R. 655-680, Also included in Addendum to Brief of Plaintiff Exhibit "C")

Defendants rely on three cases in support of their argument: (1) Turtle Management, Inc. v. Haggis Management, 645 P.2d 667, 671 (Utah 1982); (2) State v. Castner, 825 P.2d 699, 705 n.4 (Utah Ct. App. 1992); and (3) Lebaron & Assoc. v. Rebel Enterprises, 823 P.2d 479, 482-84 (Utah Ct. App. 1991). In order to bolster their argument, defendants have purposely misquoted the courts in both Turtle and Castner, substituting the words "District Court" for the courts' words "trial court" in both instances.

Perhaps defendants intend to draw the court's attention away from the fact that all three cases mentioned above were very different from the instant case of Mr. Penney. The plaintiffs in all three of the above cases were allowed complete trials with their appeals being raised only after the verdict had been rendered.

Unlike the appellants in Turtle, Castner, and Lebaron, Penney has never had the opportunity to raise any issues at trial. Indeed, this entire appeal is to determine whether Penney, who has recovered from his injury and regained sufficient physical and emotional strength effectively to participate fully in this litigation, will be given his day in court. Turtle, Castner, and Lebaron stand only for the proposition that an issue must be raised at trial in order to preserve its claim on appeal. Therefore, these cases do not apply to Penney's situation in the instant case.

A more appropriate standard in the instant case would be that set forth in Mounteer v. Utah Power & Light Co., 823 P.2d 1055, 1058 (Utah 1991) where the court recognized the necessity to

construe the complaint in "the light most favorable to the plaintiff and indulge all reasonable inferences in his favor." In doing so, the court inferred from the pleadings an issue of defamation that had not been specifically defined in the complaint itself.

In the federal system, the standard for summary judgement is set by Adickes v. S.H. Kress & Co., 398 U.S. 144 which stands for the principle that summary judgement is only applicable where the moving party can fully "meet its initial burden of establishing the absence" of a genuine issue. Even if the motion for summary judgment goes unopposed, Adickes further states that the inferences to be drawn from all the underlying facts contained in the moving party's materials must be viewed in a light most favorable to the party opposing the motion.

The materials to be considered in a summary judgment motion are outlined in Rule 56(c) of the Federal Rules of Civil Procedure which reads in pertinent part:

[A summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Defendants have failed to meet their initial burden of proving that there are no genuine issues of fact in the instant case.

III. The district court erred in ruling that the ERISA statute bars the instant case from its jurisdiction.

Defendants rely on the following three cases in support of

their contention that Penney's claim is barred by ERISA: (1) Shaw v. Delta Airlines, 463 U.S. 85, 90 (1983); (2) Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987); and (3) Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990).

However, all three cases are easily distinguishable from the instant case. In the above-mentioned ERISA cases, the plaintiffs' causes of action were integrally based on whether or not an ERISA claim existed, and they required the courts' analyses of the ERISA claim. The Ingersoll-Rand court held: "Because the existence of a plan is a critical factor in establishing liability, and the trial court's inquiry must be directed to the plan, this judicially created cause of action 'relate[s] to' an ERISA plan." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133,133 (1990).

Unlike the Ingersoll-Rand and Shaw plaintiffs, Penney does not claim that defendants' motive for dismissing him was to deprive them of ERISA benefits. The court in the instant case is not required to determine any legal issues relating to ERISA.

In the instant case, Penney is only claiming that loss of insurance due to defendants' negligent or willful departure from company policy²⁶ resulted in damages easily calculated by the existence of Penney's medical bills which he had to pay without

²⁶ In Appellees' Brief, defendants admit that they had a duty to provide plaintiff with the insurance conversion form. They further admit that the procedure was one expressly provided by E-Systems' own Health Care and Weekly Income Disability Plan. (Defendants' Brief, page 19 paragraph 9 and footnote 12.)

By violating their own express policy, defendants have severely injured plaintiff. They should not now be allowed to hide behind an ERISA statute to shield them from the rightful consequences of their wrongful actions.

benefit of insurance.

Whether or not the plaintiff was covered by the ERISA statute has no material bearing on the outcome or the damages in the instant case. Therefore, it would be inappropriate for the court to say that the case before it somehow relates to ERISA.

IV. The district court should have found that defendants' pattern of conduct rises to a level which reasonable minds could conclude was sufficiently outrageous to support a claim for intentional infliction of emotional distress.

In order for plaintiff to defeat a summary judgment motion on this issue, he need only allege conduct sufficient to support a claim for emotional distress. The court in Jenks v. Mountain States T & T Co., 53 FEP Cases 1709, 1713 referred to the decision rendered in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) when it stated, " At the summary judgment stage, the court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial."

Defendants seem to think that plaintiff has no right to a jury trial on the issue unless he first "proves" his case to the trial judge. (See Brief of Defendants p. 21.) Defendants have apparently forgotten that the purpose of a trial is to "prove" to the trier of fact the merits of the claims asserted.

Certainly, Plaintiff Penney has alleged conduct that reasonable people could determine is outrageous.²⁷

Defendants cite a case where a supervisor's racial slurs,

²⁷ See Plaintiff's Brief pages 24-31 for arguments describing defendants' pattern of conduct designed to cause plaintiff severe emotional and physical distress.

jokes and other rude and non-sympathetic behavior toward the plaintiff were not found to be outrageous. In the instant case, however, Penney has alleged an on-going, complex pattern of conduct that, considered all together, rises to the threshold level required to allege a prima facie case of outrageous conduct.

Defendants also cite Jenks (supra) as an example of a plaintiff who did not allege sufficient damage that might sustain a claim for emotional distress. Plaintiff Penney is very different from the plaintiff in Jenks. The plaintiff in Jenks stated that she felt turmoil and a "sort of depression" over losing her job.

Penney, on the other hand, has alleged much more emotional distress than did the plaintiff in Jenks who claimed only a "sort of depression" over being fired. In the instant case, Penney has claimed that defendant Williams exercised his authority to carry out a campaign of intimidation and coercion against plaintiff with the intent to create an intolerable work place situation.

Plaintiff alleges the following conduct that taken as a whole created an intolerable working environment:²⁸

(1) That because of his health problems, he was subjected to ridicule and ostracization by defendant Williams;

(2) That he was denied access to projects, relieved of resources and authority, while given an increased work load;

(3) That he was forced to work hundreds of hours of overtime,

²⁸ The following claims are supported by facts alleged in Plaintiff's Complaint and in Plaintiff's First Affidavit. For a more complete statement of the facts surrounding Penney's claim for intentional infliction of emotional distress, see also Brief of Plaintiff, pages 6-11.

even during illness;

(4) That he was under constant threat of firing; and

(5) That he was refused his lawfully accrued vacation time and sick leave, and even denied the right to use vacation time for doctor appointments after he was injured in an automobile accident.

Reasonable people could find, under such circumstances, that Penney did indeed suffer severe emotional distress from his treatment by defendant E-Systems. The court is obligated to look at the allegations in a light most favorable to plaintiff before deciding whether plaintiff has pled a prima facie case on this issue.

Defendants erroneously claim that Penney's emotional distress claim is barred by Utah Workers' Compensation Act. In Munteer v. Utah Power & Light Co., 823 P.2d 1055 (Utah 1991) the court held that the Utah Workers' Compensation Act bars claims based on a co-worker's injurious acts unless they were intended or directed by the employer.

In the instant case, Penney makes no claim against a co-worker. His claims are solely based on and confined to the actions of Defendant E-Systems and its agents, those in management positions with authority over Plaintiff Penney.

Therefore, the Workers' Compensation argument presented by defendants is not applicable in this case.

- V. The district court should have considered Penney's extraordinary circumstances, and the court erred when it prejudiced Penney's case by prematurely cutting off discovery.

It is not unheard of for discovery in complicated civil cases to take several years to complete even where all litigants are in best of health and reside in close proximity to the trial court.

In their motion for an extension of time to respond to plaintiff's appellate brief, defendants, themselves, noted the complex nature of the case and the arguments involved. Although the defendants are represented by a large legal firm that can draw on multiple staff and resources, they pled extenuating personal circumstances and case complexity as a reason for requiring the extension of time.

Defendants apparently expect a double standard when it comes to the court's granting extensions of time. Although defendants have begged the court's indulgence due to their own circumstances, they have shown a total disregard for Penney's misfortunes, part of which are of defendants' making.²⁹

The following list of Penney's extenuating circumstances will demonstrate clearly why the district court should have granted Penney additional time for discovery:

1. During the two years of discovery Penney underwent five major surgeries. (Dr. Meril Affidavit R. 603)
2. Each surgery naturally required extensive recuperation. The court showed little or no consideration for Penney's surgery schedules or recuperation when it arranged its own docket. (Dr. Meril Affidavit R. 603)

²⁹ See R. 70-71.

3. Because defendants' actions rendered Penney uninsured and uninsurable, Penney was forced to spend all his personal assets on medical treatment.
4. Penney was unable to continuously employ and effectively work with legal counsel during most of this discovery period because of his impecuniosity caused by his extensive medical treatment, and because of his resultant physical and mental incapacitation making it difficult to deal with the numerous complex facts and issues of discovery.
5. Penney had the additional burden of trying to pursue this discovery, pro se, while living out of the State of Utah.
6. Penney's attempts to complete discovery were frustrated by: (1) defendants' lack of cooperation in scheduling their depositions, and (2) their evasive or incomplete responses to plaintiff's interrogatories and request for production of documents.
7. Defendants themselves admit (in their motion for enlargement of time in which to file their Brief of Appellees) to the complex nature of this case, and assert that the issues herein cannot be easily dealt with.

Plaintiff Penney cooperated fully with defendants' efforts to take his deposition and made himself fully available for discovery, even though he was required to travel back and forth between Utah and his home in Texas. However, once defendants had achieved their discovery objectives, they sought to avoid giving Penney any document or deposition necessary to the completion of his discovery.

Instead, they succeeded in cutting off the date for discovery, fully aware of Penney's impecuniosity, his inability to travel frequently to Utah, his physical and emotional break down, his pro se status, his inexperience with the legal system, and their own recalcitrance.

Considering Penney's entire list of extenuating

circumstances, reasonable minds could clearly conclude that the district court abused its discretion in prematurely cutting off discovery in the instant case.

CONCLUSIONS

It is a fundamental principle of civil procedure that the moving party in a summary judgment motion must show "the absence of a genuine issue concerning any material fact." Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 2d 142.

The general formula for the administration of a summary judgment motion has been long established and was reiterated in Corwin v. Los Angeles Newspaper Serv. Bur. Inc., 484 P.2d 953, 958 (1971) (Emphasis added.):

The matter to be determined by the trial court in considering such a motion is whether the defendant (or the plaintiff) has presented any facts which give rise to a triable issue. The court may not pass upon the issue itself. Summary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor and his opponent does not by affidavit show such facts as may be deemed . . . sufficient to present a triable issue. . . . [T]he affidavits of the moving party are strictly construed and those of his opponent liberally construed, and doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. Such summary procedure is drastic and should be used with caution so that it does not become a substitute for the open trial method of determining the facts.

The nature of the evidence presented by defendants in support of their motion for summary judgment is in the form of affidavits which simply deny some of the allegations and facts introduced by plaintiff in the prosecution of his claim. These affidavits prove nothing more than the existence of a factual dispute between the parties. They carry no more weight than the affidavits of the

plaintiff; in fact, being strictly construed for the purposes of the motion, they carry very much less weight than the affidavits of the plaintiff.

Although plaintiff also has submitted opposing affidavits and other evidence to support his claim,³⁰ defendants wish the court to consider only their affidavits as evidence in the case. It appears that defendants are hoping to reverse the rules by expecting the court to strictly construe plaintiff's affidavits while giving them every liberal interpretation that might be given to documents accepted at face value.

Apparently, defendants wish to try all issues of this case by affidavit as a substitute for the open trial method of determining the facts. They have thus far succeeded in denying plaintiff his full discovery and hope to succeed in altogether denying him his day in court.

Plaintiff prays that this court will weigh the pleadings, depositions, affidavits and other documents produced in discovery in the light most favorable to his case. Plaintiff prays that this court will re-open the discovery process so that he may take the deposition of defendants and witnesses essential to the proving of his claims. Plaintiff prays that this court will also consider the extraordinary extenuating circumstances caused by the combination of his severe health problems, his impecuniosity, his out-of-state

³⁰ See Plaintiff's Response (with its accompanying exhibits) to Defendants' Motion for Summary Judgment, Plaintiff's Affidavits, and the Affidavit of Dr. Alan J. Meril, along with the Docketing Statement and other documents included in the record and the addenda.

residency, and his pro se status in deciding whether he has been given full access to, and benefit of, the consideration of the district court in the prosecution of his claims.

And finally, Plaintiff prays that after due consideration this court will overturn the trial court's harsh summary judgment verdict, that has summarily disposed of his claims without the benefit of completing discovery or of presenting his issues of fact before a jury.

//

//

//

RESPECTFULLY submitted this 10th day of September, 1993.

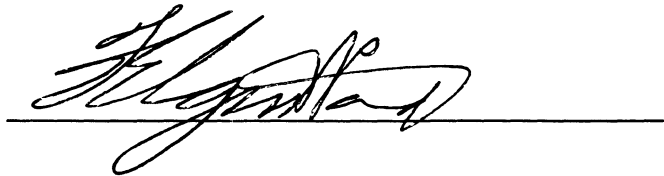

William V. Penney

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 10th day of September, 1993, a true, accurate and complete copy of the foregoing was served upon the defendants by the undersigned's mailing same first class mail postage prepaid as follows:

DAVID A. ANDERSON, Esq.
PAUL E. DAME, Esq.
Parsons Behle & Latimer
201 South Main St., Suite 1800
P.O. Box 11898
Salt Lake City, Utah 84147-0898

UTAH COURT OF APPEALS
230 South 500 East
Suite 400
Salt Lake City, Utah

A handwritten signature in cursive script, appearing to read "D. Anderson", is written over a horizontal line.

EXHIBITS "A", "B" and "C"

EXHIBIT "A"

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

E-Systems, Inc., et al
Plaintiff - Appellant
VS

Hazeltine Corporation
Defendant - Appellee

Clerk's Certificate
District Court No. 890904469
Supreme Court No. 900053

I, clerk of the above entitled court, do hereby certify that the hereto attached file contains all the original papers as requested by the designation on file herein, filed in the court in the above entitled case, including the Notice of Appeal which was filed on the 25th day of January, 1990 . I further certify that the above described documents constitute the Judgment Roll and that the same is a true and correct transcript of the record as it appears in my office.

I further certify that an Undertaking on Appeal in due form has been properly filed and that the same was filed on the 25th day of January, 1990.

I further certify that said Judgment Roll is this date transmitted to the Supreme Court of the State of Utah, pursuant to such appeal.

Witness my hand and the Seal of said court at Salt Lake City,
Utah, this 27th day of July 1990.

CRAIG E. LUDWIG
CLERK OF THE COURT

By

Craig E. Ludwig

000001

FILED
DISTRICT COURT

JUL 20 12 17 PM '89

6/20/89

MERLIN O. BAKER (A0180) and
JONATHAN A. DIBBLE (A0881) of
RAY, QUINNEY & NEBEKER
79 South Main Street
P. O. Box 45385
Salt Lake City, Utah 84145-0385
Telephone: (801) 532-1500

JAMES A. HOURIHAN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Telephone: (202) 637-6544

RICHARD E. DUNNE, III
JOSEPH H. YOUNG
HOGAN & HARTSON
111 South Calvert Street
Suite 1600
Baltimore, Maryland 21202
Telephone: (301) 659-2700
Attorneys for Plaintiff

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

-----oo0oo-----

JUDGE J. DENNIS FREDERICK

E-SYSTEMS, INC./MONTEK DIVISION, :

Plaintiff, :

v. :

HAZELTINE CORPORATION, :

Defendant. :

C O M P L A I N T

(Plaintiff Demands
Trial by Jury)

Civil No. C-89-

Judge _____

-----oo0oo-----

Plaintiff E-Systems, Inc./Montek Division, by counsel,
files this Complaint against defendant Hazeltine Corporation, and
for its Complaint states and alleges as follows:

000002

JURISDICTION

1. Jurisdiction of this Court is based upon Utah Code Ann. § 78-3-4, and upon the Utah long-arm statute, Utah Code Ann. § 78-27-24.

VENUE

2. Venue in this Court is based upon Utah Code Ann. § 78-13-4, in that the plaintiff is doing business in this judicial district and the events and actions giving rise to this cause of action occurred or were taken or the effects were felt in this judicial district.

PARTIES

3. Plaintiff E-Systems, Inc., Montek Division ("E-Systems"), is a division of E-Systems, Inc., a Delaware corporation having its principal place of business in Dallas, Texas. The Montek Division, which designs, develops and manufactures advanced electronic navigational equipment and avionics, maintains its principal office at 2268 South 3270 West, Salt Lake City, Utah 84119.

4. Upon information and belief, defendant Hazeltine Corporation ("Hazeltine") is a Delaware corporation having its principal place of business on Cuba Hill Road, Greenlawn, New York.

FACTS COMMON TO ALL COUNTS

5. In early 1982, E-Systems began research and development work on a ground-based transponder system known as

"DME/P," an acronym standing for "Precision Distance Measuring Equipment." The DME/P is crucial to, and E-Systems' efforts were made in anticipation of, the Federal Aviation Administration's ("FAA") Microwave Landing System program ("MLS"), a "next generation" navigation and guidance system designed to increase the number of instrument approaches and landings that could be made at various airports across the nation. The DME/P system, function of which the ground-based DME/P transponder is a crucial part, provides very precise, continuous information regarding distance (range) between the airport and an aircraft executing an MLS instrument approach, and displays that distance in the cockpit for use by the crew during the approach.

6. On December 7, 1982, and in anticipation of the solicitation of bids for the MLS program, E-Systems and Hazeltine entered into a Teaming Agreement, one of the purposes of which was to facilitate an integrated approach by the parties to compete for, and meet the demands of, the anticipated FAA contract award for the MLS program. A copy of the December 1982 Teaming Agreement is attached hereto as Exhibit 1 and incorporated herein by reference.

7. Pursuant to the terms of the 1982 Teaming Agreement, Hazeltine was to serve as the prime contractor on any contract awarded by the FAA. E-Systems, in turn, was to act as the subcontractor for the design, testing and production of the

DME/P. The 1982 Teaming Agreement further imposed certain pre-award and post-award obligations on both parties, including significant obligations on E-Systems' part to provide technical expertise and assistance in the preparation of Hazeltine's proposal for the MLS contract.

8. Based upon performance specifications released by the FAA in advance of its formal Request for Proposals and upon Hazeltine's instructions as to what would be necessary to meet the FAA specifications, E-Systems continued work at its own expense on the development and testing of the DME/P through the spring of 1983.

9. It was Hazeltine's and E-Systems' intent to develop a full system design prior to submission of a proposal to the FAA so that the Hazeltine proposal could include actual, measured data demonstrating that the E-Systems' design for the DME/P fully complied with the FAA specifications. The parties believed that this strategy would serve several objectives. First, it would provide a high degree of confidence that the specification requirements could be met by the proposed design. Also, it would both permit the submission of the offer to perform under a fixed-price contract requested by the FAA and demonstrate an ability to meet the FAA's 18-month schedule. Because the E-Systems' DME/P design had very nearly been completed and tested prior to the award of the FAA contract, and with the understanding

that this proven design was to be utilized in the event of the award of the FAA contract to Hazeltine, E-Systems agreed to absorb the non-recurring costs for research and development of its DME/P design. At the time of the FAA contract award, E-Systems had already expended approximately 95 percent of the anticipated development costs for its design, using its own funds.

10. On April 18, 1983, the FAA published its formal Request for Proposal No. DTFA-01-83-R-27174 for the MLS program (the "RFP"). Subsequently, in June 1983, Hazeltine submitted its proposal in response to the RFP, which included, among other things, actual test data for the E-Systems' DME/P. As anticipated, this data demonstrated that all of the major performance specifications called for by the FAA's RFP could be met by the originally developed E-Systems' design.

11. During the latter part of 1983, Hazeltine and the FAA performed their evaluation of the E-Systems technical and cost proposals. As part of that review process, E-Systems met with Hazeltine and the FAA to provide clarification and answers to questions regarding E-Systems' proposed design for the DME/P system. As evidenced by the ultimate award of the prime contract to Hazeltine and the subsequent award of the subcontract to E-Systems, the originally proposed DME/P was determined by Hazeltine and the FAA to be adequate for contract performance.

12. On January 12, 1984, Hazeltine was awarded FAA Contract DTFA01-84-C00008 for the Microwave Landing System. Shortly thereafter, on January 31, 1984, Hazeltine issued to E-Systems its telex authorization to proceed with work. In accordance with the telex authorization and the 1982 Teaming Agreement, E-Systems accepted Hazeltine's telex offer and commenced work as a subcontractor to Hazeltine at that time.

13. On December 21, 1985, to "definitize" the telex authorization, Hazeltine and E-Systems agreed upon additional terms of the subcontract ("Subcontract K25213") for the development, production and delivery of 178 DME/P systems plus options for a total firm fixed price of \$13,064,549.73. Modifications to the subcontract not relevant hereto subsequently reduced the fixed-price to \$11,539,925.94. At the same time, the parties entered into a second Teaming Agreement, which superseded their prior agreement of December 7, 1982. Copies of the December 21, 1985 Teaming Agreement and Subcontract K25213 are attached hereto as Exhibits 2 and 3, respectively, and are incorporated herein by reference.

14. To date, Hazeltine has made progress payments to E-Systems under the subcontract of approximately \$7,000,000.

15. By the time E-Systems received authorization to proceed under the subcontract, and as a direct result of E-Systems' company-funded program of development, an engineering model of

E-Systems' DME/P was 95 percent complete. It was understood and agreed upon by the parties that the subcontract would not contain any additional research and development costs because the DME/P proposed by E-Systems was based upon an existing, nearly finalized design, the cost of which had already been borne by E-Systems, and which previously had been shown to be capable of meeting all major performance specifications contained in the FAA's original RFP.

16. In negotiating the terms of the Teaming Agreement and subcontract, the parties relied upon the following understandings, each of which was material to E-Systems' decision to enter into an agreement with Hazeltine:

a) the DME/P design which was proposed and priced by E-Systems during the proposal phase would be used for purposes of subcontract performance;

b) because research and development of that DME/P design was essentially complete prior to contract and subcontract award, no additional development costs would have to be passed on to Hazeltine or, in turn, to the FAA;

c) the E-Systems' design would meet all major DME/P specification requirements contained in the original FAA Request for Proposal; and,

d) in order to comply with the FAA's 18-month program schedule, use of the existing DME/P design was not only preferable, but was, in fact, required.

17. After the issuance of the telex authorization to E-Systems, Hazeltine imposed a series of design and specification changes and new interpretations of existing specifications, which together constituted a drastic revision of the basic understandings on which the telex authorization, the definitized subcontract, and the Teaming Agreements were based. These changes and interpretations had not been made known to E-Systems at the time of the proposal preparation or subcontract award and, in virtually each instance, were contrary to the express understandings of both Hazeltine and E-Systems at the time the telex authorization was accepted and the subcontract entered into. Hazeltine subsequently refused to recognize these modifications under the "Changes" clause of the definitized subcontract and, therefore, refused to reimburse E-Systems for the added costs and expenses reasonably incurred by it in order to perform these changes.

18. The modifications had the effect of altering the subcontract from a contract for the production of equipment using an existing design (properly designated a "fixed-price" contract) to a contract under which Hazeltine claimed that E-Systems was responsible for developing an entirely new system that would meet its revised and considerably more demanding requirements (properly designated a "cost reimbursement" contract). However, a cost reimbursement contract was not provided to E-Systems, and yet

E-Systems was required by Hazeltine to perform the new development under the original fixed-price contract.

19. Because of the modifications imposed upon it by Hazeltine, E-Systems was forced to abandon the design upon which its subcontract with Hazeltine was based and virtually to "start from scratch." Indeed, in actual flight testing by the FAA, the new design forced upon E-Systems provided test results ten times more precise than those required by the original specifications.

20. As a further consequence of these modifications, E-Systems was required to perform substantial additional work and to incur additional costs over and above those contained in Subcontract K25213. These costs included both recurring costs (e.g., material and production) and non-recurring costs (e.g., research and development) not envisioned by the parties.

21. Pursuant to the terms of the subcontract, E-Systems submitted separate claims totalling more than \$10,000,000 for equitable adjustments for non-recurring and recurring costs on November 30, 1988 and May 12, 1989, respectively. In derogation of its contractual obligations under the subcontract, Hazeltine has: 1) refused to submit E-Systems' certified claims for non-recurring costs in a timely manner or to pursue those claims in good faith; 2) unreasonably delayed the processing of E-Systems' certified claim for recurring costs and has otherwise failed to pursue that claim in good faith; and 3) by its actions under the

prime contract with the FAA, has further prejudiced both E-Systems' certified claims for non-recurring and recurring costs.

22. Upon information and belief, and in further derogation of E-Systems' rights and Hazeltine's duties under Subcontract K25213, Hazeltine informed the FAA in August 1988 that it intended to phase down its efforts under the prime contract in order to enter into a study period as a result of which virtually all work on the contract and related Subcontract K25213 came to a halt. Upon further information and belief, Hazeltine and the FAA subsequently entered into a Memorandum of Understanding to permit resolution of the various contractual issues between them.

23. E-Systems was not informed of such agreement or Memorandum of Understanding prior to its execution, nor was it permitted to participate in key meetings prior thereto, despite the fact that such meetings and agreement plainly affected terms, conditions and ultimate performance of the E-Systems' subcontract with Hazeltine. Hazeltine's failure to keep E-Systems informed as to these and other matters pertinent to E-Systems' performance violates and is in breach of the terms of the Teaming Agreement, which expressly provides that "Hazeltine will at all times during the period of this Teaming Agreement keep [E-Systems] fully advised of the status of each proposal, contract, subcontract or modification to the prime contract which affects [E-Systems] and inquiries and comments with respect thereto. Hazeltine will also

afford [E-Systems] the opportunity to be present at all key presentations, discussions, conferences or program reviews, whether pursuant to a solicitation or under awarded contract(s), where the product of E-Systems is under discussion. . . ."

Exhibit 2 at page 3.

24. Throughout the performance period of the subcontract, Hazeltine has repeatedly breached the terms of its agreement with E-Systems by failing to provide necessary support services requested by E-Systems as provided for under the terms of the subcontract. By way of example, and without intended limitation, Hazeltine failed to resolve several issues regarding the number and unit price of equipment called for under the subcontract, claiming that the issue was pending final resolution of Hazeltine's own disputes with the FAA under its prime contract. Similarly, Hazeltine has refused to witness various testing procedures or to pursue FAA approval of so-called First Article Testing ("FAT"). As a result, and despite repeated requests by E-Systems for this and other similar support, Hazeltine's breach of contract has rendered E-Systems unable to perform necessary testing of its new DME/P, and has left it in a position in which it is clearly untenable, if not impossible, for E-Systems to proceed with the production and delivery of the system.

25. Hazeltine's conduct has placed E-Systems in a "stop-work" position under the terms of its subcontract, by virtue of the fact that Hazeltine has called an effective halt to the program by not permitting E-Systems to proceed with the testing and production of the DME/P system despite E-Systems having been ready, willing and able to do so. By letters dated July 13, 1988, July 21, 1988, July 27, 1988, August 3, 1988, August 26, 1988, September 19, 1988 and September 26, 1988, E-Systems documented the delay and disruption occasioned by Hazeltine's conduct, and ultimately informed Hazeltine that, as a result, E-Systems had been placed in a stop-work position for purposes of future performance under the subcontract. Copies of these letters are attached hereto as Exhibits 4 through 10, respectively, and are incorporated herein by reference.

26. Hazeltine initially took the position that, despite its phase-down, E-Systems could nevertheless complete various discrete tasks under the subcontract. Hazeltine was, however, unable to identify any such tasks during a meeting convened for that purpose in January 1989.

27. As a consequence of Hazeltine's constructive stop-work order, E-Systems has been required to expend substantial resources in order to assure that it would remain ready to perform its obligations under the subcontract should Hazeltine lift the

stop-work and request E-Systems to complete performance. To date, no such request has been received by E-Systems.

28. Pursuant to Article XXXVII of Subcontract K25213, Hazeltine must, within 90 days of the date that it imposes a stop-work condition upon E-Systems, either cancel the stop-work condition (that is, permit E-Systems to complete performance) or terminate the subcontract for convenience pursuant to the "Termination for Convenience" clause of Article XXXVII of the subcontract. See Exhibit 3, Art. XXXVII at pages 111-10 and 111-30.

29. Because Hazeltine has permitted the stop-work condition to persist for more than 90 days without permitting E-Systems to return to work, the subcontract has, by its terms, constructively been terminated by convenience, entitling E-Systems to an award of the various costs, together with a reasonable margin of profit, as more fully set forth under Article XXXVII of the subcontract.

30. At all times relevant hereto, E-Systems has remained fully ready, willing and able to perform the services and obligations required of it under the terms of its agreement with Hazeltine.

COUNT ONE

(Breach of Contract -- Subcontract K25213)

31. E-Systems incorporates by reference the allegations

set forth in Paragraphs 1 through 30 as though fully set forth herein.

32. The unilateral acts and omissions of Hazeltine were in derogation of E-Systems' rights under, and in breach of the terms of, Subcontract K25213.

33. As a result of Hazeltine's breach, E-Systems has been unable to perform its obligations under the subcontract.

34. E-Systems has remained ready, willing and able to perform each and every obligation required of it under the parties' original agreement.

WHEREFORE, plaintiff E-Systems, Inc./Montek Division demands judgment against defendant Hazeltine Corporation as follows:

a) a declaration that Hazeltine Corporation's conduct constitutes a constructive Notice to Stop Work under Article XXXVII of Subcontract K25213;

b) a declaration that, by virtue of Hazeltine's inaction, Subcontract K25213 has been terminated for convenience pursuant to Article XXXVII of the subcontract;

c) an award to E-Systems of its recurring and non-recurring costs incurred as a result of Hazeltine Corporation's wrongful conduct, in an amount not less than \$20,000,000, together with interest and a reasonable margin of profit thereon;

d) an award of E-Systems' costs and reasonable attorneys' fees, together with such other relief as the Court may deem appropriate.

COUNT TWO

(Breach of Implied Covenant of Good Faith
and Fair Dealing -- Subcontract K25213)

35. E-Systems incorporates by reference the allegations set forth in Paragraphs 1 through 34 as though fully set forth herein.

36. In entering into Subcontract K25213 with E-Systems, Hazeltine impliedly agreed to carry out in good faith the obligations and duties imposed upon it, including, inter alia, the provision of support services which served as the necessary basis for E-Systems' performance under the subcontract.

37. By failing to honor its obligations under the subcontract and by purposefully delaying and disrupting E-Systems' performance thereunder, Hazeltine breached its implied covenant of good faith and fair dealing.

38. As a result of Hazeltine's conduct, including its failure to take any action regarding the constructive stop-work order imposed upon E-Systems by it, E-Systems has been damaged in an amount not less than \$20,000,000.

WHEREFORE, plaintiff E-Systems, Inc./Montek Division demands judgment against defendant Hazeltine Corporation as follows:

a) a declaration that Hazeltine Corporation's conduct constitutes a constructive Notice to Stop Work under Article XXXVII of Subcontract K25213;

b) a declaration that, by virtue of Hazeltine's inaction, Subcontract K25213 has been terminated for convenience pursuant to Article XXXVII of the subcontract;

c) an award to E-Systems of its recurring and non-recurring costs incurred as a result of Hazeltine Corporation's wrongful conduct, in an amount not less than \$20,000,000, together with interest and a reasonable margin of profit thereon;

d) an award of E-Systems' costs and reasonable attorneys' fees, together with such other relief as the Court may deem appropriate.

COUNT THREE

(Breach of Contract -- Teaming Agreement)

39. E-Systems incorporates by reference the allegations set forth in Paragraphs 1 through 38 as though fully set forth herein.

40. The unilateral acts and omissions of Hazeltine were in derogation of E-Systems' rights under, and in breach of the terms of, the December 21, 1985 Teaming Agreement.

41. As a result of Hazeltine's breach, E-Systems has been unable to perform its obligations under the Teaming Agreement.

42. E-Systems has remained ready, willing and able to perform each and every obligation required of it under the parties' Teaming Agreement.

WHEREFORE, plaintiff E-Systems, Inc./Montek Division demands judgment against defendant Hazeltine Corporation in an amount to be determined at trial, but in no event less than \$20,000,000, representing the costs and expenses incurred by E-Systems as a result of defendant's breach of the Teaming Agreement, together with interest, costs and attorneys' fees, and such other relief as the Court may deem appropriate.

COUNT FOUR

(Breach of Implied Covenant of Good Faith
and Fair Dealing -- Teaming Agreement)

43. E-Systems incorporates by reference the allegations set forth in Paragraphs 1 through 42 as though fully set forth herein.

44. In entering into the December 21, 1985 Teaming Agreement with E-Systems, Hazeltine impliedly agreed to carry out in good faith the obligations and duties imposed upon it, including, inter alia, its duty to keep E-Systems fully informed as to developments affecting its performance under the subcontract, as well as its duty to perform diligently its own obligations and responsibilities under the prime contract with the FAA.

45. By failing to perform diligently its obligations under the prime contract and by refusing to keep E-Systems fully informed as to all pertinent developments affecting E-Systems' performance under its subcontract with Hazeltine, Hazeltine breached its implied covenant of good faith and fair dealing.

46. As a result of Hazeltine's breach, E-Systems has been damaged in an amount not less than \$20,000,000.

WHEREFORE, plaintiff E-Systems, Inc./Montek Division demands judgment against defendant Hazeltine Corporation in an amount to be determined at trial, but in no event less than \$20,000,000, together with interest, costs and attorneys' fees, and such other relief as the Court may deem appropriate.

DEMAND FOR JURY TRIAL

Plaintiff E-Systems, Inc./Montek Division, hereby demands a trial by jury as to all issues of fact triable as of right by a jury.

DATED this 20th day of July, 1989.

RESPECTFULLY SUBMITTED,



Merlin O. Baker
Jonathan A. Dibble
RAY, QUINNEY & NEBEKER
79 South Main Street
P.O. Box 45385
Salt Lake City, Utah 84145-0385
(801) 532-1500



James A. Hourihan
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6544

Richard E. Dunne, III
Joseph H. Young
HOGAN & HARTSON
111 South Calvert Street
Suite 1600
Baltimore, Maryland 21202
(301) 659-2700

Attorneys for Plaintiff
E-Systems, Inc./Montek Division

Plaintiff's address:

2268 South 3270 West
Salt Lake City, Utah 84119

0825b

EXHIBIT "B"

WILLIAM V. PENNEY
Plaintiff, Appearing Pro Se
709 West Rusk Suite "A"
Rockwall, TX 75087
Telephone: 214/771-8383

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

WILLIAM V. PENNEY, Plaintiff, vs. E-SYSTEMS, INC., a Delaware corporation, DAVID A. WILLIAMS, ALFRED B. BUCHANAN, Defendants.	PLAINTIFF'S OBJECTION TO DISTRICT COURT'S ORDER AND STATEMENT ALLOWING FILING OR USE OF PLAINTIFF'S DEPOSITION BY DEFENDANTS Civil No. 900903522CV Judge Frank G. Noel Ct of Appeals # 930368-CA
---	--

Pursuant to the order of the THIRD JUDICIAL DISTRICT COURT in the above case filed as of August 9, 1993, and pursuant to Utah Rule of Appellate Procedure 11(h), Plaintiff William V. Penney ("Penney"), appearing pro se, hereby files his PLAINTIFF'S OBJECTION TO DISTRICT COURT'S ORDER AND STATEMENT ALLOWING FILING OR USE OF PLAINTIFF'S DEPOSITION BY DEFENDANTS as follows:

STATEMENT OF FACTS

1. It was agreed by defendants' counsel in advance of their taking Penney's deposition that they would limit each deposition session to a morning session not to exceed two to three hours in duration. See attached copy of August 13, 1990 letter of Penney's counsel Mr. L. Zane Gill to defendants' counsel which stated, among other things:

I appreciate your accommodation with regard to the scheduling of the depositions set for my client. Mr. Penney's physical condition makes it very difficult for him to do anything that requires constant attention for more than two or three hours at a time.

(See also copy of attached AFFIDAVIT OF ALLEN J. MERIL, M.D., from R.565)

2. By letter dated August 10, 1990, defendants' counsel Douglas R. Davis agreed to time limitations requested by Penney as follows:

Regarding your request to limit the number of hour your client must sit through his deposition scheduled for September 10, 1990, we will certainly be willing to make any appropriate accommodations, including continuing the deposition until the next day, September 11, 1990, if necessary. (See attached copy of said August 10, 1990 letter)

3. Despite defendants' counsels' express written and oral promises, though Penney's deposition commenced at 9:30 a.m. on the morning of September 10, 1990, defendants' counsel breached their promise and required Penney to continue in the deposition until 4:30 p.m. of that day, long after Penney had been forced to exceed his physical limitations.

4. Despite defendants' counsels' express written and oral promises, though Penney's deposition resumed at 8:33 a.m. on the morning of September 11, 1990, defendants' counsel breached their promise and required Penney to continue in the deposition until 3:50 p.m., long after Penney had been forced to exceed his physical limitations.

5. In his September 14, 1990 letter, Penney's former counsel L. Zane Gill censored defendants' counsel for their flagrant

violation of their express written and oral agreement to limit Penney's deposition to mornings and to two to three hour sessions. (See attached 9/14/1990 letter of Gill to Parsons, Behle & Latimer)

6. After receiving a printed copy of his deposition, Penney found many errors, paraphrasing, omissions, and sections taken out of context that Penney objected to.

7. Penney's attorney of record of the time informed Penney that there was a deadline to be met and, therefore, said attorney used a signature that Penney had left with said counsel to affix Penney's "signature" to the deposition.

8. Since Penney did not actually sign the deposition, it was never corrected, dated nor notarized as required.

9. Through no fault of Penney's, defendants' counsel negligently did not file the deposition, but chose to reference and submit selected pages to the District Court in order to distort and support their inaccurate positions.

10. Though final Judgment was entered in the above case on March 9, 1993 and Penney served his Notice of Appeal on April 7, 1993, the District Court's ORDER AND STATEMENT OF PROPOSED CHANGES TO THE RECORD, which purportedly allows Penney's deposition to be unsealed, was not filed until August 9, 1993, and allows the Penney deposition to be filed "as of July 9, 1993", some four (4) months after final Judgment was entered in the above case.

11. In his oral argument before the District Court on July 9, 1993, defendants' counsel David Anderson, Esq., expressly conceded that Utah Rule of Appellate Procedure 11(h) did not allow the

"late" admission of the Penney deposition.

12. It is Penney's position that the Penney deposition was "contaminated", that it should NOT be allowed to be filed or used in any way, and that NO judgment should enter against Penney for any costs associated with the contaminated Penney deposition.

DISCUSSION

By Penney's NOTICE OF APPEAL of April 6, 1993, Penney appealed certain specified judgments, orders, acts and omissions of the District Court that had occurred prior to the final Judgment dated March 9, 1993. The Penney deposition was never corrected, never signed, never notarized and never filed with the District Court prior to March 9, 1993. Hence, the District Court never had access to and made or entered NO judgments or orders based on said Penney deposition. The effect of the District Court's ordering that the Penney deposition may be filed "as of July 9, 1993" is to have said deposition **introduced for the first time on appeal** which is wholly inappropriate as being contrary to applicable rules of appellate procedure, existing case law and contrary to the requirements of just and equitable treatment of the parties in the above case.

In his oral argument before the District Court on July 9, 1993, defendants' counsel David Anderson, Esq., expressly conceded that Utah Rule of Appellate Procedure 11(h) did not allow the "late" admission of the Penney deposition.

Neither the District Court nor the Appellate Court should allow the filing, publication, or consideration of the Penney deposition where the Penney deposition was taken by defendants'

counsel in a manner that materially and substantially breached and violated their express written and oral promises to Penney and his counsel of record and where that breach and violation resulted in substantial, material and irreparable harm to Penney.

If the District Court or Appellate Court allow, for any reason, the filing of the Penney deposition, absolutely no or negligible credence, credibility, or other consideration should be given to the Penney deposition by the Appellate Court in the context of Penney's appeal because said Penney deposition was "contaminated" by defendants' counsels' taking and conducting the Penney deposition in a manner that materially and substantially breached and violated their express written and oral promises to Penney and his counsel of record and that breach and violation resulted in substantial, material and irreparable harm to Penney.

CONCLUSION

WHEREFOR, based on the facts and law previously cited herein, the District Court and Appellate Court should NOT allow the filing of the Penney deposition; and, if the filing of the Penney deposition is allowed for any reason, absolutely no or negligible credence, credibility, or other consideration should be given to the Penney deposition by the Appellate Court in the context of Penney's appeal because said Penney deposition was "contaminated" by defendants' counsels' taking and conducting the Penney deposition in a manner that materially and substantially breached and violated their express written and oral promises to Penney and his counsel of record and that breach and violation resulted in

substantial, material and irreparable harm to Penney.

Respectfully submitted this 19 day of August, 1993.

/s/ William V. Penney
William v. Penney, Pro Se

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 19 day of August, 1993, a true, accurate and complete copy of the foregoing was served upon the defendants by the undersigned's mailing same first class mail postage prepaid as follows:

DAVID A. ANDERSON, Esq.
PAUL E. DAME, Esq.
Parsons Behle & Latimer
201 South Main St., Suite 1800
P.O. Box 11898
Salt Lake City, Utah 84147-0898

UTAH COURT OF APPEALS
230 South 500 East
Suite 400
Salt Lake City, Utah

_____/s/ Eleonore Fox

EXHIBIT "C"

WILLIAM V. PENNEY
Pro Se
2333 East Cliff Swallow Drive
Sandy, Utah 84093
Telephone: 801/944-0983

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

WILLIAM V. PENNEY,
Plaintiff,

vs.

E-SYSTEMS, INC., a Delaware
corporation, DAVID A.
WILLIAMS, ALFRED B. BUCHANAN,

Defendants.

AFFIDAVIT OF
ALLEN J. MERIL, M.D.

Civil No. 900903522CV

Judge Frank G. Noel

STATE OF TEXAS)
 : ss.
COUNTY OF DALLAS)

I, ALLEN J. MERIL, having first been sworn, state under oath:

1. I am a citizen of the United States of America, a resident of the State of Texas, and of the County of Dallas, and am and have been at all relevant times a physician, medical doctor and surgeon licensed by and practicing in the State of Texas.

2. I have been Mr. William V. Penney's ("Mr. Penney's") physician and surgeon since 1986 regarding spine injuries resulting from an automobile accident in that same year.

3. Surgery was performed on Mr. Penney's neck in 1987 and again in 1988. Although aware of injuries to the lower spine and in the chest area, a conservative approach using alternatives to surgery were taken due to the critical nature of the areas injured.

4. As his condition continued to deteriorate, new M.R.I. technology was used to identify specific areas requiring surgical intervention. Surgery on the low back was performed on 11-13-91. See attached report, where electronic bone growth simulators and mechanical support devices were installed.

5. Subsequently, Mr. Penney's recovery reached a point to

where he was strong enough that he was referred to specialists for evaluation of the chest spine condition. After evaluation by Andri Czitrom, M.D. (Orthopedic Surgeon/Chest Specialist), Walter Bobachco, M.D. (Orthopedic Surgeon/Tumor Specialist), and Michael Mack, M.D. (Thoracic Surgeon/Cardiac Specialist) surgery was scheduled for Mr. Penney at Medical City Hospital in Dallas, Texas in March of 1993, see attached report.

6. Mr Penney began physical therapy again after an extended period of in home nursing support. During his recovery and physical therapy period, Mr. Penney broke one of the rods of the mechanical support device that had been previously installed during the low back surgery. Mr. Penney had not recovered from the chest surgery to a point where it was advisable to operate on the low back again. He was advised to stop all physical therapy and activity until he had recovered enough and was strong enough for surgery to be scheduled.

7. Mr. Penney, however, insisted on traveling to Salt Lake City, Utah in order to attend a meeting with a judge presiding over a litigation that he was a party to. The surgery was scheduled after his trip. Fortunately, no further damage was caused due to his travels and surgery was performed at Garland Community Hospital in August of 1992, see attached report. The surgery was performed and the broken rod, the electronics for the bone growth stimulator, and the other mechanical support devices were removed. Since that time Mr. Penney has experienced significant pain from both the low back and the chest conditions and still takes a significant amount of medication for his physical as well as psychological conditions.

8. It is my opinion that Mr. Penney's physical and mental condition would have had a negative affect on his ability to participate in the discovery process of a litigation. The combined affects of his pain, trauma, and medication would have a profound negative affect on his ability to think and function normally. At present his lower spine is progressing slowly as a result of on-going physical therapy, but Mr. Penney still has limited physical and mental capabilities due to his chest/spine condition and the

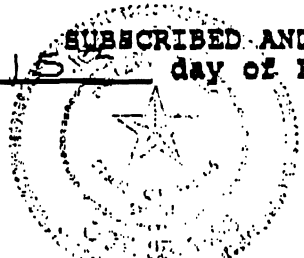
cumulative affects of his previous surgeries.

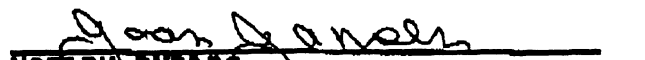
9. I have known Mr. Penney since 1972 and performed a spine fusion in 1976 that helped him recover completely from a disabled condition to become a productive member of society again. I know him to be an honest person who sets positive goals and follows his physicians' instructions.

FURTHER AFFIANT SAITH NAUGHT.

DATED this _____ day of February, 1993.


Allen J. Meril, M.D.

 SUBSCRIBED AND SWORN to before me, a notary public on the
15 day of February, 1993.


NOTARY PUBLIC
Residing at Dallas County

My commission expires:

10-25-93

**GARLAND
COMMUNITY
HOSPITAL**2696 W. Walnut Street
Garland, Texas 75042
214/276-7116

COPY

20108853

PENNEY, WILLIAM

1-19710-2

ALLEN J. MERIL, M.D.

DATE OF OPERATION:

11/13/91

OPERATIVE NOTE

PREOPERATIVE DIAGNOSIS:

1. Disk disruption syndrome L3-4, L4-5.

POSTOPERATIVE DIAGNOSIS:

Same.

OPERATION PERFORMED:

1. Repeat bilateral laminectomy, excision of disk L3-4, L4-5.
2. Posterior lumbar interbody fusion with EBI implantable stimulator L3-4, L4-5.
3. Segmental fixation with Harm's device L3-4, L4-5.
4. Insertion of epidural catheter for continuous epidural Fentanyl administration.

SURGEON:

Dr. Meril

ASSISTANT SURGEON:

Dr. Whelan

P. A. ASSISTANT:

Steve Allen, A. Geiger

ANESTHESIA:

DESCRIPTION OF PROCEDURE: Patient was prepped and draped in a sterile manner. Previous midline incision was utilized. Paravertebral musculature was stripped bilaterally from L3-4, L4-5 interlaminar spaces under image intensifier control to correctly identify the proper spaces. A generous bilateral laminectomy and partial facetectomy was carried out at L3-4 and L4-5 in anticipation of the posterior lumbar interbody fusion. Moderately bulging disks were encountered at both L3-4, L4-5 and postoperative change most marked at L4-5 left. The disk was entered with a #15 blade, and with graduated pituitary rongeurs, curettes, and high speed bur, a thorough discectomy was accomplished. Then, a pilot hole was started with a #0 starter, and then with high speed burs and the Anspach end cutter, circular troughs were made bilaterally at L3-4, L4-5 for the posterior lumbar interbody fusion. Four patellar grafts were taken and trimmed to appropriate size, and then longitudinal troughs were placed about each graft, and a single diagonal hole was placed within each graft.

The EBI units times two were tested, found to be active. Cathode was then threaded in and around each of the four grafts. Then, each

(CONTINUED NEXT PAGE)

**GARLAND
COMMUNITY
HOSPITAL**

2696 W. Walnut Street
Garland, Texas 75042
214/276-7116

PENNEY, WILLIAM

1-19710-2

ALLEN J. MERIL, M.D.

OPERATIVE REPORT (Continued)

Page 2

graft was gently tamped into place first at the L4-5 left, and then L3-4. Then similarly, the grafts on the right were gently tamped into place. Surgicel was placed over the exposed grafts, and the cathodes were packed to the lateral wall, and there was no contact noted with the dura or nerve roots.

Then, the junction of the transverse process pedicles were identified at the pedicle of L3-4 and L5. With a high speed bur, this area was decorticated, exposing cancellous bone within the pedicle. Then, under image intensifier control, gear shift was utilized and each pedicle was probed. Pedicles were tapped, and then 4 cm. screws were utilized at all levels, and were advanced under image intensifier control. Then, a bar was taken and trimmed to appropriate size, and placed into the slotted heads of the screws, and then the nuts were tightened, giving excellent stability.

A tunnel was then made under the retained lamina of L3, and through a separate stab wound, an epidural catheter was introduced approximately 10 cm. from distal to proximal for continuous epidural Fentanyl administration.

Free fat grafts were placed over the exposed dura, and the wound was irrigated again. It had been irrigated throughout the procedure with triple antibiotic solution. The wound was then closed in layers, and the patient was returned to Recovery Ward in good condition.

AJM/jsc
D:11/13/91
T:11/14/91
Y16

ALLEN J. MERIL, M.D.

X3: Dr. Whelan

SENT BY:GOC or AOS

; 2-15-93 ; 3:46PM ;

GOC or AOS-PENNEY & ASSOCIATES :# 7

JUN-12-1992 12:35 FROM ORTHOPEDIC CENTER DALLAS

TO

94945703 P.02

Humana Hospital-Medical City Dallas 7777 FOREST LANE DALLAS, TEXAS 75230 TELEPHONE 214/661-7000

Bobechko

PENNEY, William

54 69 56-4

OPERATIVE REPORT

DATE OF OPERATION: 03/10/92

PREOPERATIVE DIAGNOSIS: Hemangioma of T7 vertebral body.

POSTOPERATIVE DIAGNOSIS: Hemangioma of T7 vertebral body.

COSURGEONS: Andrei Czitrom, M.D. (Assistant: Dr. Bobechko)
Walter Bobechko, M.D. (Assistant: Dr. Czitrom)
Michael Mack, M.D. (Assistant: Dr. Czitrom)

OPERATION PERFORMED: Vertebral corpectomy of T7 with radical excision of hemangioma through transthoracic approach with decompression of the spinal cord.

ANESTHESIA: General.

ANESTHESIOLOGIST: Donald L. Drennon, M.D.

CLINICAL NOTE: Mr. Penney is a 49-year-old man who has had chronic midthoracic back pain secondary to a hemangioma in the body of T7 for several years. The pain came on after a motor vehicle accident in 1988. The patient underwent cervical fusions and lumbar fusions which eradicated his cervical and lumbar pain, and he was left with a midthoracic pain. He was admitted electively for a transthoracic resection of the symptomatic hemangioma in the T7 vertebra.

DESCRIPTION OF OPERATION: Procedure involved Dr. Michael Mack who performed a thoracotomy for exposure. Dr. Andrei Czitrom performed the vertebral corpectomy of T7 by transthoracic approach with decompression of the spinal cord. Dr. Bobechko performed the interarthrodial and stabilizations of the spine. This note will only document the procedure performed by Dr. Czitrom, which is the vertebral corpectomy of T7.

It should be noted that Dr. Czitrom assisted Dr. Bobechko and Dr. Bobechko assisted Dr. Czitrom during their respective part of the operative procedure.

The patient was positioned on the table in the right lateral position and the left thoracotomy was carried out by Dr. Michael Mack. After exposure of the spine by thoracotomy and the ligation of the three segmental vessels in the area of T7, T8 and T6, the vertebral corpectomy was begun, first by identifying the levels with the help of needles placed into the disk spaces of what was thought to be the T6-7 and the T7-8 disk spaces. X-ray verification of the correct level was obtained.

It should be noted that spinal cord monitoring was used throughout this procedure. The 6th rib had been removed by Dr. Michael Mack and this provided excellent exposure of the level of T6, T7 and T8.

A longitudinal incision was made through the periosteum at the level of T6, T7 and T8, and the periosteum was reflected anteriorly with the help of elevators. Bleeding was controlled with electrocautery and with the Argon beam coagulator. After reflection of the periosteum, the T7 vertebra

Humana Hospital-Medical City Dallas 7777 FOREST LANE DALLAS, TEXAS 75220 TELEPHONE 214/661-7000

PENNEY, William

54 69 56-4

OPERATIVE REPORT

Page 2

appeared slightly abnormal with more bleeding than the adjacent vertebrae. A small osteotome was used to cut a window in the vertebra, and following this, a curette was used to scoop out the bone of the vertebra until the abnormal tissue was encountered, which appeared to be more fatty-looking and was bleeding quite briskly. Hemostasis was achieved at each step using the Argon beam coagulator, as well as Surgicel and Gelfoam soaked with thrombin.

The level was again identified after the initial window was made by placing a vascular clip into the vertebra, and again verifying that the correct level was operated on, which was T7.

The MRI previously showed that the left side of T7 was involved, including the pedicle. Careful removal of bone was carried out, beginning from the midvertebra towards the posterior aspect of the vertebra, using curettes, Kerrison rongeurs, as well as pituitary rongeurs.

After meticulous dissection and quite frequent intervals, during which hemostasis was carried out, the abnormal tissue was removed bit by bit from the posterior aspect of the vertebral body of T7. The pedicle was also removed and this ultimately led to the entrance into the spinal canal. The dura was exposed gradually, and the spinal cord was decompressed of the mixture of hemangioma, tissue and bony tissue that was present in the area.

The removal continued and the disk between T6-T7 and T7-T8 was removed. The dura was decompressed circumferentially and a nerve probe could be placed into the spinal canal, up and down, without any difficulty at the end of the decompression. The vertebral body bleeding was controlled with Surgicel and Gelfoam packs using thrombin and adrenalin.

During the procedure, the Cell Saver was used and a total of 2 units was reinfused into the patient. One unit of autologous blood was also reinfused during the procedure.

After the entire decompression was completed and hemostasis was accomplished, Dr. Bobechko proceeded to carry out the reconstruction, using a rib graft for arthrodesis and anterior spinal plating using the Alpha plating system. This part of the procedure will be described in a separate report by Dr. Bobechko.

At the end of the reconstruction, during which Dr. Citron assisted Dr. Bobechko, the hemostasis was again completed and a Marxan mesh was attached to the parietal pleura, in order to cover the plate and the bolts, and protect the aorta from them.

At the end of this, Dr. Michael Mack proceeded to close the chest, and this is described in a separate report.

The procedure was carried out without any complications with a total blood loss of approximately 2,000 cc. Patient was transfused one autologous unit and was given back 2 units through the Cell Saver.

SENT BY:GOC or AOS

; 2-15-93 ; 3:48PM ;

GOC or AOS-PENNEY & ASSOCIATES ;# 9

JUN-12-1992 12:36

FROM ORTHOPEDIC CENTER DALLAS

TO

94945703 P.04

Humana Hospital Medical City Dallas 7777 FOREST LANE DALLAS, TEXAS 75230 TELEPHONE 214/641-7000

PENNEY, William

54 69 56-4

OPERATIVE REPORT

Page 3

He returned to the Recovery Room in excellent condition and the spinal cord monitoring stayed stable throughout the procedure.

Andrei Csitrom, M.D.

AC/D67

D: 03/10/92

T: 03/11/92

5945R

cc: 3 copies to Dr. Csitrom
Walter Bobechko, M.D.
Michael Mack, M.D.
Jon Blachley, M.D.
Allen Maril, M.D. (Garland)

GARLAND
COMMUNITY
HOSPITAL

2696 W. Walnut Street
Garland, Texas 75042
214/276-7116

PENNY, WILLIAM

1-21429-5

ALLEN MERIL, M.D.

DATE OF OPERATION:

8-19-92

OPERATIVE NOTE

PREOPERATIVE DIAGNOSIS:

1. Status post posterior interbody fusion, L3-4 and L4-5, with retained fractured Harm's device and EBI generators x 2.

POSTOPERATIVE DIAGNOSIS:

Same.

OPERATION PERFORMED:

1. Removal of fractured Harm's device, L3-4 and L4-5, and explant EBI bone generators x 2.

SURGEON:

Dr. Meril.

ASSISTANT:

Dr. Whelan

PA ASSISTANT:

Steve Allen, P.A.

ANESTHESIA:

TECHNIQUE: The patient was prepped and draped in the sterile manner. The anesthesiologist had placed an epidural catheter for postoperative Fentanyl; however, the catheter was placed too low necessitating removal of the catheter, reprepping and redraping this patient. The previous incision was then utilized. The paravertebral musculature was stripped from the interlaminar spaces at L3-4 and L4-5, and the Harm's device was circumscribed with the high-speed Onspa side cutter. The nuts were backed off one by one. The bar was removed, and all three screws were removed from the pedicles. The EBI generators had been placed on both sides of the spinous processes at approximately L2 where this area was explored. The EBI generators were exposed and circumscribed. Each was removed, and the wires were cut. The wound was copiously irrigated with double-antibiotic solution, and then closed in layers. The patient was returned to the Recovery Ward in good condition.

AM/cmg
D&T:8/19/92
G23

ALLEN MERIL, M.D.