STATE OF MAINE
WALDO, SS.

SUPERIOR COURT
Civil Action
Docket No. BELSC-CV-10-41

ALEXIS INGRAHAM and BRETT INGRAHAM,

Plaintiffs,

v.

MADELINE B. GRAY d/b/a NICKERNEWS.NET,

Defendant.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

NOW COMES the Defendant, Madeline B. Gray d/b/a Nickernews.net ("Gray"), by and through her undersigned counsel, Preti, Flaherty, Beliveau & Pachios LLP, pursuant to M.R. Civ. P. 56 and respectfully moves this Court for the entry of summary judgment in her favor on Plaintiffs, Alexis and Brett Ingrahams' (collectively "Ingrahams") Complaint. In support, Gray states the following:

The Ingrahams' criminal conviction for animal cruelty puts an end to this defamation action. The Ingrahams allege that Gray published false and defamatory statements accusing them of animal cruelty in the operation of their farm. The Ingrahams, however, each pled guilty to and were convicted of six (6) counts of cruelty to animals. The convictions established that the Ingrahams intentionally, knowingly or recklessly deprived sixteen (16) horses of food, shelter, and medical attention. The Ingrahams' sentence included time in jail, $7,320.00 in fines, $6,000.00 in restitution to the State of Maine, and stringent conditions of administrative release governing their contact with animals.

Under the doctrine of collateral estoppel, a criminal conviction conclusively establishes all facts essential to the conviction and is preclusive in favor of a third party in a subsequent civil action. Moreover, collateral estoppel applies notwithstanding whether the Ingrahams entered

traditional guilty pleas or an *Alford*-guilty pleas (it is not entirely clear which type of plea was entered since the docket reflects simply a "guilty" plea) – meaning they pleaded guilty, but at the same time maintained their innocence. There is no material difference for purposes of estoppel between an *Alford*-guilty plea and a conventional guilty plea. In either setting, a defendant is afforded a full and fair opportunity to litigate the criminal charges and the overwhelming weight of authority supports giving estoppel effect to an *Alford*-guilty plea.

To establish a defamation claim the Ingrahams must prove, among other things, that they were *not* engaged in animal cruelty. Yet, collateral estoppel conclusively establishes the Ingrahams deprived sixteen (16) horses of "necessary sustenance, necessary medical attention, proper shelter, [and] protection from the weather or humanely clean conditions." No longer in dispute, these facts prove fatal to the Ingrahams' defamation claim.

Put simply, the Ingrahams cannot plead guilty to animal cruelty and sue Gray for accusing them of animal cruelty. The basis for this motion is more fully set forth in the following Incorporated Memorandum of Law.

INCORPORATED MEMORANDUM OF LAW

I. STATEMENT OF FACTS

On September 21, 2010, the Ingrahams filed an Amended Complaint[1] against Gray arising out of allegations that Gray published false and defamatory statements accusing the Ingrahams of animal cruelty in connection to the operation of their farm on her website Nickernews.net. (Defendant's Supporting Statement of Material Facts ("DSMF") ¶ 1). The Ingrahams contend that Gray published false and defamatory statements on Nickernews.net

[1] The Ingrahams' Amended Complaint included three claims: 1) Defamation (Count I); 2) Intentional Infliction or Negligent Infliction of Emotional Distress (Count II); and 3) Malice (Count III). *See* Pl.'s Am. Compl. On November 1, 2010, the Court dismissed Count II for failure to state a claim upon which relief may be granted and ruled that Count III is not a separate claim. Order (Nov. 1, 2010).

between approximately February 15, 2010 and July 1, 2010. (DSMF ¶ 2). The Ingrahams allege Gray published a statement accusing the Ingrahams of "massive horse neglect" and having "horses [which] were at immediate risk of starvation and exposure." (DSMF ¶ 3). The Ingrahams allege Gray published a statement accusing the Ingrahams of having "horses being emaciated, without adequate shelter, in need of medical attention." (DSMF ¶ 4).

On November 1, 2010, the State of Maine charged Alexis and Brett Ingraham each with eight (8) counts of cruelty to animals pursuant to 17 M.R.S.A. § 1031(1)(E). (DSMF ¶ 6). Between February 18, 2010 and June 3, 2010, the State alleged that the Ingrahams, being the owners of sixteen (16) horses named Glory, Baby, Rocket, Tricky, Czar, Magnum, Lincoln, Luther, Strawberry, Molly, Grace, Milo, Armani, Bando, Amadeus, and Marie Cassidy at Fair Play Farm in Clinton, Maine, "did intentionally, knowingly or recklessly deprive animals of necessary sustenance, necessary medical attention, proper shelter, protection from the weather or humanely clean conditions." (DSMF ¶¶ 7-11, 14). In addition, between February 18, 2010 and June 3, 2010, the State alleged that the Ingrahams, being the owners of goats, pigs, and dogs "did intentionally, knowingly or recklessly deprive animals of necessary sustenance, necessary medical attention, proper shelter, protection from the weather or humanely clean conditions." (DSMF ¶¶ 12-13).

On June 10, 2011, on the eve of an anticipated six-day trial, the Ingrahams each entered guilty pleas on six (6) counts of cruelty to animals (Class D). The State recommended capping their sentences: Alexis (364 days in jail, all but 30 suspended); Brett (364 days in jail, all but 15 days suspended); one year administrative release with conditions; $25.00 per month supervision fees, $500.00 fines per conviction; $10,000.00 restitution and a permanent ban on owning/caring for horses. On June 29, 2011, the court entered final judgment against Alexis and Brett

Ingraham on six (6) counts of animal cruelty. (DSMF ¶ 15). The final judgments were signed by the Ingrahams. (DSMF ¶ 16).[2]

The Superior Court (Cole, J.) sentenced the Ingrahams each to nine months in jail, all but forty-eight (48) hours suspended, $7,320.00 in fines, $6,000.00 in restitution to the State of Maine, and administrative release for a period of one (1) year. (DSMF ¶ 17).

The administrative release governs the conditions by which the Ingrahams are permitted to own, train, groom, feed, transport, or care for any animal ("care giving"). (DSMF ¶ 18). In the event the Ingrahams engage in care giving they must: (a) inform the Animal Welfare Program; (b) consent and also obtain written consent from the owner of the animal allowing a random search of the premises such that the Animal Welfare Program is able to determine relevant conditions; and (d) obtain written consent from the owner of the property allowing a random search of the premises such that the Animal Welfare Program is able to determine relevant conditions. (DSMF ¶ 19).

II. STANDARD OF REVIEW

"Summary judgment is appropriate when the parties' statements of material facts and the record evidence to which the statements refer, considered in the light most favorable to the non-moving party, demonstrate that there is no genuine issue of material fact that is in dispute and the moving party is entitled to judgment as a matter of law." *Middlesex Mutual Assurance Co. v. Maine School Admin. Dist. No. 43*, 2011 ME 95, ¶ 12, ___ A.2d. ___ (Aug 25, 2011). A party opposing summary judgment may not rest on mere allegations, denials, or conclusory assertions. *Forbes v. Osteopathic Hospital of Maine, Inc.*, 552 A.2d 16, 17 (Me. 1988); M.R. Civ. P. 56(e).

---

2 The State brought a separate civil action against the Ingrahams related to the State's seizure of the Ingraham' animals. That action was settled when the Ingrahams permanently gave up ownership of all of their animals.

III. ARGUMENT

The Court should grant summary judgment in favor of Gray for the following reasons:

A. Under the Doctrine of Collateral Estoppel, the Ingrahams' Guilty Pleas to Animal Cruelty Conclusively Establishes and Bars the Ingrahams from Relitigating the Issue of Whether They Committed Animal Cruelty.

The doctrine of collateral estoppel or issue preclusion prevents relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented in the second action were or might have been litigated in the first action. *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 8, 940 A.2d 1097, 1099. Issue preclusion bars relitigation of "factual issues, not claims" and asks whether a party had a fair opportunity and incentive in an earlier proceeding to present the same issue or issues it wishes to litigate again in a subsequent proceeding. *Macomber v. Macquinn-Tweedie*, 2003 ME 121, ¶ 22, 834 A.2d 131, 139. A party has had a fair opportunity to litigate an issue if that party either controls the litigation, substantially participates in that litigation, or could have participated in that litigation had they chosen to do so. *State v. Hughes*, 2004 ME 141, ¶ 5, 863 A.2d 266, 269.

The doctrine of collateral estoppel establishes that a criminal conviction "conclusively establishes all facts essential to the final judgment of the conviction [and is] preclusive in favor of a third party in a subsequent civil action against the defendant in the civil case." *Butler v. Mooers, et. al.*, 2001 ME 56, ¶ 8, 771 A.2d 1034, 1037, *citing Hanover Insurance Co. v. Hayward, Jr.*, 464 A.2d 156, 160 (Me. 1983). In cases where the conviction is based on a guilty plea instead of a jury verdict collateral estoppel is applied in reliance on the premise that it is the "full and fair opportunity to litigate in the prior suit that protects due process rights." *Id., citing State Mutual Insurance Co. v. Bragg*, 589 A.2d 35, 37-38 (Me. 1991) (defendant's guilty plea to murder precluded relitigation of the issue of defendant's subjective intent to cause bodily injury).

Guilty pleas are allowed only after the court is satisfied that the "defendant in fact committed the crime charged and has determined that the plea is voluntary." *State v. Doucette*, 398 A.2d 36, 38 (Me. 1978); M.R. Crim. P. 11(e).

The Ingrahams pled guilty to the crime of cruelty to animals. (DSMF ¶ 15). The guilty pleas have collateral estoppel effect. *Butler*, 2001 ME at ¶ 8. All facts essential to the conviction – most notably that the Ingrahams deprived sixteen (16) horses on their farm of adequate food, water, shelter, and medical care – are conclusively established. (DSMF ¶¶ 7-11, 14-15). The Ingrahams are now barred from relitigating the factual issue of whether they committed animal cruelty as described in the criminal complaints. (DSMF ¶¶ 7-11, 14). The Ingrahams were afforded a "full and fair opportunity to litigate all essential" facts at the time of the prosecution for animal cruelty.

B. Collateral Estoppel Applies Even if the Ingrahams Entered Guilty Pleas Pursuant to the Supreme Court's Decision in North Carolina v. Alford.

The Ingrahams might contend their convictions resulted from guilty pleas made under *North Carolina v. Alford* and, therefore, collateral estoppel does not apply. *Id.*, 400 U.S. 25, 37 (1970) (holding that a court may constitutionally accept a guilty plea from a defendant who affirmatively protects his innocence when the defendant intelligently concludes that the plea is in his interests and the record contains strong evidence of guilt). This argument is without merit. For purposes of collateral estoppel, there is *no* difference between a guilty plea and an *Alford*-guilty plea.

Maine courts recognize the concept of an *Alford*-guilty plea. *See Oken v. State of Maine*, 1998 ME 196, ¶ 2, 716 A.2d 1007, 1008. An *Alford*-guilty plea occurs when a criminal defendant enters a guilty plea and either: (1) maintains he or she is innocent; or (2) is unwilling or unable to admit guilt. *Alford*, 400 U.S. at 37. Significantly, however, courts overwhelmingly find no material difference between a guilty plea and an *Alford*-guilty plea. *See e.g. U.S. v.*

Tunning, 69 F.3d 107, 111 (6th Cir. 1995) ("[a]n Alford-type guilty plea is a guilty plea in all material respects."); *Ballard v. Burton*, 444 F.3d 391, 397 (5th Cir. 2006) ("[w]e likewise view and Alford plea as nothing more than a variation of an ordinary guilty plea.) (Exhibit A attached); *Blohm v. Comm. Internal Revenue*, 994 F.2d 1542, 1555 (11th Cir. 1993) ("[a] guilty plea's basic chemistry is not transformed by a concurrent claim of innocence.") (Exhibit B attached); *U.S. v. Delgado-Lucio*, 184 Fed. Appx. 737, 740, (10th Cir. 2006) ("an Alford plea is a guilty plea and properly considered as a prior criminal conviction"); *U.S. v. Mackins*, 218 F.3d 263, 268 (3rd Cir. 2000) *cert. denied*, 531 U.S. 1098 (2001) ("an Alford plea is, without doubt, an adjudication of guilt"); *Merchants Mut. Ins. Co. v. Arzillo*, 98 A.D.2d 495, 504 (N.Y. 1984) ("[t]he criminal defendant who enters [an Alford plea] is no less guilty than one who is convicted of the same charge…by a conventional guilty plea"); *Argot v. State*, 583 S.E.2d 246 (Ga. App. 2003) ("[a]n Alford plea is thus a guilty plea and places the defendant in the same position as if there had been a trial and conviction by a jury.).

Accordingly, the weight of authority is that the doctrine of collateral estoppel applies to *Alford*-guilty pleas in the same manner as if the criminal defendant entered a traditional guilty plea. *See e.g. Ballard*, 444 F.3d at 396-401 (holding a conviction pursuant to an *Alford* plea has the same consequences as any conviction for the rule that the defendant cannot maintain a subsequent civil action on a claim that necessarily implies the invalidity of the conviction); *Blohm*, 994 F.2d at 1554 ("it is the voluntary plea of guilt itself, with its intrinsic admission of each element of the crime, that triggers the collateral consequences attending the plea. Those consequences may not be avoided by an assertion of innocence."); and *Cortese v. Black*, 838 F. Supp. 485, 491 (D. Colo. 1993) ("courts treat *Alford* pleas as having the same preclusive effect as a guilty plea"); *Merchants Mut. Ins. Co.*, 98 A.D.2d at 496 (granting summary judgment on the basis collateral estoppel applies to defendant's *Alford*-guilty plea).

For example, the South Carolina Supreme Court upheld the trial court's grant of summary judgment in favor of a defendant when the plaintiff entered an *Alford*-guilty plea leading to a previous criminal conviction involving the same set of facts. *Zurcher v. Bilton*, 666 S.E.2d 224, 225 (S.C. 2008) (Exhibit C attached). Zurcher filed a civil suit against Bilton for claims including assault and battery, false imprisonment, and intentional infliction of emotional distress arising out of a fight between the two over the purchase of a new car. *Id.* At the same time, Zurcher was criminally charged with three (3) counts of assault and battery for his role in the fight with Bilton. *Id.* Zurcher entered an *Alford*-guilty plea to one (1) count of assault and battery in exchange for the dismissal of the remaining counts. *Id.* at 226. In opposing summary judgment, Zurcher argued his *Alford*-guilty plea did *not* collaterally estop him from litigating the issue of civil liability. *Id.* In dismissing Zurcher's argument, the court held "the entry of an Alford plea at a criminal proceeding has the same preclusive effect as a standard guilty plea." *Id.* at 227. Further, Zurcher had a "full and fair opportunity" to litigate the criminal assault and battery charges. *Id.* The court explained:

> [t]hat he deemed a plea of guilty to be the more appealing alternative at the criminal does not diminish the voluntariness of Zurcher's plea under the circumstances. Acting on the advice of competent counsel, Zurcher simply reasoned that the evidence weighed heavily against him…Zurcher is bound by his Alford plea and is precluded from denying liability in the subsequent civil action with Bilton.

Id.

As the vast majority of other jurisdictions have concluded, the Ingrahams cannot escape the collateral consequences of their criminal convictions on the basis they may have made *Alford*-guilty pleas to the court. As courts such as the Sixth Circuit in *Blohm* point out, the Ingrahams voluntarily entered guilty pleas. In so doing, the Ingrahams offered the court an "intrinsic admission" to engaging in the conduct alleged in the criminal complaint, thus triggering collateral consequences – most notably the inability to dispute that they deprived

animals of necessary food, shelter, and medical attention. (DSMF ¶¶ 7-11, 14-15). The basic chemistry of the Ingrahams' guilty pleas are unchanged by a concurrent statement either proclaiming their innocence or refusing to admit guilt.

The Ingrahams are bound by their guilty pleas. The Ingrahams should *not* be allowed a second bite at the apple to litigate the facts conclusively established by their animal cruelty convictions.

C. The Facts Conclusively Established by the Ingrahams' Conviction Entitles Gray to Summary Judgment on the Defamation Claim.

Under Maine law, to maintain a defamation action, the Ingrahams must show:

1) a false and defamatory statement concerning another;
2) an unprivileged publication to a third party;
3) fault amounting to at least negligence on the part of the publisher; and
4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Rippett v. Bemis, 672 A.2d 82, 86 (Me. 1996) *quoting Lester v. Powers*, 596 A.2d 65, 69 (Me. 1991). The Law Court has held that "a plaintiff has the burden of proving not only that plaintiffs' statement was false and defamatory, but also that she was at least negligent in publishing the statements." *Courtney v. Bassano*, 1999 ME 101, ¶ 16, 733 A.2d 973, 976. A defendant is not negligent in failing to ascertain truth or falsity of a statement when there is a "reasonable basis" for a statement. *Id.; See also* Horton & McGehee, *Maine Civil Remedies* § 20-1(f).

In addition, Maine recognizes substantial truth as a defense. *McCullough v. Visiting Nurse Association of Southern Maine*, 1997 ME 55, ¶ 10, 691 A.2d 1201, 1204 (holding a statement that an employee was terminated for "several incidents" when, in fact, the employee was only terminated for two incidents substantially true even though not technically accurate)

citing Restatement (Second) of Torts, § 581A (1977) (it is not necessary to establish the literal truth of the precise statement made).

The Ingrahams' criminal conviction, at minimum, *conclusively* establishes the essential facts set forth in the criminal complaint with respect to sixteen (16) horses:

> [b]etween February 18, 2010 and June 3, 2010 [the Ingrahams]...did intentionally, knowingly or recklessly deprive animals, horses...of necessary sustenance, necessary medical attention, proper shelter, [and] protection from the weather or humanely clean conditions.

(DSMF ¶¶ 7-11, 14-15).

A comparison of these conclusively established facts against those underpinning the Ingrahams' defamation claim demonstrates that the scope of the two actions concerns substantially the same facts. (DSMF ¶ 1). The gravamen of the Ingrahams' defamation claim is that Gray, between February 15, 2010 and July 1, 2010 published false and defamatory statements accusing the Ingrahams of animal cruelty. (DSMF ¶ 2). The Ingrahams allege that Gray published statements accusing them of "massive horse neglect including horses at immediate risk of starvation and exposure." (DSMF ¶ 3). Other statements cited by the Ingrahams include accusations of "horses being emaciated, without adequate shelter, in need of immediate medical assistance." (DSMF ¶ 4).

The facts established by the Ingrahams' criminal conviction are fatal to their defamation claim. The alleged defamatory statements published by Gray on Nickernews.net accusing the Ingrahams of animal abuse are *not* false. The time frame of the criminal complaint (February 18, 2010 to June 3, 2010) corresponds to the time frame of the civil complaint (February 15, 2010 to July 1, 2010). (DSMF ¶¶ 2, 7-14). During this period, sixteen (16) horses named Glory, Baby, Rocket, Tricky, Czar, Magnum, Lincoln, Luther, Strawberry, Molly, Grace, Milo, Armani, Bando, Amadeus, and Marie Cassidy *were* neglected, emaciated, and put at immediate risk of

starvation because they were deprived "necessary sustenance." (DSMF ¶¶ 7-11, 14-15). These sixteen horses *were* without adequate shelter because they were deprived "proper shelter [and] protection from the weather or humanely clean conditions." (DSMF ¶¶ 7-11, 14-15). These sixteen horses *were* in need of immediate medical assistance because they were deprived "necessary medical attention." (DSMF ¶¶ 7-11, 14-15). Quite clearly, Gray's published statements accurately characterized the Ingrahams' cruel treatment of the horses and other animals in their care.

Even if there is some discrepancy between the statements alleged to have been made by Gray and the facts established by the guilty pleas, the substantial truth doctrine protects Gray. The Ingrahams broadly allege Gray published statements accusing them of "massive horse neglect" – the specific statements alleged to have been made relate to this premise. (DSMF ¶ 3). Depriving sixteen horses of necessary food, proper shelter, and necessary medical attention is, in substance, "massive horse neglect" despite the fact those words are not literally found in the criminal complaints to which the Ingrahams pled guilty.

IV. CONCLUSION

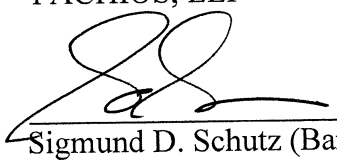
Gray is entitled to summary judgment on the Ingrahams' defamation claim because the facts essential to the Ingrahams' criminal conviction for cruelty to animals are preclusive in her favor.

WHEREFORE, Defendant Madeline B. Gray d/b/a NickerNews.net respectfully requests that the Court grant summary judgment in her favor, allow Gray to file a bill of costs, and grant such other and further relief as may be just and proper.

Dated at Portland, Maine this 28th day of September, 2011.

Respectfully Submitted,
Madeline B. Gray d/b/a NickerNews.net

by her attorneys,
PRETI FLAHERTY BELIVEAU &
PACHIOS, LLP

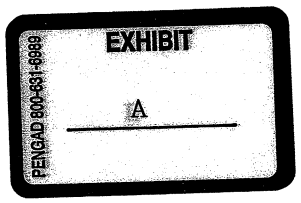


Sigmund D. Schutz (Bar No. 8549)
Adam J. Shub, Esq. (Bar No. 4708)
One City Center
P. O. Box 9546
Portland, ME 04112-9546
Telephone: (207) 791-3000
Facsimile: (207) 791-3111
E-Mail: sschutz@preti.com
E-Mail: aschub@preti.com

IMPORTANT NOTICE

ANY OPPOSITION (PURSUANT TO RULE 7(c) OF THE MAINE RULES OF CIVIL PROCEDURE) TO THE FOREGOING PLEADING, INCLUDING ANY RELATED MEMORANDA OF LAW, MUST BE FILED NOT LATER THAN TWENTY-ONE DAYS AFTER THE DATE ON WHICH THE FOREGOING PLEADING WAS FILED. FAILURE TO FILE ANY SUCH OPPOSITION WILL BE DEEMED A WAIVER OF ALL OBJECTIONS TO THE FOREGOING PLEADING, WHICH MAY BE GRANTED BY THE COURT WITHOUT FURTHER NOTICE OR HEARING.

ANY OPPOSITION (PURSUANT TO RULE 7(b)(1)(B) OF THE MAINE RULES OF CIVIL PROCEDURE) TO THE FOREGOING PLEADING MUST COMPLY WITH THE REQUIREMENTS OF RULE 56(h) INCLUDING SPECIFIC RESPONSES TO EACH NUMBERED STATEMENT IN THE MOVING PARTY'S STATEMENT OF MATERIAL FACTS, WITH CITATIONS TO POINTS IN THE RECORD OR IN AFFIDAVITS FILED TO SUPPORT THE OPPOSITION AND THAT NOT COMPLYING WITH RULE 56(h) IN OPPOSING THE MOTION MAY RESULT IN ENTRY OF JUDGMENT WITHOUT HEARING.



LexisNexis®

STEPHEN BALLARD, Plaintiff-Appellant, versus BRIAN BURTON, individually and in his Official capacity; OKTIBBEHA COUNTY, MISSISSIPPI, Defendants-Appellees.

No. 04-60621

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

444 F.3d 391; 2006 U.S. App. LEXIS 7381

March 24, 2006, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Mississippi, Eastern Division,.

COUNSEL: For STEPHEN BALLARD, Plaintiff - Appellant: Jim D Waide, III, Joseph R Murray, II, Waide & Associates, Tupelo, MS; Lisa S Rohman, Tupelo, MS.

For BRIAN BURTON, Individually and in his Official capacity; OKTIBBEHA COUNTY, MISSISSIPPI, Defendants - Appellees: James Lawson Hester, Craig, Hester, Luke & Dodson, Ridgeland, MS.

JUDGES: Before DAVIS, STEWART, and DENNIS, Circuit Judges.

OPINION BY: CARL E. STEWART

OPINION

[*393] CARL E. STEWART, Circuit Judge:

Stephen Ballard ("Ballard") appeals from the grant of summary judgment in favor of the defendants, Brian Burton, Deputy Sheriff of the Oktibbeha County Sheriff's Office ("Burton"), and Oktibbeha County, Mississippi, on his action brought pursuant to *42 U.S.C. § 1983*. Ballard's complaint alleges, in pertinent part, that Burton, individually and in his official capacity, caused permanent injuries by shooting Ballard during an arrest attempt. The essence of Ballard's claim is that Burton violated his *Fourth Amendment* rights by using excessive force that rendered him permanently paraplegic.

On appeal, Ballard contends that the district court erred in its determination that (1) pursuant to *Heck v. Humphrey, 512 U.S. 477, 486-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)*, [1] Ballard was collaterally [*394] estopped from bringing this *§ 1983* claim due to his state conviction for simple assault on a law enforcement officer; and (2) *Heck* applies to [**2] this *§ 1983* action even though the state conviction was obtained via a guilty plea pursuant to *North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)*. [2] We agree with Ballard's contention that *Heck* does not bar his claim. Nevertheless, we affirm the district court's summary judgment against Ballard because the summary judgment record does not reveal a *Fourth Amendment* violation.

1 The Court in *Heck* held that an inmate could not challenge the constitutionality of his state conviction in a subsequent suit for damages brought pursuant to *42 U.S.C. § 1983* if a judgment in his favor in the *§ 1983* action would undermine the validity of the state conviction.

2 *North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)* permits a defendant to enter a guilty plea to the underlying offense charged, while affirmatively maintaining his factual innocence.

I. FACTUAL AND PROCEDURAL BACKGROUND

Stephen Ballard, while armed with a 30/30 rifle, [**3] was shot during a confrontation with Mississippi law enforcement officers. Following the incident, Ballard was charged with two counts of simple assault on a law enforcement officer and one count of aggravated assault on a law enforcement officer. Ballard was convicted on two counts of the indictment. But these convictions were overturned by the Mississippi Supreme Court on the basis that the trial court erred by not allowing testimony on Ballard's insanity defense. On remand, instead of defending himself at trial, Ballard pleaded guilty to the charge of simple assault on Deputy Leroy Boling, pursuant to *North Carolina v. Alford*, admitting only that he put Boling in fear and that he fired the 30/30 rifle several times while he was near officers.

Ballard then filed the instant action pursuant to *42 U.S.C. § 1983*, alleging that Burton and Oktibbeha County violated his *Fourth Amendment* rights against use of unreasonable force. The defendants moved for summary judgment, contending that Ballard was barred from bringing this action under the "favorable termination rule" established in *Heck*. In addition to the pleadings, the parties filed excerpts from the [**4] trial transcript, depositions, and other documents in support of, or opposition to, the motion for summary judgment. The following factual background is drawn from disputed and undisputed statements in the pleadings and other documents presented to the district court prior to its ruling on the motion for summary judgment.

On or about August 11, 1996, Ballard sought psychiatric treatment from the Oktibbeha County Hospital after he and his wife had a heated argument. Ballard was suicidal at the time he sought treatment but was not admitted into the hospital and did not receive any medical attention. Ballard left the hospital and armed himself with a 30/30 caliber rifle. Because of his disturbed mental condition, he "irrationally drove" through Starkville, Mississippi, stopping occasionally to fire his gun in the air and to threaten his own life. Law enforcement officers from the Okitibbeha County Sheriff's Office and the Starkville Police Department were notified and followed him in patrol cars.

The last time Ballard stopped, Deputy Leroy Boling was in the first patrol car behind him. Boling exited the patrol car and crouched down behind its open door. Ballard came toward Boling with [**5] the rifle down, pointing toward Boling but not "up sighting" him. Boling asked Ballard to stay back and put the weapon down, but Ballard refused. Boling testified that the [*395] rifle was aimed at Boling's head because that was the only thing showing, and that he could vividly see the end of the rifle's barrel. Ballard then pointed the rifle at an upward angle that Boling and other law enforcement officers described as "port arms."

By this time, Starkville Police Lieutenant Keith Davis had arrived, exited his patrol car and gone to the back of Boling's patrol car. Deputy Charles Cole, Jr., who arrived at the scene in Davis' patrol car, remembered seeing Ballard in front of Boling's car with a rifle and with Boling pinned down behind his car. Cole testified that he saw Ballard pointing the gun at Boling and that he felt like Ballard was pointing the gun at everyone there.

Boling moved to join Davis at the rear of Boling's patrol car. Ballard put the rifle up under his chin and said, "Watch this," then lowered the rifle. Ballard again pointed the rifle at the upward port arms angle while he pulled up his shirt and patted his chest with his free hand. Ballard indicated his chest was a target [**6] and told the officers to shoot at him. Ballard fired a shot in the air, then lowered the rifle toward Davis. Burton saw Ballard talking to Davis and Boling, and saw Ballard lower the gun toward Davis. Likewise, Deputy Brett Watson saw Ballard aim at Davis and believed Ballard "was fixing to kill Lieutenant Davis and possibly Lieutenant Boling." Watson shot Ballard with a shotgun, but it seemed to have little effect. Ballard "just swayed back a little bit and then went back with the gun towards the two officers." Watson's shotgun jammed, but he cleared the jam, fired a second time, and saw Ballard fall backwards onto the concrete. At the same time that Watson aimed and fired his second shot, Burton aimed at Ballard's mouth and shot him. The shot to Ballard's mouth caused severe damage to his spinal cord and rendered him permanently paraplegic.

Ballard's complaint asserts that Burton knew Ballard's rifle was empty prior to taking aim and shooting him, and that Burton therefore had no reason to believe that any of the officers were in imminent danger. The complaint further alleges that, under these circumstances, Burton's decision to shoot him was unreasonable and amounted to a use of [**7] excessive force, in violation of *§ 1983*, and that this use of unreasonable force rendered him paraplegic. The complaint also asserts as a

proximate contributing cause of Ballard's injuries the gross negligence of Oktibbeha County, Mississippi, via its failure to properly train Burton and other officers how to handle a suicidal person without killing him.

Presented with pleadings, testimony, and other documents that included the foregoing as both disputed and undisputed facts, the district court directed the parties to brief the issue of whether *Heck*'s favorable termination rule bars Ballard from bringing his *§ 1983* action, in light of the *Alford* nature of Ballard's state conviction. Reasoning that (1) Ballard's *Alford* plea was a conviction and was not a "favorable termination" and (2) *Heck*'s favorable termination rule applies to preclude Ballard's *§ 1983* claim, the district court subsequently granted the defendants' motion for summary judgment against Ballard.

Ballard appeals the judgment against him, asserting that his *Alford* plea does not have the same collateral estoppel effect as a non-*Alford* guilty plea and that *Heck*'s favorable termination rule [**8] does not bar his *§ 1983* action. While we agree with the district court that the *Alford* nature of Ballard's state conviction has no effect on its use for *Heck* purposes, we find that *Heck*'s favorable termination rule does not apply to the instant circumstances. [*396] Nevertheless, because the summary judgment record does not support at least one element necessary for Ballard to prevail in his *§ 1983* claim, we affirm.

II. DISCUSSION

A. Standard of Review

We review de novo a district court's grant of a motion for summary judgment, applying the same standard as the district court did in the first instance. *See Burge v. Parish of St. Tammany, 187 F.3d 452, 465 (5th Cir. 1999)*. Summary judgment is appropriate where the moving party establishes "there is no genuine issue of material fact and that [it] is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; *see Cronn v. Buffington, 150 F.3d 538, 541 (5th Cir. 1998)*. The moving party must show that if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry [**9] its burden. *Celotex v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

B. *Heck*'s Favorable Termination Rule

It is well settled that, under *Heck v. Humphrey, 512 U.S. 477, 486-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)*, a plaintiff who has been convicted of a crime cannot recover damages for an alleged violation of his constitutional rights if the alleged violation arose from the same facts attendant to the charge for which he was convicted, unless he proves "that his conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck, 512 U.S. at 486-87*; *Randell v. Johnson, 227 F.3d 300, 301 (5th Cir. 2000)*; *Sappington v. Bartee, 195 F.3d 234, 235 (5th Cir. 1999)*. "*Heck* requires the district court to consider 'whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the [**10] conviction or sentence has already been invalidated.'" *Jackson v. Vannoy, 49 F.3d 175, 177 (5th Cir. 1995)* (citation omitted). This requirement or limitation has become known as the "favorable termination rule." *Sappington, 195 F.3d at 235*.

As a preliminary matter, we address Burton's assertion that his conviction cannot be used to bar his excessive force claim because it is based on an *Alford* plea.

1. *Collateral Consequences of an Alford Plea*

Ballard argues that because he entered an *Alford* plea, his simple assault conviction cannot be used to impose *Heck*'s favorable termination rule. We disagree. Although a res nova issue in regard to *Heck*, various Courts of Appeals have deemed an *Alford* plea the procedural equivalent of a non-*Alford* guilty plea. [3] [*397] We likewise view an *Alford* plea as nothing more than a variation of an ordinary guilty plea. Moreover, we are not persuaded by Ballard's suggestion that, because his plea was pursuant to *Alford*, there is an insufficient factual basis to support a finding that his simple assault conviction was terminated unfavorably. "Once accepted by a court, it is the voluntary [**11] plea of guilt itself, with its intrinsic admission of each element of the crime, that triggers the collateral consequences attending that plea. Those consequences may not be avoided by an assertion of innocence." *Blohm v. Comm'r of Internal Revenue, 994 F.2d 1542, 1554 (11th Cir.1993)* (citing *Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23*

L. Ed. 2d 274 (1969)). Accordingly, we hold that a conviction based on an *Alford* plea can be used to impose *Heck*'s favorable termination rule.

> 3 *See, e.g., Burrell v. United States, 384 F.3d 22, 29 (2d Cir. 2004)* ("A guilty plea under the *Alford* doctrine is the functional equivalent to an unconditional plea of nolo contendere which itself has the same legal effect as a plea of guilty on all further proceedings within the indictment. The only practical difference is that the plea of nolo contendere may not be used against the defendant as an admission in a subsequent criminal or civil case." (citation omitted)); *United States v. Tunning, 69 F.3d 107, 111 (6th Cir. 1995)* ("An *Alford*-type guilty plea is a guilty plea in all material respects."); *United States v. Morrow, 914 F.2d 608, 611 (4th Cir. 1990)* (same); *see also Watson v. New Orleans City, 275 F.3d 46 (5th Cir. 2001)* where we applied *Heck*'s favorable termination rule to a Louisiana conviction obtained via a no contest plea noting that, under Louisiana law, a no contest plea constitutes a conviction.

[**12] Because Ballard has failed to establish that his state conviction for simple assault was terminated in his favor, we shall examine whether his *§ 1983* claim alleging excessive force is otherwise barred by *Heck*.

2. *Applicability of Heck's Favorable Termination Rule*

The policy undergirding the favorable termination rule is based on "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Heck, 512 U.S. at 486*. This principle is another manifestation of the doctrine of issue preclusion or collateral estoppel, i.e., the policy of finality that prevents the collateral attack of a criminal conviction once the matter has been litigated. *See id. at 484-85* ("[The Supreme] Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack." (citations omitted)). The *Heck* Court determined that this principle of collateral estoppel "applies to *§ 1983* damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always [**13] applied to actions for malicious prosecution." *Id. at 486*. If a judgment in the plaintiff's favor would necessarily imply that his conviction is invalid, then the *§ 1983* action is not cognizable unless the conviction were reversed on direct appeal, expunged, declared invalid or otherwise called into question in a habeas proceeding. *See id. at 487*; *Hudson v. Hughes, 98 F.3d 868, 872 (5th Cir. 1996)*. Therefore, "the maturity of a *section 1983* claim . . . depends on 'whether a judgement in [the plaintiff's] favor . . . would necessarily imply the invalidity of his conviction.'" *Hudson, 98 F.3d at 872* (alteration in original) (citing *Heck, 512 U.S. at 487*).

Thus, in order to determine whether *Heck*'s favorable termination rule precludes Ballard's *§ 1983* claim that Burton used excessive force, we first must determine whether a judgment in Ballard's favor on this claim would necessarily imply the invalidity of Ballard's simple assault conviction. We conclude that it would not.

Ballard was convicted of simple assault of a law enforcement officer in violation of *section 97-3-7 of the Mississippi Code* [**14] . This section provides, in pertinent part, as follows:

> A person is guilty of simple assault if he . . . (c) attempts by physical menace to put another in fear of imminent serious bodily harm . . . However, a person convicted of simple assault [upon a law enforcement officer while the law enforcement [*398] officer is acting within the scope of his employment] . . . shall be [imprisoned] for not more than five (5) years . . . .

Miss. Code Ann. § 97-3-7. Count two of the indictment, to which Ballard entered the *Alford* plea, states that,

> on or about the twelfth day of August, in Oktibbeha County [Ballard] did unlawfully, willingly, feloniously, purposely, and knowingly attempt by physical menace to put Leroy Bolen [sic], a law enforcement officer with the Oktibbeha County, Mississippi Sheriff's Department in fear of imminent serious bodily harm at a time when the said Leroy Bolen [sic] was acting within the scope of his official duties and office, by pointing a gun at the said Leroy Bolen [sic] without authority of law and not in necessary self-defense.

As part of his *Alford* plea, Ballard admitted that he put Boling [**15] in fear and that he fired the 30/30 rifle several times while he was near officers.

To prevail on his *§ 1983* claim for damages due to Burton's use of excessive force, Ballard must prove, inter alia, that Burton's use of deadly force was objectively unreasonable in the circumstances. [4] *See Graham v. Connor, 490 U.S. 386, 395-97, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)*. Therefore, the dispositive question in determining whether *Heck* applies to preclude Ballard's *§ 1983* claim is as follows: Would a finding that Burton's use of force was objectively unreasonable necessarily call into question the validity of Ballard's conviction for simple assault upon Boling? If it is possible for Ballard to have assaulted Boling *and* for Burton's shooting of Ballard to have been objectively unreasonable, then *Heck* does not bar Ballard's claim. On the other hand, if the only way that Burton's shooting of Ballard could be objectively reasonable is for Ballard to have assaulted Boling, then *Heck* bars Ballard's excessive force claim.

> 4 While Ballard must establish additional elements to prove his excessive force claim, as discussed in Part II.C., *infra*, the only element at issue in this case is the objective reasonableness of Burton's use of force.

[**16] In *Sappington v. Bartee, 195 F.3d 234 (5th Cir. 1999)*, law enforcement officer Garcia appealed the district court's denial of his motion for summary judgment on a claim that he had used excessive force against Sappington. The district court had reasoned "that [Sappington's] conviction for assaulting Garcia does not necessarily imply the invalidity of his criminal conviction because under Texas law, unlike Louisiana law, the use of force to resist arrest is justified only if, among other elements, the arresting peace officer uses unnecessary force before the actor offers any resistance." *Sappington, 195 F.3d at 236* (citation and internal quotation marks omitted). Sappington's conviction for aggravated assault required proof that he caused serious bodily injury to Garcia. *Id. at 237*. This court determined that his conviction necessarily implied that Garcia did not use excessive force and held that, as a matter of law, the force Sappington claimed was used could not, under *Heck*, be deemed excessive. This determination and holding were based on Texas laws which provide that (1) as an individual, Garcia "could use force up to and [**17] including deadly force to protect himself against the other's use or attempted use of unlawful deadly force[,]" and (2) as a peace officer, Garcia could use deadly force in the course of an arrest if he reasonably believed that there was a substantial risk that the person to be arrested would cause serious bodily injury if the arrest were delayed. *Id.*

[*399] In *Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000)*, this court was faced with a district court holding that *Heck* did not bar Hainze's *§ 1983* suit because "a conviction for aggravated assault against a police officer does not necessarily preclude a finding of excessive force against the assaulter." *Hainze, 207 F.3d at 798* (citation and internal quotation marks omitted). Nevertheless, the district court granted summary judgment on the *§ 1983* claim because it determined that, though *Heck* did not apply, the officers' actions under the circumstances were objectively reasonable and therefore they were entitled to qualified immunity. On appeal, this court stated that, "subsequent to the district court's decision we held that, based on *Heck*, an excessive force claim under *section 1983* is [**18] barred as a matter of law if brought by an individual convicted of aggravated assault related to the same events." *Hainze, 207 F.3d at 798* (citation omitted). This court disagreed with the district court's determination that *Heck* did not apply but concluded that summary judgment was appropriate because, "as in *Sappington*, the force used by the deputies to restrain Hainze, up to and including deadly force, cannot be deemed excessive." *Id. at 798-799*.

The Texas statute in *Sappington* and *Hainze* authorized use of deadly force upon reasonable belief that there was imminent danger of serious bodily injury. Those decisions turned on the fact that, because serious bodily injury to the defendant was an element of the *§ 1983* plaintiff's conviction, it was impossible for the defendant to have used excessive force because the statute authorized use of deadly force to defend against the bodily injury that the *§ 1983* plaintiff had inflicted upon him. [5] We note that, facially similar to the Texas justification statute, Mississippi's justifiable homicide statute provides that (1) as a law enforcement officer, Burton's use of deadly force is justified [**19] "in overcoming actual resistance to the execution of some legal process, or to the discharge of any other legal duty," *Miss. Code Ann. § 97-3-15 (1)(b)*; and (2) as an individual, Burton's use of deadly force is justified "when committed in the lawful defense of one's own person or any other human being, where there shall be reasonable

ground to apprehend a design to commit a felony or to do some great personal injury, and there shall be imminent danger of such design being accomplished," *Miss. Code Ann. § 97-3-15 (1)(f)*. Nevertheless, we distinguish the analysis and application of *Heck* in *Sappington* and *Hainze*.

> 5 *Hudson v. Hughes* also involved state law that made the *§ 1983* plaintiff's allegations of excessive force necessarily inconsistent with his conviction. There, we stated that, "because self-defense is a justification defense to the crime of battery of an officer, [the plaintiff's] claim that [the defendants] used excessive force while apprehending him, if proved, would necessarily imply the invalidity of his arrest and conviction for battery of an officer." *Watson v. New Orleans City, 275 F.3d 46 (5th Cir. 2001)* (quoting *Hudson, 98 F.3d at 873*).

[**20] *Hainze* and *Sappington* each involved a conviction for aggravated assault under Texas law where the assault was against a defendant in the *§ 1983* claim for excessive force. Each of those convictions required proof that the *§ 1983* plaintiff had caused serious bodily injury. By contrast, Ballard's conviction was for assault, by physical menace, on an officer who is not a defendant in his *§ 1983* claim. Ballard's conviction did not require proof that he caused bodily injury, serious or otherwise. Not a single element of Ballard's simple assault conviction would be undermined if Ballard were to prevail in his excessive force claim against Burton or [*400] Oktibbeha County. For this reason, unlike the *Hainze* and *Sappington* convictions, Ballard's Mississippi conviction for simple assault does not, as a matter of law, necessarily imply that Burton did not use excessive force as alleged in the instant complaint.

We also factually distinguish *Sappington* because Ballard's *§ 1983* claim of excessive force is conceptually different than his conviction for simple assault such that "a successful suit on the former would not necessarily imply the invalidity of the latter." *Hudson, 98 F.3d at 873* [**21] (citing *Smithart, 79 F.3d at 952-953*). Undisputed in the summary judgment record is the fact that Ballard pointed the rifle in the general direction of Boling before Burton arrived at the scene and in the general direction of Boling and Davis after Burton arrived at the scene. When recovered, it was determined that, but for a spent cartridge, the rifle was empty prior to the time Ballard allegedly pointed it toward Boling and Davis. Ballard admitted that he put Boling in fear and that he fired the 30/30 rifle several times while near officers. On these undisputed facts, a determination that Burton used unreasonable force tends to neither prove nor disprove the validity of Ballard's conviction for assaulting Boling. During the course of events from Ballard's "irrational" drive through Starkville to the times he exited his truck and fired the rifle near officers, Ballard's behavior satisfied the elements for simple assault against Boling, as charged in the indictment to which he pled guilty, both before and after Burton arrived at the scene of the final confrontation. A finding that Burton's use of force was unreasonable would imply neither that Ballard did not attempt [**22] by physical menace to put Boling in fear of imminent bodily harm, nor that Ballard's assault on Boling was in necessary self defense.

Although we have distinguished *Sappington*, our method of analysis remains consistent. The *Sappington* court analyzed the circumstances attendant to the conviction and carefully compared them with the allegations in the *§ 1983* complaint and the remainder of the summary judgment record. We noted that the theoretical possibility that Garcia might have used excessive force after Sappington offered resistance was completely at odds with the summary judgment record in which Sappington stated that his physical contact with Garcia occurred only after he was "maced and/or assaulted" by the defendant law officer(s) and "that the physical contact between [Sappington] and Garcia began when Garcia grabbed his wrist." *Sappington, 195 F.3d at 237*. Accordingly, we did not address the mere possibility that Garcia could have used unreasonable force *and* that Sappington could have committed the aggravated assault. Instead we looked to the circumstances presented in the summary judgment record and found "[Sappington's] claim [] necessarily [**23] inconsistent with his criminal conviction." *Id.*

When we look to the circumstances presented in the instant record, we find that Ballard's allegations that Burton used excessive force are not necessarily inconsistent with his conviction. The circumstances in this summary judgment record involve a time period during which Ballard pointed the rifle out of his truck while driving in front of Boling, and another time period during which Ballard pointed the rifle toward Boling before Burton and other officers arrived. [6] In addition, there is disputed testimony that Ballard was observed

pointing his rifle at Boling as well as at Davis and/or at Davis and Boling [*401] near the time Burton shot Ballard. A finding that Burton's use of force was unreasonable would not necessarily mean that Ballard did not attempt by physical menace to put Boling in fear of imminent serious bodily harm. Based on the events described in the summary judgment record, we conclude that a judgment in Ballard's favor on his *§ 1983* claim against Burton and Oktibbeha County could easily coexist with Ballard's conviction for simple assault of Boling, without calling into question any aspect of that conviction.

> 6 Ballard denies pointing the rifle at any officer, but the indictment to which he pled guilty stated that he pointed the rifle "at the said Leroy Boling."

[**24] This is not the first time we have noted circumstances where a plaintiff's prior conviction is not inconsistent with his claim of excessive force. In *Wells v. Bonner, 45 F.3d 90, 95 (1995)*, we assumed without deciding that a successful excessive force claim would not imply the invalidity of a conviction for resisting a search. In *Hudson v. Hughes, 98 F.3d at 872-873*, we discussed *Smithart v. Towery, 79 F.3d 951, 952-953 (9th Cir. 1996)*, where the Ninth Circuit addressed whether a successful excessive force claim would imply the invalidity of a conviction for assault. The *Smithart* court "reasoned that the plaintiff's claim that officers used force far greater than that required for his arrest is conceptually distinct from his conviction for assault with a deadly weapon, and that a successful suit on the former would not necessarily imply the invalidity of the latter[,]" *Hudson, 98 F.3d at 873*, and "concluded that *Heck* does not bar a civil rights action alleging excessive force brought after the plaintiff entered an *Alford* plea to a charge of assaulting the arresting officers with a deadly weapon," *id. at 872-873.* [**25] Considering *Smithart*'s reasoning, we stated that "this observation may be applicable in many *section 1983* claims of excessive force . . . ." *Id. at 873.* Today we find this *Smithart* reasoning applicable to the unique factual scenario at bar.

In an unpublished opinion, we examined various applications of *Heck* and concluded that "the *Heck* determination depends on the nature of the offense and of the claim." *Arnold v. Slaughter, 100 Fed. Appx. 321, 323 (5th Cir. June 14, 2004)*. Though this quotation from *Slaughter* is not binding, it is persuasive. [7] The nature of Ballard's simple assault conviction and the nature of his excessive force claim are such that a judgment in favor of Ballard on his *§ 1983* claim would not undermine the validity of his conviction. For the foregoing reasons, we find that the district court erred in its determination that *Heck*'s favorable termination rule bars this *§ 1983* action for use of excessive force.

> 7 An unpublished opinion issued after January 1, 1996 is not controlling precedent, but may be persuasive authority. *5th Cir. R. 47.5.4.*

[**26] C. *Fourth Amendment* Violation

The defendants' motion for summary judgment asserts that Ballard cannot establish a prima facie case of liability against them as alleged because this record does not show a *Fourth Amendment* violation of Ballard's rights by either Burton's shooting or Oktibbeha County's alleged failure to train. The motion further asserts that, as a political subdivision and its employee, the defendants are immune from liability under these circumstances. The district court found that *Heck* barred Ballard's claims, and therefore reached neither the defendants' assertions that there exist no genuine issues of material fact that preclude entry of summary judgment in their favor nor the defendants' assertions of qualified immunity.

Even though we have concluded that the reasons given by the district court do not support the summary judgment [*402] entered against Ballard, we may affirm this judgment on any other grounds supported by the record. *Lifecare Hosp., Inc. v. Health Plus of La., Inc., 418 F.3d 436, 439 (5th Cir. 2005)* (citing *Forsyth v. Barr, 19 F.3d 1527, 1534 n.12 (5th Cir. 1994))*. Therefore, we now examine whether, viewing [**27] the record in the light most favorable to Ballard, summary judgment against him was proper.

In order to succeed on a *§ 1983* claim that the defendants violated his *Fourth Amendment* right against excessive force, a plaintiff must show that he was seized and that he "suffered (1) an injury that (2) resulted directly and only from the use of force that was excessive to the need and that (3) the force used was objectively unreasonable." *Flores v. City of Palacios, 381 F.3d 391, 396 (5th Cir. 2004)* (citations and internal quotation marks omitted); *Goodson v. City of Corpus Christi, 202 F.3d 730, 740 (5th Cir. 2000)*. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather

than with the 20/20 vision of hindsight." *Graham, 490 U.S. at 396*. In this "reasonableness" inquiry,

> the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a *Fourth Amendment* violation out of an objectively reasonable [**28] use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Id. at 397. "Use of deadly force is not unreasonable when an officer would have reason to believe that the suspect poses a threat of serious harm to the officer or others." *Mace v. City of Palestine, 333 F.3d 621, 624 (5th Cir. 2003)* (citing *Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985))*.

The only disputed element of Ballard's excessive force claim is whether Burton's use of force was unreasonable. Viewed in the light most favorable to Ballard, the facts are as follows:

After his attempt to get treatment at the hospital failed, Ballard was mentally disturbed and suicidal. He armed himself with a 30/30 rifle and "irrationally drove" through Starkville, Mississippi. Ballard stopped at least twice, got out of his truck and fired shots into the air. The rifle held a total of seven rounds and was fully loaded and discharged by Ballard during his irrational drive-stop-get-out-of-the-truck-and-shoo t activity. The last time Ballard got out of his truck, officers asked him to put down the rifle but he refused. [**29] Ballard fired another shot into the air, placed the rifle at port arms, pulled up his shirt and told the officers to shoot using his chest as the target. Ballard then began to lower the rifle. Illuminated by lights from one or more patrol cars and a flashlight held by Davis or Boling, Ballard could not see Davis or Boling even though he was within ten or fifteen feet of them. Ballard had discharged, but did not afterward cock his rifle. Seeing Ballard begin to lower the rifle toward two law enforcement officers, Watson shot Ballard with a shotgun, but the pellets did not appear to affect Ballard. As Watson cleared a jam in the shotgun, Burton carefully aimed at Ballard's mouth. Burton shot Ballard at the same time that Watson fired a second shot. Burton's shot rendered Ballard permanently paraplegic. At the time Ballard was shot, his rifle was pointed in the air, not at Davis or Boling.

Burton was confronted with a mentally disturbed person who had, during the course of the night's events refused to put down his rifle, discharged the rifle into the [*403] air several times while near officers, and pointed it in the general direction of law enforcement officers. [8] We find that, regardless [**30] of the direction in which Ballard pointed the rifle just before he was shot, a reasonable officer in these circumstances would have reason to believe that Ballard posed a threat of serious harm to himself or to other officers. Because a reasonable officer in these circumstances may or may not have known or calculated how many rounds had been fired or how many rounds remained in Ballard's rifle, it is immaterial whether Burton knew that Ballard's rifle was uncocked or that it contained only a spent cartridge. Accordingly, Burton's use of force was not unreasonable. *See Mace, 333 F.3d at 624* ("Use of deadly force is not unreasonable when an officer would have reason to believe that the suspect poses a threat of serious harm to the officer or others." (citation omitted)).

> 8 Although Ballard denied pointing the rifle at any officer, he admitted that he put Boling in fear and that he fired the 30/30 rifle several times while he was near officers. The fact that Ballard pointed the gun at law enforcement officers during the course of the night's events is, at least in some sense, undisputed by virtue of his guilty plea.

[**31] The record reveals that factual disputes abound regarding what happened immediately before Burton shot Ballard: the angle and direction in which the rifle was pointed, whether Ballard had cocked the rifle, whether Ballard pointed the rifle toward Davis and Boling, and whether Burton knew that the rifle was uncocked and/or unloaded and therefore not a danger to anyone. Moreover, Ballard urges that because he entered his plea under *Alford*, he did not admit facts in the plea agreement that could demonstrate that he placed officers Davis and Boling in imminent danger. Nevertheless, when we view this record in the light most favorable to Ballard and judge Burton's use of force from the perspective of a reasonable officer at the scene, these factual disputes do not present issues of material fact about the objective reasonableness of Burton's use of

force. Because Burton's actions were objectively reasonable, his knowledge about whether Ballard's rifle was cocked or loaded is of no moment. *See Graham, 490 U.S. at 397* (stating that an officer's evil intentions will not make a *Fourth Amendment* violation out of an objectively reasonable use of force).

We find that, viewed [**32] in the light most favorable to Ballard, this summary judgment record reveals that Burton's use of force was not unreasonable and that, therefore, neither Burton nor Oktibbeha County violated Ballard's *Fourth Amendment* rights against excessive use of force.

III. CONCLUSION

For the foregoing reasons, we conclude that, even though *Heck* does not bar Ballard's *42 U.S.C. § 1983* claims for excessive use of force and failure to train, on this summary judgment record Ballard cannot establish that the defendants violated his *Fourth Amendment* rights. As a result, his *§ 1983* claims are not cognizable and we AFFIRM the district court's order granting summary judgment in favor of the defendants.

Nelson M. BLOHM and JoAnn M. Blohm, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 92-6509.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

994 F.2d 1542; 1993 U.S. App. LEXIS 17068; 93-2 U.S. Tax Cas. (CCH) P50,518; 72 A.F.T.R.2d (RIA) 5347; 7 Fla. L. Weekly Fed. C 513

July 9, 1993, Decided

SUBSEQUENT HISTORY: [**1] As Amended.

PRIOR HISTORY: Appeal from a Decision of the United States Tax Court. DISTRICT/BKRPTCY COURT DKT# TAX CT. 5741-89. DISTRICT JUDGE: TAX CT. L.W. HAMBLEN, Wash

DISPOSITION: AFFIRMED.

COUNSEL: For Petitioners-Appellants: Thomas Troy Zieman, Jr.; Jerome E. Speegle, Louis T. Urbanczyk, MILLER, HAMILTON, SNIDER & ODOM, 254-256 State St., P.O. Box 46, Mobile, Al 36601, 205-432-1414.

For Respondent-Appellee: Abraham N.M. Shashy, Jr., Chief Counsel, IRS, Washington, DC 20224. Robert W. West, District Counsel, IRS, Room 340, 500 South 22nd St. Birmingham, AL 35233. Charles S. Casazza, Clerk of US Tax Court, 400 2nd Street, NW Washington, DC. James A. Bruton, Acting Assistant Attorney General Tax Division, U.S. Dept of Justice, S. Robert Lyons, Gary R. Allen, Brian C. Griffin, Charles E. Brookhart, P. O. Box 502, Washington, D.C. 20044.

JUDGES: Before DUBINA, Circuit Judge, CLARK and ESCHBACH, * Senior Circuit Judges.

* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

OPINION BY: DUBINA

OPINION

[*1545] DUBINA, Circuit Judge:

Appellants Nelson M. Blohm ("Blohm") and JoAnn M. Blohm [1] appeal a judgment from the United States Tax Court upholding an Internal Revenue Service ("IRS" or the "Commissioner") deficiency notice alleging that the appellants owed taxes on unreported income. We affirm.

1 Nelson M. Blohm and JoAnn M. Blohm are referred to collectively throughout as the "Blohms."

I. FACTS

This tax deficiency case revolves around the nefarious business activities of Blohm and his business associates, Merlin C. Stickelber ("Stickelber") and Charles Ritchey ("Ritchey"). The facts are largely based upon the Tax Court's detailed findings.

Blohm was president and chief operating officer of Marion Corporation ("Marion"), a large oil exploration firm located in Mobile, Alabama. [**2] Stickelber was Marion's chairman of the board of directors and chief executive officer. Ritchey was vice-president of Marion's Oil and Gas Division. This case emanates from two business schemes whereby portions of certain monies

used by Marion to purchase oil leases were "kicked back" to Blohm, Stickelber and Ritchey, who subsequently failed to report that income on their federal tax returns. The kickback schemes are discussed in turn.

A. *The Cayman Islands Transaction*

In 1981 several independent oil and gas operators and landsmen [2] from Texas (the "Texas Group") approached Ritchey and proposed that Marion buy a group of oil leases known as the Jourdanton Prospect. As part of the deal at least one-half of the purchase price was to be paid in the Cayman Islands through Marion Coal, Marion's Cayman Islands subsidiary. The Texas Group promised to "kick back" a portion of this money to representatives of Marion. Ritchey discussed the proposed scheme with Stickelber, who agreed to it. That same day, Stickelber alerted Blohm who also agreed to the proposal.

2 An oil and gas landsman obtains oil and gas leases from various land owners and leasehold owners in an area with production potential and sells the leases to an oil exploration company.

[**3] The purchase price for the Jourdanton Prospect was $ 2,578,825. A member of the Texas Group executed a contract to sell one-half of his interest in the Jourdanton Prospect to Marion Coal for $ 1,289,412.50. [3] Marion Coal's president signed the contract of sale. Stickelber co-signed the check paying for the purchase. At the time of these events, Marion was a Fortune 500 company. Marion's purchase of the Jourdanton Prospect was the largest single purchase in its history.

3 The parties did not introduce a copy of any other contract or document transferring the remaining half interest in the Jourdanton Prospect to Marion.

On February 17, 1981, Stickelber, Ritchey and the Texas Group flew to the Cayman Islands. There they met with attorneys retained to set up several shell corporations to shield the kickback proceeds. Stickelber had arranged to have the $ 1,289,412.50 purchase price wire transferred to the Cayman Islands that day. The funds, however, did not arrive. Stickelber made several phone calls to ensure the money's [**4] arrival by the next day, February 18th. On the 18th, Stickelber, Ritchey and the Texas Group met again the attorneys who then established three shell corporations: San Pedro Finance Company ("San Pedro"), St. Lucy Investment Co., Ltd. ("St. Lucy") and Linfield Investment, Ltd. ("Linfield"). San Pedro was owned by the Texas Group, Stickelber, Ritchey and Blohm. St. Lucy was owned one-third each by Stickelber, Ritchey and Blohm. Linfield was owned by the Texas Group. Stock certificates were issued for each owner, including Blohm who held one share of San Pedro class "B" stock and one ordinary share of St. Lucy stock.

The same day a wire transfer from Marion was received by The Bank of Nova Scotia, Cayman Islands, for the account of Marion Coal in the amount of $ 1,289,412.50. The next day, that money was transferred from [*1546] the Marion Coal account to the San Pedro account. The following amounts were then transferred from the San Pedro account to the St. Lucy and Linfield accounts:

1.	San Pedro to St. Lucy:	$ 429,374.36
2.	San Pedro to Linfield:	860,038.14
	TOTAL:	$1,289,412.50

The $ 429,374.36 transferred to the St. Lucy account owned by Stickelber, Ritchey and Blohm is referred to as the "Cayman Islands kickback." Blohm did not travel to the Cayman Islands in [**5] 1981.

Stickelber, Ritchey, Blohm and each member of the Texas Group signed an indemnity agreement in favor of Cayhaven Corporate Services Ltd. ("Cayhaven") as agent for San Pedro. Stickelber, Ritchey and Blohm, as beneficial owners of St. Lucy, each signed a second indemnity agreement in favor of Cayhaven as agent for

St. Lucy. Cayhaven invested the St. Lucy funds in a series of short-term certificates of deposit, where they remained for about one year. Several disbursements and loans were made to Stickelber and Ritchey. No disbursements are known to have been made to Blohm.

In November 1982 Blohm and Stickelber signed affidavits to dissolve St. Lucy. The affidavits were notarized by Blohm's secretary. The one-page affidavits contained no corporate titles under the signatures. The Blohms did not report any portion of the Cayman Islands kickback on their 1981 joint tax return.

The Promissory Notes

Stickelber took Blohm's share of the money in the St. Lucy account ($ 143,268) to satisfy a $ 282,750 debt Blohm owed to a trust settled by Stickelber's father of which Stickelber was co-trustee (the "Stickelber Trust"). In 1982 or 1983, Stickelber canceled Blohm's entire debt to the Stickelber [**6] Trust. On their joint amended federal income tax return for 1983, which was filed in 1985, the Blohms reported income totalling $ 282,750 from the discharge of the indebtedness to the trust.

B. *Kitchen Table Transaction*

A second scheme surfaced in 1981. This time the Texas Group approached Ritchey about purchasing another group of leases known as the Stuart City Prospect. This plan also involved a kickback of a portion of the purchase price to Marion representatives. Ritchey explained the proposal to Stickelber and Blohm, who both agreed to it.

Ritchey flew to Seguin, Texas and returned to Alabama with a box filled with cash. [4] He took it to Blohm's home and there divided the money equally with Stickelber and Blohm. The payment is referred throughout as the "Kitchen Table kickback." The Blohms did not report any portion of the Kitchen Table kickback on their 1981 joint tax return.

4 The exact amount of cash is unknown. Stickelber testified that the box contained more than $ 300,000. (R.II-368.) Ritchey testified that the amount was $ 377,000. (R.III-489.) On cross-examination, Stickelber acknowledged that he had earlier indicated that the amount was less than $ 300,000. (R.II-412, 414-15.)

[**7] II. PROCEDURAL HISTORY

In 1986 the government granted immunity from prosecution to Ritchey in exchange for evidence of tax fraud committed by Blohm and others. In 1988 a grand jury indicted Blohm for tax evasion in violation of *26 U.S.C. § 7201.* [5] JoAnn M. Blohm was not indicted. Blohm pled guilty, but denied guilt pursuant to *North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).* [6] [*1547] The district court entered judgment against him. Blohm moved to vacate his sentence, quash the indictment or grant a new trial. He alleged prosecutorial misconduct causing a violation of his constitutional rights in two respects: (1) that the indictment was based solely on Ritchey's affidavit, which, Blohm claimed, the government knew to be false, and (2) that his guilty plea was coerced by the government's making a false offer of proof at his plea hearing.

5 *Section 7201 of Title 26 of the United States Code* states:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $ 100,000 ($ 500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

[**8]

6 In *Alford* the Supreme Court addressed the question of whether an express admission of guilt is required before a court may impose sentence upon a defendant who pleads guilty but nonetheless maintains his or her innocence. The defendant in *Alford* pled guilty to murder, but maintained his innocence. During his arraignment, Alford denied committing the crime, but elected to plead guilty to avoid the death penalty should he be convicted at trial. The Supreme Court affirmed the conviction and the imposition of sentence, holding that

> while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional prerequisite to the imposition of a criminal penalty. An individual accused of crime may

voluntarily, knowingly, and understandably consent to the imposition of a prison sentence if he is unwilling or unable to admit his participation in the acts constituting the crime.

400 U.S. at 37, 91 S. Ct. at 167. Guilty pleas accompanied by assertions of innocence have come to be known as "*Alford*" pleas.

[**9] After conducting a hearing, the district court denied the motion to vacate, concluding that Blohm's claims were procedurally barred because he failed to raise them on direct appeal from his conviction and sentence. Alternatively, the district court determined that there were no violations of Blohm's constitutional rights, that Blohm's guilty plea was voluntary and that the discrepancies between Ritchey's affidavit and other records were "minor" and "immaterial." The district court denied Blohm's motion for reconsideration and Blohm appealed. In an unpublished opinion, we affirmed the district court's alternative holding. *Blohm v. United States, 964 F.2d 1147 (11th Cir.1992)* (per curiam).

A. *The Notice of Deficiency*

Shortly after Blohm pled guilty in 1988, the Commissioner issued the Blohms a notice of deficiency for $ 269,035 of unreported income from the Cayman Islands kickback ($ 143,268) and the Kitchen Table kickback ($ 125,767). As to the former, the Commissioner alleged that Blohm applied his one-third share of the proceeds to cancel the debt he owed to the Stickelber Trust. The claimed tax deficiency totalled $ 133,749. The Commissioner further [**10] determined an addition to tax of $ 119,725 under *26 U.S.C. § 6653(b)* 7. The determination was based upon Blohm's guilty plea, an affidavit of Ritchey and a letter from Stickelber to an IRS agent in which he linked Blohm to both the Cayman Island and Kitchen Table kickbacks. The Blohms petitioned for a redetermination before the Tax Court.

7 *Section 6653(b) of Title 26 of the United States Code* states in pertinent part:

(b) Fraud. --

(1) **In general.** -- If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud.

The parties have stipulated that JoAnn M. Blohm is not liable for the addition to tax pursuant to *§ 6653(b)*.

B. *Proceedings Before The Tax Court*

Prior to trial the Blohms moved to strike Ritchey's testimony and to supplement the record. The government moved for relief from the [**11] binding effect of the parties' stipulation of facts. The Tax Court denied the Blohms' motion to strike Ritchey's testimony but granted their motion to supplement the record. The Tax Court denied as premature the government's motion for relief from the stipulated facts.

At trial the government renewed its motion for relief from the binding effect of certain stipulations of fact because the evidence did not support those stipulations. Specifically, stipulation twenty-two incorrectly averred that the $ 1,289,412.50 transferred from Marion to the account of Marion Coal occurred on February 19, 1981. The record demonstrated that the correct date was one day earlier, February 18, 1981. Noting that it was not bound by facts contrary to evidence in the record, *Kirchner, Moore & Co. v. Commissioner, 54 T.C. 940, 1970 WL 2264 (1970), aff'd, 448 F.2d 1281 (10th Cir.1971)*, the court granted the motion as to stipulation twenty-two. It denied the motion as to other challenged stipulations.

The Tax Court upheld the deficiency determination. *Blohm v. Commissioner, 1991 Tax Ct. Memo LEXIS 684, 62 T.C.M. (CCH) 1586, 1991 WL 271600, 1991 T.C. Memo 636, 9163 T.C. Memo 6 (1991)*. [**12] [*1548] It determined that (1) Blohm earned the Cayman Islands kickback by arranging Marion's purchase of the Jourdanton Prospect leases and that the kickback was therefore taxable income; (2) Blohm derived $ 125,767 in unreported income from the Kitchen Table kickback; and (3) Blohm was collaterally estopped from denying liability for the additional tax for fraud under *26 U.S.C. § 6653(b)* because of his guilty plea to tax evasion under *26 U.S.C. § 7201*. The Tax Court denied the Blohms' motion to vacate or revise its decision and their motion for reconsideration of findings and opinion. 8 The Blohms perfected this appeal. 9

8 The motions were denied with unusually harsh language from the court:

> The new allegations made are based on [the Blohms'] blatant misstatements of the findings of fact and opinion of this Court. In our view, this transcends mere advocacy and borders on an affront to the Court. We must admonish [the Blohms'] counsel that any continuation of his egregious distortion of the record in this case will be considered frivolous and will be dealt with appropriately.
>
> Tax Court Order of March 12, 1992 at 2.

[**13]

9 Because the Tax Court ruled that Blohm earned $ 143,268 from the Cayman Islands kickback and thus should have reported that money as income, the Blohms filed a tax refund action in federal district court seeking, *inter alia,* a refund for taxes paid for 1983 on the forgiveness of debt. They claimed that they faced double taxation for the taxes due on the Cayman Islands kickback proceeds and those paid on the 1983 satisfaction of debt. The district court found that the Blohms failed to comply with the statute of limitations. *Blohm v. United States,* No. 91-0831- B-C, 1993 WL 117988 (S.D.Ala. Jan. 19, 1993). Moreover, the district held that the Blohms' assertions of equitable estoppel and equitable recoupment, two exceptions to the limitations requirement, were inapplicable. The district court further found that the Blohms' third claimed basis for an exception to the limitations requirement, mitigation, was unripe because the Tax Court's decision had yet to become "final" pursuant to *26 U.S.C. § 7481.* Once appealed to the Court of Appeals, a Tax Court decision does not become final until (1) the decision has been affirmed by the Court of Appeals and no petition for certiorari has been timely filed or, if filed, the petition for certiorari has been denied, or (2) the decision has been reversed or modified by the Court of Appeals and no petition for certiorari has been timely filed or, if filed, the petition for certiorari has been denied, and, if the case has been remanded to the Tax Court for rehearing, the Tax Court has rendered its decision upon rehearing. *See 26 U.S.C. § 7481.* Thus, any relief due the Blohms for double taxation may appropriately be sought in a refund action in federal district court once the Tax Court's decision becomes final.

[**14] III. ANALYSIS

The Blohms advance three arguments in this appeal. First, they argue that the Tax Court incorrectly found them liable for tax deficiencies in 1981 based on purported income from the Cayman Islands and Kitchen Table kickback schemes. Second, they argue that the Tax Court erroneously refused to be bound by stipulation of fact number twenty-two. Last, Blohm contends that the Tax Court incorrectly applied collateral estoppel to preclude him from denying civil liability for tax fraud because of his *Alford* plea to tax evasion in the district court.

We review the Tax Court's fact findings for clear error. *Atlanta Athletic Club v. Commissioner, 980 F.2d 1409, 1411 (11th Cir.1993).* A finding of fact is clearly erroneous "if the record lacks substantial evidence to support it," *Thelma C. Raley, Inc. v. Kleppe, 867 F.2d 1326, 1328 (11th Cir.1989),* such that our review of the entire evidence leaves us "with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 541, 92 L. Ed. 746 (1948);* [**15] *see also Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985).* The Tax Court's rulings on the interpretation and application of the statute are conclusions of law reviewed *de novo. Estate of Wallace v. Commissioner, 965 F.2d 1038, 1044 (11th Cir.1992).* Moreover, whether a taxpayer received income is an ultimate fact and as such is to be treated as a legal rather than a factual determination to be reviewed *de novo. Weiss v. Commissioner, 956 F.2d 242, 244 (11th Cir.1992).*

A. *Presumption of Correctness*

Ordinarily, the Commissioner's determination of tax liability is presumed correct. *Welch v. Helvering, 290 U.S. 111, 115, 54 S. Ct. 8, 9, 78 L. Ed. 212 (1933); Tax Court Rules of Practice and Procedure 142(a).* The [*1549] taxpayer, therefore, bears the burden of proving the determination erroneous or arbitrary. *Welch, 290 U.S. at 115, 54 S. Ct. at 9; Webb v. Commissioner, 872 F.2d 380, 381 (11th Cir.1989).* [**16] For the presumption to adhere in cases involving the receipt of unreported income, however, the deficiency determination must be supported by "some evidentiary foundation linking the taxpayer to the alleged income-producing activity." *Weimerskirch v. Commissioner, 596 F.2d 358, 362 (9th Cir.1979).* Although a determination that is unsupported

by such a foundation is clearly arbitrary and erroneous, *id.*, the required showing is "minimal." *Carson v. United States, 560 F.2d 693, 697 (5th Cir.1977)* (quoting *Gerardo v. Commissioner, 552 F.2d 549, 554 (3rd Cir.1977))*. [10] Once the Tax Court has found that this minimal evidentiary showing has been made, the deficiency determination is presumed correct, and it becomes the taxpayer's burden to prove it arbitrary or erroneous. *Gold Emporium, Inc. v. Commissioner, 910 F.2d 1374, 1378 (7th Cir.1990)*.

> 10 As stated by the *Carson* court, "the tax collector's presumption of correctness has a herculean muscularity of Goliathlike reach, but we strike an Achilles' heel when we find no muscles, no tendons, no ligaments of fact." *560 F.2d at 696*.

[**17] The Tax Court noted the following evidence to support its conclusion that the Commissioner had met her initial burden as to the Cayman Islands kickback scheme: 1) Stickelber's testimony that he presented the Cayman Islands kickback proposal to Blohm, who agreed to it, and that Blohm was a one-third owner of St. Lucy; 2) Ritchey's testimony that the terms of the Cayman Islands kickback were discussed with Blohm, including that he would take a one-third share of the kickback; 3) the affidavit to dissolve St. Lucy signed by Blohm as one of the two beneficial owners thereof and notarized by Blohm's secretary; and 4) the indemnity agreements signed by Blohm as a beneficial owner of San Pedro and St. Lucy in favor of Cayhaven.

As to the Kitchen Table kickback scheme, the Tax Court cited: 1) Stickelber's testimony that Ritchey presented the proposal to Stickelber and Blohm at the same time, and both agreed to it; 2) Stickelber's and Ritchey's testimony that the Kitchen Table kickback was divided equally among the three of them; 3) the fact that Blohm admitted that Ritchey and Stickelber came to his home on the night the proceeds were divided, that Ritchey said something about a Texas Santa [**18] Claus when he brought the money into the house, and that Blohm found a sack of money on the kitchen table the next morning; 4) Ritchey's testimony that Blohm never returned the money; and 5) Blohm's assertion that he put the money in the trunk of his car for several days to a week.

The above evidence establishes a sufficient evidentiary foundation linking Blohm to the Cayman Islands and Kitchen Table kickback schemes; the presumption of correctness therefore applies. Moreover, we find no error in the Tax Court's conclusion that Blohm failed to meet his burden of proving the Commissioner's determination arbitrary or erroneous.

B. *The Kickback Schemes.*

The Blohms mount a double-barrelled attack on the Tax Court's judgment. First, they challenge the Tax Court's legal analysis and fact findings as to the Cayman Islands kickback scheme. Second, they attack the credibility of the evidence against Blohm as to the Kitchen Table kickback, primarily the evidence given by Stickelber and Ritchey.

Gross income includes all income from "whatever source derived." *26 U.S.C. § 61(a)(1)*. Kickbacks are taxable income. See, e.g., *Bragg v. Commissioner, 856 F.2d 163, 165 (11th Cir.1988)*; [**19] *United States v. Sallee, 984 F.2d 643, 647 (5th Cir.1993)*. Income is taxed to the party who earns it. *Commissioner v. Bollinger, 485 U.S. 340, 346, 108 S. Ct. 1173, 1177, 99 L. Ed. 2d 357 (1988)*. A taxpayer is not relieved of the obligation to pay taxes on earned income merely by a transfer of that income to another party. *United States v. Basye, 410 U.S. 441, 449-51, 93 S. Ct. 1080, 1085-86, 35 L. Ed. 2d 412 (1973)*. Thus, if the evidence supports a finding that Blohm participated in either kickback scheme, then all income attributable to him is to be taxed. We must, [*1550] therefore, determine whether the evidence supports the Tax Court's conclusion that Blohm participated in both kickback schemes, and by so doing, earned the proceeds derived from them.

1. *The Cayman Islands Kickback.*

The Tax Court held that Blohm earned the Cayman Islands kickback by participating in Marion's purchase of the Jourdanton Prospect leases and directing that his share of the kickback proceeds be paid to St. Lucy, the corporation he formed with Stickelber and [**20] Ritchey for the sole purpose of receiving illegal kickback proceeds. *62 T.C.M. at 1593*.

The Blohms argue that the Tax Court erred in concluding that the proceeds of the Cayman Islands kickback were income taxable to them. Their arguments emanate from the bedrock assertion that Blohm took no part in the Cayman Islands kickback scheme. In fact, Blohm testified that he knew nothing of the Cayman

Islands corporations until 1985. (R.II-279.) He further claims that he was never a shareholder in either the San Pedro or St. Lucy corporations. (R.II-256-57.) He testified that he had no recollection of signing the various documents relevant to the forming and dismantling of San Pedro or St. Lucy. (R.II-257-59.) He claims that if he did sign those documents, he did so without reading them because, as president of Marion, he signed many documents. Blohm further testified that Stickelber canceled his debt to the Stickelber Trust not in exchange for his share of the Cayman Islands kickback proceeds but to entice Blohm to remain with Marion after Blohm threatened to resign. (R.II-267-68.) According to Blohm, Stickelber's testimony that he kept Blohm's share of the Cayman [**21] Islands kickback proceeds in exchange for cancellation of Blohm's debt to the Stickelber Trust was simply a lie, as was all of Stickelber and Ritchey's testimony linking him to the Cayman Islands kickback scheme. In short, the Blohms assert that no plausible evidence links Blohm to knowledge of and participation in the Cayman Islands kickback scheme. Therefore, they claim, because Blohm neither knew of nor benefitted from the Cayman Islands scheme, any proceeds from that illicit transaction cannot be attributed to them as gross income.

These contentions, however, fail to prove the Tax Court's conclusions arbitrary or erroneous. *Gold Emporium, 910 F.2d at 1378.* The Tax Court's conclusions are amply supported by the evidence. Stickelber testified that he presented the Cayman Islands kickback proposal to Blohm, who agreed to participate in it:

A. (Stickelber) Mr. Ritchey brought the project to me, and I concurred that they could do it -- that we would handle it through the Cayman Island -- the coal company group and that the share of their half of the lease bonus would be divided two-thirds to them and one-third to whomever. And that whomever is defined [**22] as one-third to me, one-third to Mr. Blohm, and one-third to Mr. Ritchey.

Q. Okay. When this offer was made by the Texas Group, did you tell Mr. Blohm?

A. I did.

Q. How did you tell him?

A. Well, I just told him that this was the proposition, and this is the way it would -- to use the vernacular, this is the way it was going to come down. And that was the proposal on their part. They were willing to share their part of the profit with us. And we would do it through the Cayman Islands centrum.

....

Q. (The Court) Well, I want to know what was your impression as to his reaction.

A. My impression is that his reaction is that he concurred with the transaction that we presented -- that I presented.

(R.II-320-24.) Stickelber further testified that Blohm authorized him to represent Blohm's interests in the Cayman Islands transactions. (R.II-354.)

Ritchey testified that the terms of the Cayman Islands kickback were discussed with Blohm, including Blohm's one-third share in its proceeds:

[*1551] Q. How were the [Cayman Islands] rebate monies to be divided?

A. A third, a third, a third, with a third to Mr. Stickelber, a third to Mr. Blohm, and a third to myself.

Q. Was that division communicated to [**23] Mr. Blohm?

A. Yes, it was.

Q. When -- how was it -- when was it communicated to him?

A. Well, as I stated previously, in a conversation in Mr. Stickelber's office.

Q. Was that prior to the -- to February -- to your trip to the Cayman Islands?

....

A. Yes, it was.

(R.III-468.)

Furthermore, documentary evidence supported the conclusion that Blohm owned one-third of St. Lucy. Blohm, as a beneficial owner of San Pedro and St. Lucy, signed several indemnity agreements in favor of

Cayhaven. Blohm's personal secretary at the time, Dorothy Franco, notarized these agreements and testified that she never notarized unsigned documents. (R.III-448.) As a beneficial owner of St. Lucy, Blohm also signed an affidavit to dissolve St. Lucy; that affidavit was also notarized by Ms. Franco.

The Tax Court also noted the circumstantial evidence against Blohm. The Jourdanton Prospect purchase was the single largest purchase made by Marion at that time. The Tax Court found that Blohm, as president of Marion and a director, would almost certainly have been thoroughly familiar with the transaction, including the payment through Marion Coal in the Cayman Islands and Marion Coal's taking title to one-half interest [**24] in the Jourdanton Prospect. Moreover, the Tax Court found implausible Blohm's assertion that he unwittingly signed the affidavit dissolving St. Lucy. Blohm signed that affidavit in his individual capacity, and not as president of Marion.

Although not necessary to its holding, the Tax Court's conclusion that Blohm applied his proceeds to cancel his debt to the Stickelber Trust was also supported by the evidence. Stickelber testified that he used Blohm's share of the Cayman Islands kickback ($ 143,268) to cancel the balance of Blohm's debt of $ 282,750 out of a sense of obligation arising from a separate transaction in which Blohm unfairly lost a business opportunity. (R.II-384.) This testimony supports the Tax Court's explanation as to why there are no known bank documents evidencing disbursements from the Cayman Islands accounts to Blohm. The promissory notes help explain why no funds went to Blohm directly. Moreover, Stickelber testified that in early 1982 he "canceled" the promissory notes and back-dated the cancellation to "December 1977" at Blohm's request to create the impression that the notes were canceled before the Cayman Islands kickback occurred. (R.II-366-67.)

We agree [**25] with the Tax Court's conclusion that Blohm knew of and participated in the Cayman Islands kickback scheme. The Tax Court's fact findings resulted from careful consideration of the evidence and were based upon reasonable credibility choices among persons of dubious virtue. The court's findings were not clearly erroneous. In short, the evidence amply supports the view that Blohm acceded to the Cayman Islands kickback scheme ahead of time and directed that his share of the proceeds be paid to St. Lucy, one of two shell corporations set up for the sole purpose of harboring the kickback funds and in which he held beneficial ownership. One-third of the proceeds of the Cayman Islands kickback scheme was therefore income earned by Blohm and taxable to him as a one-third owner of St. Lucy.

2. *The Kitchen Table Kickback*

The Blohms also attack the Tax Court's fact findings regarding the Kitchen Table kickback as clearly erroneous. They argue that the testimony of Stickelber and Ritchey, upon which the Tax Court relied, is inconsistent, contrary to agreed upon stipulations, and self-contradictory.

Their strongest salvos are aimed at Ritchey, who the Blohms claim is a crook and therefore unreliable. [**26] The former is clear; the latter is not. The Blohms correctly state that Ritchey gave evidence "not presently available to the Grand Jury" in exchange for [*1552] immunity from prosecution. They claim that Ritchey was forced to create false evidence against Blohm to save himself from prosecution. That Ritchey agreed to provide new evidence does not, alone, make him inherently incredible. *See, e.g., United States v. Greenwood, 974 F.2d 1449, 1457 (5th Cir.1992)*. Indeed, while the Tax Court found Ritchey to be unsavory, it nonetheless credited his testimony:

> We hold no esteem for Ritchey, who appears to be the instigator of this insidious, nefarious, and reprehensible scheme as far as the Marion group was concerned, and we consider it anomalous that Ritchey might bear less a brunt or taint than the others of the consequences of this evil plot. Nevertheless, while we do not find Ritchey to be an ideal witness, we find his testimony plausible in context with the testimony of Stickelber and all the circumstances extant.

62 T.C.M. at 1592. Ritchey's character and the extent of his cooperation with the government were well known to the Tax [**27] Court; his motives and credibility were for it to consider in its role as fact finder. *See Amadeo v. Zant, 486 U.S. 214, 223, 108 S. Ct. 1771, 1777, 100 L. Ed. 2d 249 (1988)*. We find no clear error.

The Blohms also challenge the Tax Court's fact findings as to the specific dollar amount of the proceeds of the Kitchen Table kickback. No paperwork documented the transaction. Blohm's memory regarding

the Kitchen Table kickback was hazy. He testified that Stickelber and Ritchey came to his home one evening and that he remembered "a lot of drinking of alcohol." (R.II-282.) He testified that he had no recollection of what was said that evening beyond Ritchey saying "something about a Texas Santa Claus when he was bringing money into the house." *Id.* Blohm further testified that he found a brown sack the next morning containing a "few thousand" dollars on a counter, and that he put the money into his car trunk and kept it for "at least a week" before returning the money to Ritchey. (R.II-284.)

The Tax Court discounted Blohm's testimony, relying in large part upon the testimony of Stickelber. As noted by the Tax Court:

> [Blohm] testified [**28] that there were a few thousand dollars in the sack [left on the counter after the kickback money was divided]. However, we find his version of this to be incredible, including the aspect where he supposedly put the few thousand dollars in his car truck for several days to a week. [Blohm] did not introduce any other evidence regarding the amount of the Kitchen Table Kickback. Stickelber testified that it was $ 300,000 plus in total, and Ritchey testified that it was $ 377,000. They both testified that the cash was in denominations ranging from $ 20 bills to $ 100, and that the total was divided equally among the three. On cross-examination, Stickelber acknowledged that in his letter to the Internal Revenue Service he indicated that the amount of his share of the Kitchen Table Kickback was at least $ 75,000, and that in a deposition taken in a civil lawsuit by Marion against the Texas Group, Stickelber, Ritchey and [Blohm], he testified that the total was $ 210,000 and his share was $ 70,000.

62 T.C.M. at 1594. The Tax Court found Blohm's version of the Kitchen Table kickback to be "evasive, implausible, and incredible." *Id.* It concluded that since Blohm [**29] failed to present credible evidence regarding the amount of the Kitchen Table kickback, he "failed to show that the determination in the notice of deficiency of his share of the Kitchen Table kickback of $ 125,767 was incorrect." *Id. at 1595*. The Tax Court's fact findings were not clearly erroneous. Accordingly, we agree with its conclusion that the proceeds derived by Blohm from the Kitchen Table kickback scheme were income taxable to him.

C. *Stipulation of Fact Number Twenty-two*

Stipulation twenty-two provides: "On February 19, 1981, a wire transfer from Marion to Marion Coal Corporation was received by the Bank of Nova Scotia, Cayman Islands, for the amount of $ 1,289,412.50. The transfers are attached as Exhibit '8-H'."

As noted, the Commissioner moved for relief from the binding effect of certain stipulations of fact because the evidence did not support them. Among them was stipulation [*1553] twenty-two. This stipulation incorrectly averred that the $ 1,289,412.50 transferred from Marion to the account of Marion Coal occurred on February 19, 1981. The record demonstrated that the correct date was one day earlier, February 18, 1981. The court therefore [**30] granted the Commissioner's motion.

While stipulations are not to be set aside lightly, courts have broad discretion in determining whether to hold a party to a stipulation. *See Morrison v. Genuine Parts Co., 828 F.2d 708 (11th Cir.1987), cert. denied, 484 U.S. 1065, 108 S. Ct. 1025, 98 L. Ed. 2d 990 (1988); Wheeler v. John Deere Co., 935 F.2d 1090 (10th Cir.1991).*

The Blohms argue that the stipulation's reference to February 19, 1981, as the correct date of the Cayman Islands kickback transactions confirms the "capricious use of false evidence" by the IRS because Stickelber and Ritchey were not present in the Cayman Islands on that day. This argument is meritless. The overwhelming evidence contained in the record demonstrates that the stipulated date was simply incorrect. There is both a debit advice documenting when the money was transmitted from the Marion Coal account and a credit advice documenting when this money was deposited into the San Pedro account. The debit advice refers to two dates: "19/2/81," listed on the date line, and "18/2/81," listed in the "particulars" [**31] section. The credit advice has no date in the particulars section but has "19/2/81" on the date line. The Tax Court found the date listed in the particulars section of the debit advice (18/2/81), along with Ritchey and Stickelber's testimony that the money was in the Cayman Islands when they were on the 18th, established that the money was indeed there on the 18th. The Tax Court properly found that it was not bound by facts contrary to the record. *See Mead's Bakery, Inc. v. Commissioner, 364 F.2d 101, 106 (5th Cir.1966).* Moreover, we determined in our review of Blohm's § 2255 petition that the "discrepancy of one day in the

arrival time of the funds is insignificant." *Blohm v. United States, 964 F.2d 1147 (11th Cir.1992)* (per curiam). Accordingly, we see no abuse of discretion.

D. *Collateral Estoppel and the Alford Plea.*

The Tax Court held that Blohm was estopped from denying liability for the additional tax for fraud assessed under *26 U.S.C. § 6653(b)* because of his Alford plea to tax evasion under *26 U.S.C. § 7201*. Blohm claims error based [**32] on two grounds. First, he claims that collateral estoppel is inappropriate here because he was denied a fair opportunity to litigate in the district court. Second, he argues that an *Alford* plea has no collateral estoppel effect.

Collateral estoppel bars relitigation of an issue previously decided if the party against whom the prior decision is asserted had "a 'full and fair opportunity' to litigate that issue in an earlier case." *Allen v. McCurry, 449 U.S. 90, 94-95, 101 S. Ct. 411, 414-15, 66 L. Ed. 2d 308 (1980)*. For collateral estoppel to be invoked 1) the issue must be identical in the pending case to that decided in the prior proceeding; 2) the issue must necessarily have been decided in the prior proceeding; 3) the party to be estopped must have been a party or have been adequately represented by a party in the first proceeding; and 4) the precluded issue must actually have been litigated in the first proceeding. *In re Raiford, 695 F.2d 521, 523 (11th Cir.1983)*.

Blohm's argument that he was denied a full and fair opportunity to litigate in the district court is based on his assertion [**33] that the criminal indictment against him was fraudulently obtained. He argues that the government knew or should have known that the factual basis of the indictment against him was false. The indictment was based, *inter alia,* on information provided by Ritchey. Blohm's arguments, contained in his § 2255 petition, were previously dispatched by this court. *Blohm, 964 F.2d 1147 (11th Cir.1992)*. We need not exhume them here.

Next, Blohm argues that an *Alford* plea is analogous to a plea of *nolo* [*1554] *contendere* [11] and thus has no collateral estoppel effect in a subsequent civil proceeding. *See Hudson v. United States, 272 U.S. 451, 455, 47 S. Ct. 127, 128, 71 L. Ed. 347 (1926)*; *Raiford, 695 F.2d at 523*; *Doherty v. American Motors Corp., 728 F.2d 334, 337 (6th Cir.1984)*. Blohm claims, therefore, that he should be free to relitigate the issue of fraud in his *§ 6653(b)* proceeding. We disagree.

11 Under a plea of *nolo contendere,* a defendant does not expressly admit his guilt, but nonetheless waives his right to trial and authorizes the court for purposes of the case to treat him as if he were guilty. *Alford, 400 U.S. at 35, 91 S. Ct. at 166.*

[**34]

A criminal tax fraud conviction under *26 U.S.C. § 7201* estops a taxpayer from denying liability for civil fraud under *26 U.S.C. § 6653(b)* for the same year. *Klein v. Commissioner, 880 F.2d 260, 262 (10th Cir.1989)*; *Carlson v. Commissioner,* 1993 *T.C. Memo 48, 65 T.C.M. 1880, 1883, 1993 WL 27506 (1993)*. This is because the "elements of criminal tax evasion and of civil tax fraud are identical." *Gray,* 708 F.2d at 246. The same result attaches if the conviction is based upon a guilty plea. *Id.* (stating that "a guilty plea is as much a conviction as a jury trial"); *Manzoli v. Commissioner, 904 F.2d 101, 105 (1st Cir.1990)*. Thus, for purposes of applying the doctrine of collateral estoppel, there is no difference between a judgment of conviction based upon a guilty plea and a judgment rendered after a trial on the merits. *See United States v. Killough, 848 F.2d 1523, 1528 (11th Cir.1988)*; *Mazzocchi Bus Co., Inc. v. Commissioner,* 1993 *T.C. Memo 43, 65 T.C.M. (CCH) 1858, 1865,* [**35] *1993 WL 20139 (1993)*. The conclusive effect is the same. *Raiford, 695 F.2d at 523.*

The collateral consequences of a guilty plea may not be avoided by the simultaneous assertion of innocence. A guilty plea is "more than a confession which admits that the accused did various acts." *Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711, 23 L. Ed. 2d 274 (1969)*. It is an "admission that he committed the crime charged against him." *Alford, 400 U.S. at 32, 91 S. Ct. at 164*; *McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 1170, 22 L. Ed. 2d 418 (1969)*. A guilty plea is distinct from a plea of *nolo contendere.* A guilty plea is an "admission of all the elements of a formal criminal charge." *McCarthy, 394 U.S. at 466, 89 S. Ct. at 1170.* A *nolo contendere* plea is instead a "consent by the defendant that he may be punished as if he were guilty and a prayer for leniency." *Alford, 400 U.S. at 35 n. 8, 91 S. Ct. at 166 n. 8.* [**36] Guilty pleas must be rooted in fact before they may be accepted. *Fed.R.Crim.P. 11(f)*; *Alford, 400 U.S. at 35 n. 8, 91 S. Ct. at 166 n. 8.* No similar requirement exists for pleas of *nolo contendere. Alford, 400 U.S. at 35 n. 8, 91 S. Ct. at 166 n. 8.* Courts

may accept them without inquiring into actual guilt. *Id.*

Once accepted by a court, it is the voluntary plea of guilt itself, with its intrinsic admission of each element of the crime, that triggers the collateral consequences attending that plea. Those consequences may not be avoided by an assertion of innocence. As long as the guilty plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant, see *Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711, 23 L. Ed. 2d 274 (1969)*, and a sufficient factual basis exists to support the plea of guilt, *see Fed.R.Crim.P. 11(f)*, the collateral consequences flowing from an *Alford* plea are the same as those flowing from an ordinary plea of guilt. Were [**37] this not so, defendants pleading guilty would routinely proclaim their innocence to reap two benefits: (1) the avoidance of a trial and a possible reduction in sentence, and (2) the extinguishment of all collateral consequences of their plea. Nothing in *Rule 11 of the Federal Rules of Criminal Procedure* or in *Alford* sanctions this distortion of the pleading process. As we noted in a similar context,

> A federal criminal defendant wishing to avoid a trial and any collateral effect may ask the court for permission to plead *nolo contendere.* (Citations omitted.) A defendant who fails to exercise this option cannot argue subsequently that the lack of a contested trial renders the plea ineffective for collateral estoppel purposes.

Raiford, 695 F.2d at 523. Assertions of innocence, therefore, do not transform ordinary guilty pleas into pleas of *nolo contendere.* Each remains distinct, and the collateral effects [*1555] of a guilty plea are undiminished by a simultaneous protestation of innocence.

Blohm cites a case in which the Ohio Court of Appeals determined that a defendant's previous *Alford* plea to arson was tantamount to a plea of *nolo contendere,* [**38] thus precluding collateral estoppel in a subsequent civil action:

> Such a plea does not constitute an admission of guilty [sic], but rather that the accused is willing to waive a trial and accept the consequences of the plea. It, however, does not act as an admission of the plea but rather is similar to the nolo contendere plea.
>
> Therefore, appellant's guilty plea, by way of a qualified *Alford* plea, operates in the same fashion as a nolo contendere plea for the purposes in a subsequent civil action.
>
> Based upon the foregoing, the plea does not operate ... to foreclose litigation on the issue of whether appellant intentionally set the fire....

Fleck v. State Farm Ins. Co., No. 89- L-14-070, 1990 WL 124648 (Ohio Ct.App. Aug. 24, 1990).

We respectfully differ with the Ohio Court of Appeals. A guilty plea, even one accompanied by a claim of innocence, is not a plea of *nolo contendere.* [12] *See Fed.R.Crim.P. 11.* A guilty plea's basic chemistry is not transformed by a concurrent claim of innocence. The collateral consequences stemming from a guilty plea remain the same whether or not accompanied by an assertion of innocence. A taxpayer who enters an *Alford* plea to tax evasion [**39] under *§ 7201* is therefore collaterally estopped from denying fraud in a subsequent civil proceeding with respect to the same year. *Lackey v. Commissioner,* 1976 *T.C. Memo 298, 35 T.C.M. (CCH) 1330, 1337, 1976 WL 3478 (1976).* The Tax Court properly estopped Blohm from denying liability for the additional tax for fraud assessed under *§ 6653(b).*

> 12 The Supreme Court's statement in *Alford* that there was no "material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence," *400 U.S. at 37, 91 S. Ct. at 167*, does not affect our holding here. *Alford* specifically addressed the question of whether an express admission of guilt was a constitutional requisite to the imposition of a criminal penalty. The Court held that, like pleas of *nolo contendere,* guilty pleas coupled with assertions of innocence did not bar entry of judgment against the defendant. *Alford* did not address in any fashion the collateral effect of such pleas.

[**40] Finally, Blohm argues that the government violated the plea agreement. The agreement states in pertinent part: "The United States will recommend to the Court that Nelson M. Blohm receive a protective sentence, a $ 5,000 fine and that the tax due and owing for 1981 be determined in civil proceedings." Blohm argues that this agreement enshrines a promise that the conviction would not be used against him in civil proceedings. We disagree. The government promised that "the tax due and owing for 1981 [will] be determined in

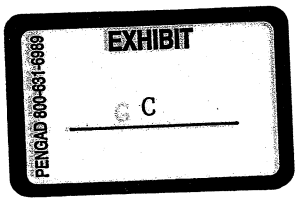
civil proceedings." Those proceedings are before us now. The plea agreement did not promise Blohm the chance to relitigate the facts underlying his guilty plea. It promised only that the "tax due and owing" would be determined in a subsequent civil proceeding. The language of the plea agreement assumes that taxes are due for the tax evasion to which Blohm pled guilty; it simply left for another day the determination of the amount.

Blohm further argues that courts should explore the circumstances "behind" a guilty plea to determine the plea's collateral effect. He claims that he did not understand that his plea might later be used against him in a civil proceeding, and [**41] thus this misunderstanding should not be used against him. He cites *Plunkett v. Commissioner, 465 F.2d 299, 306 (7th Cir.1972)*, a case wherein the court estopped a taxpayer from denying civil liability for tax evasion where the taxpayer had previously pled guilty to the charge. Blohm argues that the *Plunkett* court examined the circumstances behind the plea when it noted that the "petitioner did not misunderstand the terms or immediate consequences of the agreement and his plea of guilty." *465 F.2d 299 at 306.* We note, however, that the court's remark in *Plunkett* was made pursuant to its examination of whether the defendant's plea was *voluntary,* not whether the defendant misperceived the plea's collateral consequences. The district court here examined Blohm thoroughly at his plea hearing [*1556] and found the plea to be voluntary and made "with the understanding of the nature of the charge and the consequences of the plea." Blohm plea colloquy at 20. A close examination of the plea colloquy's transcript reveals no clear error.

IV. CONCLUSION

The Blohms have failed to prove the IRS deficiency notice arbitrary or erroneous. [**42] Moreover, the Tax Court properly concluded that Blohm was collaterally estopped from denying liability for the addition to tax under *§ 6653(b)*. Accordingly, we affirm the Tax Court's judgment in all respects.

AFFIRMED.



LexisNexis®

1 of 1 DOCUMENT

Rodney L. Zurcher, Appellant, v. Richard J. Bilton, individually and as agent and servant of Woody Bilton Ford, Inc., and Woody Bilton Ford, Inc., Respondents.

Opinion No. 26531

SUPREME COURT OF SOUTH CAROLINA

379 S.C. 132*; *666 S.E.2d 224*; *2008 S.C. LEXIS 235

April 16, 2008, Heard
August 11, 2008, Filed

PRIOR HISTORY: [***1]

Appeal from Berkeley County. Roger M. Young, Circuit Court Judge.

DISPOSITION: AFFIRMED.

COUNSEL: Timothy A. Domin and Michael B. McCall II, both of Clawson & Staubes, of Charleston, for Appellant.

E. Warren Moise, of Grimball & Cabaniss, of Charleston, for Respondents.

JUDGES: CHIEF JUSTICE TOAL. MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

OPINION BY: TOAL

OPINION

[*133] [**225] **CHIEF JUSTICE TOAL:** Appellant initiated a civil action against Respondents alleging various torts arising out of a physical altercation between the parties. The trial court granted Respondents' motion for summary judgment as to each claim on the grounds that Appellant's *Alford* plea in a previous criminal proceeding collaterally estopped Appellant from litigating a civil claim based on the same facts as the criminal conviction. We affirm.

[*134] **FACTUAL/PROCEDURAL BACKGROUND**

In June 2004, Appellant Rodney Zurcher ("Zurcher") approached Respondent Joey Bilton ("Bilton") in Bilton's office at the Woody Bilton Ford dealership to request a referral fee for recruiting a customer who had recently purchased a vehicle from the dealership. When Bilton refused to pay the fee, a physical altercation ensued which ultimately involved two female employees of the dealership who came to assist Bilton. [***2] Zurcher and Bilton immediately reported the incident to the local police department, each claiming that the other was the aggressor.

The solicitor charged Zurcher with three counts of simple assault and battery against Bilton and the two female employees. Subsequently, Zurcher filed a civil suit against Bilton and Woody Bilton Ford, Inc. (collectively, "Respondents") alleging assault and battery, false imprisonment, abuse of process, malicious prosecution, and intentional infliction of emotional distress. Respondents counterclaimed alleging assault and battery. Each party denied liability for the other's claims and further claimed self-defense.

The criminal charges against Zurcher went before the magistrates court in February 2006. Considering the presence of Bilton, the two female employees, and one additional witness to testify against him, and the "significant likelihood of being convicted on all three counts," Zurcher entered a guilty plea under *North*

Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) on a [***3] single count of simple assault and battery in [**226] exchange for the dismissal of his remaining two assault and battery claims. The magistrate assessed the maximum fine, but did not impose a sentence.

Following Zurcher's criminal proceeding in magistrates court, Respondents filed a motion for summary judgment in the civil action. The trial court granted the motion for summary judgment as to all of Zurcher's claims against Respondents and granted partial summary judgment as to Respondents' claims against Zurcher, leaving only the issues of proximate cause and damages. Specifically, the trial court ruled that Zurcher's previous *Alford* plea to simple assault and battery at the criminal proceeding collaterally estopped Zurcher from litigating the claims and counterclaim asserted at the [*135] subsequent civil proceeding, all of which hinged on whether Zurcher physically assaulted Bilton. This appeal followed.

The case was certified to this Court from the court of appeals pursuant to Rule 204(b), SCACR, and Zurcher raises the following issue for review:

> Did the trial court err in holding that a defendant who enters an *Alford* plea in a criminal proceeding is collaterally estopped from litigating the issue [***4] in a subsequent civil action based on the same facts underlying the plea?

STANDARD OF REVIEW

An appellate court reviews the grant of summary judgment under the same standard applied by the trial court. *Houck v. State Farm Fire & Cas. Ins. Co., 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005)*. Summary judgment is appropriate where there are no genuine issues of material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Hanson v. Scalise Builders of S.C., 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007)*.

LAW/ANALYSIS

Zurcher argues that the trial court erred in holding that the entry of an *Alford* plea at a criminal proceeding collaterally estops a defendant from litigating the issue in a subsequent civil action based on the same facts underlying the plea. We disagree.

Under the doctrine of collateral estoppel, also known as issue preclusion, when an issue has been actually litigated and determined by a valid and final judgment, the determination [***5] is conclusive in a subsequent action whether on the same or a different claim. *S.C. Prop. and Cas. Ins. Guar. Assoc. v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991)*. The doctrine may not be invoked unless the precluded party has had a full and fair opportunity to litigate the issue in the first action. *See id.* This Court recently extended the doctrine of collateral estoppel by adopting the rule that "once [*136] a person has been criminally convicted, the person is bound by that adjudication in a subsequent civil proceeding based on the same facts underlying the criminal conviction." *Doe v. Doe, 346 S.C. 145, 148, 551 S.E.2d 257, 258 (2001)*.

We find no legal or practical justification for excluding guilty pleas from the ambit of the doctrine of collateral estoppel. Although the defendant who enters a guilty plea has chosen a legal strategy which avoids a trial while the defendant who is adjudicated guilty has opted to take his chances at a contested trial, both are means to the same legal end: the imposition of the punishment prescribed by law. *See Sanders v. Leeke, 254 S.C. 444, 447, 175 S.E.2d 796, 797 (1970)* ("A plea of guilty is a confession of guilt, made in a [***6] formal manner and has the same effect in law as a verdict of guilty . . . ."). For this reason, so long as a defendant has entered a guilty plea freely and voluntarily, [1] an admission of guilt fully and fairly litigates the matter in the same manner as a contested trial in which a defendant is adjudicated guilty. Accordingly, we hold that a defendant [**227] who enters a guilty plea may be collaterally estopped from litigating the same issue in a subsequent civil suit.

> 1 *See Gaines v. State, 335 S.C. 376, 380, 517 S.E.2d 439, 441 (1999)* (stating the constitutional standard governing the entry of guilty pleas).

An *Alford* plea is not distinguishable from a standard guilty plea in this regard. An *Alford* plea -- a guilty plea

accompanied by an assertion of innocence -- was held to be a constitutional admission of guilt in *North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)*. The *Alford* court reasoned that so long as a factual basis exists for a plea, the Constitution does not bar sentencing a defendant who makes a calculated choice to accept a beneficial plea arrangement rather than face overwhelming evidence of guilt. *400 U.S. at 38*. [2] Under this same reasoning, we find that the [*137] defendant must likewise [***7] accept the collateral consequences of that decision. Therefore, we hold that the entry of an *Alford* plea at a criminal proceeding has the same preclusive effect as a standard guilty plea.

2 In its analysis, the *Alford* court compared guilty pleas accompanied by an assertion of innocence with *nolo contendere* pleas, in which a defendant does not expressly admit guilt, yet waives the right to a trial and authorizes the court to treat him as guilty. *See 400 U.S. at 35-37*. We reiterate that the significance of *Alford* lies in the determination that the *Alford* class of guilty pleas is constitutionally valid. To this end, the *Alford* court's analogy is only intended to show that an *Alford* guilty plea is the constitutional equivalent of a *nolo* plea. The comparison in no way suggests that *Alford* pleas are the equivalent of *nolo* pleas for all practical purposes, particularly with respect to evidentiary standards which prohibit using *nolo* pleas as substantive evidence of guilt in a subsequent proceeding. *See* Rule 410(2), SCRE.

Our rules of evidence also distinguish *nolo contendere* pleas from *Alford* pleas in some circumstances. *See* Rule 609, SCRE (permitting prior convictions to be used for impeachment [***8] purposes and that for purposes of the rule, "a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to *North Carolina v. Alford*"). In light of this distinction, had the policy underlying the rules been to give *Alford* pleas the same non-preclusive effect on collateral review as *nolo* pleas, the drafters could have specified such in the rules governing the admissibility of prior convictions. *See* Rule 410, SCRE (providing that a *nolo* plea is inadmissible in any civil or criminal proceeding); *and* Rule 803(22), SCRE (excluding *nolo* pleas from the hearsay exception for judgments of previous convictions after a trial or upon a plea of guilty).

For these reasons, we find that any perceived similarity between *Alford* pleas and *nolo* pleas is irrelevant to the Court's determination in this case.

Applying this to the instant case, we find the trial court correctly determined that Zurcher was estopped from denying liability for the assault in the subsequent civil action. Zurcher had a full and fair opportunity to litigate the criminal assault and battery charge at the trial before the magistrate, and the testimony of the [***9] three witnesses against him who were present during the altercation clearly provided a sufficient factual basis for Zurcher's plea. Furthermore, as the trial court observed, Zurcher claimed no difficulties in procuring witnesses and no procedural limitations affecting his opportunity to litigate. That he deemed a plea of guilty to be the more appealing alternative at the criminal proceeding does not diminish the voluntariness of Zurcher's plea under the circumstances. Acting on the advice of competent counsel, Zurcher simply reasoned that the evidence weighed heavily against him and that he preferred to pay a fine for one charge of simple assault and battery rather than risk the imposition of three consecutive thirty-day sentences for three charges of assault and battery. Accordingly, we hold that Zurcher is bound by [*138] his *Alford* plea and is precluded from denying liability in the subsequent civil action with Bilton. [3]

3 Only guilty pleas to "a crime punishable by death or imprisonment in excess of one year" are admissible under the hearsay exception found in Rule 803(22), SCRE. Therefore, it appears that Zurcher's guilty plea to simple assault and battery, a misdemeanor carrying a $ 500 [***10] fine or 30 days imprisonment, *see S.C. Code Ann. §§ 22-3-540, -560* (2007), was inadmissible hearsay evidence in the first instance. Because Zurcher neither objected at trial nor appealed the issue on grounds of hearsay, this Court need not address the matter. We also note that Zurcher could have pleaded *nolo contendere* and altogether avoided this appeal as *nolo* pleas are permitted only for misdemeanor charges, *S.C. Code Ann. § 17-23-40* (2003), and are inadmissible in any civil or criminal proceeding, Rule 410, SCRE, except for impeachment purposes, Rule 610, SCRE.

CONCLUSION

For the foregoing reasons, we affirm the trial court's decision holding that a party who [**228] has pleaded guilty under *Alford* in a previous criminal proceeding is collaterally estopped from litigating the issue in a subsequent civil action based on the same facts underlying the plea.

MOORE, WALLER, PLEICONES and BEATTY, JJ., concur.

STATE OF MAINE
WALDO, SS.

SUPERIOR COURT
Civil Action
Docket No. BELSC-CV-10-41

ALEXIS INGRAHAM and BRETT INGRAHAM,

Plaintiffs,

v.

MADELINE B. GRAY d/b/a NICKERNEWS.NET,

Defendant.

ORDER

Upon Motion and consideration, it is hereby ORDERED that Defendant Madeline B. Gray d/b/a Nickernews.net's Motion for Summary Judgment is granted.

SO ORDERED.

Dated: _____, 2011

_____
Justice, Superior Court