

Granting Plaintiff's motion to vacate the judgment will prevent a manifest injustice to Plaintiff because Defendants have not attempted to identify all the remains of his family member.

Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships, which, from time to time, arise from a hard and fast adherence to another court-made rule, the general rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility, which enables it to meet new situations, which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 at 248 (1944)

As set out more fully below, Plaintiff objects to all of the findings and conclusions of the Report and Recommendation (ECF No. 139) except those pertaining to the issues of *res judicata* and collateral estoppel. (*Id.* At 7 fn 6) .

I. The Court and Plaintiff were misled by Defendants false statement that they had identified all of the remains of Private Kelder in their possession.

The basic premise of Plaintiff's objections is that the Court was misled, whether knowingly or not, by Defendant's statement that "ten sets of remains" had been approved for disinterment. (ECF No. 64 at 1). On January 20, 2014, Defendants informed this Court that they had "identified the remains of Private Arthur H. Kelder" from the remains disinterred from the Manila American Cemetery. (ECF No. 98 at 1) Based on these representations, the Court, over Plaintiff's objection, (*see* ECF No. 73, ECF No. 110 at 1) issued an order (ECF No. 120 at 2) concluding that "the remains of Private Kelder have been identified" and effectively concluding this litigation. At no point did Defendants state or infer in any way that anything less than the

anatomically complete remains of Private Kelder had been identified. Based upon the wording of the order, the Court reasonably understood that all of the subject remains had been identified and would be returned to Private Kelder's family for interment as they might direct.

Most recently, Defendants have again disingenuously equivocated on this point and again attempt to mislead the Court by Dr. Berg's statement that, "[t]he DPAA Laboratory has in its possession no additional remains for which it can be said that they are likely those of PVT Kelder, rather than another servicemember." (ECF No. 137 at 3) Elsewhere they state that they haven't yet completed all testing. (ECF No. 137-4 ¶ 11) In other words, a careful reading of their claim is that they have none of Private Kelder's remains because they haven't looked for them.

At no time prior to the issuance of judgment did Defendants inform this Court or the Kelder family that the disinterred remains were substantially commingled or that there may be difficulties in fully identifying all of the remains of Private Kelder.

Subsequently, Defendants representatives briefed the Kelder family and informed them that only portions of the remains of Private Kelder had been identified, but promised to produce additional portions as they were identified. The Kelder family accepted the identification based on the government's assurance that the balance of the remains would be timely produced for burial. Two additional deliveries of a few bones were produced and buried with the original installment of remains. The most recent delivery was in 2019.

While Plaintiff has no evidence that Defendants' statements implying that all of Private Kelder's remains had been identified were intended to deceive this Court, Defendants should have reasonably been aware of the extent of the intentional comingling of the remains and

the inherent difficulty inherent in reassociation and identification using the antiquated DNA technology they had chosen to employ.

Plaintiff's Exhibit 4 to his motion to vacate judgment (*Anthropologist's Memo* ECF No. 128-3) details Defendants unlawful practice of assembling unrelated remains to create a set of anatomically complete remains for burial and concealing the rest. Bones, which were not needed to create an anatomically complete set for burial, were placed in caskets packed full to capacity and buried as a single Unknown and referred to as "CIL caskets." That this practice was unauthorized is shown by the overprint on the files indicating that the collection of remains was not to be considered for selection as the WWII Unknown.

Had Defendants actions occurred in the State of Texas they would have been guilty of the offense of Abuse of Corpse.¹

While Defendants knowledge of this practice and the memo detailing it is unknown, they reasonably should have been aware of it as this same memo is contained in all of the Individual Deceased Personnel Files (IDPF) pertaining to the USS Oklahoma. Defendants

¹ Texas Penal Code - PENAL § 42.08. Abuse of Corpse (Current as of January 01, 2024) |

(a) A person commits an offense if the person, without legal authority, knowingly:

(1) disinters, disturbs, damages, dissects, in whole or in part, carries away, or treats in an offensive manner a human corpse;

(2) conceals a human corpse knowing it to be illegally disinterred;

(3) sells or buys a human corpse or in any way traffics in a human corpse;

(4) transmits or conveys, or procures to be transmitted or conveyed, a human corpse to a place outside the state; or

(5) vandalizes, damages, or treats in an offensive manner the space in which a human corpse has been interred or otherwise permanently laid to rest.

(b) An offense under this section is a state jail felony, except that an offense under Subsection

(a)(5) is a Class A misdemeanor.

(c) In this section, "human corpse" includes:

(1) any portion of a human corpse;

(2) the cremated remains of a human corpse; or

(3) any portion of the cremated remains of a human corpse.

[emphasis added]

undertook to identify the Unknowns from the USS Oklahoma beginning in 2003.² Therefore, Defendants reasonably should have been aware of the extensive commingling of remains and the inherent difficulties they would encounter in identification of Private Kelder's remains when they falsely informed this Court that his remains had been identified.

Defendants' knowledge of this practice was confirmed most recently by Dr.

Berg's statement:

17. This is a picture of the contents from each of the ten (10) caskets of unknowns that were associated with CG 717 directly after they were disinterred in Manila, Republic of the Philippines ("R.O.P."). Each table has the remains from one (1) casket. It is important to understand these are not skeletons from single humans, but in fact are just representations of skeletons that were constructed by the Army Graves Registration Service ("AGRS") back in the 1940's/1950's. None of these are the skeleton of any one individual, or of Pvt. Kelder. They are a conglomeration of at least between three (3) and nine (9) different people (to the best of our scientific testing). The remains previously thought to be Pvt. Kelder, are in fact the remains of at least seven (7) different servicemembers, including Pvt. Kelder. The identified remains of Pvt. Kelder actually came from four (4) of these tables (and as noted supra, another disinterred grave in the United States).

Declaration of Dr. Gregory Berg, November 26, 2024, (ECF No. 137-4 ¶ 17)

Defendants report that as late as November 26, 2024, they still did not have all the necessary family reference samples needed to complete DNA testing and identification of all the remains recovered from Cabanatuan Common Grave #717. (ECF No. 137-4 ¶ 11)

Defendants' claim of having identified these commingled remains based on identification of only a few bones is either very poor science or intentionally deceptive.

² Defense POW/MIA Accounting Agency, The USS Oklahoma Project, <https://dpaa-mil.sites.crmforce.mil/Projects/WWII/USSOklahoma>, last viewed Jan 23, 2025

II. The delay in showing that Defendants have mishandled and failed to return the complete remains of Private Kelder was not due to Plaintiff's lack of diligence.

Plaintiff's motion to vacate the judgment likely would have been filed under FED. R. CIV. P. 60(b)(3) in less than one year after judgment had discovery not been terminated prematurely due to Defendants' false statements and had Defendants not actively concealed relevant documents. Plaintiff has been diligent in searching for the documents necessary to show Defendants misconduct.

When discovery was prematurely terminated, Plaintiff was forced to file multiple FOIA requests to obtain documents showing that Defendants were, or should have been, aware that Private Kelder's complete remains had not been produced as represented by Defendants. Ultimately, Plaintiff resorted to filing a FOIA action in this Court before Judge Lamberth. (5:16-cv-00972-RCL) This litigation necessary to show Defendants misconduct was not concluded until August 23, 2024, more than eight years later, and resulted in the production of more than 504,000 documents consisting of an estimated 25 million pages. Considering the volume of documents produced, and Defendants opposition to producing them, it is surprising that the "smoking gun" anthropologist's memo showing Defendants misconduct was ever found.

Plaintiff's motion to vacate was also delayed by Defendants repeated assurances that they would produce additional portions of Private Kelder's remains and two such token, but incomplete, deliveries actually occurred. The Kelder family has been collectively very patient, but that patience has worn thin after five years since the last delivery of remains. Ultimately, Plaintiff's family felt they had no choice but to ask this Court's assistance in fully accounting for the remains of their family member.

Plaintiff has diligently searched for the documents necessary to show Defendants misconduct. Further, Defendants have been allowed reasonable time to produce Private Kelder's

remains as they told this Court they had already done. The complete remains of Private Kelder should no longer be withheld from the Kelder family.

While Defendants state that they possess a considerable amount of remains recovered from Cabanatuan Common Grave #717, (ECF No. 137-4 at 11) Defendants report that as late as November 26, 2024, they still did not have all the necessary family reference samples needed to complete DNA testing and identification of all the remains recovered from Cabanatuan Common Grave #717. (*Id.*) Defendants' incompetence or refusal to do their job should not be further rewarded.

Clearly, Defendants statement that they had identified the remains of Private Kelder was premature and false. Any delay in pursuing this Court's assistance has not been due to lack of diligence by Plaintiff.

III. Defendants' false statement that Private Kelder's remains had been identified is grounds for relief from a Final Judgment under Fed. R. Civ. P. 60

While Defendants' false statements that Private Kelder's remains had been identified is grounds for relief under Fed. R. Civ. P. 60(b)(2) or (3), those provisions are unavailable because Defendants successfully concealed their misdeeds and the documents describing them beyond the one-year limit prescribed by FED. R. CIV. P. 60(c). Therefore, Plaintiff's motion is based on Fed. R. Civ. P. 60(b)(6). Plaintiff further prays for relief under Fed. R. Civ. P. 60(d)(3) which allows a court to set aside a judgment for fraud on the court.

Clearly, it was due to Defendants misconduct that Plaintiff was forced to show extraordinary circumstances under Fed. R. Civ. P. 60(b)(6) and that Plaintiff did so as soon as possible.

IV. The judgment did not extinguish the controversy.

On *de novo* review prior to entry of judgment, this Court concluded that there was no live controversy regarding Plaintiff's requested relief because the remains of Private Kelder have been identified, accordingly the Court entered judgment dismissing Plaintiff's suit.. (ECF No. 120 at 2, ECF No. 139 at 4) The Court accordingly entered judgment dismissing Plaintiff's suit. (ECF No. 121) Plaintiff has moved to vacate that judgment as Private Kelder's remains have not in fact been identified and Defendants have concealed additional portions of remains.

The original controversy was not extinguished when judgment was entered because Defendants had not actually identified Private Kelder's remains.

This is the very same issue put forth in Plaintiff's First Amended Complaint (ECF No. 39 at 2) and it has not been resolved. As set out below, Plaintiff has a right to possession of all of the remains of Private Kelder. Defendants have stated that they consider Private Kelder to have been identified and they have no intention of further testing. Contemporaneously, Defendants describe the large volume of remains from Cabanatuan Grave #717 that they have not tested and which almost certainly contains substantial portions of Private Kelder's remains. (ECF No. 137-4 at 14, 15)

Through related litigation in this Court and other research, Plaintiff obtained the records necessary to conclusively identify the remains of his family member. Defendants have arbitrarily and capriciously refused to consider this new evidence or conduct DNA sequencing to identify the remains. Defendants have concealed documents, filed superseded and misleading documents with this Court, and systematically denied Plaintiff's right to due process. Accordingly, Plaintiff seeks injunctive relief, mandamus, and other appropriate relief acknowledging that the remains identified as Unknown X-816 Manila #2 ("X-816") are those of Private Arthur H. "Bud" Kelder and that his survivors have the right to possess such remains for burial as they may direct.

First Amended Complaint (ECF No. 39 at 2)

By identification of even a single bone from the disinterred caskets as that of Private Kelder, Defendants have confirmed that they possess the remains of Private Kelder and until every one of the disinterred remains is identified, or the anatomically complete remains of Private Kelder have been identified, Defendants cannot dispute that they possess the remains of Private Kelder.

The Fifth Circuit has recognized the existence of a "quasi-property" right ... [in a dead body] by virtue of state law. (*Arnaud v. Odom*, 870 F. 2d 304 - Court of Appeals, 5th Circuit 1989) "The right to bury a corpse and preserve its remains is a legal right which is well recognized, and it is held that the courts will protect such right and the right to dispose of a corpse by a decent burial which includes the right to possession of the body in the same condition in which death leaves it. 17 Tex.Jur. 2d 485; *Burnett v. Surratt*, Tex.Civ.App., 67 S.W.2d 1041. . . . Any interference with such right of possession of the body of a deceased by mutilation or otherwise disturbing the body without the consent of the next of kin is an actionable wrong for which a claim for damages may be maintained. *Love v. Aetna Casualty & Surety Company*, Tex.Civ.App., 99 S.W. 2d 646, affirmed 132 Tex. 280, 121 S.W.2d 986." (cited *Terrill v. Harbin*, 376 SW 2d 945 – 1964)

V. Defendants Have Deliberately Failed to Return All Remains

Defendants' denial that they possess any additional portions of the remains of Private Kelder is disingenuous. First, Defendants state, "Pvt. Kelder has been accounted for, his identified remains have been released, and all available information has been provided to his primary next of kin." (ECF No. 137-4 ¶ 14) Then, they state, "Once an identification is made, there is no mandate to continue testing for additional remains." (*Id.* ¶ 15) In other words,

Defendants are saying that they don't have any of Private Kelder's remains because they haven't looked for them and they have no obligation to do so.

The laboratory manager's declaration (ECF No. 137-1 ¶ 11) reports that DNA testing of the fourteen caskets of remains disinterred from Cabanatuan Common Grave #717 found at least eighteen different DNA sequences. This indicates that those fourteen caskets contained portions of at least four more individuals than had been reported as having been interred in this grave. This would indicate that portions of remains equivalent to four individuals were classified as CIL portions and likely interred in "CIL Caskets" as indicated by the Anthropologists' Memo (ECF No. 127-4) and Dr. Berg. (ECF No. 137-4 ¶ 17)

In addition to returning more than one-hundred identifications per year, by statute (10 U.S.C. 1501-1513, *inter alia*), and annual expenditures estimated at nearly \$200 million tax dollars, Defendants have conceded their obligation to return the identified remains of deceased servicemembers to their families for burial, but contend here that they have no obligation to officially identify these remains. (*Mot. Dismiss* ECF No. No. 47 at 7) However, with the government's official recognition that Private Kelder's remains are among those disinterred from Cabanatuan Common Grave # 717, the situation changes from one of identification of remains to proper reassociation of each individual and care of the complete remains of a deceased servicemember. (10 U.S. Code § 1481 *inter alia*) Defendants can no longer argue that they have no ministerial duty to identify and return the remains of Private Kelder to his family for burial.

VI. The Report and Recommendation erroneously considered the Patterson case

The Report and Recommendation erroneously considered the Patterson case. (ECF No. 139 at 6). Plaintiff was not a party to this case, which was filed subsequent to judgment in the instant case.

While Patterson was decided on Due Process violations and violations of the APA (ECF No. 139 at 4), the instant case has always been primarily grounded in Mandamus and, as shown above, Statute (10 U.S.C. 1481, 1501, *inter alia*) and Defendants actions in the partial identification of Private Kelder's and others' remains show Defendants obvious ministerial duty to Plaintiff.

Respectfully submitted,

/s/ John Eakin

John Eakin, Plaintiff *pro se*
9865 Tower View, Helotes, TX 78023
210-695-2204 or 210-695-0006
johnjeakin@gmail.com
jeakin@airsafety.com

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all parties of record.

/s/ John Eakin

John Eakin, Plaintiff *pro se*