

**ATTACHMENTS TO
OFFERS OF PROOF OF
DEPOSITION
TESTIMONY OF ROGER
M. ROWLEY TAKEN
APRIL 30, 2004**

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SWA Painting, Inc.,)	
)	
Plaintiff,)	
)	
vs.)	No. CIV-03-2364-PHX-DGC
)	
Golden Eagle Insurance)	
Corporation; Does 1-100; XYZ)	
Corporations 1-100; Black and)	
White Business Entities 1-100,)	
)	
Defendants.)	

Phoenix, Arizona
April 30, 2004
10:30 a.m.

DEPOSITION OF ROGER M. ROWLEY

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Reported by: Mary F. Vincelette, RMR
Certified Court Reporter
Certificate No. 50551

1 And if you have to make a correction or
2 change your answer, we have the right to comment on that
3 in front of a jury at some point in time. Fair enough?

4 A. Okay. Yes.

5 Q. How old are you, sir?

6 A. 46.

7 Q. And your educational background?

8 A. Two years of college.

9 Q. Where was that at?

10 A. Mesa Community College.

11 Q. Did you grow up here in Arizona?

12 A. Yes.

13 Q. Did you go to high school here?

14 A. Yes.

15 Q. Which high school?

16 A. Mesa High School.

17 Q. What year did you graduate?

18 A. 1976.

19 Q. So you're a Jackrabbit?

20 A. I am.

21 MR. RYAN: Did you go to Mesa High?

22 MR. MYLES: Off the record.

23 (Discussion off the record.)

24 Q. Is it okay if I call you Roger?

25 A. Yes.

1 Q. Roger, where are you employed today?

2 A. Blucor Contracting.

3 Q. And what do they do?

4 A. They are a general engineering contractor. They
5 do water, sewer, paving, grading projects, land
6 development.

7 Q. Where are they located at?

8 A. Their main offices are in Carefree. Actually,
9 their address is Scottsdale, but it's in the Carefree
10 area.

11 Q. What is your position at the company?

12 A. Project manager.

13 Q. And how long have you been there?

14 A. Just started there three weeks ago.

15 Q. Where did you work before that?

16 A. Well, I was unemployed for about three months.
17 And, then, prior to that, I worked for a company called
18 Legacy Financial Solutions for about a year.

19 Q. And what did you do for them?

20 A. Financial planning, spread sheets analysis, some
21 marketing corporate image work.

22 Q. Any other places you have worked since you left
23 CMS?

24 A. No.

25 Q. How long were you at CMS?

1 A. Approximately four years.

2 Q. And what positions did you hold while you were
3 there?

4 A. I believe I was CEO and on the board, a member of
5 the board during that time.

6 Q. The entire time?

7 A. I believe so.

8 Q. Would that have been roughly 1998 till 2002?

9 A. It was '99, I think, around May of '99 when I
10 first became involved until I think the resignation was
11 January of 2003.

12 Q. Why did you leave?

13 A. Just taking care of other interests and other
14 businesses that were -- I had some other business
15 interests going and it was too much for me at the time.

16 Q. It's my understanding that you are the individual
17 who negotiated or got the insurance that covered CMS from
18 Golden Eagle; is that true?

19 A. Yeah, that's correct.

20 Q. What agent did you use?

21 A. Lebaron & Carroll was the agency. John Carroll,
22 his son, Brian Carroll, were the agents.

23 Q. In terms of the coverage that you needed for CMS,
24 was there anyone else who negotiated with Lebaron &
25 Carroll other than you?

1 literally taken off or what was the remedy; do you know?

2 A. I don't know.

3 Q. Do you know how many homes he applied the bad
4 paint to?

5 A. I don't.

6 Q. Do you know how much the paint cost that he had
7 to buy to repaint the homes?

8 A. I don't.

9 Q. At some point in time, there was a stipulated
10 judgment entered in favor of SWA against CMS for \$500,000.
11 Do you know that?

12 A. Yes.

13 Q. Did you play any part in determining whether or
14 not that \$500,000 stipulated judgment was reasonable or
15 not?

16 MR. RYAN: Object to the form.

17 Q. BY MR. MYLES: Do you understand my question?

18 A. No, I'm not sure I do.

19 Q. I'm just trying to find out where the \$500,000
20 figure came from that was in the stipulated judgment. Did
21 you suggest it?

22 A. No.

23 Q. Do you know who did?

24 A. No.

25 Q. Did anyone ask you whether or not you thought it

1 was reasonable or not?

2 A. No.

3 Q. Do you have enough information today or did you
4 have enough information then to tell me whether it's
5 reasonable or not?

6 A. No.

7 Q. Was there any negotiation concerning the figure?

8 A. No.

9 Q. Did you ever have any conversations with your
10 insurance agent as to whether or not Golden Eagle should
11 be providing coverage and paying for that loss?

12 A. Yes.

13 Q. Who did you speak with?

14 A. John Carroll.

15 Q. Do you remember basically the first time you
16 spoke to him?

17 A. Are you talking about a date?

18 Q. A month is probably good enough. I can show you
19 some exhibits which are in front of you that may orientate
20 you a little bit.

21 Exhibit No. 1, which is in front of you, is
22 a letter dated June of 2001 --

23 A. Uh-huh.

24 Q. -- that was sent to you by Golden Eagle
25 acknowledging a claim for problems with the paint.

1 make things right with SWA?

2 A. I didn't do any analysis. I saw some figures
3 that they had provided on each of the homes and the cost
4 that it would take to redo those homes. In terms of lost
5 revenues or anything else, I'm not -- I didn't see
6 anything on paper for that.

7 Q. On the repainting cost, do you remember what the
8 figure was?

9 A. Originally, I think it started out around \$48,000
10 and some change, and then I think it ended up somewhere
11 around the low 70s. I think some other -- originally, I
12 think it was one house or two houses and then a couple of
13 other houses exposed themselves with the problem and so it
14 started growing.

15 Q. Do you know how much of that figure of \$70,000,
16 roughly, was labor and how much was actual paint?

17 A. No, I don't.

18 Q. Do you know how much paint was sold to SWA that
19 was mixed inappropriately?

20 A. I don't.

21 Q. Was there any determination made at CMS as to
22 whether or not the paint was bad or not?

23 A. Yes.

24 Q. Was it?

25 A. Yes, we determined it was bad.

1 Q. So, with respect to liability for the bad paint,
2 that was pretty much a given?

3 A. Right.

4 Q. In terms of the range of potential damages, the
5 highest figure that was ever communicated to you was about
6 \$70,000?

7 MS. HALL: Object to form and foundation.

8 MR. RYAN: Join.

9 A. Yes.

10 Q. BY MR. MYLES: While you were at CMS, was it
11 primarily your responsibility to deal with the lawyers and
12 deal with this particular lawsuit involving SWA?

13 A. Yes.

14 Q. Was there anybody else who you worked with or
15 helped you out whose opinion you sought?

16 A. Yes.

17 Q. Who was that?

18 A. You mean besides the attorney that I worked with?

19 Q. Yes.

20 A. Danny McClain was involved.

21 Q. What was his role?

22 A. Danny McClain was president of the company and he
23 was the chief chemist.

24 Q. Did you wind up hiring a lawyer or law firm to
25 represent you with respect to the claim that was being

1 meeting. It was a long time ago.

2 Q. Who came up with the \$500,000?

3 A. I believe that was -- that would have been
4 Mr. Ryan and his client.

5 Q. Was there any discussion as to how they came up
6 with that number?

7 A. I don't recall any.

8 Q. Did you agree with the number, disagree, or not
9 care? What was your position on that?

10 MR. RYAN: Form.

11 A. I guess from my standpoint, as long as we weren't
12 going to be liable for it, that was up to them.

13 Q. Take a look at Exhibit No. 7, if you would,
14 Roger. It should be the complaint that was filed by SWA
15 against CMS.

16 A. Yes.

17 Q. I take it you have seen this before?

18 A. Yes.

19 Q. Did you know this was going to be filed and
20 discuss it with Mr. Ryan or anyone else before you
21 actually got a copy of it?

22 A. You know, I honestly don't remember back then if
23 I knew it was going to be filed or the timing of it.

24 Q. Would it be fair to say that when you got it, you
25 weren't surprised that it was filed?

1 information?

2 A. At some point in time.

3 Q. Why was it that you had an agreement that said
4 you tendered the defense for coverage and they denied
5 coverage without a reasonable basis after the lawsuit was
6 filed when, in fact, that wasn't true?

7 MR. RYAN: Object to the form and foundation.

8 A. Okay. I'm not sure exactly what I understand,
9 but I'll tell you that the Damron Agreement had taken
10 place. When Golden Eagle came and suggested that they
11 would do that, it was long after we had asked for their
12 help and felt like that they had denied us and that they
13 weren't gonna do anything. We felt like there was bad
14 faith and there was nothing that they were going to do to
15 help us out. And that's when we did this, and this seemed
16 like a reasonable solution.

17 Q. BY MR. MYLES: Are you aware of Golden Eagle ever
18 having denied a defense to CMS after the lawsuit was
19 filed?

20 MR. RYAN: Object to the form and foundation.

21 A. No.

22 Q. BY MR. MYLES: Take a look at Paragraph 5. The
23 last full sentence says, quote, "Golden Eagle has not
24 offered to defend such claims under a reservation of
25 rights, but instead has chosen to issue an outright denial

1 of coverage at its own peril," closed quote. Do you see
2 that?

3 A. Yes.

4 Q. That's not true, though; is it?

5 MR. RYAN: Object to the form.

6 A. Well, let me read that again. You're asking me
7 if that's not true?

8 Q. BY MR. MYLES: I'll ask you, is that true?

9 MR. RYAN: Object to the form.

10 A. I'm not sure what they're offering.

11 Q. Did you ever personally make a demand on Golden
12 Eagle to defend the complaint that's Exhibit No. 7?

13 MR. RYAN: Object to the form.

14 A. No.

15 Q. BY MR. MYLES: Do you know if anyone did it on
16 your behalf?

17 A. No, I don't know.

18 Q. So you don't know whether or not Golden Eagle
19 accepted or rejected the tender of defense?

20 A. No.

21 Q. Did you know at the time or you don't know now?

22 A. Did I know at the time --

23 Q. At the time you entered into this agreement --

24 A. Yes.

25 Q. -- and at the time the complaint was filed, did

1 not they're going to defend the lawsuit that was filed by
2 SWA; correct?

3 A. Yes.

4 Q. Do you have any personal knowledge that Golden
5 Eagle ever said they were not going to defend this lawsuit
6 prior to this letter of October 14th?

7 A. No.

8 Q. Exhibit No. 11 is a letter dated October 16th
9 sent by Golden Eagle to Chris Gooch. Have you ever seen
10 this before?

11 A. I don't know.

12 Q. You're cc'd on the letter. Would it be fair to
13 assume that you got a copy and read it?

14 A. Let me look at it and see if it refreshes my
15 memory.

16 I don't specifically recall, but I probably
17 saw it if it was copied to me at the time.

18 Q. In the first paragraph, the last sentence says
19 that Golden Eagle is going to defend the case under a
20 reservation of rights; correct?

21 A. Yes.

22 Q. And not to belabor this, but Exhibit No. 8, that
23 Damron Agreement that you were working under since June of
24 2002 --

25 A. Uh-huh.

1 Q. -- says that --

2 Is that yes?

3 A. Yes.

4 Q. -- this agreement says that Golden Eagle never
5 offered to defend under a reservation of rights. I mean,
6 that statement is not true in the Damron Agreement; right?

7 MR. RYAN: Object to the form.

8 A. If the dates are correct, I would agree with you.

9 Q. BY MR. MYLES: When you learned that Golden Eagle
10 was going to defend under a reservation of rights, what
11 was the position of CMS as to whether or not you were
12 going to accept that or not?

13 MR. RYAN: Object to the form and foundation.

14 A. Well, I remember that, but it was a long
15 conversation with my attorney about it, and I guess it's
16 kind of an attorney-client privilege as to that point.

17 MR. MYLES: I don't want to know what your lawyer
18 said.

19 Q. I want to know if the company's ultimate decision
20 regarding whether or not they were going to let Golden
21 Eagle defend under a reservation of rights was yes or no?

22 MR. RYAN: Object to the form and foundation.

23 A. We didn't feel like that was in our best
24 interest.

25 Q. BY MR. MYLES: Was that decision made after

1 October 16th of 2002 or before?

2 A. I don't recall.

3 Q. If you will look at Exhibit No. 12, it's a letter
4 dated February 14th sent to you by Ellen Levy.

5 A. Yes.

6 Q. And in that letter she says, "This office has
7 been retained to represent the interest of CMS." Do you
8 see that?..

9 A. Yes.

10 Q. Before you got this letter, had the decision been
11 made by CMS not to accept a defense under a reservation of
12 rights by Golden Eagle?

13 MR. RYAN: Object to the form and foundation.

14 A. Yes, I believe so.

15 Let me back up a little bit. I was not
16 actively involved in the day-to-day operations for the six
17 months leading up to this. But, from what I see, that
18 would be a fair assumption.

19 Q. BY MR. MYLES: When did you stop being involved
20 in the day-to-day handling of this lawsuit?

21 A. In May of 2002, we hired a new CEO that took my
22 place. I was involved from time to time on certain
23 matters, and I think I was involved in this particular
24 matter for a time after that. But I believe after 2002,
25 any correspondence I received from that time forward, I

1 Q. Did you ever talk to Ellen Levy?

2 A. No.

3 Q. Did you ever talk to anyone with her firm?

4 A. No.

5 Q. Do you know whether or not anyone at CMS talked
6 to Ellen Levy?

7 A. I have been told that other people have.

8 Q. You entered into the Damron Agreement in June of
9 2002 on behalf of CMS; right?

10 A. Yes. Again, I'm not sure of the date, but that
11 sounds right.

12 Q. And, after that, we have looked at letters
13 showing that the defense of the lawsuit that was then
14 filed was tendered to Golden Eagle; right?

15 A. Yes.

16 Q. And we also know that Golden Eagle accepted and
17 said they would defend under a reservation of rights;
18 correct?

19 A. Yes.

20 Q. And we also know that CMS had decided sometime in
21 the summer or fall of 2002 not to accept that defense
22 under a reservation of rights; correct?

23 MR. RYAN: Object to the form and foundation.

24 A. I think that where you're going with this is, CMS
25 decided that the Damron Agreement was in its best

1 interest. And I believe that Rees & Levy had advised not
2 to enter into the Damron Agreement. As far as not to
3 accept Rees & Levy and their defense with a reservation of
4 rights, I don't know that there was any rejection of that.
5 It was just we felt like it was better to continue on with
6 the Damron Agreement.

7 Q. BY MR. MYLES: Okay. So if you look at
8 Exhibit 12, when Ellen Levy is writing to you, she talks
9 about her knowledge of the existence of some type of
10 agreement and says, this is not in accordance with her
11 advice -- I don't know what that sentence means, to be
12 honest with you.

13 MR. RYAN: Off the record.

14 (Discussion off the record.)

15 MR. RYAN: Can we take just a minute?

16 MR. MYLES: Sure.

17 (Recessed from 12:32 p.m. until 12:33 p.m.)

18 (Stephen Anderson entered the room.)

19 MR. MYLES: Are we ready?

20 MR. RYAN: Yeah.

21 A. I'm ready.

22 Q. BY MR. MYLES: Roger, Exhibit 13, if you could
23 take a look at that, is a letter dated March 3rd, 2003, to
24 Steve Anderson from Dan Trevino. Have you ever seen that
25 before?

1 A. I don't think so.

2 Q. Do you have any personal knowledge with regard to
3 the addendum or amendment to the original Damron Agreement
4 you entered into?

5 A. No.

6 Q. Do you know why it was amended?

7 A. No.

8 Q. I think you told me or you will tell me that
9 after December of 2002, you didn't have anything else to
10 do with the underlying lawsuit, the Damron Agreement, any
11 negotiations or contact with Ellen Levy; is that true?

12 A. That is correct.

13 Q. And that is because you left the company?

14 A. Yes.

15 Q. Do you have a financial interest personally in
16 the outcome of this bad faith lawsuit?

17 MR. RYAN: Object to the form.

18 A. I don't believe so.

19 Q. BY MR. MYLES: In the Damron Agreement you
20 entered into, did CMS reserve the right to get back some
21 of the money they had previously paid dependent upon the
22 lawsuit that SWA filed against Golden Eagle?

23 A. My understanding was that that was part of it.

24 Q. Are you a stockholder with CMS?

25 A. Yes.

1 harming it. CMS breached that duty by negligently
2 manufacturing, mixing and selling SWA defective paint,
3 which physically and tangibly damaged the property of the
4 homeowners for whom SWA performed painting services," end
5 quote. Did I read that correctly?

6 A. Yes.

7 Q. Now, Roger, do you see in your own mind any
8 difference from Mr. Gooch's statement that there was
9 physical damage to the property and the complaint
10 statement that there was physical damage to the property?

11 MR. MYLES: Form and foundation.

12 A. No.

13 Q. BY MR. RYAN: Is there any additional information
14 that Golden Eagle could have gained from what's contained
15 in the complaint than what was contained in Chris Gooch's
16 letter?

17 MR. MYLES: Form and foundation.

18 A. Not that I see.

19 Q. BY MR. RYAN: Ellen Levy never called you ever;
20 is that correct?

21 A. Not that I know of. I never spoke to her.

22 Q. If she would have called you, would you have
23 talked to her?

24 A. Yes.

25 Q. Now, is it your understanding, Roger, that CMS'

1 decision was to go forward with the Damron Agreement, but
2 CMS was not stating that they wouldn't cooperate with
3 Mrs. Levy?

4 A. That's correct.

5 Q. That's your understanding, that CMS never refused
6 to cooperate with Ms. Levy?

7 A. Right. We were always cooperative, as far as I
8 know.

9 Q. From your review of Ms. Levy's letter where she
10 says -- let me find it. I got my exhibits mixed up now.

11 Here it is. It's Exhibit 17 [sic] where it
12 states in the second paragraph, quote, "It has come to my
13 attention that you are entertaining the idea of entering
14 into an agreement with the plaintiff. Please note this is
15 adversary to the advice of counsel," end quote. Do you
16 see that?

17 A. Is that on the first page?

18 MR. RYAN: I think it's only one letter.

19 A. This is 17.

20 MR. MYLES: Exhibit 14 you're talking about?

21 MR. RYAN: Exhibit 12. I can't read my own
22 writing. It looked like a seven. I apologize, Roger.

23 A. That's all right.

24 What was the question?

25 Q. BY MR. RYAN: I just read the second paragraph

1 MR. RYAN: Object to the form and foundation.

2 A. I may have known at the time. I don't recall. I
3 don't know.

4 Q. BY MR. MYLES: Was that explained to you by
5 anyone?

6 A. I don't remember.

7 Q. You also made the statement that Golden Eagle
8 never said that they were going to pay any indemnity
9 dollars. Do you remember that?

10 A. Yes.

11 Q. When they sent you the letter saying they were
12 going to defend under a reservation of rights, was it your
13 impression that they were also telling you they weren't
14 going to pay any money to settle the lawsuit?

15 MR. RYAN: Object to the form and foundation.

16 A. I'm trying to remember. You know, that was a
17 conversation I had with my attorney, and he explained that
18 to me.

19 Q. BY MR. MYLES: What did he explain to you?

20 MS. HALL: Okay. To the extent you're getting
21 into the actual conversations, you're not required to
22 answer that.

23 A. All right. Just that it wasn't in my best
24 interest.

25 Q. BY MR. MYLES: When you got the letter saying

1 that they were going to provide a defense, did you
2 understand that they were also acknowledging that there
3 was potentially coverage under the insurance contract with
4 regard to some of the allegations in the complaint? Did
5 you understand that?

6 A. No. They had always denied that there was
7 coverage.

8 Q. Is that something you discussed with your lawyer
9 and he provided you advice with respect to whether or not
10 they were going to pay or not going to pay under the
11 circumstances? Just answer that "Yes" or "No."

12 A. Yes.

13 Q. With respect to the decision to enter into the
14 Damron Agreement and the ramifications of that, was that
15 something you also discussed with your attorney and he
16 advised you what to do? Just answer it "Yes" or "No."

17 A. Yes.

18 Q. Would it be a fair statement that with respect to
19 the facts and circumstances surrounding entering into the
20 Damron Agreement, whether or not you were going to
21 communicate with Ellen Levy and listen to her advice were
22 all things that were discussed with your attorneys as to
23 what, if any, communication you would have with Golden
24 Eagle or Ellen Levy or anyone else?

25 MS. HALL: Object to form.

1 A. Yes.

2 Q. And you knew that the lawsuit that was then later
3 filed, there was no defense to it; correct?

4 A. There's always a defense. I'm not sure what that
5 question is.

6 Q. Did you make the decision not to inform Golden
7 Eagle that you had entered into a Damron Agreement while
8 you were at the company?

9 MS. HALL: Object to form.

10 A. No.

11 Q. BY MR. MYLES: Do you know who did?

12 A. I don't think anybody did.

13 Q. Do you know why no one notified them that you had
14 stipulated to a judgment when the complaint was filed?

15 MS. HALL: Object to form.

16 A. Do I know why -- I'm sorry. What was the
17 question again?

18 Q. BY MR. MYLES: Here's what has me a little
19 confused. When the complaint is filed, a lawyer on your
20 behalf tenders the defense of that complaint to Golden
21 Eagle.

22 A. Okay.

23 Q. Do you remember looking at that letter?

24 A. Yes.

25 Q. Why was that done if you had already stipulated

1 and admitted liability with respect to that very lawsuit?

2 MR. RYAN: Object to the form and foundation.

3 Q. BY MR. MYLES: Do you know?

4 A. You would have to ask the attorney. I don't.

5 Q. I would have to ask the lawyer because you didn't
6 make that determination; correct?

7 A. I don't remember at the time.

8 MR. MYLES: I think that's all the questions I
9 have. Thank you.

10 Read and sign?

11 MS. HALL: Yes, please.

12 MR. RYAN: I don't have anything further.

13 MR. MYLES: Thanks a lot.

14 THE WITNESS: You're welcome.

15 (12:50 p.m.)

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ROGER M. ROWLEY

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1 STATE OF ARIZONA)
) ss.
2 COUNTY OF MARICOPA)

3

4 BE IT KNOWN that the foregoing deposition was
5 taken before me, Mary F. Vincelette, RMR, a Certified
6 Court Reporter in the State of Arizona; that the witness
7 before testifying was duly sworn by me to testify to the
8 whole truth; that the questions propounded to the witness
9 and the answers of the witness thereto were taken down by
10 me in shorthand and thereafter reduced by computer-aided
11 transcription to print under my direction; that the
12 deposition was submitted to the witness to read and sign;
13 that the foregoing 69 pages are a true and correct
14 transcript of all proceedings had upon the taking of said
15 deposition, all done to the best of my skill and ability.

16 I FURTHER CERTIFY that I am in no way related to
17 any of the parties hereto nor am I in any way interested
18 in the outcome hereof.

19 DATED at Phoenix, Arizona, this 11th day of May,
20 2004.

21

22

Certified Court Reporter
Certificate No. 50551

23

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