

FILED

JAN 22 2015

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____ DEPUTY CLERK

JOHN EAKIN

Plaintiff,

v.

AMERICAN BATTLE MONUMENTS
COMMISSION, *et al*

Defendants

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CIVIL ACTION NO. SA-12-CA-1002-FB(HJB)

**PLAINTIFF-INTERVENOR'S REPLY TO DEFENDANTS' OPPOSITION TO
MOTION TO INTERVENE FILED BY SALLY HILL JONES**

Plaintiff-Intervenor Dr. Sally Hill Jones files her reply in support of her Motion to Intervene.

Defendants attempt to essentially moot Plaintiff-Intervenor's Motion to Intervene by the presentation of an eleventh-hour claim that unidentified remains X-345 are not the remains of her family member. Defendants' claim is not supported by scientifically valid evidence or admissible testimony; rather, it is based on what they admit are unvalidated test results using an unaccredited test protocol. This is not unlike their suggestion, nearly six months ago, that Plaintiff's case was moot because they could identify the X-816 remains in 90 – 120 days (Fletcher Decl. ECF Doc. No. 64-1 at 5).

Defendants further argue that Plaintiff-Intervenor's interests are adequately represented by Plaintiff acting *pro se*. (Def Reply ECF Doc. No. 96 at 4) Conversely, Defendants then argue that the two cases are very different. (*Id.* at 3-4)

I. Defendants' Claim of Non-Identification is not Verifiable nor Admissible

Defendants argue that Gardner's notification of Plaintiff-Intervenor that Unknown Remains X-345 are not those of her uncle precludes her legal interest in this action. However, the non-identification is not admissible, not valid, and questionable due to its suspicious timing.

Besides being scientifically invalid, the Gardner Declaration (ECF 96-1) is hearsay in that Gardner, as a casualty officer, is not qualified to interpret DNA test results and makes no effort to qualify either himself nor Colonel Tremaine as experts in the field of DNA testing. (Fed. Rules Evidence 702) The witness' testimony is based on a memo which states, "current DNA testing methods do not yield reproducible results" and that their laboratory accreditation standards prevent them from issuing a signed case report in this case.

"'General acceptance' is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence, especially Rule 702, do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands." *Daubert v. Merrell Dow*, 509 U. S. 597, 585 (1993)

Finally, the timing of this eleventh hour claim of non-identification is suspicious. As noted in the Declaration of Col Kelly E. Fletcher (ECF 64-1), Defendants claimed almost six months ago that they could identify X-816 in 90 – 120 days. Now, Defendants are putting forth the same claim about being able to identify X-345 in 2015. In addition, Defendants made a similar "non-identification" in 2003 to the family member who first discovered that remains of Unknown X-345 were one of seven possible servicemen. See Declaration of Sally Hill Jones, attached. Yet, twelve years later, Defendants are still unable to tell this Court the actual identity of X-345.

These non-identifications, along with Defendants' attempt to moot Plaintiff Eakin's case by suddenly deciding to exhume the remains in Grave 717, (ECF Doc. No. 64) bring into question Defendants' motives for these decisions and therefore the accuracy of these results.

Therefore, the nonidentification fails to negate the legally-cognizable interest of the Plaintiff-Intervenor in this action. At the least, Plaintiffs should have an opportunity to examine the evidence and cross-examine Defendants' expert witness in this matter. In addition, the suspicious non-identification strengthens the case for Plaintiff-Intervenor's request for relief in the form of independent testing of the remains. (ECF Doc. No. 90-1 at 21).

II. **Intervenor Satisfies all Requirements to Intervene as of Right**

Intervenor satisfies all four requirements to intervene as of right. Fed. R. Civ. P. 24(a); *Ross v. Marshall*, 426 F.3d 745,753 (5th Cir. 2005)

(1) Defendants do not dispute that Intervenor's motion to intervene is timely.

(2) Intervenor has a legally protectable interest. While Defendants may dispute Intervenor's claim to unidentified remains X-345, the fact is that those remains are unidentified and Defendants have not submitted valid scientifically recognized, much less admissible, evidence of the identity of X-345. Additionally, Intervenor claims a legally protectable interest to due process which has been denied her by Defendants.

(3) Disposition of that case may impair or impede the potential intervenor's ability to protect her interest. This prong also rests upon Defendants' scientifically invalid claim of "non-identification" of the X-345 remains.

(4) Last, Intervenor believes it obvious that the existing parties do not adequately represent her interest. "The final requirement for intervention of right under Rule 24(a)(2) is that the would-be intervenor's interest not be adequately represented by existing parties. The burden

of establishing inadequate representation is on the applicant for intervention. The Supreme Court has decided "[this] requirement ... is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Edwards v. City of Houston*, 78 F.3d 983, 999 (5th Cir. 1996) (internal citations omitted) see *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n. 10, 92 S.Ct. 630, 636 n. 10, 30 L.Ed.2d 686 (1972)

Early in these proceedings, this Court found that it would be in the interest of justice to appoint pro bono counsel for Plaintiff in this case. (Order ECF Doc. No. 35) A conflict later arose between Plaintiff and appointed counsel and this Court vacated the appointment. (Order ECF Doc. No. 71) It was at this point that Intervenor recognized that Plaintiff *pro se* did not adequately represent her interests. The Court's finding that the interests of justice required the appointment of professional counsel supports Intervenor's contention that her interests are not adequately protected by reliance on Plaintiff's *pro se* representation.

"Although failure to satisfy any one element precludes the applicant's right to intervene, we have noted that "the inquiry under subsection (a)(2) is a flexible one, which focuses on the particular facts and circumstances surrounding each application," and concluded that "intervention of right must be measured by a practical rather than technical yardstick." Intervention should generally be allowed where 'no one would be hurt and greater justice could be attained.'" *Ross v. Marshall*, 426 F. 3d 745 (5th Cir 2005) (internal footnotes omitted)

III. CONCLUSION

Defendants' unvalidated and inadmissible claim of non-identification should be rejected as a basis for denial of Intervenor's right to intervene. Intervenor meets all the requirements to intervene as of right and should be allowed to do so. For the above reasons and as stated in Dr.

Jones' Motion to Intervene, the Court is urged to grant Intervenor's motion in the above styled case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of January, 2015, a true and correct copy of the foregoing was forwarded to Defendants and Plaintiff by First Class Mail at the following addresses:

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