

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**  
CASE NUMBER: 9:03-cv-81110-CIV-HURLEY/HOPKINS

MAUREEN STEVENS, as Personal  
Representative of the Estate of  
ROBERT STEVENS, Deceased, and  
on behalf of MAUREEN STEVENS,  
Individually, NICHOLAS STEVENS,  
HEIDI HOGAN and CASEY STEVENS,  
Survivors,

Plaintiff,

vs

UNITED STATES OF AMERICA,  
Defendant.

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**PLAINTIFF'S MOTION TO WITHDRAW STIPULATION OF FACT NO. 6**

COMES NOW the Plaintiff, MAUREEN STEVENS, as Personal Representative of the Estate of ROBERT STEVENS, deceased, by and through her undersigned counsel, and hereby files this Motion to Withdraw Stipulation of Fact No. 6 previously filed in this cause on June 5, 2009, and as grounds therefore would state as follows:

1. On June 9, 2009, Plaintiff and Defendant, United States of America, entered into certain Stipulations of Fact prior to any discovery being undertaken in this matter.
2. Those Stipulations of Fact were entered into prior to any depositions being taken in this cause and prior to the production of documentary evidence, which discovery continues to this date. One of those stipulations, No. 6 stated:

As was announced on August 6, 2008 by the U.S. Department of Justice, Dr. Bruce Ivins was the person who sent the anthrax to which Robert Stevens was exposed.

3. That as a result of evidence gathered in this cause, and specifically depositions<sup>1</sup> taken of Dr. Bruce Ivins' immediate supervisors/superiors at the United States Army Medical Research Institute for Infectious Diseases (USAMRIID) in late January, 2011, the Plaintiff hereby moves to withdraw her Stipulation of Fact No. 6 that Bruce Ivins was the person who sent the anthrax to which Robert Stevens was exposed.

**Dr. Byrne's Deposition**

4. Specifically, Plaintiff took the deposition of William Russell Byrne, M.D. on January 18, 2011, and the deposition of Gerard P. Andrews, Ph.D., on January 26, 2011. Dr. Byrne was Chief of Bacteriology at USAMRIID from August, 1998 to January, 2000 (10/5) and Dr. Andrews was Chief of Bacteriology at USAMRIID from 2000 to 2003 (12/1-13/4). As such, these two men were the immediate supervisors/bosses of Dr. Bruce Ivins in the period immediately preceding and the period immediately succeeding the anthrax attacks (September, 2001 and October, 2001).
5. Dr. Byrne testified that all the senior people, including Bruce Ivins, were rated by him in his capacity as Chief of Bacteriology (13/10). He knew Bruce Ivins from the time he arrived at USAMRIID (25/10). He also had contact with Dr. Ivins at St. John the Evangelist Church (27/15).
6. Dr. Byrne testified that you could run a good size study for BSL (Biological Safety Level) and three projects out of that lab at USAMRIID. Many people worked there including post-docs, post-doctoral fellows from National Science Council (including non-governmental employees) as well as a lot of foreign nationals either employed as contractors (non-governmental employees) or NSC fellows. He stated that "we had people from Egypt, Poland, India, Iran, Latvia and China" (71/13 – 71/24).
7. Dr. Byrne also testified that the RMR-1029 flask (from which it is agreed that the attack anthrax came) was kept in Building 1412 and then it was moved to Building 1425 (74/6).

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<sup>1</sup> In order to maximize confidentiality, Plaintiff has not filed the Deposition of Dr. Byrne and Dr. Andrews, but will do so if the court requests them to be filed.

8. When asked the question directly, Dr. Byrne testified that “I don’t believe that Bruce Ivins was the perpetrator” (75/16). FROM PG. 4
9. His basis for that opinion was that “it just wasn’t the person I knew” number 1, and number 2, the equipment used to produce the anthrax powder sent in the letters has not been identified. He stated that the speed vac (lypholizer) wasn’t in the suites of the BSL and he did not see how it would be possible to not have evidence that it was used to lypholize that powder. Third, he stated that Bacteriology Department is very close quarters. It is not a large area and it is hard to do things unobserved. People are coming and going in different labs. To produce that volume (of powder), it would have been very difficult not to be observed (75/16). He reiterated that if the laboratory’s equipment (lypholizer) had been used to lypholize that powder, you would have been able to find evidence of it pretty easily (76/23). The powder would have gotten everywhere inside the lypholizer. “It was so light, it was virtually impossible to weigh it – it was like a mist. It would have contaminated every bit of space inside the lypholizer and you could not have gotten rid of all of it” (77/4).
10. Dr. Byrne reiterated that it was his opinion that if the lypholizer was identified as the machine that was used to dry the powder, that there would be evidence of RMR-1029 there, yet it was never found. He said that the spores get out and you can’t get rid of them all. And even if you killed them, the DNA is still left behind (77/14).
11. Additionally, Dr. Byrne testified that if Dr. Ivins had worked at night, it would have generated a lot of plates, and people notice stuff there (78/1). People notice if there is a bag full of plates being sterilized, people are going to notice something that’s different (78/11). Dr. Byrne indicated that people would notice a lot of plates being sterilized because they work with such hazardous organisms. “They pay attention to things because your lack of observation could cost you your life” (78/19).
12. Dr. Byrne also stated that “to my knowledge, Dr. Ivins did not have the lab skills to make the fine powdered anthrax used in the letters” (83/16).

13. Dr. Byrne was adamant that Bruce Ivins did not have anything to do with the anthrax attacks, although he agrees that the genetic analysis validly traced the attack anthrax back to RMR-1029 (71/3-8) (171/14-18).

**Dr. Andrew's Deposition**

14. Dr. Andrews, who was Dr. Ivins' supervisor/superior from 2000 to 2003, also testified to his belief that Dr. Ivins had nothing to do with the anthrax attacks. One reason for his opinion is that the FBI says Dr. Ivins worked the 20 hours or less at night in the lab preparing the attack anthrax which would be, in Dr. Andrew's opinion, absolutely insufficient to make the volume of spores that were estimated to be in those letters collectively (73/16-20). He said the amount of time would probably be off by "orders of magnitude" (supra). In his opinion, the effort needed to generate the spores and dry the spores to match what he saw as the evidence (in the envelopes) was probably in the range of six months to a year's worth of work pretty much dedicating three-quarters to full-time during the work week (75/2-9).

15. Dr. Andrews indicated that where Dr. Ivins was operating, with levels of concentration he originally had in liquid form, it would take a very long period of time to arrive at or achieve the type of concentrations that were in the letters and that "Bruce never made dry spores" (77/8-21).

16. Dr. Andrews indicated that what he saw strongly suggested to him that there were some downstream processing methodologies that were used, or experimented with, on the spores sent in the letters and that Bruce Ivins would not have any idea how to do them. The equipment and facilities that were present in BSL3 at the time were inconsistent with the amount of spores as well as the physical characteristics of the spores (78/3-12). In essence, he stated that Dr. Ivins did not have the equipment to grow, harvest, store and develop the concentrations found in the letters, nor the time in that laboratory necessary to do the work (79/5-14).

17. Dr. Andrews stated: “No, I don’t believe he had the equipment, in my opinion.” He said that the equipment in BSL3 had limitations in that the lypholizer was a low-volume lypholizer that could handle maybe up to 50 mils at a time in separate small tubes. He opined “where would he do it without creating any sort of contamination is beyond me, but it has been speculated that the lypholizer may have been moved into a Class 2 Biological Safety Cabinet to prevent spores from flying everywhere. I would think the physical size of the lypholizer would be difficult to get the entire, or the speed vac to get the entire apparatus under the hood. It might be possible to get the apparatus under the hood; however, there would be contamination of it inside the hood if that was the case” (79/25-80/1-25, 81/1). Dr. Andrews further stated that the HEPA filter would capture a lot of the contamination and those hoods were never serviced by project investigators such as Dr. Ivins (81/4-16).
18. Dr. Andrews summed up his testimony by saying that from his perspective and the knowledge that he has of the equipment, the type of organism and the people, he didn’t think that there was sufficient equipment present at USAMRIID to develop the type of powders that were seen in the envelopes. Secondly, he didn’t think that the summary of hours that Dr. Ivins supposedly spent in the evenings before the two mailings represent a sufficient amount of time to develop the type of spores and concentrations that were seen in the envelopes. Third, Dr. Ivins did not have the technical expertise to achieve the type of development of these spores that were put in the envelopes (83/23-84/21).
19. Dr. Andrews stated that in his opinion, it would take more than one person to achieve this attack because of the unusual physical characteristics of the powders. He did not believe that a single person could achieve the physical or biochemical characteristics of the powder simply by putting them in a speed vac (85/9-15).
20. When asked if he had any other basis for his opinion that Dr. Ivins was not the anthrax attacker, he stated there was no forensic evidence of any of the spores of a physical

nature that were found in those envelopes that compared with the same as were found at USAMRIID.

21. Interestingly, Dr. Andrews indicated that he held his opinion with a degree of 95% confidence that the final weaponized product could not have been produced at USAMRIID (94/1-4). He also added that the spore preparation between 1997 and 1999 was being stored in a different building, meaning Building 1412 (94/16-23) and that the fact that the original RMR-1029 anthrax that was developed by Dr. Ivins was stored in the 1412 Building would have given other people at USAMRIID access including other people besides Bacteriology Division personnel (95/1-8). When asked how many other people would have access to the RMR-1029 at that time when it was in the other building, he would say “more than ten people”.
22. Finally, Dr. Andrews indicated that his opinion was firm that Dr. Bruce Ivins was not the anthrax perpetrator not only because he didn’t understand or have the technology available to him, didn’t have the time available to him, and didn’t have the facilities available to him to accomplish this at USAMRIID, there was no indication to him “in the sixteen years that I’ve known him, that he understood weaponization technology of anthrax spores nor did any of my colleagues ever talk to me about his interest or understanding or if he showed any kind of knowledge of being able to downstream process these preparations in dry form” (172/8-25). Dr. Andrews also noted the fact that Dr. Ivins “did pass two polygraphs” (173/22).
23. That based on the above testimony, Plaintiff feels compelled to move to withdraw her Stipulation of Fact (No. 6) that Dr. Bruce Ivins was the anthrax perpetrator.

#### **MEMORANDUM OF LAW**

The trial court has broad discretion in determining whether to a hold party to a stipulation, see Morrison v. Genuine Parts Co., 828 F.2d 708 (11th Cir. 1987); Blohm v.

Commissioner of Internal Revenue, 994 F.2d 1542, 1553 (11th Cir. 1993). Four factors are considered as significant in that analysis Waldorf v. Shuta, 142 F.3d 601, 616 (3d Cir. 1998):

- 1) The effect of the stipulation on the party seeking to withdraw the Stipulation,...
- 2) The effect on the other parties to the litigation,...
- 3) The occurrence of intervening events since the parties agreed to the stipulation,... and
- 4) Whether evidence contrary to the stipulation is substantial.

The case sub judice is unique in many respects, and one of those unique aspects is directly relevant to this motion. This case arises from the death of the decedent in October of 2001 from Anthrax derived from the Defendant's laboratory at Fort Detrick, Maryland. From the date of that incident, the Federal Bureau of Investigation engaged in an extensive investigation of the incident and did not come to its conclusion regarding the perpetrator until almost seven years later in 2008. While the Plaintiff filed this case in 2003, due to intervening legal issues, including an appeal to the Eleventh Circuit and the Supreme Court of Florida, no discovery was engaged in until 2009. A joint scheduling order was entered into in April of 2009, the stipulations were entered into on June 8, 2009, and discovery commenced thereafter.

The substantial documentation produced by the government early in discovery did not mention any of the conflicting evidence regarding Dr. Ivins' involvement or the conclusions of his immediate supervisors, as set forth in the depositions above. While normally one party would not rely on the adversary's investigative materials, this is a unique case in light of the extensive presuit investigation of the FBI, entirely independent of this litigation, which created a

situation where such reliance was not unreasonable at the time the stipulation was entered into by the Plaintiff.

At the time this stipulation was entered into, Plaintiff was aware of the FBI's conclusion as to the identity of the perpetrator, and the lengthy investigation which had preceded it, and did not have reason to doubt the FBI's resolution. However, Plaintiff has not been informed of many facts elicited in the investigation including that Dr. Bruce Ivins had passed two polygraph tests, and that two of his superiors had serious concerns about his capability, access to equipment, and time constraints, all of which convinced them that he could not have been the perpetrator. These facts, contradictory to the FBI's conclusion, were not determined until after discovery was commenced. In fact, the depositions of Dr. Byrne and Dr. Andrews were not taken until January of this year.

In considering the four factors identified above, the effect of the stipulation on Plaintiff would be to unreasonably limit the presentation of the evidence to the fact-finder, and impair the ability to rebut the defenses of the Defendant. On the other hand, withdrawing from the stipulation would have no real effect on the Defendant with respect to its preparation or presentation of its case, since the government had over seven years of uninterrupted investigation time prior to any of the discovery in the case sub judice. The intervening events represented by the depositions of Dr. Byrne and Dr. Andrews, as well as the disclosure of the fact that Dr. Ivins had passed two polygraph tests lead to the conclusion that the evidence contrary to the stipulation is substantial, and certainly should be considered by the fact-finder in achieving a just resolution of this lawsuit. To preclude the Plaintiff from presenting all substantial relevant evidence, especially on the issue of the identity of the perpetrator, would be a manifest injustice that could be avoided by permitting her to withdraw Stipulation of Fact No. 6.




Therefore, for the reasons stated above, Plaintiff respectfully requests leave to withdraw Stipulation of Fact No. 6.

I HEREBY CERTIFY that a copy of the foregoing has been furnished to all counsel of record on the attached list, by electronic filing this 2<sup>nd</sup> day of April, 2011.

Respectfully submitted,

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