

JEFFERSON COUNTY DISTRICT COURT 100 Jefferson County Parkway Golden, Colorado 80401	DATE FILED: February 18, 2014 2:58 PM CASE NUMBER: 2012CV2550 <b>Case No.: 12 CV 2550</b> <b>Div.: 5</b> <b>Courtroom: 4e</b>
<hr/> <b>In re the Lower North Fork Fire litigation</b>	
<p style="text-align: center;"><b>ORDER re: claims concerning willful and wanton conduct of individual defending parties</b></p>	

The present Order addresses the sufficiency of claims that the conduct of the individual defending parties was willful and wanton.

**1. Present controversy**

The events which resulted in the Lower North Fork Fire have been reviewed by the parties on many occasions. The court sees no need to review these events again

**(a) parties**

In the present posture of this litigation, the parties may generally be grouped into homeowners and insurance companies, on one side of the case, and various governmental agencies and their agents or employees, on the other.

The formal names of the parties involved in this litigation are difficult to understand.<sup>1</sup> To simplify the present Order, and without prejudice to any party, the court usually refers to the homeowner and insurance company parties as simply “homeowners” or “claiming parties.” The court usually refers to the governmental entities or employees who are opposing the homeowners as “defending parties.”

**(b) present controversy**

The Lower North Fork wildfire was caused by the escape of a controlled burn which was started on property owned by the Denver Water Board. It is not disputed that the Forest Service employees who started the controlled burn were Mssrs. Michalak, Will and Gallamore.

Several homeowner groups seek damages against the above-named individuals on the theory that the conduct of these individuals which caused the wildfire was willful and wanton. These individuals now ask the court to dismiss the willful and wanton claims against them pursuant to Rule 12(b)(5), C.R.C.P.

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<sup>1</sup> Most of the homeowners, for example, are technically Respondents in Interpleader.

### **(c) purpose of willful and wanton allegations**

To place the homeowners' "willful and wanton" allegations in context, the court first notes that governmental actors are ordinarily immune from suit for conduct which is performed in the course of their employment. In our state, this general principle is codified in the Colorado Governmental Immunity Act, sec. 24-10-101, *et. seq.*, C.R.S.

The court next notes that there is an exception to the above-cited general principle for conduct which is "willful and wanton." Should complained-of conduct be "willful and wanton," as that term is defined in Colorado law, the usual rule of immunity does not apply. See sec. 24-10-105(1), C.R.S.

The purpose of the homeowners' "willful and wanton" allegations is to place the conduct of the three individual defending parties outside the immunity bar of the CGIA.

### **(d) present Order**

The court finds that directing the present Order to particular arguments advanced by particular parties is neither necessary nor desirable. The court accordingly addresses the present Order to all of the claiming parties who have alleged that the conduct of the individual defending parties was willful and wanton, and to all of the defending parties who have asked the court to dismiss these claims pursuant to Rule 12(b)(5), C.R.C.P.

## **2. Applicable law - Rule 12(b)(5)**

The individual defending parties ask the court to dismiss the claims against them pursuant to Rule 12(b)(5), C.R.C.P.

In ruling upon Rule 12(b)(5) motions, the court must accept the factual allegations of the complaint as true, and must view the allegations in the light most favorable to the non-moving party. Denver Post Corp. v. Ritter, 255 P.3d 1083, 1088 (Colo. 2011). The court is not to accept as true legal conclusions which the complaint miscasts as factual allegations. Denver Post, *supra* at 1088; Western Innovations, Inc. v. Sonitrol Corp., 187 P.3d 1155, 1158 (Colo. App. 2008).

Viewing the complaint in the manner stated in the preceding paragraph, the court is to test the legal sufficiency of a party's claims by asking whether "it appears beyond a doubt that a plaintiff can prove no set of facts in support of her claim which would entitle her to relief." Cherokee Metropolitan Dist. v. Upper Black Squirrel, etc., 247 P.3d 567, 573 (Colo. 2011); *see also* Dorman v. Petrol Aspen, Inc. 914 P.2d 909, 911 (Colo.1996).

## **3. Analysis**

The present Order is one of a series of orders issued by this court concerning the defending parties' Rule 12 motions.

A number of the Rule 12 motions challenged the sufficiency of claims which alleged violations of 42 U.S.C. sec. 1983. In the course of its application of the Rule 12 standard to these motions, the court reviewed federal authorities concerning the meaning of the terms "shock the conscience" and "deliberate indifference," which are terms of art in sec. 1983 litigation. In determining that the conduct alleged in the homeowners' claims did

not shock the conscience, and did not constitute deliberate indifference, the court quoted the Tenth Circuit's opinion in Uhlrig v. Harder, 64 F.3d 567 (C.A. 10 1995), as follows:

*Collins'* [i.e., Collins v. City of Harker Heights, Texas, 503 U.S. 115 (1992)] focus on deliberateness coheres with our previous recognition that a sec. 1983 violation must be predicated on a state action manifesting one of two traditional forms of wrongful intent—that is, either: (1) an intent to harm; or (2) an intent to place a person unreasonably at risk of harm. While “an intent to harm” follows the traditional tort law concept of intentionality, we have defined “an intent to place a person unreasonably at risk” (or reckless conduct) as when a state actor “was aware of a known or obvious risk that was so great that it was highly probable that serious harm would follow and he or she proceeded in conscious and unreasonable disregard of the consequences.”

64 F.3d at 573 (citation and footnotes omitted).

To the above-quoted language defining “deliberate indifference” the court compares the language of Colorado authorities which defines the term, “willful and wanton.” An early decision defined the term as follows:

The demarcation between ordinary negligence, and willful and wanton disregard, is that in the latter the actor was fully aware of the danger and should have realized its probable consequences, yet deliberately avoided all precaution to prevent disaster. A failure to act in prevention of accident is but simple negligence; a mentally active restraint from such action is willful. Omitting to weigh consequences is simple negligence; refusing to weigh them is willful.

Pettingell v. Moede, 271 P.2d 1038, 1042 (Colo. 1954) (emphasis added). Similar language is found in the present punitive damages statute, sec. 13-21-102(1)(b), C.R.S. (defining “willful and wanton conduct” as conduct “purposely committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others...”) and in modern decisions applying the punitive damages statute, see, e.g., Stamp v. Vail Corp. 172 P.3d 437, 448 (Colo. 2007) (“Conduct is willful and wanton if it is ‘a dangerous course of action’ that is consciously chosen ‘with knowledge of facts, which to a reasonable mind creates a strong probability that injury to others will result.’”).

Based upon above-described comparison of definitions of “deliberate indifference” and “willful and wanton,” the court can find no principled distinction between the two.

#### **4. Conclusion**

The court found that the factual allegations of the homeowners' sec. 1983 claims did not give rise to the reasonable inference that the governmental conduct of which they complained constituted “deliberate indifference.” The court adopts the reasoning of its sec. 1983 Order and finds that the homeowners' factual allegations also do not give rise to the reasonable inference that the complained-of conduct was willful and wanton. The

court also finds, in the alternative, that there is no set of facts which can be proven which would entitle the homeowners to relief on their theory of willful and wanton conduct.

The motions to dismiss the claims against individual defending parties which allege that the defending parties' conduct was willful and wanton are GRANTED.

Date: February 18, 2014

A handwritten signature in cursive script that reads "Conn Hill". The signature is written in black ink and is positioned above a horizontal line.

Judge