

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MILDRED FAYE STOKES BREUER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HODGES MOVING & STORAGE CO., )  
 a corporation, )  
 )  
 Defendant, )  
 )  
 and )  
 )  
 THE HOME INSURANCE COMPANY and )  
 ALLIED VAN LINES, INC., a )  
 corporation, )  
 )  
 Additional Defendants. )

FILED

SEP 30 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 76-C-473-C

ORDER OF DISMISSAL WITH PREJUDICE

NOW on this 30<sup>th</sup> day of September, 1977, upon  
application of the parties,

IT IS HEREBY ORDERED that the above entitled cause and  
the Cross-Complaint be and the same is dismissed with prejudice to  
any further action thereon.



JUDGE

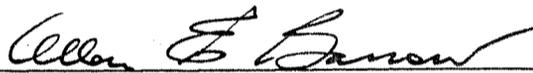


Plaintiff has alleged a violation of Section 1983, Title 42 U.S.C.

The Court, therefore, finds, that in the interests of justice, and pursuant to 28 U.S.C. §1406(a) this case should be transferred to the Eastern District of Oklahoma.

IT IS, THEREFORE, ORDERED that this cause of action and complaint and all pleadings are hereby transferred to the United States District Court for the Eastern District of Oklahoma.

ENTERED this 30<sup>th</sup> day of September, 1977.



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CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DOUGLAS W. SELLS and  
NORMA L. SELLS, Husband  
and Wife, Individually and  
as Surviving Father and  
Mother For and On Behalf of  
the Heirs, Executors and  
Administrators of the Estate  
of Prentiss Douglas Sells,  
Deceased,

And

BRENDA FERGUSON and  
CHIQUITA FOSTER, and  
MARVIN FOSTER, Individually  
and as Surviving next of kin,  
For and On Behalf of the Heirs,  
Executors and Administrators of  
the Estate of Clotiel Foster and  
Dale Foster, Deceased,

Plaintiffs,

Vs.

THE UNITED STATES OF AMERICA  
and the CITY OF SAND SPRINGS,  
OKLAHOMA, a Municipal Corporation,  
Defendants

CIVIL NO. 77-C-27-C

CIVIL NO. 77-C-364-C

**FILED**

SEP 30 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

NOW on this 22nd day of September, 1977, the above styled and numbered causes of action came on for hearing, having been heretofore consolidated for trial by Order of the Court entered herein on September 7, 1977; Plaintiffs Douglas W. Sells and Norma L. Sells being present and represented by the their Attorneys, Frank R. Hickman and Stephen M. Booth; Plaintiffs Brenda Ferguson, Chiquita Foster and Marvin Foster being present and represented by their Attorney, Paul D. Brunton; the Defendant, United States of America being represented by its Attorney, Ben Baker, Assistant United States Attorney, and John Chronister.

AND all parties having rested after trial of the issues to the Court on September 21, 1977, the Court proceeded to hear the arguments of counsel, and thereafter the Court having announced findings of fact and conclusions of law, finds upon the ultimate issues herein as follows:

That Plaintiffs Douglas W. Sells and Norma L. Sells are entitled to judgment against the Defendant, United States of America, for the sum of

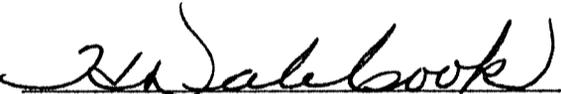
\$32,138.25 money damages for the wrongful death of Prentiss Douglas Sells.

That Plaintiffs Brenda Ferguson, Chiquita Foster, and Marvin Foster are entitled to judgment against the Defendant, United States of America, for the sum of \$ 46,402.78 money damages for the wrongful death of Clotiel Foster.

That Plaintiffs Brenda Ferguson, Chiquita Foster and Marvin Foster are entitled to judgment against the Defendant, United States of America, for the sum of \$11,095.00 money damages for the wrongful death of Dale Foster.

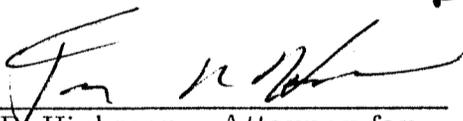
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court, that Plaintiffs Douglas W. Sells and Norma L. Sells have and recover judgment against the Defendant, United States of America, in the amount of \$32,138.25, together with interest thereon at the rate of 10 per cent per annum from the date of judgment, and for the costs of the action.

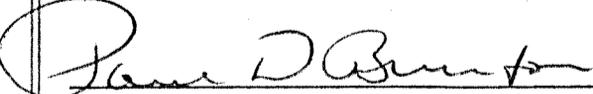
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that Plaintiffs Brenda Ferguson, Chiquita Foster and Marvin Foster have and recover judgment against the Defendant, United States of America, in the total amount of \$ 57,497.78 , together with interest at the rate of 10 per cent per annum from the date of judgment and for the costs of the action.

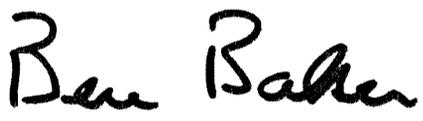
  
JUDGE

Approved as to Form ~~and Contents~~

BB

  
Frank R. Hickman, Attorney for Plaintiffs, Douglas W. Sells and Norma L. Sells

  
Paul D. Brunton, Attorney for Plaintiffs, Brenda Ferguson, Chiquita Foster and Marvin Foster

  
Ben Baker, Attorney for Defendant, United States of America

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
OF OKLAHOMA

DOUGLAS W. SELLS and  
NORMA L. SELLS, Husband  
and Wife, Individually and  
as Surviving Father and  
Mother For and On Behalf  
of the Heirs, Executors  
and Administrators of the  
Estate of Prentiss Douglas  
Sells, Deceased,

and

BRENDA FERGUSON and  
CHIQUITA FOSTER, and  
MARVIN FOSTER, Individually  
and as Surviving Next of  
Kin, For and On Behalf of  
the Heirs, Executors and  
Administrators of the Estate  
of Clotiel Foster and  
Dale Foster, Deceased,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA  
and the CITY OF SAND SPRINGS,  
OKLAHOMA, a Municipal Corporation,

Defendants.

CIVIL NO. 77-C-27-C

CIVIL NO. 77 C-364-C

FILED

SEP 30 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now on this 22nd day of September, 1977, this cause having been submitted to the Court for decision, after presentation of evidence on September 21, 1977, finds that the plaintiffs in each of the above entitled causes sustained, by a preponderance of the evidence, the burden of proof, and the Court accordingly finds the issues in favor of plaintiffs and against the defendant.

The Court finds that in 1964 the Corp of Engineers completed the Keystone Dam Reservoir Project, and in 1968, in furtherance of said project, constructed a low water or redirection dam approximately eight miles below the Keystone Dam; that on the north side of the low water dam there is maintained a gate area which permits water to flow through such gates; that when water is released from the main dam facility, it takes approximately three hours for such water to reach the low water dam from the main dam facility; that having once reached the low dam, said water will

rise approximately two and one half feet in the first hour, and in the next three hours, three to three and one half feet; that north of the low dam site and immediately downstream therefrom, the Corp of Engineers leased to the City of Sand Springs certain land for the express purpose of having said City operate a recreational park; that in said park was constructed ball diamonds, picnic areas, sand beaches, boat ramp and other facilities to accommodate the public; that the public is invited to use said facilities, including swimming, wading and fishing activities in the area; that the defendant, through the Corp of Engineers, prior to July 25, 1976, was fully aware how the deceptively calm water can create a dangerous undertow and swift current by release of water from the Keystone Reservoir; that such danger was unknown by the deceased persons; that on July 25, 1976, there was erected a warning signal on two islands for the purpose of warning boaters ~~which was had to read from the park area~~; that warning signs were posted on the north edge of the low water dam, but no warning signs regarding the dangerous undertow and prohibition to swimming had been erected below the dam; that on July 25, 1976, on a summer weekend, many people were making use of the recreational facilities at the park; that Prentiss Douglas Sells, Clotiel Foster and her son, Dale Foster, among others, while enjoying such facilities, went wading, along with others, below the low water dam; that upon Eugene Ferguson noting a rise in the water, all in his group were directed to and did move further south down the river <sup>from the</sup> ~~to~~ the low water dam; that the water continued to rise, and that Clotiel Foster found that she was unable to control herself in the water, was carried towards the low water dam; that Prentiss Douglas Sells and Dale Foster entered the water near the dam in a rescue attempt; that each was unsuccessful, and in their attempt, were asphyxiated by drowning; that Clotiel Foster, after attempt was made to rescue her by Eugene Ferguson, her son-in-law, she too was asphyxiated by drowning; that at the time of the drowning of said three individuals, the water had developed in a swirling manner and that same had created an

BB

uncontrollable undertow; that although there was a warning sound at the Keystone Dam several hours before of the intended release of such water and red lights between the low water dam and the Keystone Dam were blinking for the purpose of warning the public, such lights were not installed nor in use on the low water dam at the time of the drowning, and no ~~written~~<sup>NOT.</sup> notice given of the release of the water by the Corp of Engineers to said deceased persons; that in this regard, said deceased persons were without neglect; that no oral or written notice had been given said decedents prior to their drowning of the danger of such undertow, nor were there any rescue facilities available at the time for the purpose of attempting such rescue; that said individuals were not trespassers but permissive users and the Court finds that the defendant owed a duty to give warnings adequate of the change of condition, and in this it failed so to do, and that the release of such water and the failure to give such warnings was the proximate cause of the death of each of said decedents.

The Court finds that although a special and unusual danger was created by the construction of said low water dam, and release of water from the Keystone Dam, and that special danger warnings could have been given at little cost, a general warning by the posting of a sign advising no swimming may or may not be sufficient to advise the public, and the deceased in particular, of the danger which was created by the rising water.

The Court further concludes that by reason of Title 12, Section 1053 of the Oklahoma Statutes, and Title 12, Section 1055 of the Oklahoma Statutes, plaintiffs are entitled to recover judgment, including funeral expenses, as set out in their complaint and is more fully described in the Journal Entry of Judgment filed herein.

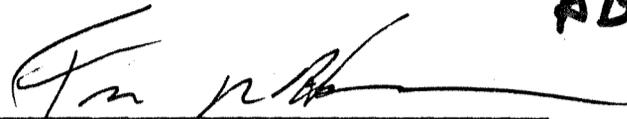
The Court further concludes that the determination in this case is based upon special facts and is not to be construed as indicating a general liability on the part of the defendant as it

may relate to other occurrences in the use of the Keystone Dam Project.

  
United States District Judge

APPROVED AS TO FORM ~~AND CONTENT~~:

BB

  
Frank R. Hickman

Attorney for Plaintiffs, Sells.

  
Paul D. Brunton

Attorney for Plaintiffs, Ferguson  
and Foster.

  
Ben Baker

Attorney for Defendant, United  
States of America.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

EDWIN E. ROBINSON a/k/a  
EDWIN EARL ROBINSON, and  
CAROLYN A. ROBINSON,

Defendants.

CIVIL ACTION NO. 77-C-294-C

**FILED**  
SEP 30 1977  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 30<sup>th</sup>  
day of October, 1977, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney; and the Defendants,  
Edwin E. Robinson a/k/a Edwin Earl Robinson and Carolyn A.  
Robinson, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Edwin E. Robinson a/k/a  
Edwin Earl Robinson and Carolyn A. Robinson, were served on  
July 13, 1977, as appears from the United States Marshal's Service  
herein.

It appearing that the Defendants, Edwin E. Robinson  
a/k/a Edwin Earl Robinson and Carolyn A. Robinson, have failed  
to answer herein and that default has been entered by the Clerk  
of this Court.

The Court further finds that this is a suit based  
upon a mortgage note and foreclosure on a real property mortgage  
securing said mortgage note upon the following described real  
property located in Tulsa County, Oklahoma, within the Northern  
Judicial District of Oklahoma:

Lot Twenty-One (21), Block Four (4), VALLEY  
VIEW ACRES ADDITION to the City of Tulsa,  
County of Tulsa, State of Oklahoma, according  
to the recorded plat thereof.

THAT the Defendants, Edwin E. Robinson and Carolyn A.  
Robinson, did, on the 23rd day of July, 1976, execute and deliver

to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$10,750.00 with 9 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Edwin E. Robinson and Carolyn A. Robinson, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$10,842.44 as unpaid principal with interest thereon at the rate of 9 percent per annum from August 1, 1976, until paid, plus the cost of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Edwin E. Robinson and Carolyn A. Robinson, in personam, for the sum of \$10,842.44 with interest thereon at the rate of 9 percent per annum from August 1, 1976, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each

of them and all persons claiming under them since the filing of the complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

1st H. Dale Cook  
UNITED STATES DISTRICT JUDGE

APPROVED

  
ROBERT P. SANTEE  
Assistant United States Attorney



- 6) That the trial court erred in its admission into evidence of certain photographs;
- 7) That the trial court erred in allowing the jury to separate after submission of the case;
- 8) That the trial court erred in admitting evidence of a prior conviction claimed to be invalid without a bifurcated trial; and
- 9) That the information under which he was charged and convicted was defective.

The only issues raised in the direct state appeal of the petitioner's conviction were (1) the evidentiary error of admitting prejudicial photographs; (2) allowing the jury to separate after submission of the case; and (3) the excessiveness of the sentence. The remaining issues raised by the petitioner in his federal habeas corpus petition have not been presented for review by a state court. The petitioner has not sought post-conviction relief provided by 22 O.S. 1971, § 1080, on any of the issues raised in this petition.

Habeas corpus jurisdiction of persons in custody pursuant to the judgment of a state court is conferred on federal courts by 28 U.S.C., § 2254, which requires exhaustion of available state remedies prior to the filing of a federal habeas corpus petition. Pitchess v. Davis, 421 U.S. 482, 486, 44 L.Ed.2d 317, 321, 95 S.Ct. 1748 (1975). It is only when the issue is clearly one of law and there are no facts to be developed that the petitioner is not required to avail himself of state post-conviction procedures in the sentencing court. Sandoval v. Rodriguez, 461 F.2d 1097, 1099 (10th Cir. 1972). Moles v. State of Oklahoma, 384 F. Supp. 1148 (W.D. Okl. 1974).

Thus, the issues raised by the petitioner, having not been presented to the state courts, are not properly before this Court for adjudication. See, Hoggatt v. Page, 432 F.2d 41, 43 (10th Cir. 1970).

Additionally, with respect to Petitioner's claim of ineffective counsel, Petitioner alleges only in a conclusory fashion that he received ineffective assistance of counsel in his state court trial. No specific allegations of facts indicating any basis for such allegation is made. To sustain a claim of incompetent or ineffective counsel it is necessary to demonstrate that the representation was such as to make the trial a mockery, a sham or a farce. Ellis v.

State of Oklahoma, 430 F.2d 1352, 1356 (10th Cir. 1970); Linebarger v. State of Oklahoma, 404 F.2d 1092, 1095 (10th Cir. 1968). There is no indication from the record in this case of incompetence on the part of the petitioner's attorney. Further, no allegation having been made by the petitioner as to any particular in which the representation was inadequate, his conclusory averment imposes no obligation for a hearing. Eskridge v. United States, 443 F.2d 440, 443 (10th Cir. 1971).

The petitioner's claim that the sentence imposed by the Court was excessive is also without merit. Title 21 O.S. 1971, § 1436, provides that Burglary is punishable by imprisonment in the penitentiary; that Burglary in the First Degree is punishable for any term not less than seven (7) nor more than twenty (20) years. Title 21 O.S. Supp. 1976, §51(1), provides that every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, subsequently commits any crime after such conviction, which is punishable by a term exceeding five (5) years for the subsequent offense, is punishable for the subsequent conviction for a term of not less than ten (10) years. Thus, Burglary in the First Degree, After Former Conviction of a Felony is punishable by only a minimum sentence. There is no maximum sentence for conviction of such offense. Therefore, the petitioner's sentence of forty (40) years imprisonment is within that allowed by statute.

The petitioner's claim that his sentence was excessive does not raise a federal constitutional question. Karlin v. State of Oklahoma, 412 F. Supp. 635, 637 (W.D. Okl. 1976). When the sentence imposed is within the limits prescribed by statute for the offense committed, it ordinarily will not be regarded as cruel and unusual. Karlin, supra, citing Edwards v. United States, 206 F.2d 855, 857 (10th Cir. 1953).

As additional grounds for relief petitioner claims that the evidence was insufficient to support his conviction.

The sufficiency of evidence to support a state conviction raises no federal constitutional question. Capes v. State of Oklahoma, 412 F. Supp. 1111, 1115 (W.D. Okl. 1975); Young v. State of Alabama

433 F.2d 854, 855 (5th Cir. 1971). The guilt or innocence of an accused person when determined by a state court is not subject to review by federal courts in habeas corpus proceedings. A state prisoner is entitled to relief in federal courts only when rights guaranteed by the United States Constitution have been denied him. Sinclair v. Turner, 447 F.2d 1158, 1161 (10th Cir. 1971); Bradshaw v. State of Oklahoma, 398 F. Supp. 838, 843-844 (E.D. Okl. 1975).

The petitioner also alleges error on the part of the state court in admitting into evidence "gruesome and highly prejudicial photographs." The admissibility of photographs was an evidentiary question for the state trial judge. Mercado v. Massey, 536 F.2d 107, 108 (5th Cir. 1976). Unless there is a denial of fundamental fairness or the denial of a specific constitutional right, no constitutional issue is involved. Maglaya v. Buchkoe, 515 F.2d 265, 268 (6th Cir. 1975). Questions relating to the admissibility of evidence are usually a matter of state law and procedure not involving constitutional issues. Jones v. Wyrick, 415 F. Supp. 108, 110 (E.D. Mo. 1976); United States, ex rel Smith v. Fogel, 403 F. Supp. 104, 106 (N.D. Ill. 1975); and Stallings v. State of South Carolina, 320 F. Supp. 824, 825 (D. Ct. S.C. 1970). Trial errors such as the erroneous admission of evidence cannot afford a basis for collateral attack. Cassell v. People of State of Oklahoma, 373 F. Supp. 815, 817 (E.D. Okl. 1973). A state court's rulings on admissibility of evidence do not present grounds for federal review. Buchannon v. Wainright, 474 F.2d 1006, 1007, (5th Cir. 1973). The only question considered on an application for habeas corpus is whether the admission of evidence constituted a denial of due process. United States, ex rel Mertz v. State of New Jersey, 423 F.2d 537, 540 (3rd Cir. 1970); cf. Peterson v. Tinsley, 331 F.2d 569 (10th Cir. 1964). It is only when the error of admission of evidence is found to be such as may be characterized as impugning fundamental fairness or infringing specific constitutional protections, and is so conspicuously prejudicial as to deprive the defendant of a fair trial, that a federal question is presented warranting federal intervention. Stallings v. State of South Carolina, supra.

The admission of the complained of photographs in the instant case cannot be said to assume constitutional dimensions.

The petitioner further contends in his Petition and in handwritten pages attached thereto that the court admitted evidence of a prior conviction without a bifurcated trial; that the evidence of the prior conviction was not properly certified; and that the information under which he was charged was in some manner defective.

Pages 115 through 124 of the transcript of the trial clearly indicate that there was a bifurcated trial. An examination of the complete transcript clearly shows that evidence of the petitioner's prior convictions was offered and admitted only in the second stage of trial. Further, at page 117 of the transcript, the petitioner's attorney stated that the defense had no objection to the introduction into evidence of State's Exhibits 8, 9, and 10 which appear from the index page of the transcript to be certified copies of Judgments and Sentences of former convictions.

Habeas corpus proceedings cannot ordinarily be used to correct mere error or irregularities in the trial court proceedings. Bishop v. Wainright 511 F.2d 664, 666 (5th Cir. 1975); Pierce v. Page, 362 F.2d 534 (10th Cir. 1966). Trial errors such as the erroneous admission of evidence do not afford a basis for collateral attack. Carrillo v. United States, 332 F.2d 202 (10th Cir. 1964); Wing v. Anderson, 398 F. Supp. 197, 199 (E.D. Okl. 1973).

Introduction at trial of evidence of prior crimes is a matter of state evidentiary law and, thus, absent constitutional infringements, ordinarily are not subject to review in federal habeas corpus proceedings. Parker v. Swenson, 332 F. Supp. 1225, 1228 (E.D. Mo. 1971). Hubbard v. Wilson, 401 F. Supp. 495, 500 (D.C. Col. 1975); Manning v. Rose, 507 F.2d 889, 892 (6th Cir. 1974).

On habeas corpus, the court will not examine the information or indictment further than to see that it affords a jurisdictional basis for the conviction. Meeks v. Kaiser, 125 F.2d 826, 827 (8th Cir. 1942). The sufficiency of an indictment or information in a state

court is a matter for the court of the state to determine and is not reviewable in a federal habeas corpus proceeding. Cole v. VanHorn, 67 F.2d 735, 736 (10th Cir. 1933). It is well settled that defects in an indictment not going to the jurisdiction of the court may not be raised on habeas corpus. Knight v. Hudspeth, 112 F.2d 137, 139 (10th Cir. 1940), cert. den. 311 U.S. 681, 85 L.Ed. 439, 61 S.Ct. 62. Thus, the petitioner's allegations regarding the information and evidence of the prior conviction are without merit.

Petitioner's claim that the state court erred in allowing the jury to separate after submission of the case does not give rise to a constitutional violation. The record in the state court trial reflects that petitioner made no request that the jury be kept together nor any objection when they were allowed to separate for lunch. Jury sequestration is not a fundamental or constitutionally guaranteed right. Young v. State of Alabama, 443 F.2d 854, 856 (5th Cir. 1971), cert. den. 405 U.S. 976, 31 L. Ed.2d 251, 92 S.Ct. 1202. Separation of the jurors after the case has been submitted where there is no objection by the defense, and absent a showing of prejudice from the separation, does not constitute error. Roth v. United States, 339 F.2d 863, 866 (10th Cir. 1964); Grant v. United States, 368 F.2d 658, 660 (5th Cir. 1966).

Finally Petitioner, in conclusory allegations claims that he was denied due process and equal protection in violation of the Fourteenth Amendment. Whether a state prisoner has been denied due process must be adjudged from the facts as they exist in each particular case and from a totality of such facts. Miller v. Crouse, 346 F.2d 301, 306 (10th Cir. 1965). Mere conclusions in an application for habeas corpus, unsupported by allegations of facts, are not sufficient to state a claim for relief. Gay v. Graham, 269 F.2d 482, 486 (10th Cir. 1959).

In the instant case, the petitioner's allegations of denial of due process and equal protection are bald conclusions unsupported by any factual allegations whatever and amount to conclusions of law.

Anderson v. Croom, 316 F. Supp. 1406 (E.D. N.C. 1970). Broad complaints do not entitle a habeas corpus petitioner to a hearing. Arsad v. Henry, 317 F. Supp. 129, 130 (E.D. N.C. 1970). Accordingly, the allegations of the petitioner in connection with his "due process and equal protection" claims are legally insufficient and should be denied without a hearing. Cassell v. People of State of Oklahoma, supra.

For the reasons stated herein, the Petition for Writ of Habeas Corpus is denied.

IT IS SO ORDERED this 30<sup>th</sup> day of September, 1977.

  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MFA INSURANCE COMPANY,  
a corporation,

Plaintiff,

vs.

HARROL F. WADE,

Defendant.

76-C-618-B

FILED

SEP 30 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT

Based on the Findings of Fact and Conclusions of Law  
filed this date,

IT IS ORDERED that Judgment be entered in favor of the  
defendant and against the plaintiff, and that defendant recover his  
costs herein expended.

ENTERED this 30th day of September, 1977.



CHIEF UNITED STATES DISTRICT JUDGE



5. Thereafter, the plaintiff made a due demand upon the defendant for the return of said sum claiming that defendant had not actually sustained the loss and maintained the defendant obtained said sum from the plaintiff by means of fraud.

#### CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law.

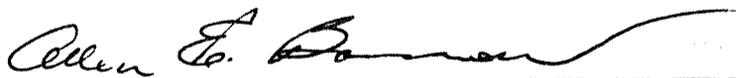
1. The evidence and testimony adduced in this case was conflicting and diametrically opposed.

2. Where fraud is charged, it becomes a question of fact, and must be proved by the party alleging the fraud. It cannot be inferred from facts which may be consistent with honesty of purpose. At law, fraud or collusion is never presumed. It be established by clear, satisfactory and convincing evidence. *State ex rel Derryberry v. Kerr-Mcgee Corporation*, 516 P.2d 813, 817 (Okla. 1973); *Davis v. Howe*, 226 P.2d 316 (Okla. 1924); *Jones v. Jones*, 290 P.2d 757 (Okla. 1956); *Jones v. Featherston*, 373 P.2d 16, 19 (Okla. 1962).

3. Fraud is never presumed, but must be proved by clear and satisfactory evidence, and when a transaction is fairly susceptible of two constructions, the one which will free it from the imputation of fraud will be adopted. *Cromwell v. Ream*, 175 Okla. 498, 52 P.2d 752; *Brooks v. LeGrand*, 435 P.2d 142, 145 (Okla. 1967).

4. The Court, having observed the demeanor of the witnesses and their credibility, finds that plaintiff has not sustained the burden of proof and the plaintiff should take nothing by virtue of this action and Judgment should be entered in favor of the defendant and against the plaintiff.

ENTERED this 30th day of September, 1977.



CHIEF UNITED STATES DISTRICT JUDGE



1. His confession was illegal, coerced, obtained without benefit of counsel and used as evidence in obtaining his conviction.
2. He was denied counsel or opportunity to retain counsel during investigation and crucial stage of proceeding when confession obtained.
3. He was denied right to appeal in that he told his retained counsel he wished to appeal and no appeal taken or counsel appointed.

The only transcript before this Court is that of the Judgment and sentencing on March 26, 1970. There is no transcript of the trial itself and the Court reporter has since retired suffering with cervical cancer and physically unable to perform the task of preparing this transcript. Therefore, the cause proceeds before this Court on interrogatory, and being fully advised in the premises after having carefully reviewed the entire file including the sentencing transcript and the answers to interrogatories and cross interrogatories, the Court finds:

Petitioner's first two bald, conclusory contentions that his confession was illegal, coerced, obtained without benefit of counsel, and that he was denied counsel or opportunity to retain counsel during investigation when confession was obtained are not supported and are clearly refuted by the record before this Court.

Petitioner in answer to interrogatories states that he has no knowledge and does not remember giving either an oral or written confession at the time of his arrest because of his physical and mental condition. Lack of memory has been held, although in a different factual context, not a per se deprivation of due process. United States v. Borum, 464 F.2d 896 (10th Cir. 1972). He was at trial represented by two retained attorneys who are recognized in both State and Federal Courts as able lawyers in the Tulsa area, well versed and experienced in criminal law. They filed a motion to suppress the confession contending that the Defendant, Petitioner herein, was unable to understand his Miranda warnings and his confession was not voluntary due to the defendant's physical and mental condition.

An evidentiary hearing was conducted outside the hearing of the jury on this motion and from the affidavit and answers to interrogatories of the trial Judge, as well as the answers to interrogatories of the arresting officers, it is clear that the arresting officer gave the Defendant his Miranda warnings prior to the oral confession. The officers took the Defendant to a hospital for treatment of his cuts and abrasions, which from

the confession Defendant admits were received in a beating occurring shortly prior to the shooting, and from which altercation the Defendant personally drove to the place of the crime. The officers, upon Defendant's release from the hospital, took him to the police station where the Defendant was again given his Miranda warnings and opportunity to retain counsel, or have one appointed, prior to the taking of his written confession.

Following the evidentiary hearing on Defendant's suppress motion, the trial Judge ruled that the Defendant had been given his rights as required by the Constitution of the United States. See, Miranda v. Arizona, 384 U. S. 436 (1966); Jackson v. Denno, 378 U. S. 368 (1964). The Judge further found that the Defendant understood those rights, knowingly waived his right to counsel, and voluntarily and intelligently gave both his oral and written confessions free of threat or coercion, and the confessions were admitted as evidence in the trial. On the record before this Court, an evidentiary hearing for further evidence is not required, it being clear that Petitioner's contention that his confession was coerced, involuntary, and without opportunity to obtain counsel, is without merit.

Petitioner's third allegation that he was denied his right to appeal is also without merit. The Petitioner at sentencing March 26, 1970, was fully and carefully advised by the trial Judge of his appellate rights and the procedure necessary, as appears in the transcript, line No. 17 of page No. 5 through line No. 23 of page No. 7. These rights having been explained, it was Petitioner's responsibility to insure that his retained counsel went forward with the appeal, or to file appropriate, timely instruments for appointment of counsel to appeal in forma pauperis. He was deprived of no appellate rights by the State. McKee v. Page, 435 F.2d 689 (10th Cir. 1970); Oyler v. Taylor, 338 F.2d 260 (10th Cir. 1964).

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Sid Roberts be and it is hereby denied and the case is dismissed.

Dated this 29<sup>th</sup> day of September, 1977, at Tulsa, Oklahoma.

  
\_\_\_\_\_  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

LUCILLE ROBEDEAUX, et al., )  
)  
Plaintiffs, )  
)  
vs. )  
)  
OKLAHOMA STATE DEPARTMENT )  
OF CORRECTIONS, et al., )  
)  
Defendants. )

No. 76-C-358-C

**FILED**

SEP 29 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

Now on this 3rd day of August, 1977, plaintiff appearing through counsel, defendant officials of the United States Department of the Interior and of the Osage Tribe appearing through counsel, and the State of Oklahoma Department of Corrections appearing through counsel, hearing after due notice was held for injunctive relief, with evidence being introduced, exhibits admitted, and arguments of parties fully heard; having been fully informed and duly considering all of the evidence presented, the Court finds:

FINDINGS OF FACT

1. There is presently oil and gas production on the premises occupied by the Oklahoma State Department of Corrections, and the evidence fails to establish that the existence of the prison facility will interfere with said production. No evidence was offered by the plaintiffs relating to any interference with present or future oil and gas leases or production, and counsel for plaintiff announced to the Court that he had abandoned that portion of his complaint dealing with oil and gas leases and production.

2. Substances other than oil and gas underlying the prison site are sandstone, limestone and shale; said substances are neither rare or exceptional, nor do they have any particular characteristic giving them special value; furthermore, the

evidence fails to establish that said substances can be, or can reasonably be expected to be, extracted to be marketed for profit.

3. The sandstone, limestone and shale underlying the prison site are found in abundance underlying a substantial portion of the surface area of Osage County. The sandstone, limestone and shale underlie in abundant quantities throughout Osage County surface area in which the Osage Tribe of Indians hold mineral rights.

4. The Oklahoma Department of Corrections acknowledges and represents to the Court that the United States of America holds the mineral interests underlying the prison site in trust for the Osage Indians.

5. Plaintiffs in this action do not, by virtue of ownership of headright interests, have a possessory interest in the minerals or other substances underlying the prison site.

6. The Osage mineral estate does not share in the production costs involved in extracting minerals from beneath the premises.

7. Neither the United States, as trustee for the Osage Tribe, nor the Osage Indian Tribe nor any defendant herein, claim a present injury by reason of the use by the Oklahoma Department of Corrections of the surface estate; and the evidence fails to establish any such present injury.

8. The United States, as trustee for the Osage Tribe, has a continuing responsibility to fully protect and enforce in a court of law, the mineral estate rights of the Osage Tribe, should, at any time in the future, such enforcement become proper and necessary.

#### CONCLUSIONS OF LAW

1. The applicant for injunctive relief must establish by competent evidence that it will suffer irreparable injury to be entitled to relief. See Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970); Munitions Carriers Conference, Inc.

v. American Farm Lines, 440 F.2d 944 (10th Cir. 1970).

2. Before injunction will issue the right therefore must be clear, and the injury reasonably impending or threatened; it will not issue in doubtful cases, and will be refused until the Courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury is about to be accomplished by an illegal act. Detroit Newspaper Publishers Association v. Detroit Typographical Union No. 18, International Typographical Union, 471 F.2d 872 (6th Cir. 1972).

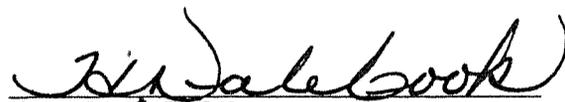
3. In making a determination as to whether injunctive relief is warranted, the Court must consider whether the plaintiff will suffer more from the denial of an injunction than will the defendant from its issuance. Boysmarkets v. Retail Clerks Union, 398 U.S. 235, 254, (1970).

4. Substances such as shale, limestone and sandstone are not minerals unless they are rare and exceptional in character or possess a peculiar characteristic giving them special commercial value. United States v. Coleman, 390 U.S. 599, (1968); Holland v. Dolese Co., 540 P.2d 549 (Okla. 1975).

5. The construction of the prison facility by the Oklahoma State Department of Corrections, as such prison facility relates to the accessibility of shale, limestone and sandstone beneath said facility does not, at this time, result in any actionable wrong, enjoined by this Court in behalf of plaintiffs.

IT IS, THEREFORE, the Order of the Court that the request for injunctions be and the same are hereby denied, and the cause of action be and the same is hereby dismissed.

It is so Ordered this 29<sup>th</sup> day of September, 1977.

  
H. DALE COOK  
United States District Judge



SEP 26 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

WILLIAM ISELIN & CO., INC., a corporation,	)	
	)	
Plaintiff,	)	76-C-383-B
	)	
vs.	)	
	)	
WILLIAM W. WILSON, SR., and WILLIAM W. WILSON, JR.,	)	
	)	
Defendants.	)	

JUDGMENT

The Court has for consideration the Motion for Entry of Judgment filed by the plaintiff, and, having carefully perused the entire file, and, being fully advised in the premises, finds:

That heretofore and on February 27, 1977, plaintiff filed its Motion for Judgment on the pleadings, or in the alternative, Motion for Summary Judgment. That the defendants were directed to respond and on March 11, 1977, the Court granted the defendants until March 20, 1977, to respond to plaintiff's motion.

Thereafter and on March 17, 1977, the parties entered into a Stipulation of Settlement, which was filed on March 24, 1977.

That according to the Motion presently before the Court, the first payment under the Stipulation was due on April 1, 1977, and defendants defaulted on said payment.

On April 28, 1977, plaintiff filed a Motion for Entry of Judgment, which was set for hearing on July 7, 1977. According to the plaintiff, on June 8, 1977, the defendants tendered the delinquent installments due in May and June, which were accepted by plaintiff with the understanding and agreement that all future payments would be made in accordance with the Stipulation and plaintiff's Motion for Judgment was stricken from the docket on July 7, 1977.

Plaintiff alleges that since that date the defendants

have wholly failed and refused to make the payments due on the 1st day of the calendar months of July through September, 1977.

That according to the plaintiff, the defendants have paid a total sum of \$400.00 on the amount due plaintiff of \$33,882.20.

The Court finds that the defendants are in default, and in accordance with said Stipulation, judgment should be entered in favor of the plaintiff and against the defendants for the remaining balance due, plus interest.

IT IS, THEREFORE, ORDERED that Judgment be and the same is hereby entered in favor of the plaintiff and against the defendants in the sum of \$33,482.20, plus interest at the rate of 8-1/4% per annum from May 1, 1976, until paid.

ENTERED this 21<sup>st</sup> day of September, 1977.



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CHIEF UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA  
TULSA DIVISION

FILED

SEP 26 1977

*pk*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

DILLARD CRAVENS, et al.,  
Plaintiffs,  
vs.  
AMERICAN AIRLINES, et al.,  
Defendants.

CIVIL ACTION NO. 74-C-301  
ORDER OF DISMISSAL RE  
CLAIMS OF PLAINTIFFS  
BURRIS, RAGSDALE, AND  
SEALS

The separate motions of defendant, American Airlines, Inc., and defendants, International and Local 514 - Transport Workers Union of America, AFL-CIO, to dismiss the claims of plaintiffs, Thelma Burris, Theresa Ragsdale, and Emmanuel Seals, pursuant to Rules 56 and 37(d) of the Federal Rules of Civil Procedure, came on regularly for hearing on September 9, 1977, at 2:00 p.m. before the Honorable H. Dale Cook, United States District Judge. Plaintiffs appeared by their attorneys, Philip Kaplan and Darrell Bolton, defendant American appeared by its attorneys, George Christensen and David Russell, and the TWU appeared by its attorney, Maynard Ungerman.

The court having considered defendants' motions and memoranda in support thereof, the plaintiffs having filed no opposition and having orally advised the court that they did not oppose the granting of such motions, the court being fully advised in the premises and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Defendants' motions to dismiss the claims of plaintiffs, Thelma Burris, Theresa Ragsdale, and Emmanuel Seals,

1 are hereby granted as expressly provided hereinbelow;

2 2. All claims of plaintiff Thelma Burris shall be and  
3 hereby are dismissed, with prejudice to each of the defendants;

4 3. All claims of plaintiff Theresa Ragsdale shall be  
5 and hereby are dismissed with prejudice to each of the defendants;

6 4. All claims of plaintiff Emmanuel Seals shall be and  
7 hereby are dismissed with prejudice to each of the defendants;

8 5. Defendants are awarded their costs of suit with  
9 respect to each of said plaintiffs;

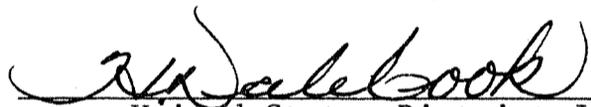
10 6. Pursuant to Rule 54(b) of the Federal Rules of Civil  
11 Procedure, there is no just reason for delay in the entry of  
12 judgment against each of said plaintiffs and the entry of such  
13 judgment in accordance with this Order is expressly directed.

14 DATED: September 26, 1977.

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United States District Judge

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CERTIFICATION OF SERVICE BY MAIL

I certify that a copy of the foregoing ORDER OF DISMISSAL RE CLAIMS OF PLAINTIFFS BURRIS, RAGSDALE, AND SEALS was furnished all counsel of record by mailing same to the following on September 21, 1977:

Walker, Kaplan & Mays, P.A.  
622 Pyramid Life Building  
Little Rock, Arkansas 72201

Maynard L. Ungerman, Esq.  
Ungerman, Grabel & Ungerman  
Wright Building, Sixth Floor  
Tulsa, Oklahoma 74103

---

George Christensen

**NOTE:** THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JOYCE MARIE ENGLISH,

Plaintiff,

vs.

Case No. 75-C-322

VERA KUYKENDALL, LOUIS  
FENSTER, STANLEY THOMEYER,  
and TOV CORPORATION, a  
corporation,

Defendants.

**F I L E D**

SEP 26 1977

O R D E R

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

This matter coming before the Court this 26<sup>th</sup> day  
of September, 1977, and it appearing that the parties have reached  
a settlement as to this dispute by an agreement whereby the  
Defendants will pay the Plaintiff the amount of Seven hundred  
twenty-four dollars and seventy cents (\$724.70), it appears to  
the Court that the above-entitled action has been fully settled,  
adjusted, and compromised, and based on stipulation; therefore,

IT IS ORDERED ADJUDGED that the above-  
entitled <sup>*cause of and complaint*</sup> action <sup>*they are*</sup> be, and ~~it is~~ hereby, dismissed, without cost  
to either party and with prejudice to the Plaintiff.

*Cellan E. Barrow*  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

*Gordon D. McAllister, Jr.*  
Attorney for Plaintiff

*J. Low Bowe*  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

RALPH A. HUNT, )  
 )  
 Plaintiff, )  
 )  
 VS )  
 )  
 ROACH AIRCRAFT, INC., )  
 a corporation, )  
 )  
 Defendant. )

77-C-14-C

**FILED**

SEP 23 1977 11:34 A.M.

*hm*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

J U D G M E N T

On the 12th day of September, 1977, the above entitled cause came on for trial by jury. The Plaintiff appeared in person and by his attorney, C. Rabon Martin. The Defendant appeared through its President, Joseph A. Roach, and by its attorney, Sidney Dunagan. The parties announced ready and the jury was empaneled and sworn; whereupon, the case was adjourned until September 15, 1977, at 1:30 p.m., for trial on the merits in the United States Courthouse in Miami, Oklahoma.

On September 15, 1977, trial commenced and continued through 4:32 p.m. on September 19, 1977, at which time the jury returned with a verdict in favor of the Plaintiff on his complaint and against the Defendant on its counterclaim, assessing the Plaintiff's recovery at \$25,689.00.

Pursuant to stipulation of the parties the Plaintiff's attorney fees were set at \$7,500.00 and taxable costs at \$350.00.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Plaintiff have and recover judgment against the Defendant in the sum of \$25,689.00, together with an attorney fee of \$7,500.00 and costs of \$350.00.

Dated this 23rd day of September, 1977.

Approved as to Form:

*C. Rabon Martin*  
Attorney for Plaintiff

*Sidney Dunagan*  
Attorney for Defendant

*Ken Walbrook*  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MONTARIA LIMITED, )  
an Oklahoma Corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
NIPAK, INC., )  
a Texas Corporation, )  
 )  
Defendant. )

No. 77-C-117-C

FILED

SEP 23 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER APPROVING DISMISSAL

Upon consideration of the Stipulation of Dismissal With Prejudice filed herein by the parties to this action, the Court hereby approves dismissal of the captioned cause of action and complaint with prejudice to any and all further action with each party to pay its own costs incurred herein, and hereby releases and discharges Nipak, Inc., principal, and Hartford Accident and Indemnity Company, surety, from all obligations contained in that certain Bond On Removal filed herein on March 25, 1977.

DATED this 23<sup>rd</sup> day of September, 1977.

s/ H. Dale Cook  
H. Dale Cook  
United States District Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MARVIN O. G. ADKINS, a/k/a )  
 Marvin O. Adkins, )  
 DOROTHY MARIE ADKINS, )  
 et al, )  
 )  
 Defendants. )

SEP 23 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

CIVIL ACTION FILE  
No. 77-C-275-C

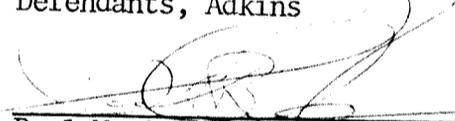
STIPULATION OF DISMISSAL

Pursuant to Rule 41 (a) (1) (ii), the parties who have appeared affirmatively herein stipulate the dismissal of the Complaint and the Cross-Petition of First National Bank and Trust Company of Tulsa, without prejudice, and upon no further conditions.

HUBERT A. MARLOW, ACTING U. S. ATTORNEY

BY   
Robert P. Santee, Assistant  
U. S. Attorney

  
Warren L. McConnico, Attorney for the  
Defendants, Adkins

  
Paul Naylor, Attorney for the  
Defendant-Cross-Petitioner, First National  
Bank and Trust Company of Tulsa

FILED

SEP 23 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

H. JOHN HAUSAM,  
Plaintiff,

vs.

METROPOLITAN TULSA TRANSIT  
AUTHORITY,  
Defendant.

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) 77-C-344-B  
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ORDER

The Court has for consideration the Motion to Dismiss filed by the defendant, the brief in support thereof, and, being fully advised in the premises, finds:

This action was instituted pro se by the plaintiff on August 9, 1977. With his letter, which was filed as a Complaint and treated as a complaint, plaintiff filed an Application for Leave to File Action Under Title VII of the Civil Rights Act of 1964 (Sec. 2000e-5 of Title 42 U.S.C.) Without Payment of Fees, Costs or Security and for the Appointment of Counsel. The Court allowed plaintiff to proceed without payment of costs. With reference to the request for appointment of counsel, the Court denies such request. *Spanos v. Penn Central Transp. Co.*, 470 F.2d 806 (C.A. Pa., 1972). Appointment of counsel is an employment discrimination case is not governed by the provisions of 28 U.S.C. §1915. Instead, Title VII has a provision for appointment of counsel, but such appointment is discretionary and it is up to the court to determine whether the circumstances are such that justice requires appointment. 42 U.S.C. §2000(e)-5(f); *Edmonds v. E. I. duPont deNemours & Co.*, 315 F.Supp. 523 (D.Kan. 1970); *Carter v. Safeway Stores, Inc.*, Tenth Circuit Court of Appeals, No. 76-1696, decided March 10, 1977.

Summons was duly issued in this case and the defendant has filed a Motion to Dismiss. By Minute Order dated August 26, 1977, the plaintiff was ordered to respond to said Motion and has wholly failed to do so.

The Court has carefully perused the complaint of the plaintiff. Additionally, the Court has considered the Motion to Dismiss filed by the defendant. In this connection the Court will state that if it desired to consider the extraneous documentation submitted by the defendant, and attached to the Motion to Dismiss, it would have to convert said Motion to Dismiss to a Motion for Summary Judgment. *Carter v. Safeway Stores, Inc.*, supra; *Torres v. First State Bank* (10th Cir. 76-1188, filed March 3, 1977); *Duane v. Altenburg*, 297 F.2d 515 (7th Cir. 1962).

The Court finds that plaintiff has failed to prosecute the instant litigation and the same should be dismissed for failure to prosecute. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962); *Moore's Federal Practice*, Volume 5, ¶41.11[2]; *Stanley v. Continental Oil Company*, decided June 23, 1976 (10th Cir., No. 75-1613).

IT IS, THEREFORE, ORDERED that plaintiff's application for appointment of counsel is hereby denied.

IT IS FURTHER ORDERED that the Court will not at this time consider the Motion to Dismiss due to the fact that this case is ordered dismissed for failure to prosecute.

ENTERED this 23<sup>d</sup> day of September, 1977.



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CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 22 1977 *η/LO*

JOHN LEE MARKLEY, JOE WAYNE  
MARKLEY, and RUTH M. BACHLOR,  
Plaintiffs,

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

-vs-

NO. 76-C-400-B ✓

IMPERIAL GROUP, LTD., formerly  
Imperial Land Investment Company,  
a Georgia corporation,  
Defendant.

ORDER FOR DISMISSAL

Upon application of the Plaintiffs and for good cause  
as shown, this ~~action~~ *cause and complaint are* hereby dismissed with prejudice with  
prejudice to the Plaintiffs' right to refile the same in the  
future.

Dated this *22nd* day of September, 1977.

*Allen E. Bannor*

J U D G E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

GENERAL ELECTRIC COMPANY, )  
a corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CHARLES J. DAVIS, )  
 )  
Defendant. )

No. CIV-77-C-379-C

FILED

SEP 21 1977/rm

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

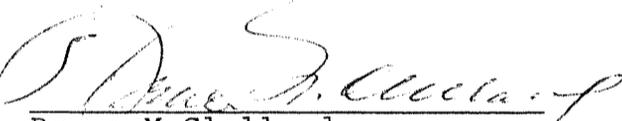
ORDER DISMISSING CAUSE WITH PREJUDICE

At Tulsa in said District on this 21<sup>st</sup> day of  
September, 1977.

Upon Motion of plaintiff in which it appears that the indebtedness herein sued upon has been fully paid and satisfied and that the plaintiff and defendant desire that this action be dismissed, it is hereby

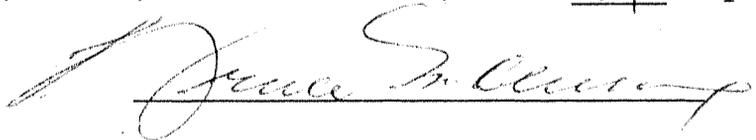
ORDERED AND ADJUDGED that this cause be and the same is hereby dismissed with prejudice.

  
UNITED STATES DISTRICT JUDGE

  
Bruce McClelland  
Attorney for Plaintiff  
600 Hightower Building  
Oklahoma City, Oklahoma 73102  
Attorney for plaintiff  
235-9371

CERTIFICATE OF SERVICE

I hereby certify that I served the defendant with a copy of the foregoing Order Dismissing Cause with Prejudice by mailing a copy thereof to his attorneys, Wallace & Owens, 300 Security Building, Miami, Oklahoma 74354, this 21 day of September, 1977.



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DR. THOMAS BONETA, M.D., )

Plaintiff, )

-vs- )

THE FAIRFAX MEMORIAL HOSPITAL, THE )  
TOWN OF FAIRFAX, THE BOARD OF )  
CONTROL OF THE FAIRFAX MEMORIAL )  
HOSPITAL, GEORGE PEASE, GLEN )  
HADLOCK, JOHN KEY, MARGARET CLARK, )  
and NORMA SMITH, all of the above )  
individually and as members of the )  
BOARD OF CONTROL of the FAIRFAX )  
MEMORIAL HOSPITAL, and HERMAN )  
RHOADS, Individually and as )  
Administrator of the FAIRFAX )  
MEMORIAL HOSPITAL, )

Defendants. )

NO. 77 C 98 C

**FILED**

SEP 21 1977 *pm*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

ON This 21<sup>st</sup> day of September, 1977, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all causes of action of the plaintiff filed herein against the defendant be and the same hereby is dismissed with prejudice to any future action.

*R. Dale Book*

JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

BONDS, MATTHEWS and BONDS,

By: *Albert R. Matthews*  
Attorney for the Plaintiff,

ALFRED B. KNIGHT,  
*Alfred B. Knight*  
Attorney for the Defendant.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JAMES R. LYON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 )  
 GEORGIA-PACIFIC CORPORATION, )  
 a Georgia corporation, and )  
 CERTAIN-TEED PRODUCTS )  
 CORPORATION, a Maryland )  
 corporation, )  
 )  
 Defendants. ) NO. 76-C-178-C

**FILED**

**SEP 21 1977**

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

Upon the application of the plaintiff and for good cause shown, this cause of action and Complaint is dismissed with prejudice.

Entered this 21st day of September, 1977.

15/11 Dale Cook  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 21 1977

JOE STEPHENSON,

Plaintiff,

vs.

GIBBLE OIL COMPANY, an Oklahoma  
corporation, and EARL GIBBLE,

Defendants.

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 76-C-413-B

ORDER OF DISMISSAL WITH PREJUDICE

On this 21st day of September, 1977, there comes on for hearing the stipulation of the plaintiff and the defendants, Gibble Oil Company, an Oklahoma corporation, and Earl Gibble, that this matter be dismissed as to said defendants with prejudice, and without costs to any party.

The Court having examined said stipulation and having heard the representations of counsel and being otherwise fully advised in the premises, now, therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint <sup>and cause of action are</sup> ~~is~~ hereby dismissed with prejudice and without costs to any party.

(Signed) Allen E. Barrow

United States District Judge

APPROVED:

Frank Gregory  
Frank Gregory  
CHAPEL, WILKINSON, RIGGS & ABNEY  
Attorneys for Plaintiff

(s) James B. Browne  
James B. Browne  
Attorney for Defendants *JB*



FILED

SEP 20 1977

1 UNITED STATES DISTRICT COURT FOR THE  
2 NORTHERN DISTRICT OF OKLAHOMA  
-----

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

3 RICHARD MORALES,  
4

No. 74-C-271

5 Plaintiff,

6 vs.

JUDGMENT

7 MAPCO, Inc., and  
8 DONALD B. ROSS,  
9

10 Defendants.  
-----

11 Based upon the Order filed herein by this Court on  
12 September 9, 1977 and the Order of the United States Circuit  
13 Court for the Tenth Circuit, filed August 27, 1976,

14 IT IS ORDERED, ADJUDGED AND DECREED that the Motion  
15 For Summary Judgment of defendants, MAPCO, Inc. and Donald B.  
16 Ross previously granted and the Judgment in favor of Donald B.  
17 Ross previously entered herein be, and they hereby are vacated;  
18 and it is further

19 ORDERED, ADJUDGED AND DECREED that the Motion For  
20 Summary Judgment of Plaintiff, Richard Morales be granted and that  
21 Judgment enter in favor of MAPCO, Inc., and against Donald B. Ross  
22 in the amount of Six Thousand Three Hundred Fifty Seven & .10  
23 (\$6357.10) Dollars without pre-judgment interest and with costs.

24 DATED this 20<sup>th</sup> day of September, 1977.

25  
26 H. Dale Cook  
27 H. Dale Cook  
28 U.S.D.J.  
29  
30  
31  
32







IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JERROLD F. CHAPPELL,

Plaintiff,

vs.

DAVE FAULKNER, Tulsa  
County Sheriff,

Defendant.

77-C-336-B

FILED

SEP 20 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

Plaintiff initially instituted this action pro se for the return of the sum of \$191.00 which he contends that the defendant is illegally withholding from him, and complaining of certain confinement practices, while in state custody in the Tulsa County Jail, i.e., the alleged withholding of soap, razor and other necessary hygenic articles in disobedience of alleged federal guidelines.

Plaintiff was allowed, by order of this Court, to pursue this action in forma pauperis and summons was issued and duly served on the defendant.

Thereafter, the defendant filed a Motion to Dismiss for failure to state a claim and failure to join a necessary and proper party. Attached to the Motion to Dismiss was a brief and various and sundry affidavits and documents. A Minute Order was entered directing the plaintiff to respond to said motion within a certain time period and plaintiff has now filed a Motion for Additional Time and Appointment of Counsel.

Plaintiff has designated that he is proceeding in this litigation pursuant to 42 U.S.C. §1983.

42 U.S.C. §1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

First, there is no obligation to appoint counsel to represent a §1983 litigant. *Harbolt v. Aldridge*, 464 F.2d 1243 (10th CCA 1972); *Bethea v. Crouse*, 417 F.2d 504 (10th Cir. 1969); *Bandt v. Woodring*, Tenth Circuit Court of Appeals, decided April 6, 1976, No. 75-1591. The District Court may do so if it is deemed necessary for the full development of the factual and legal questions. The Court finds that it is not necessary for counsel to be appointed and the Motion for appointment of counsel should be denied.

The Court further finds that the Motion for Extension of Time should be denied.

The Court will now consider the Motion to Dismiss filed by the defendant.

To be actionable under §1983, a civil rights complaint must establish a deprivation of a right, privilege or immunity protected by the Constitution.

It appears that defendant was charged with uttering a forged instrument, after former conviction of a felony in two criminal cases in the State Court. It further appears that the sum of \$191.00 was taken from the defendant's possession at the time of his arrest, and he was evidently given a receipt for said sums.

Title 12 O.S.A. §1571 et seq. provides for a replevin procedure for the return of properties and it is evident that plaintiff has not followed this procedure in the State Court.

The Court finds that plaintiff's allegations in connection with the claim for return of the \$191.00 does not rise to constitutional dimensions and that there is an adequate remedy for the plaintiff in the State Court, and, that, therefore

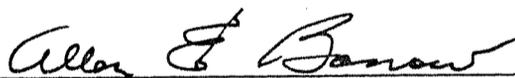
the defendant's Motion to Dismiss as to the claim for return of 191.00 for failure to state a claim should be sustained.

Turning to the alleged withholding of hygienic articles attention is called to the case of Roach v. Kligman, 412 F.Supp. 521 527 (USDC ED Pa. 1976), wherein the Court found that the failure to supply soap, toothpaste and the like did not amount to cruel and unusual treatment so as to come within the confines of an 8th Amendment violation. The Court, therefore, finds that plaintiff has failed to state a claim by virtue of this alleged violation and the Motion to Dismiss should be sustained.

IT IS, THEREFORE, ORDERED that the plaintiff's Motion for Extension of Time and for Appointment of Counsel be and the same is hereby denied.

IT IS FURTHER ORDERED that defendant's Motion to Dismiss be and the same is hereby sustained for the reasons hereinabove stated, and the cause of action and complaint are dismissed for failure to state a claim.

ENTERED this 20<sup>th</sup> day of September, 1977.



---

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

LESTER LAY, doing business )  
as S.L.S. Oil, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
AGRICO CHEMICAL COMPANY, )  
a Delaware corporation; )  
BERTRAM GLAZER and )  
FRANK J. ROBINSON, )  
both doing business as )  
DUBLIN OIL COMPANY, )  
 )  
Defendants. )

No. 76-C-362-C

**FILED**

SEP 20 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

On May 3, 1977 a pretrial conference was conducted in regard to the above-styled action. At that time, the Court determined that this case should be remanded to the State court and requested that plaintiff submit an order in accordance therewith. The afternoon of May 3, 1977 the Court received a letter from defendant's counsel asking that the Court reconsider the decision to remand. In order to allow opposing counsel to respond, on May 5, 1977 the Court forwarded a copy of defendant's letter to plaintiff's counsel and allowed time for response. The Court has carefully considered the statements of counsel and has determined this action should be remanded.

The case was originally filed in the District Court of Tulsa County on June 4, 1976. The Petition alleges that Agrico Chemical Company (hereinafter Agrico) is a Delaware Corporation doing business in Oklahoma. On July 2, 1976, Bertram Glazer and Frank J. Robinson, both doing business as Dublin Oil Company filed a Petition for Removal asserting that they were residing in and citizens of the State of Indiana. The Petition for Removal further alleged that the cause of action alleged as to them was a separate and independent claim which would be removable if sued on alone.

Removal was sought pursuant to 28 U.S.C. § 1441(c). The Court notes that defendant Agrico could not have properly sought removal since at pretrial it admitted its principal place of business is Tulsa, Oklahoma.

Plaintiff did not file a motion to remand the action and the Court was, therefore, not previously called upon to determine the issue of jurisdiction in regard to the removal by Glazer and Robinson. Without ruling upon the issue, the Court recognizes the questionable status of the removal.

Title 28 U.S.C. 1441(c) provides:

"Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

One judge, after reviewing the first twelve years of decisions under this statute, declared "it is not an exaggeration to say that at least on the surface the field luxuriates in a riotous uncertainty." This statement appears to remain accurately descriptive.

In American Fire & Casualty Company v. Finn, 341 U.S. 6, 71 S.Ct. 534, 95 L.Ed. 702 (1951) the Supreme Court stated that one purpose of Congress in adopting the "separate and independent claim or cause of action" test for removability by § 1441(c) was to limit removal from state courts. The Court went on to state:

"A separable controversy is no longer an adequate ground for removal unless it also constitutes a separate and independent claim or cause of action. . . . Congress has authorized removal now under § 1441(c) only when there is a separate and independent claim or cause of action. . . . The addition of the word 'independent' gives emphasis to congressional intention to require more complete disassociation between the federally cognizable proceedings and those cognizable only in state courts before allowing removal."

The Court thereafter concluded that the case presented no separate and independent claim or cause of action because

there was a single wrong to the plaintiff, for which relief was sought, "arising from an interlocked series of transactions."

In Snow v. Powell, 189 F.2d 172 (10th Cir. 1951) the Tenth Circuit, in citing American Fire & Casualty, pointed out that the critical words "separate" and "independent" are used in the conjunctive and should be given their full significance in order to carry out the intent and purpose of Congress to limit removals and to simplify the determination of removability. The Court thereafter stated:

"The word 'separate' means distinct; apart from; not united or associated. The word 'independent' means not resting on something else for support; self-sustaining; not contingent or conditioned."

The fact that the causes of action alleged may be based on different legal theories of recovery is not determinative of the issue of whether the causes of action are separate and independent. For example, in Winton v. Moore, 288 F.Supp. 470 (N.D.Okla. 1968) plaintiff alleged causes of action for breach of fiduciary duty and breach of contract; in Gray v. New Mexico Military Institute, 249 F.2d 28 (10th Cir. 1957) plaintiff alleged causes of action based upon negligence and breach of contract; and in Snow v. Powell, supra, the causes of action were based upon assault and upon negligence. In each of the above-cited cases the Court held that a separate and independent claim or cause of action was not alleged. In Winton v. Moore, supra, the Court noted that although the plaintiff stated a cause of action in tort against one defendant and another on the basis of contract against the other defendant, only a single recovery was sought. Although plaintiff seeks punitive damages as to defendants Glazer and Robinson, the basic recovery sought is the same as to all defendants. In American Fire & Casualty Co. v. Finn, supra, the Supreme Court, quoting from Baltimore v. Phillips, 274 U.S. 316 (1927) stated: "Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery,

whether his injury was due to one or the other of several distinct acts of negligence or to a combination of some or all of them." The Court in Gray v. New Mexico Military Institute, supra, considered the fact that the recovery on one cause of action depended for its support on the establishment of the other cause of action.

Even if the removal of the action was proper, the removing parties are no longer parties to this lawsuit. On October 12, 1976, the Court entered its Order sustaining a Motion to Dismiss filed by the defendants Glazer and Robinson, doing business as Dublin Oil Company.

In light of the fact that defendant Agrico could not have properly removed the action to this Court and the fact that the removal of the action by Glazer and Robinson is questionable, along with the fact that the removing parties are no longer parties to this action, it is the determination of the Court that the action should be and hereby is remanded to the District Court of Tulsa County.

It is so Ordered this 19<sup>th</sup> day of September, 1977.

  
H. DALE COOK  
United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ELANOR MAXINE CHANDLER,

Plaintiff,

vs

WOOLCO DEPARTMENT STORES,  
Trade Name for F. W. Woolworth  
Co., a New York Corporation,

Defendant.

NO. 77-C-239-C

FILED

SEP 19 1977 J.

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

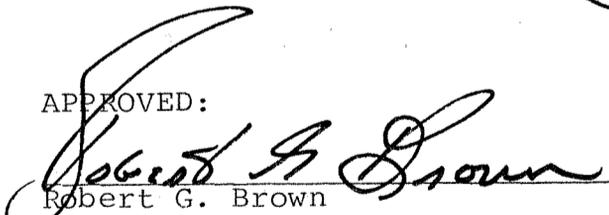
WHEREAS, the parties have stipulated that all questions and issues existing between the parties have been fully and completely disposed of by settlement, and have requested the entrance of an order of dismissal with prejudice,

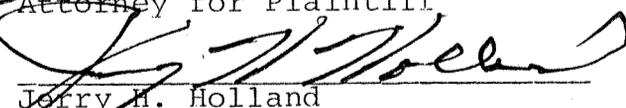
IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the cause should be and the same is hereby dismissed with prejudice and the matter fully, finally and completely disposed of hereby.

DATED this 15 day of Sept, 1977.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
Robert G. Brown  
Attorney for Plaintiff

  
Jerry H. Holland  
Attorney for Defendant

*Slenders, McClray & Carpenter*  
*207 Denver Bldg*  
*Tulsa, Okla. 74119*

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 )  
 )  
 FRED C. SLOAN a/k/a FRED SLOAN, )  
 ALICE M. SLOAN, AND GUARANTY LOAN )  
 AND INVESTMENT CORPORATION OF )  
 TULSA, INC., )  
 )  
 Defendants. )

FILED

SEP 19 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Civil Action No. 77-C-32-C

JUDGMENT OF FORECLOSURE

THIS MATTER comes on for consideration this 19<sup>th</sup>  
day of September, 1977, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney; the Defendant,  
Guaranty Loan and Investment Corporation of Tulsa, Inc.,  
appearing by its attorney, Timothy J. Sullivan; and the Defen-  
dants, Fred C. Sloan a/k/a Fred Sloan, and Alice M. Sloan,  
appearing not.

The Court, being fully advised and having examined  
the file herein, finds that Defendants Fred C. Sloan a/k/a Fred  
Sloan and Alice M. Sloan were served by publication, as shown  
on the Proof of Publication filed herein; and that Defendant  
Guaranty Loan and Investment Corporation of Tulsa, Inc. was  
served with Summons and Complaint on February 8, 1977, as  
appears from the United States Marshal's Service herein.

It appears that the Defendant, Guaranty Loan and  
Investment Corporation of Tulsa, Inc., has duly filed its  
Answer and Cross-Petition on February 23, 1977, but that  
Defendants, Fred C. Sloan a/k/a Fred Sloan and Alice M. Sloan  
have not been served said Answer and Cross-Petition.

The Court further finds that this is a suit based  
upon a mortgage note and foreclosure on a real property mort-  
gage securing said mortgage note upon the following-described

real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Eleven (11), in Block Four (4), in Lakeview Heights Amended Addition to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendants Fred C. Sloan and Alice M. Sloan did, on the 25th day of August, 1973, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$8,500.00, with 4-1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants Fred C. Sloan and Alice M. Sloan made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued, and that by reason thereof, the above-named Defendants are now indebted to the Plaintiff in the sum of \$8,132.72 as unpaid principal, with interest thereon at the rate of 4-1/2 percent per annum from April 1, 1976, until paid, plus the cost of this action, accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants Fred C. Sloan and Alice M. Sloan, in rem, for the sum of \$8,132.72, with interest thereon at the rate of 4-1/2 percent per annum from April 1, 1976, plus the cost of this action, accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to

the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them, and all persons claiming under them since the filing of the complaint herein, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

*J. H. Dale Cook*  
UNITED STATES DISTRICT JUDGE

APPROVED:

*Robert P. Santee*  
ROBERT P. SANTEE  
Assistant United States Attorney

*Timothy J. Sullivan*  
TIMOTHY J. SULLIVAN  
Prichard, Norman, Reed & Wohlgemuth  
Attorney for Defendant,  
Guaranty Loan and Investment  
Corporation of Tulsa, Inc.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 19 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

THE TRAVELERS INSURANCE COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. ) No. 76-C-124-C  
 )  
PANAMA-WILLIAMS, INC., )  
 )  
Defendant. )

J U D G M E N T

This case came on for hearing this 8th day of September, 1977 for argument of counsel and the Court to announce its Findings of Fact, Conclusions of Law, and Judgment. The trial of the case to the Court was heard on May 27, 1977. The plaintiff appeared through its counsel, Thomas R. Brett, and the defendant appeared by and through its counsel, E.W. Keller, and both parties announced ready to proceed with the hearing. After hearing arguments of counsel and having previously considered the matter thoroughly, the Court announced its Findings and Conclusions in open court ultimately concluding the plaintiff is entitled to judgment against the defendant in the sum of Sixty Five Thousand Dollars (\$65,000.00) with interest at the rate of 10% from this date.

IT IS THEREFORE ORDERED the plaintiff, The Travelers Indemnity Company, is entitled to judgment against the defendant, Panama-Williams, Inc., in the sum of Sixty Five Thousand Dollars (\$65,000.00) with interest at the rate of 10% from this date, September 8, 1977, and the costs of this action, for which let execution issue. The defendant excepted to the Court's judgment.

W. Dale Cook  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

CECIL HAGGARD and ALPHA  
HAGGARD,

Plaintiffs,

vs.

FRED C. LEAP, et al.,

Defendants.

)  
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) 77-C-324-B  
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**FILED**

SEP 19 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER REMANDING

The Court has for consideration the Plaintiff's Motion to Remand, with supporting brief, and the defendant, Annie Studie, having failed to comply with the minute order of this Court entered August 12, 1977, directing said defendant to respond to said motion within ten days, but having orally advised the Court that said defendant, Annie Studie, will stand on her petition for removal, and, the Court having carefully perused the entire file, and, being fully advised in the premises, finds:

This litigation was originally commenced in the District Court of Delaware County, Oklahoma, on March 28, 1977, against the removing defendant, as well as various and sundry other defendants. On April 14, 1977, the Field Solicitor, Muskogee, Office of the Solicitor, United States Department of the Interior, filed an Election Not to Remove.

On July 26, 1977, the defendant, Annie Studie, filed her Petition for Removal of Civil Action. In said Petition for Removal, she states in paragraph 2 as follows:

Service of summons was made by publication on defendant on the 14th day of April, 1977, by publishing in "The Delaware County Journal" at Jay, Oklahoma. The petition hereto is the initial pleading setting forth the claim upon which the action is based, and defendant first received a copy of it on or about the 10th day of May, 1977.

As grounds for removal the defendant, Annie Studie, alleges in paragraph 3 of the Removal Petition:

The action is a civil action of which this Court has orig-

inal jurisdiction under Title 28 U.S.C. Section 1331, and is one which defendant is entitled to remove to this Court pursuant to Title 28 U.S.C. Section 1441 in that it involves title to real property granted to the Cherokee Nation under Treaties with the United States Government, 32 Stat. 716.

It appears from the complaint filed in the State Court that plaintiffs seek to quiet title to certain real property located in Delaware County, Oklahoma, against various and sundry individuals named in the style of the complaint. Annie Studie is one of the named defendants.

In the Motion to Remand the plaintiffs state as grounds therefor:

That the Petition for Removal of Civil Action filed by the defendant Annie Studie on July 26, 1977, was not timely filed in this Court within thirty days after the State Court action was commenced or otherwise became removable under 28 U.S.C.A. 1446(b).

That prior to filing her Petition for Removal to this Court, the defendant Annie Studie entered her appearance and answered the plaintiffs' Petition in the District Court of Delaware County, Oklahoma, and submitted herself to the jurisdiction of that Court and waived her right to remove the State Court action to this Court.

That by Section 3(c) of the Act of Congress of August 4, 1947, the Secretary of the Interior alone is clothed with the authority to determine when actions involving restricted Indians are to be removed from State Court to Federal Court. That the Election Not to Remove the State Court case to Federal Court was filed by Harold M. Shultz, Jr., the Field Solicitor, Muskogee, Office of the Solicitor, United States Department of the Interior, in the State Court action on April 14, 1977, thereby precluding the removal of this case to Federal Court by the defendant.

That no Federal question is presented in the State action because such action was a quiet title proceeding to judicially determine the heirs of David Chuwalooky, one of the defendant's ancestors, under 84 O.S.A. 257 et seq., and to invoke 12 O.S.A. 93(4), and the 15 year limitation period, thereby depriving this Court of jurisdiction under 28 U.S.C.A. 144(b).

The Court will start from the basic premise that there can be no removal on the basis of a federal question presented for the first time in defendant's petition for removal or in his answer. Moore's Federal Practice, Volume 1A, ¶0.160; Great Northern Ry. Co. v. Alexander (Hall's Adm'r.), 246 U.S. 276 (1918)

The Act of 1947, 61 Stat. 731 provides that written notice of the pendency of any such action or proceedings shall be served on the Superintendent for the Five Civilized Tribes within ten days of the filing of the first pleading in said action or proceeding. It further provides that such notice shall be served by the party or parties causing the first pleading to be filed. The Act goes on to provide:

No action or proceeding in which notice has been served on the Superintendent for the Five Civilized Tribes pursuant to the provisions of section 3 of the Act of April 12, 1926 (44 Stat. 239), shall be removed to a United States district court except upon the recommendation of the Secretary of the Interior or his duly authorized representative. The United States shall have the right to appeal from any order of remand entered in any case removed to a United States district court pursuant to the provisions of the Act of April 12, 1926 (44 Stat. 239).

In the instant action it appears that the Superintendent has been served and has elected not to remove this case.

The general rule is that all defendants must join in a petition for removal, though applicable to both joint and interrelated causes of action, does not apply to a cause of action which may be removed under the separate and independent claim or cause of action provision of §1441(c). Moore's Federal Practice, Volume 1A, ¶0.168[3.-2]

The Court further finds that when removal is on the basis of a federal question complications may arise because of the principle that for original jurisdiction the federal question must appear in the plaintiff's complaint well pleaded. And, where the plaintiff's claim rests on both a federal and state ground, plaintiff may pitch his suit on the state ground. Moore's Federal Practice, Volume 1A, ¶0.168[3.-4]

Additionally, the Removal Statute provides that the petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief, or within thirty days after the service of summons. Additionally, it is provided that if the case stated by the initial pleading is not removable, a petition or removal may be filed within thirty days after receipt by the defendant, through service or other-

wise, a copy of an amended pleading, motion or order, or other paper from which it may first be ascertained that the case is one which is or has become removable.

More than thirty days had elapsed before the defendant, Annie Studie, had sought to remove this case to this Court.

For the reasons above stated,

IT IS ORDERED that plaintiffs' Motion to Remand be and the same is hereby sustained and this cause of action and complaint are hereby remanded to the District Court of Delaware County, Oklahoma.

ENTERED this 19<sup>th</sup> day of September, 1977.

*Allen E. Barrow*

---

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LLOYD T. ABLES, )  
 )  
 Plaintiff )  
 )  
 vs )  
 )  
 ST. LOUIS-SAN FRANCISCO RAILWAY )  
 COMPANY, A Corporation, )  
 )  
 Defendant )

No. 76-C-51-B

**FILED**

SEP 19 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

FINDINGS AND ORDER OF THE COURT

This cause came on for hearing before the Magistrate on the 10th day of June, 1977 on defendant's motion for summary judgment as to Count I of plaintiff's complaint. Plaintiff appeared by its attorney, Michael P. Atkinson, of Best, Sharp, Thomas & Glass; and defendant appeared by its attorney, Grey W. Satterfield, of Franklin, Harmon & Satterfield, Inc. The Court being fully advised in the premises makes the following findings and order:

Defendant has moved for partial summary judgment as to Count I of plaintiff's complaint in which plaintiff alleges that defendant wrongfully and maliciously demoted him and thereby deprived him of a reasonable expectation of continued employment as a supervisory employee. In Count II of his complaint, plaintiff alleges that he is entitled to damages under the Federal Employers' Liability Act for personal injuries he allegedly sustained while working for defendant as a conductor. Defendant's motion is not directed toward Count II.

Defendant asserts that it had the right to demote plaintiff without cause under Oklahoma law since he had no contract of employment with plaintiff and his employment was terminable at will. Defendant relies on Freeman vs C. R. I. & P. R. Co., 239 F.Supp. 661 (D.C. W.D. Okla. 1965); and Foster vs Atlas Life Insurance Co., 6 P.2d 805 (Okla. 1931). Plaintiff in his deposition recognized defendant's right to terminate his employment without cause when he testified that supervisory employees serve at the pleasure of the company and that "They can fire you on the telephone with a pink wire this afternoon".

Plaintiff's counsel also concede the rule, but urge that defendant's employees who decided that plaintiff should be demoted did so maliciously and unlawfully and were therefore guilty of actionable conspiracy. Plaintiff claims that the acts of defendant's officers were unlawful in that they relied in part on a report made by a Springfield, Missouri police officer which recited that plaintiff had been involved in an accident, had been drinking, and would be arrested by the officer if he drove his car onto the street (he was in a service station driveway at the time). Plaintiff's theory is that a Missouri statute, Vernon's Annotated Missouri Statutes, Section 610.100 (1973), which makes arrest records confidential, applied to the police report, and the conduct of defendant's agents in obtaining and relying on a copy of it was therefore unlawful and, as a result, constituted actionable conspiracy on the part of defendant. This argument must be rejected for several reasons. First, the Missouri statute relied upon by plaintiff relates to arrest records and not to police reports generally. The report clearly reflects that plaintiff was not arrested. Therefore, the report was not covered by the Missouri statute. Where there is no unlawful conduct, there can be no conspiracy. In Hughes vs Bizzell, et al, 117 P.2d 763 (Okla. 1941), the librarian of the University of Oklahoma Medical School brought suit against the president of the University and the dean of the medical school. She had been discharged and conceded that the defendants had the right to discharge her without cause. However, she contended that they had slandered and defamed her before the Board of Regents in a hearing to consider the propriety of her discharge and were therefore guilty of an actionable conspiracy. The Court in rejecting this contention held:

"A conspiracy is a combination of two or more persons to accomplish, by concerted action, some unlawful purpose, or to accomplish a lawful purpose by unlawful means. [Citations omitted.] It follows from this definition that there can be no conspiracy 'where the acts complained of, and the means employed in doing the acts, are lawful.' Walker v. Mills, 182 Okl. 480, 78 P.2d 697."

Even assuming, arguendo, that defendant's officers who made the decision to demote plaintiff did so unlawfully, defendant corpora-

tion cannot be held to account therefor. "A corporation cannot be a party to a conspiracy consisting of the corporation and the persons engaged in the management, direction and control of the corporate affairs, where the individuals are acting only for the corporation and not for any personal purpose of their own." 16 Am.Jur.2d, Conspiracy, Section 47. It is undisputed that defendant's officers had no personal interest in demoting plaintiff, but were acting purely as representatives of their corporate employer. Also, it will be noted that none of the individual officers were made parties to this action. In Nelson Radio & Supply Co. vs Motorola, 200 F.2d 911, 914 (5th Cir. 1952), the court in holding that a cause of action in conspiracy had not been stated against a corporation, stated:

" \*\*\* A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. Here it is alleged that the conspiracy existed between the defendant corporation, \*\*\* [and its officers], who have actively engaged in the management, direction and control of the affairs and business of defendant. This is certainly a unique group of conspirators. The officers, agents and employees are not named as defendants and no explanation is given of their non-joinder. Nor is it alleged affirmatively, expressly, or otherwise, that these officers, agents and employees were actuated by any motives personal to themselves. Obviously, they were acting only for the defendant corporation. \*\*\* "

Plaintiff urges that the Court should ignore the rule that an employer has a right to discharge an employee without cause. In support of its contention, it cites Monze vs Beebe Rubber Company, 316 A.2d 549 ( N. H. 1974); Peterman vs International Brotherhood of Teamsters, 344 P.2d 25 (Cal. App. 1959); and Frampton vs Central Illinois Gas Company, 297 N.E.2d 425 (Ind. 1973). However, so long as the rule is in force in the State of Oklahoma under the decisions of its Supreme Court, this Court is bound by it. Erie R. Co. vs Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1937). However, it should be observed that the cases cited by plaintiff in support of his contention that the rule should be changed are not in point here, since each one involved the discharge of an hourly paid laborer. Here, plaintiff was a supervisory employee. An employer has a legitimate interest in hiring and retaining the best

supervisory employees available. Geary vs U. S. Steel Corporation, 319 A.2d 174 (Pa. 1974). The Court could not find a holding which would have a chilling effect on an employer's judgment of the qualifications of its supervisory employees.

The allegations contained in Count I of plaintiff's complaint and the depositions, answers to interrogatories and affidavits on file herein in support thereof do not present an issue of material fact. Defendant's motion for partial summary judgment directed to Count I of plaintiff's complaint should therefore be sustained.

IT IS SO ORDERED.

DATED on this the 19<sup>th</sup> day of September, 1977.

  
\_\_\_\_\_  
United States District Judge



IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**  
NORTHERN DISTRICT OF OKLAHOMA

SEP 19 1977

ENTERPRISE SCHOOL PHOTOS, INC., )  
an Oklahoma Corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ANTHONY R. MUMPOWER, )  
 )  
 )  
Defendant. )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 76-C-203-B

JOURNAL ENTRY OF JUDGMENT

This cause comes on for hearing on the 7th day of July, 1977, upon Plaintiff's application for default judgment, and the Court being fully advised in the premises and fully familiar with the files and records herein, and having heard the statements of counsel for the Plaintiff and having three times called the Defendant in open Court, and the Defendant having failed to appear personally or by his counsel or other representative, the Court finds as follows:

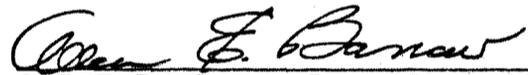
1. That this matter was set by this Court on the 7th day of July, 1977, at the hour of 10:00 o'clock a.m., on Motion for Default Judgment for failure to answer. That on the 7th day of July, 1977, the Defendant having been called three times in open Court appearing not nor by his representative or counsel the Court granted default judgment against said Defendant and referred the matter to the United States Magistrate for the purpose of taking testimony as to the amount of the judgment to be entered.

Based upon the Findings and Recommendations of the Magistrate filed herein on ~~August~~ <sup>Sept</sup> 7 1977, the Court finds that the Plaintiff, Enterprise School Photos, Inc., should have judgment in the amount of Fifty-One Thousand Four Hundred Fifteen and 88/100 Dollars (\$51,415.88); that the Plaintiff should have judgment for its costs herein accrued and accruing; that the Plaintiff, Enterprise School Photos, Inc., should have judgment for

a reasonable attorney's fee for the use and benefit of its attorney, Larry Harral, in the amount of Two Thousand One Hundred and 00/100 Dollars (\$2,100.00); and that this judgment should carry interest at the rate of 10% per annum from July 7, 1977, until full paid.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that judgment be and is hereby entered in favor of the Plaintiff and against this Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Enterprise School Photos, Inc., have judgment in the amount of Fifty-One Thousand Four Hundred Fifteen and 88/100 Dollars (\$51,415.88); that the Plaintiff have judgment for its costs herein accrued and accruing; that the Plaintiff, Enterprise School Photos, Inc., have judgment for a reasonable attorney's fee for the use and benefit of its attorney, Larry Harral, in the amount of Two Thousand One Hundred and 00/100 Dollars (\$2,100.00); and that this judgment carry interest at the rate of 10% per annum from July 7, 1977, until fully paid.



CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FARMERS INSURANCE COMPANY, INC., ) No. 75-C-92-B  
 )  
Plaintiff, )  
 )  
Vs. )  
 )  
DAVID ARMSTRONG, ET AL., )  
 )  
Defendants. )

**FILED**

SEP 16 1977

ORDER OF SETTLEMENT  
ON STIPULATION OF  
THE PARTIES AS TO  
THE DEFENDANT,  
SUSAN HANSON PEQUEEN

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

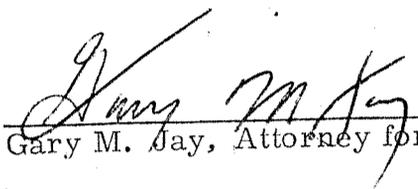
NOW on this 16<sup>th</sup> day of September, 1977, this cause comes on for consideration upon the Application of Susan Hanson, now Pequeen, for an order of the Court allowing her the sum of \$1,140.00 as her share of the proceeds of the policy of insurance previously deposited with the clerk of this Court by the plaintiff. The Court, upon consideration, finds that all parties hereto have agreed to the payment of said sum and that same is fair and equitable to Susan Hanson Pequeen and to the other parties hereto, including the minor

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Susan Pequeen, formerly Susan Hanson, have and receive as her share of the funds on deposit herein the sum of \$1,140.00, the payment of which shall satisfy and discharge her from any further rights or claims in and to said funds.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the clerk of this Court be, and he is hereby, authorized and directed to pay the said sum of \$1,140.00 forthwith to Susan Pequeen, through her Attorney, Gary M. Jay.

  
JUDGE

Approved as to Form and Content:



Gary M. Jay, Attorney for Susan Pequeen



Ross Hutchins, Attorney for the defendants,  
Wagon and for Ed Munson and Murray Stewart,  
Co-Counsel.



Thomas H. Tucker  
Attorney for D. I. S. R. S.



Thomas R. Brett,  
Attorney for St. Francis Hospital and for  
T. J. Sinclair, Co-Counsel

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 14 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

WILLIAM G. VANDEVER, )  
d/b/a WILLIAM G. )  
VANDEVER & COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
HASTINGS PORK, a partner- )  
ship and HAYDEN H. THOMPSON, )  
an individual, and J.E. )  
FEUERHELM, an individual, )  
 )  
Defendants. )

No. 76-C-640-B

ORDER

The Court has for consideration defendants' Motion to Quash Summons, Objection to Jurisdiction and Motion to Dismiss and the Court has carefully reviewed the pleadings, affidavits and briefs filed by all of the parties hereto and has carefully considered the recommendations of the Magistrate concerning the motions, and being fully advised in the premises, FINDS:

That the defendants' Motion to Quash Summons, Objection to Jurisdiction and Motion to Dismiss should be sustained for the reasons stated herein.

This is an action by an individual resident of the State of Oklahoma against a Nebraska partnership and its general partners for an alleged breach of contract based upon a document delineated as "Authorization to Obtain Loan".

Jurisdiction is based solely upon a diversity of citizenship. The Complaint alleges that the plaintiff is a "resident" of the State of Oklahoma and that the defendant Hastings Pork is a partnership organized under the laws of Nebraska. No allegation is made as to the "residence" of the individual defendants, Hayden H. Thompson and J. E. Feuerhelm.

The pleadings and affidavits submitted show that none of the defendants were served with Summons or Complaint in the State of Oklahoma, but all were served pursuant to the Oklahoma Long-Arm Statutes in jurisdictions outside of the state. None of the

defendants do business in the State of Oklahoma nor have they ever conducted business in the State of Oklahoma.

The pleadings and affidavits before the Court show that the "Authorization to Obtain Loan", which was allegedly breached, was presented to the defendants in Nebraska, by a Nebraska loan broker, Donald E. Benson. Mr. Benson had done business as a co-broker with the plaintiff on a previous occasion and had the plaintiff's contract forms in his possession in Nebraska. Mr. Benson solicited the defendants, in the State of Nebraska, to engage the services of the plaintiff.

The defendants did not enter the State of Oklahoma, at any time relevant to this action, and their only contact was through telephone calls or correspondence which pertain to the plaintiff's request for information from the defendants. Mr. Benson, as co-broker, was the contact for the plaintiff in Nebraska with the defendants. Mr. Benson was considered an "associate" or field representative of the plaintiff, in Nebraska, and for such efforts he was to receive a commission from the plaintiff.

The defendants assert that this Court is without jurisdiction of the person of the defendants or the subject matter of this action.

12 O.S.(1971) §187(a) of the Oklahoma Statutes authorizes jurisdiction in Oklahoma over a non-resident defendant when a cause of action arises from "the transaction of any business within this state". A newer and parallel section of 12 O.S. (1971) §1701.03 likewise authorizes such jurisdiction over claims based on the non-resident defendant's "transaction of any business". These provisions require both minimum reasonable contact between a defendant and the State of Oklahoma and that the claim sued upon in Oklahoma derives itself from the purposeful acts of the defendant in Oklahoma. Garrett v. Levitz Furniture Corp., 356 F. Supp. 283, 284 (N.D.Okla. 1973); Crescent Corp. v. Martin, 443 P.2d 111, 117 (Okla. 1968). In a diversity case, a Federal court is limited in its ability to effectuate

extra territorial service of process and jurisdiction by the law of the forum state. F.R.C.P. 4(e) and (f); Jem Engineering and Mfg., Inc. v. Toomer Elec. Co., 413 F. Supp. 481 (N.D.Okl. 1976).

To constitute doing business in Oklahoma, a defendant's activities must be substantial, continuous, and regular as distinguished from casual, single or isolated. Anderson v. Shiflett, 435 F.2d 1036, 1037 (10th Cir. 1971). In addition, in considering the question of personal jurisdiction when the defendant is an individual, as in the case at bar, the analysis must be more rigorous and restrictive than it is when it is a corporation which is engaged in arguable business activities. Id. at 1038. Further, the defendant must personally avail himself of the privilege of doing business in the State of Oklahoma and by doing so invoking the benefits and protection of its law. Id. at 1038.

Even though the contract at issue in this case states that it shall be governed by the laws of the State of Oklahoma, such perfunctory statement is irrelevant when the question of jurisdiction over the defendant is at issue. Anderson v. Shiflett, at 1037.

The Oklahoma Supreme Court in Roberts v. Jack Richards Aircraft Co., 536 P.2d 353, 355 (Okla. 1975) held:

"To assert personam jurisdiction over a foreign corporation by 12 O.S. (1971) §187, the record should show a voluntarily committed act of the defendant by which that defendant purposefully availed itself of the privilege of conducting activities within the State so as to invoke the benefits and protection of the laws of Oklahoma."

Thus, where a non-resident purchaser of services did not initiate the contact which gave rise to a contract claim by an Oklahoma resident, and where the purchaser has no other relationship with Oklahoma, Oklahoma's Long-Arm Statutes simply do not apply. Jem Engineering and Mfg., Inc. v. Toomer Elec. Co., supra.; Vacu-Maid, Inc. v. Covington, 530 P.2d 137 (Ct. App. Okla. 1975).

The Court finds that the circumstances surrounding the alleged "Authorization to Obtain Loan", its execution, and per-

formance demonstrate no reasonable relationship with Oklahoma which could give rise to a basis for jurisdiction over the defendants in this forum. In addition, the plaintiff's Complaint reflects only that the plaintiff is a "resident" of the State of Oklahoma. Jurisdiction, in this case, is asserted under Title 28 U.S.C. §1332(a) which provides that the District Courts of the United States shall have original jurisdiction in all civil actions where the matter in controversy exceeds the sum of Ten Thousand Dollars (\$10,000) and it is between "citizens" of different States or citizens of a State and foreign States and citizens thereof. Allegations of citizenship are required to meet the jurisdictional requirements. Guerrino v. Ohio Casualty Insurance Company, 423 F.2d 419, 421 (3rd Cir. 1970); Boehnen v. Walston & Company, Inc., 358 F. Supp. 537 (D.C.S.D. 1973); Attwell v. City of Chicago, 358 F. Supp. 1248 (D.C.Wis. 1973).

IT IS, THEREFORE, ORDERED that the defendants' Motion to Quash Summons, Objection to Jurisdiction and Motion to Dismiss be and is hereby sustained.

DATED this 14<sup>th</sup> day of September, 1977.

  
ALLEN E. BARROW  
CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT  
OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEENE CORPORATION, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HAROLD J. HOOVER and )  
 RICHARD A. MAWDSLEY, )  
 d/b/a ROAD RUNNER )  
 DISTRIBUTING COMPANY, )  
 )  
 Defendants. )

No. 76-C-570-B

FILED

SEP 14 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

STIPULATION AND ORDER OF  
DISMISSAL WITH PREJUDICE

The plaintiff and defendants, having stated that the above-entitled action, and each and every claim for relief asserted therein, whether asserted by plaintiff or defendants, may be dismissed with prejudice, each party to bear its or his own costs, and the Court being fully advised, IT IS ORDERED that this cause of action and complaint and the counterclaim of the defendants, and each of them, be and the same are hereby dismissed with prejudice to the bringing of a future action thereon and that each party hereto shall bear its or his own costs.

DATED this 14<sup>th</sup> day of Sept., 1977.

*Allen E. Benson*

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ELMRIA HILL, a/k/a ELMIRA  
HILL, CHARLOTTE BROOKENS,  
SURETY FINANCE, INC., COUNTY  
TREASURER, Tulsa County, and  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County,

Defendants.

CIVIL ACTION NO. 77-C-262-B

FILED

SEP 14 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 14th  
day of September, 1977, the Plaintiff appearing by Robert  
P. Santee, Assistant United States Attorney; the Defendant,  
Surety Finance, Inc., a/k/a Surety Finance Service, Inc., ap-  
pearing by its attorney, Cull Bivens; the Defendants, County  
Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners,  
Tulsa County, Oklahoma, appearing by Kenneth L. Brune, Assistant  
District Attorney; and the Defendants, Elmria Hill, a/k/a Elmira  
Hill, and Charlotte Brookens, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Charlotte Brookens and  
Surety Finance, Inc., a/k/a Surety Finance Service, Inc., were  
served with Summons and Complaint on June 30, 1977; that De-  
fendant, Elmria Hill, a/k/a Elmira Hill, was served with Summons  
and Complaint on July 8, 1977; and that Defendants, County  
Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners,  
Tulsa County, Oklahoma, were served with Summons and Complaint on  
June 24, 1977, all as appears from the U.S. Marshals Service herein.

It appearing that Defendant, Surety Finance, Inc., a/k/a  
Surety Finance Service, Inc., has duly filed its Answer herein on  
July 7, 1977; that Defendants, County Treasurer, Tulsa County,

Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, have duly filed their Answers herein on July 25, 1977; and that Defendants, Elmria Hill, a/k/a Elmira Hill, and Charlotte Brookens, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note and that the following described real property is located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seventeen (17), Block Six (6), BULLETTE HEIGHTS SECOND ADDITION, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendant, Elmria Hill, did, on the 11th day of September, 1972, execute and deliver to the Administrator of Veterans Affairs, her mortgage and mortgage note in the sum of \$10,500.00 with 4 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendant, Charlotte Brookens, was the grantee in a deed from Defendant, Elmria Hill, dated and filed December 26, 1972, in Book 4049, Page 456, records of Tulsa County, wherein Defendant, Charlotte Brookens, assumed and agreed to pay the mortgage indebtedness being sued upon herein.

The Court further finds that Defendants, Elmria Hill and Charlotte Brookens, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$9,907.05 as unpaid principal with interest thereon at the rate of 4 1/2 percent per annum from August 11, 1976, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Defendant, Charlotte

Brookens, the sum of \$ 20.<sup>00</sup>/<sub>100</sub> plus interest according to law for personal property taxes for the year(\$ 1976) and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Defendant, Surety Finance, Inc., a/k/a Surety Finance Service, Inc., is entitled to judgment against Defendant, Elmria Hill, a/k/a Elmira Hill, in the amount of \$29.40, plus \$8.00 costs, plus interest according to law and accrued court costs, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Elmria Hill and Charlotte Brookens, in personam, for the sum of \$9,907.05 with interest thereon at the rate of 4 1/2 percent per annum from August 11, 1976, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Defendant, Charlotte Brookens, for the sum of \$ 20.<sup>00</sup>/<sub>100</sub> as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, Surety Finance, Inc., a/k/a Surety Finance Service, Inc., have and recover judgment, in personam, against Defendant, Elmria Hill, a/k/a Elmira Hill, in the amount of \$29.40, plus \$8.00 costs, plus accrued court costs as of the date of this judgment, plus interest thereafter according to law, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

  
UNITED STATES DISTRICT JUDGE

APPROVED



ROBERT P. SANTEE  
Assistant United States Attorney



KENNETH L. BRUNE  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County



CULL BIVENS  
Attorney for Defendant,  
Surety Finance, Inc., a/k/a  
Surety Finance Service, Inc.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 14 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

WILLIAM G. VANDEVER, )  
d/b/a WILLIAM G. )  
VANDEVER & COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
HASTINGS PORK, a partner- )  
ship and HAYDEN H. THOMPSON, )  
an individual, and J.E. )  
FEUERHELM, an individual, )  
 )  
Defendants. )

No. 76-C-640-B

ORDER

The Court has for consideration defendants' Motion to Quash Summons, Objection to Jurisdiction and Motion to Dismiss and the Court has carefully reviewed the pleadings, affidavits and briefs filed by all of the parties hereto and has carefully considered the recommendations of the Magistrate concerning the motions, and being fully advised in the premises, FINDS:

That the defendants' Motion to Quash Summons, Objection to Jurisdiction and Motion to Dismiss should be sustained for the reasons stated herein.

This is an action by an individual resident of the State of Oklahoma against a Nebraska partnership and its general partners for an alleged breach of contract based upon a document delineated as "Authorization to Obtain Loan".

Jurisdiction is based solely upon a diversity of citizenship. The Complaint alleges that the plaintiff is a "resident" of the State of Oklahoma and that the defendant Hastings Pork is a partnership organized under the laws of Nebraska. No allegation is made as to the "residence" of the individual defendants, Hayden H. Thompson and J. E. Feuerhelm.

The pleadings and affidavits submitted show that none of the defendants were served with Summons or Complaint in the State of Oklahoma, but all were served pursuant to the Oklahoma Long-Arm Statutes in jurisdictions outside of the state. None of the

wise, a copy of an amended pleading, motion or order, or other paper from which it may first be ascertained that the case is one which is or has become removable.

More than thirty days had elapsed before the defendant, Annie Studie, had sought to remove this case to this Court.

For the reasons above stated,

IT IS ORDERED that plaintiffs' Motion to Remand be and the same is hereby sustained and this cause of action and complaint are hereby remanded to the District Court of Delaware County, Oklahoma.

ENTERED this 19<sup>th</sup> day of September, 1977.

*Allen E. Barrow*

---

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LLOYD T. ABLES,  
Plaintiff

vs

ST. LOUIS-SAN FRANCISCO RAILWAY  
COMPANY, A Corporation,  
Defendant

No. 76-C-51-B

**FILED**

SEP 19 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

FINDINGS AND ORDER OF THE COURT

This cause came on for hearing before the Magistrate on the 10th day of June, 1977 on defendant's motion for summary judgment as to Count I of plaintiff's complaint. Plaintiff appeared by its attorney, Michael P. Atkinson, of Best, Sharp, Thomas & Glass; and defendant appeared by its attorney, Grey W. Satterfield, of Franklin, Harmon & Satterfield, Inc. The Court being fully advised in the premises makes the following findings and order:

Defendant has moved for partial summary judgment as to Count I of plaintiff's complaint in which plaintiff alleges that defendant wrongfully and maliciously demoted him and thereby deprived him of a reasonable expectation of continued employment as a supervisory employee. In Count II of his complaint, plaintiff alleges that he is entitled to damages under the Federal Employers' Liability Act for personal injuries he allegedly sustained while working for defendant as a conductor. Defendant's motion is not directed toward Count II.

Defendant asserts that it had the right to demote plaintiff without cause under Oklahoma law since he had no contract of employment with plaintiff and his employment was terminable at will. Defendant relies on Freeman vs C. R. I. & P. R. Co., 239 F.Supp. 661 (D.C. W.D. Okla. 1965); and Foster vs Atlas Life Insurance Co., 6 P.2d 805 (Okla. 1931). Plaintiff in his deposition recognized defendant's right to terminate his employment without cause when he testified that supervisory employees serve at the pleasure of the company and that "They can fire you on the telephone with a pink wire this afternoon".

Plaintiff's counsel also concede the rule, but urge that defendant's employees who decided that plaintiff should be demoted did so maliciously and unlawfully and were therefore guilty of actionable conspiracy. Plaintiff claims that the acts of defendant's officers were unlawful in that they relied in part on a report made by a Springfield, Missouri police officer which recited that plaintiff had been involved in an accident, had been drinking, and would be arrested by the officer if he drove his car onto the street (he was in a service station driveway at the time). Plaintiff's theory is that a Missouri statute, Vernon's Annotated Missouri Statutes, Section 610.100 (1973), which makes arrest records confidential, applied to the police report, and the conduct of defendant's agents in obtaining and relying on a copy of it was therefore unlawful and, as a result, constituted actionable conspiracy on the part of defendant. This argument must be rejected for several reasons. First, the Missouri statute relied upon by plaintiff relates to arrest records and not to police reports generally. The report clearly reflects that plaintiff was not arrested. Therefore, the report was not covered by the Missouri statute. Where there is no unlawful conduct, there can be no conspiracy. In Hughes vs Bizzell, et al, 117 P.2d 763 (Okla. 1941), the librarian of the University of Oklahoma Medical School brought suit against the president of the University and the dean of the medical school. She had been discharged and conceded that the defendants had the right to discharge her without cause. However, she contended that they had slandered and defamed her before the Board of Regents in a hearing to consider the propriety of her discharge and were therefore guilty of an actionable conspiracy. The Court in rejecting this contention held:

"A conspiracy is a combination of two or more persons to accomplish, by concerted action, some unlawful purpose, or to accomplish a lawful purpose by unlawful means. [Citations omitted.] It follows from this definition that there can be no conspiracy 'where the acts complained of, and the means employed in doing the acts, are lawful.' Walker v. Mills, 182 Okl. 480, 78 P.2d 697."

Even assuming, arguendo, that defendant's officers who made the decision to demote plaintiff did so unlawfully, defendant corpora-

tion cannot be held to account therefor. "A corporation cannot be a party to a conspiracy consisting of the corporation and the persons engaged in the management, direction and control of the corporate affairs, where the individuals are acting only for the corporation and not for any personal purpose of their own." 16 Am.Jur.2d, Conspiracy, Section 47. It is undisputed that defendant's officers had no personal interest in demoting plaintiff, but were acting purely as representatives of their corporate employer. Also, it will be noted that none of the individual officers were made parties to this action. In Nelson Radio & Supply Co. vs Motorola, 200 F.2d 911, 914 (5th Cir. 1952), the court in holding that a cause of action in conspiracy had not been stated against a corporation, stated:

" \*\*\* A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. Here it is alleged that the conspiracy existed between the defendant corporation, \*\*\* [and its officers], who have actively engaged in the management, direction and control of the affairs and business of defendant. This is certainly a unique group of conspirators. The officers, agents and employees are not named as defendants and no explanation is given of their non-joinder. Nor is it alleged affirmatively, expressly, or otherwise, that these officers, agents and employees were actuated by any motives personal to themselves. Obviously, they were acting only for the defendant corporation. \*\*\* "

Plaintiff urges that the Court should ignore the rule that an employer has a right to discharge an employee without cause. In support of its contention, it cites Monze vs Beebe Rubber Company, 316 A.2d 549 ( N. H. 1974); Peterman vs International Brotherhood of Teamsters, 344 P.2d 25 (Cal. App. 1959); and Frampton vs Central Illinois Gas Company, 297 N.E.2d 425 (Ind. 1973). However, so long as the rule is in force in the State of Oklahoma under the decisions of its Supreme Court, this Court is bound by it. Erie R. Co. vs Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1937). However, it should be observed that the cases cited by plaintiff in support of his contention that the rule should be changed are not in point here, since each one involved the discharge of an hourly paid laborer. Here, plaintiff was a supervisory employee. An employer has a legitimate interest in hiring and retaining the best

supervisory employees available. Geary vs U. S. Steel Corporation, 319 A.2d 174 (Pa. 1974). The Court could not find a holding which would have a chilling effect on an employer's judgment of the qualifications of its supervisory employees.

The allegations contained in Count I of plaintiff's complaint and the depositions, answers to interrogatories and affidavits on file herein in support thereof do not present an issue of material fact. Defendant's motion for partial summary judgment directed to Count I of plaintiff's complaint should therefore be sustained.

IT IS SO ORDERED.

DATED on this the 19<sup>th</sup> day of September, 1977.

  
United States District Judge



IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**  
NORTHERN DISTRICT OF OKLAHOMA

SEP 19 1977

ENTERPRISE SCHOOL PHOTOS, INC., )  
an Oklahoma Corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ANTHONY R. MUMPOWER, )  
 )  
Defendant. )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 76-C-203-B

JOURNAL ENTRY OF JUDGMENT

This cause comes on for hearing on the 7th day of July, 1977, upon Plaintiff's application for default judgment, and the Court being fully advised in the premises and fully familiar with the files and records herein, and having heard the statements of counsel for the Plaintiff and having three times called the Defendant in open Court, and the Defendant having failed to appear personally or by his counsel or other representative, the Court finds as follows:

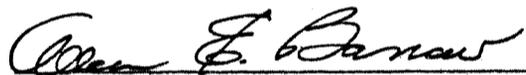
1. That this matter was set by this Court on the 7th day of July, 1977, at the hour of 10:00 o'clock a.m., on Motion for Default Judgment for failure to answer. That on the 7th day of July, 1977, the Defendant having been called three times in open Court appearing not nor by his representative or counsel the Court granted default judgment against said Defendant and referred the matter to the United States Magistrate for the purpose of taking testimony as to the amount of the judgment to be entered.

Based upon the Findings and Recommendations of the Magistrate filed herein on ~~August~~ <sup>Sept</sup> 7 1977, the Court finds that the Plaintiff, Enterprise School Photos, Inc., should have judgment in the amount of Fifty-One Thousand Four Hundred Fifteen and 88/100 Dollars (\$51,415.88); that the Plaintiff should have judgment for its costs herein accrued and accruing; that the Plaintiff, Enterprise School Photos, Inc., should have judgment for

a reasonable attorney's fee for the use and benefit of its attorney, Larry Harral, in the amount of Two Thousand One Hundred and 00/100 Dollars (\$2,100.00); and that this judgment should carry interest at the rate of 10% per annum from July 7, 1977, until full paid.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that judgment be and is hereby entered in favor of the Plaintiff and against this Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Enterprise School Photos, Inc., have judgment in the amount of Fifty-One Thousand Four Hundred Fifteen and 88/100 Dollars (\$51,415.88); that the Plaintiff have judgment for its costs herein accrued and accruing; that the Plaintiff, Enterprise School Photos, Inc., have judgment for a reasonable attorney's fee for the use and benefit of its attorney, Larry Harral, in the amount of Two Thousand One Hundred and 00/100 Dollars (\$2,100.00); and that this judgment carry interest at the rate of 10% per annum from July 7, 1977, until fully paid.



CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FARMERS INSURANCE COMPANY, INC., ) No. 75-C-92-B  
 )  
 ) Plaintiff, )  
 )  
 Vs. )  
 )  
 ) DAVID ARMSTRONG, ET AL., )  
 )  
 ) Defendants. )

**FILED**

SEP 16 1977

ORDER OF SETTLEMENT  
ON STIPULATION OF  
THE PARTIES AS TO  
THE DEFENDANT,  
SUSAN HANSON PEQUEEN

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

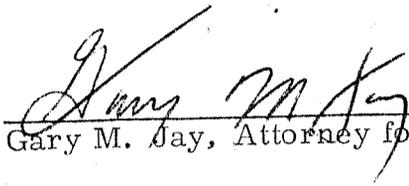
NOW on this 16<sup>th</sup> day of September, 1977, this cause comes on for consideration upon the Application of Susan Hanson, now Pequeen, for an order of the Court allowing her the sum of \$1,140.00 as her share of the proceeds of the policy of insurance previously deposited with the clerk of this Court by the plaintiff. The Court, upon consideration, finds that all parties hereto have agreed to the payment of said sum and that same is fair and equitable to Susan Hanson Pequeen and to the other parties hereto, including the minor

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Susan Pequeen, formerly Susan Hanson, have and receive as her share of the funds on deposit herein the sum of \$1,140.00, the payment of which shall satisfy and discharge her from any further rights or claims in and to said funds.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the clerk of this Court be, and he is hereby, authorized and directed to pay the said sum of \$1,140.00 forthwith to Susan Pequeen, through her Attorney, Gary M. Jay.

  
JUDGE

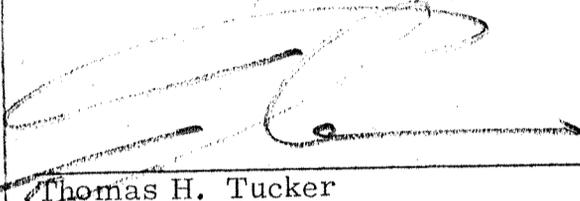
Approved as to Form and Content:



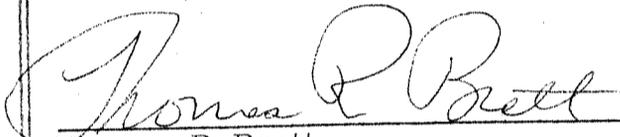
Gary M. Jay, Attorney for Susan Pequeen



Ross Hutchins, Attorney for the defendants,  
Wagon and for Ed Munson and Murray Stewart,  
Co-Counsel.



Thomas H. Tucker  
Attorney for D. I. S. R. S.



Thomas R. Brett,  
Attorney for St. Francis Hospital and for  
T. J. Sinclair, Co-Counsel

extra territorial service of process and jurisdiction by the law of the forum state. F.R.C.P. 4(e) and (f); Jem Engineering and Mfg., Inc. v. Toomer Elec. Co., 413 F. Supp. 481 (N.D.Okla. 1976).

To constitute doing business in Oklahoma, a defendant's activities must be substantial, continuous, and regular as distinguished from casual, single or isolated. Anderson v. Shiflett, 435 F.2d 1036, 1037 (10th Cir. 1971). In addition, in considering the question of personal jurisdiction when the defendant is an individual, as in the case at bar, the analysis must be more rigorous and restrictive than it is when it is a corporation which is engaged in arguable business activities. Id. at 1038. Further, the defendant must personally avail himself of the privilege of doing business in the State of Oklahoma and by doing so invoking the benefits and protection of its law. Id. at 1038.

Even though the contract at issue in this case states that it shall be governed by the laws of the State of Oklahoma, such perfunctory statement is irrelevant when the question of jurisdiction over the defendant is at issue. Anderson v. Shiflett, at 1037.

The Oklahoma Supreme Court in Roberts v. Jack Richards Aircraft Co., 536 P.2d 353, 355 (Okla. 1975) held:

"To assert personam jurisdiction over a foreign corporation by 12 O.S. (1971) §187, the record should show a voluntarily committed act of the defendant by which that defendant purposefully availed itself of the privilege of conducting activities within the State so as to invoke the benefits and protection of the laws of Oklahoma."

Thus, where a non-resident purchaser of services did not initiate the contact which gave rise to a contract claim by an Oklahoma resident, and where the purchaser has no other relationship with Oklahoma, Oklahoma's Long-Arm Statutes simply do not apply. Jem Engineering and Mfg., Inc. v. Toomer Elec. Co., supra.; Vacu-Maid,

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KEENE CORPORATION, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HAROLD J. HOOVER and )  
 RICHARD A. MAWDSLEY, )  
 d/b/a ROAD RUNNER )  
 DISTRIBUTING COMPANY, )  
 )  
 Defendants. )

No. 76-C-570-B

FILED

SEP 14 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

STIPULATION AND ORDER OF  
DISMISSAL WITH PREJUDICE

The plaintiff and defendants, having stated that the above-entitled action, and each and every claim for relief asserted therein, whether asserted by plaintiff or defendants, may be dismissed with prejudice, each party to bear its or his own costs, and the Court being fully advised, IT IS ORDERED that this cause of action and complaint and the counterclaim of the defendants, and each of them, be and the same are hereby dismissed with prejudice to the bringing of a future action thereon and that each party hereto shall bear its or his own costs.

DATED this 14<sup>th</sup> day of Sept., 1977.

*Allen E. Bonaw*  
UNITED STATES DISTRICT JUDGE

Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, have duly filed their Answers herein on July 25, 1977; and that Defendants, Elmria Hill, a/k/a Elmira Hill, and Charlotte Brookens, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note and that the following described real property is located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Seventeen (17), Block Six (6), BULLETTE HEIGHTS SECOND ADDITION, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendant, Elmria Hill, did, on the 11th day of September, 1972, execute and deliver to the Administrator of Veterans Affairs, her mortgage and mortgage note in the sum of \$10,500.00 with 4 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendant, Charlotte Brookens, was the grantee in a deed from Defendant, Elmria Hill, dated and filed December 26, 1972, in Book 4049, Page 456, records of Tulsa County, wherein Defendant, Charlotte Brookens, assumed and agreed to pay the mortgage indebtedness being sued upon herein.

The Court further finds that Defendants, Elmria Hill and Charlotte Brookens, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly install-

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

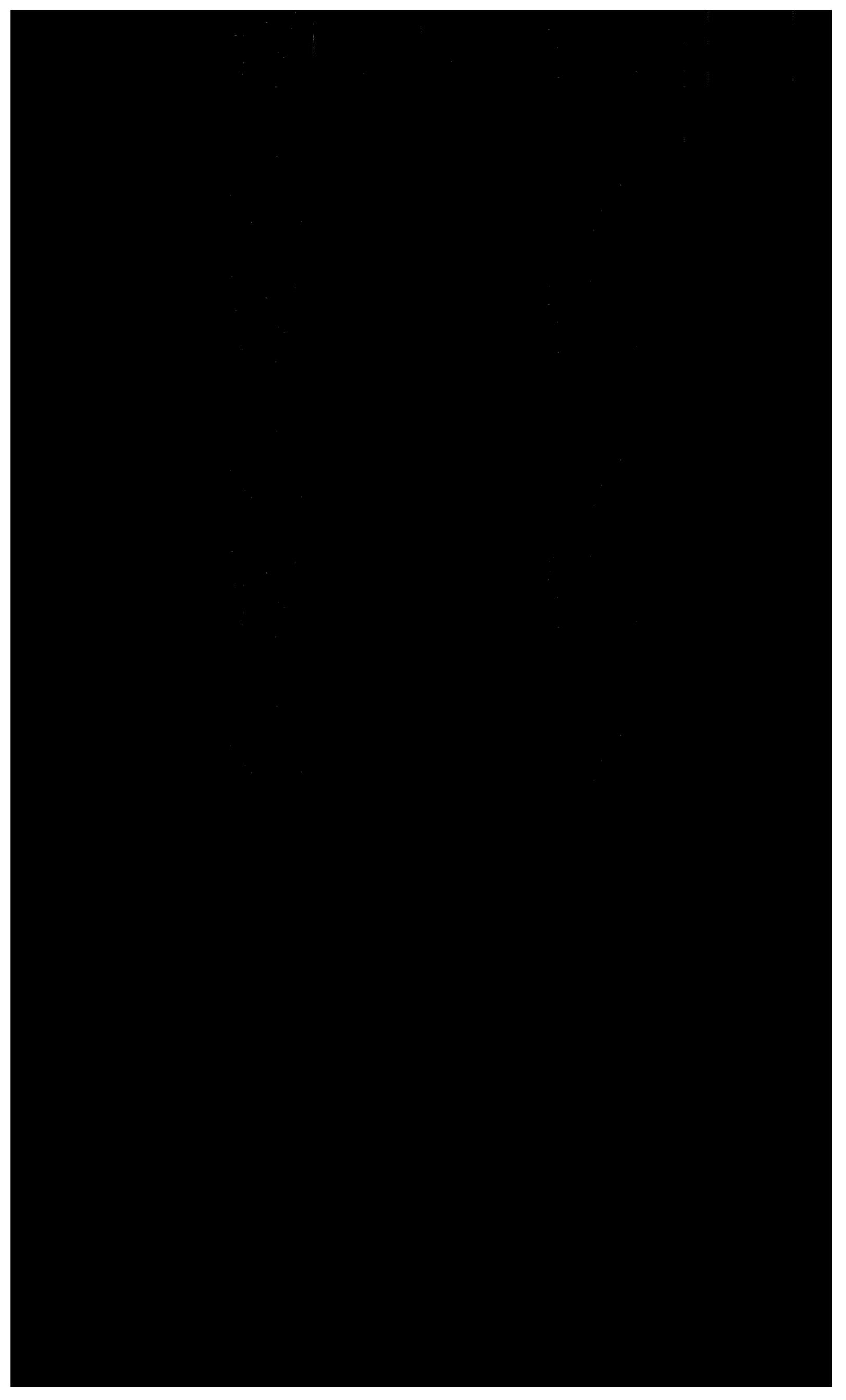
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

*Allen C. Barrow*  
UNITED STATES DISTRICT JUDGE

APPROVED

*Robert P. Santee*  
ROBERT P. SANTEE  
Assistant United States Attorney

*Kenneth L. Brune*  
KENNETH L. BRUNE  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,



The plaintiff contends that in order to assert the defense of absolute immunity, the acts of the prosecuting attorney must have been an "intergal part of the judicial process." In this case the plaintiff argues that the acts of the defendant in making prejudicial comments to the press during the course of the trial which the defendant knew would be published and disseminated to the public was outside the normal duties of the defendant's office "and hours removed so as to preclude any possibility that the complained of acts might have been an intergal part of the judicial process." In his brief the plaintiff states that the remarks of the defendant occurred when the press interviewed the defendant by telephone at his home the evening of May 12, 1976. The defendant argues that the motive of the defendant in pursuing this course of action was to intentionally cause a mistrial because the "defendant was aware that an acquittal was forthcoming from the jury and that any conviction against plaintiff would have to be (obtained) in a future trial." Plaintiff urges that the law requires this Court to examine the nature of the acts of the prosecutor in this case to determine whether the defendant was acting in his protected quasi-judicial capacity or in a role outside the cloak of absolute immunity. A persuasive argument that statements to the news media by a prosecuting attorney which might prejudice the accused in obtaining a fair trial are beyond the scope of his official duties and unprotected by the shield of absolute immunity is found in the concurring opinion in *Martin v. Merola*, 532 F.2d 191 (2nd Cir. 1976). In that case the concurring opinion states:

"It is true that many of the earlier cases have seemed to say that the prosecutor's immunity is virtually absolute and that he may speak with impunity about an indicted defendant. Doubtless it is true that all too many prosecutors have acted on that assumption in times past. But at least by 1966 it had come to be recognized that improper pre-trial publicity endanger a fair trial and may constitute a denial of due process. In *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed. 60 (1966), decided in June of that year, Mr. Justice Clark noted in reversing a murder conviction that,

unfair and prejudicial news comment on pending trials has become increasingly prevalent ...

Given the pervasiveness of modern communications and the

difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused...Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. 384 U.S. at 362-363, 86 S.Ct. at 1522."

The opinion further points out that in 1969 the American Bar Association adopted the Code of Professional Responsibility which the Court states:

"... precludes an attorney from the time of filing of an indictment or issuance of an arrest warrant, from making any extrajudicial statements whose public dissemination is reasonably foreseeable and which relates to 'the character, reputation or prior criminal record ... of the accused.' In accord, Report of the Commission on the Operation of the Jury System on the 'Free Press-Fair Trial' Issue, 45 F.R.D. 391."

However, this Court is of the view that the acts of the defendant in this case in making comments to the press about the defendant and the events that occurred during the trial, although improper, were nevertheless, not clearly outside the authority or jurisdiction of the office. The alleged improper acts might indeed subject the defendant to disciplinary action. This does not mean, however, that such a breach of his prosecutorial responsibility results in a deprivation of rights, privileges, or immunities secured by the United States Constitution or permits an action under 42 U.S.C. §1983. Unless the acts complained of are clearly outside the authority or jurisdiction of the office, the prosecutor should have absolute immunity from a civil action for damages. In *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir. 1966) the Court said:

"Because immunity is conferred on an individual solely by virtue of the office he holds, reason requires us to adopt a rule which does not provide immunity for those acts which are done clearly outside the authority or jurisdiction of the office." 361 F.2d at 590, 591.

See also *McNamara v. Hawks*, 354 F.Supp. 492 (S.D.Fla. 1973), where the Court dismissed the 42 U.S.C. §1983 action against the prosecuting attorney in which the plaintiff had alleged that the prosecution

had made unfair remarks to the jury suggesting plaintiff's guilt and had also conspired to keep a witness favorable to the plaintiff from testifying. The Court held that the prosecutor enjoyed immunity from damage claims arising out of such acts, stating:

"The immunity exists despite the alleged improper use of such authority so long as the alleged wrongful acts were conducted within the apparent jurisdiction. See Mullins v. Oakley, 437 F.2d 1217 (4th Cir. 1971); Goodwin v. Williams, 293 F.Supp. 770 (D.C.Tex. 1968)."

In the recent case of Atkins v. Lanning, No. 76-1694 (10th Cir., June 8, 1977) the Court stated:

"Case law indicates that the denial of immunity to a state prosecutor would doubtless require a gross abuse of the prosecutorial function, such as deliberately concealing evidence proving a defendant's innocence."

In Atkins, supra, the prosecutor was alleged to have conspired with others in the unlawful arrest and confinement of the plaintiff. The question as to the District Attorney was whether he was acting in his quasi-judicial capacity in his investigative or "police-related" role. The District Judge sustained a Motion for Summary Judgment on behalf of the district attorney, finding that the investigative role of the district attorney in the investigation itself did not violate plaintiff's constitutional rights, but that the violation, if any, was the bringing of the criminal charge without probable cause, which was within the quasi-judicial role for which the Supreme Court in Imbler, supra, has provided absolute immunity. Atkins v. Lanning, 415 F.Supp. 186 (N.D.Okla. 1976).

In Gaito v. Strauss, 249 F.Supp. 923 (W.D.Pa, 1966) the Court dismissed the plaintiff's 42 U.S.C. §1983 and 1985 action against the district attorney for damages for allegedly conspiring with others to convict the plaintiff of certain crimes in the Courts of Pennsylvania through the use of illegally obtained evidence, perjured testimony and other violations of plaintiff's constitutional rights.

In its opinion the Court stated:

"Judges and district attorneys acting in their official capacities in connection with criminal and commitment proceedings are entitled to absolute immunity from Civil Rights Act and other damage suits arising out of their judicial and quasi-judicial acts, without regard to their alleged motives in so acting, and notwithstanding such acts may have been performed in excess of jurisdiction. (citations omitted)" Gaito at 930.

The District Court in *Clark v. Zimmerman*, 394 F.Supp. 1166 (M.D. Pa., 1975) dismissed the Plaintiff's Complaint as frivolous, pursuant to 28 U.S.C. §1915(d), without issuance of process. The thrust of Plaintiff's Complaint in *Zimmerman* was that he had been arbitrarily arrested, incarcerated, and held for trial by the individual and concerted acts of a police officer, magistrate and district attorney in a manner that violated his constitutional rights. The district attorney was alleged to have exerted undue influence on the magistrate so as to cause the plaintiff to be held for grand jury action on false criminal charges without a proper evidentiary hearing.

The Court stated:

"The only exception to judicial and prosecutorial immunity are acts of a judge or prosecuting attorney which are clearly outside his jurisdiction, as distinguished from acts which are merely in excess of his jurisdiction, the latter not being actionable. (citations omitted)". *Zimmerman* at 1175.

In the case of *Ney v. State of California*, 439 F.2d 1285 (9th Cir. 1971) the Court held that even though the facts alleged that the prosecutor knowingly used altered tapes in the trial of the defendant, the acts were done in the course of his prosecuting function and therefore he had complete immunity.

The ruling of the Court in *Ney*, *supra*, is consistent with *Imbler*, *supra*, where the Supreme Court cautioned that absolute immunity does in some cases "leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty." *Imbler*, *supra* at 427.

In the case before this Court the plaintiff has indeed alleged that the defendant acted "wilfully, wrongfully (and) with felonious intent." Nevertheless, because of the finding of this Court that the plaintiff's complaint does not allege facts to show that the defendant acted clearly outside the scope of his authority or jurisdiction, it is the view of the Court that the defendant is entitled to complete immunity from liability for damages under 42 U.S.C. §1983. This is so even though such alleged acts were improper or in excess or abusive of such authority or jurisdiction.

Because of this Court's holding that the defendant has complete immunity, it is unnecessary for the Court to reach the additional questions presented by the motion. However, even if the alleged acts of the defendant were clearly outside the scope of his authority or jurisdiction, it is doubtful that such acts resulted in the deprivation of plaintiff's constitutional rights.

The plaintiff contends that such acts of the defendant caused him to be "twice put in jeopardy of his life" in violation of his Fifth Amendment rights under the United States Constitution. According to the briefs filed in this case, the plaintiff's counsel moved for a mistrial because certain jurors had read the newspaper article quoting the defendant.

The plaintiff has failed to allege in his complaint whether the mistrial was declared without his consent or was granted upon his motion. If in fact the plaintiff moved for a mistrial and the new trial was granted upon his motion and with his consent, the plaintiff cannot assert the defense of double jeopardy. See *Clapp v. State*, 124 P.2d 267 (1942), where the Oklahoma Court of Criminal Appeals held:

"The defendant, when a new trial is granted on his own motion, waives his constitutional right to interpose the plea of having been once put in jeopardy. (citations omitted)."

IT IS, THEREFORE, ORDERED that the defendant's Motion to Dismiss be and the same is hereby sustained and the cause of action and complaint are hereby dismissed for failure to state a cause of action.

ENTERED this 29<sup>th</sup> day of July, 1977.

*Allen E. Barrett*

---

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT IN AND FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

EASTMAN KODAK CO., )  
 )  
 Plaintiff )  
 )  
 vs. )  
 )  
 J. E. DAUGHERTY, a/k/a )  
 JERRY DAUGHERTY and )  
 MRS. J. E. DAUGHERTY, )  
 )  
 Defendants )

No. 76-C-235-B

**FILED**

JUL 29 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER FOR SUMMARY JUDGMENT

This cause having come on to be <sup>considered</sup> heard on the Motion of Plaintiff for a Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings in the action, the Stipulation of the parties dated July 13, 1977, the Pre-Trial Order filed herein, and the Brief of Plaintiff filed in support of its Motion for Summary Judgment, and having found that there is no genuine issue of fact to be submitted to the Trial Court and that the parties jointly apply for this Order for Summary Judgment, and having concluded that Plaintiff is entitled to judgment as a matter of law, it is hereby

ORDERED, that Plaintiff's Motion for a Summary Judgment is in all respects granted, and it is further

ORDERED, ADJUDGED AND DECREED, that the Plaintiff, Eastman Kodak Co., recover against the Defendants, J. E. Daugherty, a/k/a Jerry Daugherty and Mrs. J. E. Daugherty, the sum of \$25,930.23 with interest at the rate of 6% per annum from May 1, 1975 until date of judgment, a reasonable attorney's fee in the amount of \$2,500.00, and Plaintiff's costs of action.

DATE: July 29, 1977

Allen E. Barrow  
UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
 vs. ) CIVIL ACTION NO. 77-C-31-B )  
 ) )  
 )  
 THELL WILSON, VANTEEN WILSON, )  
 HANNA REMODELING, INC., C & C )  
 TILE AND CARPET COMPANY, INC., )  
 CHARLES PEST CONTROL, INC., )  
 MUTUAL PLAN OF TULSA, INC., )  
 OKLAHOMA EMPLOYMENT SECURITY )  
 COMMISSION, MERCHANTS CENTRAL )  
 SERVICE, INC., ASSOCIATES )  
 FINANCIAL SERVICES COMPANY OF )  
 OKLAHOMA, INC., HOUSING )  
 AUTHORITY OF THE CITY OF TULSA, )  
 MERLENE JONES, BOARD OF COUNTY )  
 COMMISSIONERS, Tulsa County, )  
 and COUNTY TREASURER, Tulsa )  
 County, )  
 )  
 ) Defendants. )

FILED

JUL 29 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 29<sup>th</sup>  
day of July, 1977, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney; the Defendant, C & C  
Tile and Carpet Company, Inc., appearing by its attorney, G.  
Nash Lamb; the Defendant, Mutual Plan of Tulsa, Inc., appearing  
by its attorney, Julie E. Lamprich; the Defendant, Oklahoma  
Employment Security Commission, appearing by its attorney, Christine  
Taylor; the Defendants, Board of County Commissioners, Tulsa County,  
and County Treasurer, Tulsa County, appearing by Kenneth L. Brune,  
Assistant District Attorney; and the Defendants, Thell Wilson,  
Vanteen Wilson, Hanna Remodeling, Inc., Charles Pest Control, Inc.,  
Merchants Central Service, Inc., Associates Financial Services  
Company of Oklahoma, Inc., Housing Authority of the City of Tulsa,  
and Merlene Jones, appearing not.

The Court being fully advised and having examined the  
file herein finds that Defendant, Thell Wilson, was served by  
publication, as appears from the Proof of Publication filed herein;

that Defendant, Vanteen Wilson, was served with Summons and Complaint on February 11, 1977; that Defendant, Hanna Remodeling, Inc., was served with Summons and Complaint on February 23, 1977; that Defendants, C & C Tile and Carpet Company, Inc., Charles Pest Control, Inc., Mutual Plan of Tulsa, Inc., and Housing Authority of the City of Tulsa, were served with Summons and Complaint on February 16, 1977; that Defendants, Oklahoma Employment Security Commission and Associates Financial Services Company of Oklahoma, Inc., were served with Summons and Complaint on January 25, 1977; that Defendant, Merchants Central Service, Inc., was served with Summons and Complaint on February 8, 1977; that Defendant, Merlene Jones, was served with Summons and Complaint on March 16, 1977; and that Defendants, Board of County Commissioners, Tulsa County, and County Treasurer, Tulsa County, were served with Summons and Complaint on January 24, 1977, all as appears from the U.S. Marshals Service herein.

It appearing that Defendant, C & C Tile and Carpet Company, Inc., has duly filed its Answer and Cross-Petition herein on February 23, 1977; that Defendant, Mutual Plan of Tulsa, Inc., has duly filed its Disclaimer herein on February 22, 1977; that Defendant, Oklahoma Employment Security Commission, has duly filed its Answer and Cross-Petition herein on February 7, 1977; that Defendants, Board of County Commissioners, Tulsa County, and County Treasurer, Tulsa County, have duly filed their Answers herein on February 9, 1977; and that Defendants, Thell Wilson, Vanteen Wilson, Hanna Remodeling, Inc., Charles Pest Control, Inc., Merchants Central Service, Inc., Associates Financial Services Company of Oklahoma, Inc., Housing Authority of the City of Tulsa, and Merlene Jones, have failed to answer herein and that default has been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a mortgage note and foreclosure on a real property mortgage securing said mortgage note and that the following described real property is located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Eighteen (18), in Block Seven (7), SUBURBAN HILLS ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Thell Wilson and Vanteen Wilson, did, on the 13th day of March, 1972, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$11,500.00 with 7 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Thell Wilson and Vanteen Wilson, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$11,026.24 as unpaid principal with interest thereon at the rate of 7 1/2 percent per annum from April 1, 1976, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Defendants, Thell Wilson and Vanteen Wilson, the sum of \$  $\frac{225}{100}^{22}$  plus interest according to law for personal property taxes for the year(s) 1971-76 and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Defendant, C & C Tile and Carpet Company, Inc., is entitled to judgment against Defendants, Thell Wilson and Vanteen Wilson, in the amount of \$397.00, with interest at the rate of 6 percent per annum from the 19th day of April, 1972, until the date of judgment, and at the rate of 10 percent per annum from the date of judgment until paid, together with an attorney's fee of \$150.00, plus accrued court costs, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

The Court further finds that Defendant, Oklahoma Employment Security Commission, is entitled to judgment against Defendants, Thell Wilson and Vanteen Wilson, in the amount of \$8.91, together with lawful interest at the rate of 1 percent per month on the said

taxes of \$6.85 from January 26, 1977, until paid, plus accrued court costs, but that such judgment would be subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Thell Wilson, in rem, and Vanteen Wilson, in personam, for the sum of \$11,026.24 with interest thereon at the rate of 7 1/2 percent per annum from April 1, 1976, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Defendants, Thell Wilson and Vanteen Wilson, for the sum of \$ 225<sup>22</sup>/<sub>100</sub> as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, C & C Tile and Carpet Company, Inc., have and recover judgment against the Defendants, Thell Wilson, in rem, and Vanteen Wilson, in personam, in the amount of \$397.00, with interest at the rate of 6 percent per annum from the 19th day of April, 1972, until the day of judgment and at the rate of 10 percent per annum from the date of judgment until paid, together with an attorney's fee of \$150.00, plus accrued court costs as of the date of this judgment, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant, Oklahoma Employment Security Commission, have and recover judgment, against the Defendants, Thell Wilson, in rem, and Vanteen Wilson, in personam, in the amount of \$8.91, together with lawful interest at the rate of 1 percent per month on the said taxes of \$6.85 from January 26, 1977, until paid, plus accrued court costs as of the date of this judgment, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, Hanna Remodeling, Inc., Charles Pest Control, Inc., Merchants Central Service, Inc., Associates Financial Services Company of Oklahoma, Inc., Housing Authority of the City of Tulsa, and Merlene Jones.

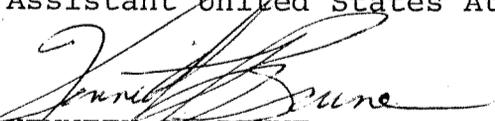
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisalment the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and foreclosed of any right, title, interest or claim in or to the real property or any part thereof, specifically including any lien for personal property taxes which may have been filed during the pendency of this action.

  
UNITED STATES DISTRICT JUDGE

APPROVED

  
ROBERT P. SANTEE  
Assistant United States Attorney

  
KENNETH E. BRUNE  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County

*G. Nash Lamb*

G. NASH LAMB  
Attorney for Defendant,  
C & C Tile and Carpet Company, Inc.

*Nancy Gorman Craig*

Nancy Gorman Craig  
Attorney for Defendant,  
Oklahoma Employment Security Commission

RECEIVED  
MAY 11 1961  
U.S. DEPARTMENT OF JUSTICE  
CIVIL RIGHTS DIVISION

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

JUL 29 1977

*L*

L. A. HORTON d/b/a	)	
HORTON'S ELECTRICAL CENTER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
STEVEN H. JANCO, et al.,	)	
	)	
Defendants.	)	
	)	
	)	
TULSA FABRICATORS AND DISTRIBUTORS,	)	
INC., an Oklahoma corporation,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
STEVEN H. JANCO, et al.,	)	
	)	
Defendants.	)	

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

75-C-182-B ✓

76-C-59-B

CONSOLIDATED

JOURNAL ENTRY OF SUMMARY JUDGMENT

Pursuant to the Court's Order, Findings of Fact and Conclusions of Law dated February 4, 1977, and the Court's Order dated July 29<sup>th</sup>, 1977, summary judgment is hereby entered for the defendant, United States of America and against plaintiffs, L. A. Horton, d/b/a Horton's Electrical Center, Tulsa Fabricators and Distributors, Inc., and defendants Steven H. Janco; William R. Satterfield; Richard S. Sudduth; Michael L. O'Donnell, d/b/a Aci Hi Construction Company; Anchor Concrete Company; Tom Dolan Heating Company; Lights of Tulsa Inc.; and Matt Collins, d/b/a World Wide Mechanical, in this consolidated cause of action.

Dated this 29<sup>th</sup> day of July, 1977.

*Allen E. Pearson*  
\_\_\_\_\_  
CHIEF  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

HILDA WHITTEN and HENRY L. KING, )  
  ) )  
  ) Plaintiffs, ) )  
  ) )  
  ) v. ) )  
  ) )  
WILLIAM S. JANNEY, ) )  
  ) )  
  ) Defendant. ) )

**FILED**

76-C-492-B

JUL 29 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

This cause came on for hearing on the 31st day of May, 1977, upon Plaintiffs' Application for Default Judgment, and the Court being fully advised in the premises and fully familiar with the files and records herein, and having heard the statements of counsel for the Plaintiffs and having three times called the Defendant in open Court, and the Defendant having failed to appear personally or by his counsel or other representative, the Court finds as follows:

1. That this matter was set by this Court on the 18th day of May, 1977, at the hour of 9:45 o'clock A.M., and on the 4th day of May, 1977, this Court caused the Defendant to be noticed of such setting. That thereafter and more than 3 days prior to the 18th day of May, 1977, the Defendant was advised by his previous counsel of such setting, and further advised that his failure to appear either personally or by his representative or counsel would result in the issuance of a default judgment against him. That thereafter on the 24th day of May, 1977, Plaintiffs by and through their counsel caused to be filed herein an application for default judgment, and this Court did on the 25th day of May, 1977, cause the Defendant to be noticed that said Application for Default Judgment would be heard at the hour of 10:00 o'clock A.M. on the 31st day of May, 1977, and that this Court did, by and through its staff, cause the Defendant's office to be advised by telephone of such setting; and the Defendant having been called 3 times in open Court appearing not nor by his representative or counsel the Court granted Plaintiffs' Motion for Default Judgment and referred the matter to the United States Magistrate for

the purpose of taking testimony as to the amount of the judgment to be entered.

Based upon the Findings and Recommendations of the Magistrate filed herein on June 13, 1977, the Court finds that the Plaintiff, Hilda Whitten, should have judgment in the amount of \$48,840.00; that the Plaintiff, Henry L. King, should have judgment in the amount of \$49,771.73; that the Plaintiffs should have judgment for their costs herein accrued and accruing; that the Plaintiff, Henry L. King, should have judgment for reasonable attorney fees for the use and benefit of his attorney, William F. Powers, in the amount of \$1,000.00; and that this judgment should carry interest at the rate of 10% per annum from May 31, 1977 until fully paid.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that judgment be and is hereby entered in favor of the Plaintiffs and against this Defendant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, Hilda Whitten have judgment in the amount of \$48,840.00; and that the Plaintiff, Henry L. King, have judgment in the amount of \$49,771.73; that the Plaintiffs have judgment for their costs herein accrued and accruing; that the Plaintiff, Henry L. King, have judgment for reasonable attorney fees for the use and benefit of his attorney, William F. Powers in the amount of \$1,000.00; and that this judgment carry interest at the rate of 10% per annum from May 31, 1977 until fully paid.

  
\_\_\_\_\_  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA



4. At the disposition docket the appellant was represented by Earl W. Wolfe and the appellee was represented by Hubert H. Bryant.

5. The Court ordered the appellant 10 days to file his brief and the appellee 20 days thereafter to file its brief. The parties were advised at that time that failure to file the briefs as directed by the Court would result in a dismissal for failure to prosecute.

6. The appellant has failed to file his brief and the case is therefore dismissed for failure to prosecute.

ENTERED this 29<sup>th</sup> day of July, 1977.



---

CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

BANK OF OKLAHOMA, N.A., AND )  
JOHN ROGERS, CO-EXECUTORS )  
OF THE ESTATE OF HORACE G. )  
BARNARD, DECEASED, )

Plaintiffs, )

vs. )

REPUBLIC GAS & OIL CO.; )  
UNITED STATES DEPARTMENT OF )  
THE INTERIOR, BUREAU OF INDIAN )  
AFFAIRS, OSAGE AGENCY; AND DAVE )  
BALDWIN, SUPERINTENDENT OF THE )  
OSAGE AGENCY, PAWHUSKA, )  
OKLAHOMA, )

Defendants. )

CIVIL NO. 77-C-115-C ✓

FILED

JUL 28 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

The Motion to Dismiss as to Certain Named Defendants filed in the captioned cause by the United States Department of the Interior, Bureau of Indian Affairs and the Osage Agency, and the Motion filed by plaintiffs to Amend First Amended Complaint, to Drop Parties Defendant, to Add Party Defendant and to Correct Misnomer, and the arguments filed in support and in response thereto having been examined, reviewed and considered this 28th day of July, 1977, and the Court thereby being fully advised, it is

ORDERED that the "United States Department of the Interior, Bureau of Indian Affairs, Osage Agency" be and is herewith dismissed as a party to this action.

IT IS FURTHER ORDERED that Cecil D. Andrus, Secretary of the Interior of the United States of America (hereinafter "Secretary"), upon proper service of process or waiver of service of process become a party defendant in the captioned cause and that all pleadings heretofore filed in said action

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

be held to apply to said defendant, Secretary, and that, specifically, all references to "Bureau" in Paragraph II 5 and elsewhere within the plaintiffs' First Amended Complaint be deemed to relate to "Secretary".

IT IS FURTHER ORDERED that all references to Dave Baldwin, Superintendent of the Osage Agency, Pawhuska, Oklahoma, be held to refer to David Baldwin, Superintendent of the Osage Agency, Pawhuska, Oklahoma.

  
H. Dale Cook  
United States District Judge

Rogers and Bell  
P. O. Box 3209  
Tulsa, Oklahoma 74101  
(918) 582-5201

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

RUSSELL J. R. BUCKMASTER, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 TULSA COUNTY SHERIFF and )  
 CITY POLICE DEPARTMENT, )  
 )  
 Defendants. )

No. 77-C-127-C

**FILED**

JUL 28 1977 *nc*

O R D E R

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

This is an action brought pro se pursuant to Title 42 U.S.C. § 1983. The plaintiff alleges certain mistreatment of him by a police officer employed by the defendant City (of Tulsa) Police Department and by medical personnel employed by the defendant Tulsa County Sheriff. Now before the Court are motions to dismiss filed by both defendants.

It is now well settled that a municipality is not a "person" within the meaning of Title 42 U.S.C. § 1983, regardless of whether the relief sought is legal or equitable. City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973); Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Actions under that statute against municipal police departments are also barred for the same reason. Henschel v. Worcester Police Department, 445 F.2d 624 (1st Cir. 1971); United States ex rel. Lee v. Illinois, 343 F.2d 120 (7th Cir. 1965); Burmeister v. New York City Police Department, 275 F.Supp. 690 (S.D.N.Y. 1967); Shackman v. Arnebergh, 258 F.Supp. 983 (D.C. Calif. 1966). Therefore, the motion to dismiss of the City Police Department is hereby sustained.

The doctrine of respondeat superior does not apply in civil rights cases under Title 42 U.S.C. § 1983. Johnson v. Glick, 481 F.2d 1028 (2nd Cir. 1973), cert. denied 414 U.S. 1033 (1973); Jennings v. Davis, 476 F.2d 1271 (8th Cir.

1973); Casey v. Purser, 385 F.Supp. 621 (W.D. Okla. 1974);  
Barrows v. Faulkner, 327 F.Supp. 1190 (N.D. Okla. 1971).

The only allegation against the defendant sheriff is that he "is responsible for the hiring of peri-medics (sic) who treat and issue all medicene (sic) to inmates." No personal participation by this defendant is alleged. The case of Barrows v. Faulkner, supra, involved the same defendant. Under circumstances similar to those present in the instant case, that Court held:

" . . . Plaintiff nowhere alleges that Defendant directed or personally participated in any of the acts of which Plaintiff complains and which constitute her federal civil rights cause of action. This being the case, Plaintiff fails to state any claim based on a federal ground against Defendant Faulkner. . . ."

Likewise, the plaintiff in this case has failed to state a federal claim against the defendant Tulsa County Sheriff, and his motion to dismiss is hereby sustained.

It is so Ordered this 27<sup>th</sup> day of July, 1977.

  
H. DALE COOK  
United States District Judge

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JUL 27 1977

BRADCO, INC., an Oklahoma )  
corporation, )  
) )  
Plaintiff, )  
) )  
vs. )  
) )  
JEFFREY J. SPANIER and PARKER- )  
HANNIFIN CORPORATION, an Ohio )  
corporation, )  
) )  
Defendant. )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

NO. 77-C-172-C

NOTICE OF DISMISSAL - WITHOUT PREJUDICE

TO: Jeffrey J. Spanier, Defendant,  
and his attorneys,  
BARROW, GADDIS, & GRIFFITH  
1600 Philtower Building  
Tulsa, Oklahoma 74103

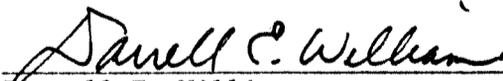
and Parker-Hannifin Corporation, Defendant,  
and its attorneys:

Charles L. Freed  
Thompson, Hine and Flory  
National City Bank Building  
Cleveland, Ohio 44114

Lance Stockwell  
Boesche, McDermott & Eskridge  
1300 National Bank of Tulsa Bldg.  
Tulsa, Oklahoma 74103

Notice is hereby given that Bradco, Inc., an Oklahoma corporation,  
the above named plaintiff, hereby dismisses the above entitled action  
without prejudice, pursuant to Rule 41(a)(1)(i) of the Federal Rules  
of Civil Procedure, and hereby files this notice of dismissal with the  
Clerk of the Court before service by defendant of either an answer or  
a motion for summary judgment.

Dated July 27, 1977

  
\_\_\_\_\_  
Darrell E. Williams  
Attorney for Plaintiff  
2431 E. 51st St., Suite 602  
Tulsa, Oklahoma 74105  
Phone: (918) 749-8391

**NOTE:** THIS ORDER IS TO BE MAILED  
BY MOVANT TO ALL COUNSEL AND  
PRO SE LITIGANTS IMMEDIATELY  
UPON RECEIPT.

CERTIFICATE OF SERVICE

I hereby certify that on the 27<sup>th</sup> day of July, 1977, a true and correct copy of the foregoing Dismissal Without Prejudice was mailed to Barrow, Gaddis, & Griffith, 1600 Philtower Building, Tulsa, Oklahoma, 74103, and Charles L. Freed, Thompson, Hine and Flory, National City Bank Building, Cleveland, Ohio, 44114, and Lance Stockwell, Boesche, McDermott & Eskridge, 1300 National Bank of Tulsa Bldg., Tulsa, Oklahoma, 74103 with postage thereon fully prepaid.

*Darrell E. Williams*  
Darrell E. Williams

defendants do business in the State of Oklahoma nor have they ever conducted business in the State of Oklahoma.

The pleadings and affidavits before the Court show that the "Authorization to Obtain Loan", which was allegedly breached, was presented to the defendants in Nebraska, by a Nebraska loan broker, Donald E. Benson. Mr. Benson had done business as a co-broker with the plaintiff on a previous occasion and had the plaintiff's contract forms in his possession in Nebraska. Mr. Benson solicited the defendants, in the State of Nebraska, to engage the services of the plaintiff.

The defendants did not enter the State of Oklahoma, at any time relevant to this action, and their only contact was through telephone calls or correspondence which pertain to the plaintiff's request for information from the defendants. Mr. Benson, as co-broker, was the contact for the plaintiff in Nebraska with the defendants. Mr. Benson was considered an "associate" or field representative of the plaintiff, in Nebraska, and for such efforts he was to receive a commission from the plaintiff.

The defendants assert that this Court is without jurisdiction of the person of the defendants or the subject matter of this action.

12 O.S.(1971) §187(a) of the Oklahoma Statutes authorizes jurisdiction in Oklahoma over a non-resident defendant when a cause of action arises from "the transaction of any business within this state". A newer and parallel section of 12 O.S. (1971) §1701.03 likewise authorizes such jurisdiction over claims based on the non-resident defendant's "transaction of any business". These provisions require both minimum reasonable contact between a defendant and the State of Oklahoma and that the claim sued upon in Oklahoma derives itself from the purposeful acts of the defendant in Oklahoma. Garrett v. Levitz Furniture Corp., 356 F. Supp. 283, 284 (N.D.Okla. 1973); Crescent Corp. v. Martin, 443 P.2d 111, 117 (Okla. 1968). In a diversity case, a Federal court is limited in its ability to effectuate

extra territorial service of process and jurisdiction by the law of the forum state. F.R.C.P. 4(e) and (f); Jem Engineering and Mfg., Inc. v. Toomer Elec. Co., 413 F. Supp. 481 (N.D.Okl. 1976).

To constitute doing business in Oklahoma, a defendant's activities must be substantial, continuous, and regular as distinguished from casual, single or isolated. Anderson v. Shiflett, 435 F.2d 1036, 1037 (10th Cir. 1971). In addition, in considering the question of personal jurisdiction when the defendant is an individual, as in the case at bar, the analysis must be more rigorous and restrictive than it is when it is a corporation which is engaged in arguable business activities. Id. at 1038. Further, the defendant must personally avail himself of the privilege of doing business in the State of Oklahoma and by doing so invoking the benefits and protection of its law. Id. at 1038.

Even though the contract at issue in this case states that it shall be governed by the laws of the State of Oklahoma, such perfunctory statement is irrelevant when the question of jurisdiction over the defendant is at issue. Anderson v. Shiflett, at 1037.

The Oklahoma Supreme Court in Roberts v. Jack Richards Aircraft Co., 536 P.2d 353, 355 (Okla. 1975) held:

"To assert personam jurisdiction over a foreign corporation by 12 O.S. (1971) §187, the record should show a voluntarily committed act of the defendant by which that defendant purposefully availed itself of the privilege of conducting activities within the State so as to invoke the benefits and protection of the laws of Oklahoma."

Thus, where a non-resident purchaser of services did not initiate the contact which gave rise to a contract claim by an Oklahoma resident, and where the purchaser has no other relationship with Oklahoma, Oklahoma's Long-Arm Statutes simply do not apply. Jem Engineering and Mfg., Inc. v. Toomer Elec. Co., supra.; Vacu-Maid, Inc. v. Covington, 530 P.2d 137 (Ct. App. Okla. 1975).

The Court finds that the circumstances surrounding the alleged "Authorization to Obtain Loan", its execution, and per-

formance demonstrate no reasonable relationship with Oklahoma which could give rise to a basis for jurisdiction over the defendants in this forum. In addition, the plaintiff's Complaint reflects only that the plaintiff is a "resident" of the State of Oklahoma. Jurisdiction, in this case, is asserted under Title 28 U.S.C. §1332(a) which provides that the District Courts of the United States shall have original jurisdiction in all civil actions where the matter in controversy exceeds the sum of Ten Thousand Dollars (\$10,000) and it is between "citizens" of different States or citizens of a State and foreign States and citizens thereof. Allegations of citizenship are required to meet the jurisdictional requirements. Guerrino v. Ohio Casualty Insurance Company, 423 F.2d 419, 421 (3rd Cir. 1970); Boehnen v. Walston & Company, Inc., 358 F. Supp. 537 (D.C.S.D. 1973); Attwell v. City of Chicago, 358 F. Supp. 1248 (D.C.Wis. 1973).

IT IS, THEREFORE, ORDERED that the defendants' Motion to Quash Summons, Objection to Jurisdiction and Motion to Dismiss be and is hereby sustained.

DATED this 14<sup>th</sup> day of September, 1977.

  
ALLEN E. BARROW  
CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT  
OF OKLAHOMA

SEP 14 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

CALVIN M. SWINDELL,	)	
	)	
Plaintiff,	)	77-C-349-B
	)	
vs.	)	
	)	
JAMES L. HALL, BOULDER BANK AND	)	
TRUST COMPANY, a banking	)	
corporation; and PERPETRUAL	)	
PIPE LINES OF AMERICA, LTD.,	)	
	)	
Defendants.	)	

ORDER REMANDING

On June 27, 1977, this case was originally filed in the District Court of Tulsa County, bearing number 77-1329.

On August 12, 1977, the defendant, James L. Hall, filed his petition for removal to this Court. The other defendants did not join in the petition for removal and no reason was stated in the removal petition for the lack of joinder.

There is no complete diversity of citizenship. The petition filed in the State Court seeks ejectment and quiet title.

In the removal petition, the defendant, James L. Hall, sets up a defense involving a federal question.

A defendant or defendants desiring to remove and who may properly remove must be treated collectively and, as a general rule, all defendants who may properly join in the removal petition must join. Moore's Federal Practice, Volume 1A, ¶0.168[3.-2

In an action invoking the original jurisdiction of the district court on the basis that the action is one arising under, the federal ground must appear in the complaint well pleaded. This same principle normally applies to removal since it is keyed to original jurisdiction; and there can be no removal on the basis of a federal question presented for the first time in defendant's petition for removal or in his answer. Moore's Federal Practice,

Volume 1A, ¶0.160; Great Northern Ry. Co. v. Alexander (Hall's Adm'r.), 246 U.S. 276 (1918).

For the foregoing reasons,

SUA SPONTE, IT IS ORDERED that this cause of action and complaint be and the same is hereby remanded to the District Court of Tulsa County, Oklahoma.

ENTERED this 14<sup>th</sup> day of September, 1977.



---

CHIEF UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

DAVID E. GILKEY, Administrator of )  
the Estate of Durward M. Gilkey, )  
Deceased, )  
vs. )  
WACHTMAN DRILLING COMPANY )  
& GEOLOGICAL & ENGINEERING )  
CONSULTANTS, et al, )  
Defendants. )

No. 75-C-218  
75-C-219

CONSOLIDATED

FILED

SEP 12 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JOURNAL ENTRY OF JUDGMENT

NOW, on this 15th day of August, 1977, the above cause comes on regularly for trial, pursuant to assignment, and the plaintiff and defendants appearing in person and by their respective attorneys of record and all parties having announced ready for trial, thereupon a jury was duly empaneled and sworn to try the case according to the law. The plaintiff having introduced his evidence and rested, and the defendants having introduced their evidence and rested, and the defendants, H. C. Wachtman and Dean Schroeder, as individuals having interposed their motion for directed verdict and the Court having sustained the same, and on the 19th day of August, 1977, the Court having instructed the jury, and the jury having heard the argument of counsel, thereupon retired to deliberate upon the case and upon said date returned their verdicts as follows:

"We, the Jury, find that the deceased, Durwood M. Gilkey, was an independent contractor. August 19, 1977.

s/ George E. Jeffries, Jr., Foreman

"We, the Jury, find for the defendants. August 19, 1977.

s/ George E. Jeffries, Jr., Foreman"

which verdict was by the Court received, ordered filed and recorded and judgment entered thereon.

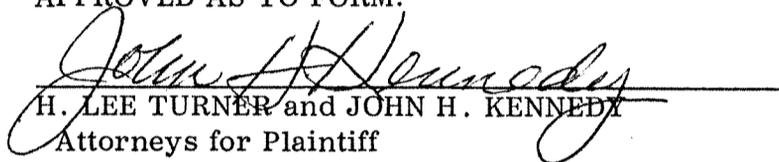
IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that judgment be entered in favor of the defendants and against the plaintiff, and that plaintiff have and recover nothing from the defendants and said defendants recover their costs from the plaintiff.

Dated: September 12, 1977.

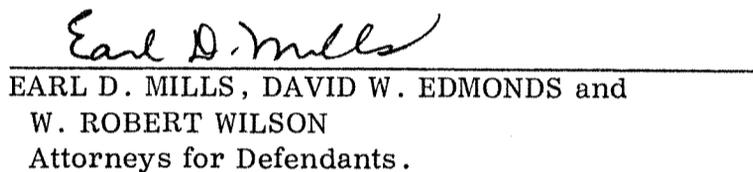


U.S. DISTRICT JUDGE

APPROVED AS TO FORM:



H. LEE TURNER and JOHN H. KENNEDY  
Attorneys for Plaintiff



EARL D. MILLS, DAVID W. EDMONDS and  
W. ROBERT WILSON  
Attorneys for Defendants.

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 12 1977

GRAND RIVER DAM AUTHORITY, )  
 )  
 ) Plaintiff, )  
 )  
 ) -vs- )  
 )  
 ) WESTINGHOUSE ELECTRIC CORPORATION, )  
 )  
 ) et al., )  
 )  
 ) Defendants. )

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

NO. 76-C-419-B

CONSOLIDATED

GRAND RIVER DAM AUTHORITY, )  
 )  
 ) Plaintiff, )  
 )  
 ) -vs- )  
 )  
 ) WESTINGHOUSE ELECTRIC CORPORATION, )  
 )  
 ) et al., )  
 )  
 ) Defendants. )

NO. 76-C-422-B

DISMISSAL WITH PREJUDICE

Comes now the plaintiff, GRAND RIVER DAM AUTHORITY, and dismisses its action against the defendants, HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY and W. R. GRIMSHAW COMPANY, with prejudice.

DISMISSAL WITH PREJUDICE

Comes now HARTFORD STEAM BOILER INSPECTION & INSURANCE COMPANY and dismisses its Cross-Claims against the defendants, WESTINGHOUSE ELECTRIC CORPORATION and W. R. GRIMSHAW COMPANY, with prejudice.

DISMISSAL WITH PREJUDICE

Comes now the defendant, WESTINGHOUSE ELECTRIC CORPORATION, and dismisses its Cross-Claim against the defendant, W. R. GRIMSHAW COMPANY, with prejudice.

JONES, GIVENS, BRETT, GOTCHER,  
DOYLE & BOGAN, INC.  
Suite 400, 201 West 5th Street  
Tulsa, Oklahoma 74103

STEPHEN W. SMITH  
105 North Grand  
Okmulgee, Oklahoma 74447

By Stephen W. Smith  
Stephen W. Smith

Attorneys for Plaintiff

GORDON & GORDON  
Box 1167  
Claremore, Oklahoma 74017

BETHELL, CALLAWAY & ROBERTSON  
P. O. Box 23  
Fort Smith, Arkansas 72902

By Donald P. Callaway  
Donald P. Callaway

Attorneys for The Hartford Steam  
Boiler Inspection & Insurance  
Company

HANSON, PETERSON & TOMPKINS, INC.  
401 North Hudson - Suite 200  
P. O. Box 917  
Oklahoma City, Oklahoma 73101

By Raymond E. Tompkins  
Raymond E. Tompkins

Attorney for Westinghouse Electric  
Corporation

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

GARY MOONEY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 BUCK MYERS, d/b/a BUCK MYERS )  
 MOTOR COMPANY, )  
 )  
 Defendant and Third Party )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JOPLIN AUTOMOBILE AUCTION )  
 COMPANY, INC., a corporation; )  
 RICHARD ABEL, an individual; )  
 DEALERS AUTO AUCTION, INC., )  
 a corporation; and DOENGES )  
 BROTHERS FORD, INC., a cor- )  
 poration, )  
 )  
 Third Party Defendants. )

**FILED**

SEP 12 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 76-C-25B

O R D E R

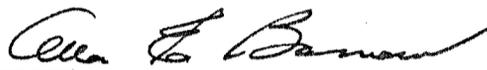
The Court has for its consideration the joint application of the remaining Parties in the above styled action to dismiss the complaint and cause of action of the Plaintiff herein and to dismiss the complaint and cause of action of Defendant and Third Party Plaintiff, both with prejudice, and, having carefully perused the entire file, and being fully advised in the premises, find:

That said Motion should be and is hereby sustained.

IT IS THEREFORE ORDERED, that the complaint and cause of action filed by the Plaintiff herein should be and the same is hereby dismissed with prejudice.

IT IS FURTHER ORDERED, that the complaint and cause of action filed by the Defendant and Third Party Plaintiff against the Third Party Defendant herein should be and the same is hereby is dismissed with prejudice.

ENTERED, this 12<sup>th</sup> day of September, 1977.



---

Allen E. Barrow  
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARVIN C. CATRON, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
McDONALD'S SYSTEM, INC., )  
BAMA PIE, INC., )  
DOLCO PACKAGING CORP., )  
and )  
PAUL W. MARSHALL, )  
 )  
Defendants )

CIVIL ACTION NUMBER

76-C-201-C

**FILED**

SEP 9 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

RULE 54(b) CERTIFICATION

It being the intent of the Court that the Order dated May 31, 1977, dismissing Dolco Packaging Corporation as a party in this action be a final order and it having been determined that there is no just reason for delay therein, the entry of judgment dismissing Dolco Packaging Corporation is hereby expressly directed.

So ordered,

9-9-77  
Date

  
\_\_\_\_\_  
H. Dale Cook  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

RICHARD MORALES, )  
 )  
 Plaintiff, )  
 )  
 vs. ) No. 74-C-271-C  
 )  
 MAPCO, INC. and )  
 DONALD B. ROSS, )  
 )  
 Defendants. )

**FILED**  
SEP 9 1977  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

This action was brought as a derivative suit by a shareholder of the nominal defendant, Mapco, Inc., (Mapco) pursuant to the provisions of § 16(b) of the Securities and Exchange Act of 1934, Title 15 U.S.C. § 78p(b). At all times relevant to this action, defendant Ross was Financial Vice-President of Mapco. Section 16(b) prohibits the unfair use of information obtained by a director, officer or principal shareholder as an "insider" of the issuing corporation. Where an "insider" has gained "short swing" profits by a sale and purchase or purchase and sale of any equity security of the corporate issuer within a period of less than six months, the profits from such unauthorized use of "inside" information are recoverable by the issuing corporation and inure to its benefit.

Under a prospectus dated March 17, 1964, Mapco issued 306,450 warrants. By the terms of the issuance, one warrant plus \$9.00 could be exchanged for one full share of Mapco common stock through March 31, 1972. Any warrants not so exchanged were to be automatically converted into one-half share of Mapco common stock on April 1, 1972, the date of expiration of the warrants. During the period from March, 1964, the date of initial issuance of the warrants, to a time six months prior to January 1, 1972, Ross acquired 3,616 Mapco warrants. In February and March, 1972, Ross disposed of the 900 warrants in issue. To effect the

conversion of the warrants into common stock, Ross either furnished his broker the required \$9.00 per warrant or drew upon the balance in his brokerage account. The 900 shares of common stock so obtained went to the broker in its street name and were sold through the New York Stock Exchange on the same day they were converted.

This action was brought to recover the profits allegedly realized by Ross from the sale of the 900 shares of Mapco common stock, the plaintiff's contention being that the conversion of the warrants and sale of the stock within a six month period constituted a prohibited "purchase and sale" under § 16(b). On April 10, 1975, this Court sustained the defendants' motion for summary judgment. Characterizing the transactions as "unorthodox", the Court applied the pragmatic test and held:

"Where there is no possibility of speculative abuse of 'inside' information, an involuntary nature to the transaction, a simultaneous transfer of warrants for stock and sale of stock, and an economic equivalent between the warrant and the stock received in the exchange such as exists in this case, § 16(b) should not be applied to render an injustice to the defendant."

The Tenth Circuit Court of Appeals reversed this Court's decision on August 27, 1976. 541 F.2d 233 (10th Cir. 1976). Noting that the transactions required Ross to make cash payments, that Court rejected the characterization of the warrants and the stock as "economic equivalents" and held that, applying either the objective or the pragmatic test, the transactions were violative of § 16(b). This Court was directed to enter an appropriate judgment in light of the opinion of the Court of Appeals. The plaintiff has renewed its previously filed motion for summary judgment. The opinion of the Court of Appeals requires this Court to grant the plaintiff's motion insofar as it relates to defendant Ross' liability. Now pending before the Court is the plaintiff's motion for summary judgment on the issue of damages.

All parties agree, and the Court of Appeals has held,

that Ross' 900 warrants entitled him to 450 shares of Mapco common stock without further action on his part. The warrants could therefore be characterized as the economic equivalent of these 450 shares. The plaintiff argues for this interpretation in his brief in support of his renewed motion for summary judgment. Because Ross was entitled to these 450 shares as a matter of right, he did not "purchase" them in February and March of 1972. What Ross held in addition to this right to 450 shares was, in effect, an option to purchase 450 shares of Mapco common stock for \$9.00 per share. This option was exercised when the warrants were converted into common stock, and Ross therefore "purchased" only 450 shares in February and March of 1972. Consequently, when Ross sold the 900 shares of common stock in issue, he was in violation of the six month requirement of § 16(b) only as to 450 shares.

The damages recoverable for a violation of § 16(b) are described in that section as the "profit realized" from the prohibited purchase and sale. This liability is limited, under certain circumstances, by 17 C.F.R. § 240.16b-6, which provides in part as follows:

"(a) To the extent specified in paragraph (b) of this section the Commission hereby exempts as not comprehended within the purposes of section 16(b) of the act any transaction or transactions involving the purchase and sale or sale and purchase of any equity security where such purchase is pursuant to the exercise of an option or similar right either (1) acquired more than six months before its exercise. . . .

(b) In respect of transactions specified in paragraph (a) of this section the profits inuring to the issuer shall not exceed the difference between the proceeds of sale and the lowest market price of any security of the same class within six months before or after the date of sale.  
. . . .

\* \* \* \*

(d) The exemptions provided by this section shall not apply to any transaction made unlawful by section 16(c) of the act or by any rules and regulations thereunder."

Section 16(c) makes it unlawful for a beneficial owner, director or officer to sell any equity security if he ". . . (1) does not own the security sold, or (2) if owning the security, does not deliver it against such sale within twenty days thereafter. . . ." The purpose of that section is to prevent "short sales" and to prohibit corporate insiders from deriving large profits from transactions in their company's securities while they conceal the fact that they are so engaged. Fuller v. Dilbert, 244 F.Supp. 196 (S.D.N.Y. 1965), aff'd 358 F.2d 305 (2nd Cir. 1966); Silverman v. Landa, 200 F.Supp. 193 (S.D.N.Y. 1961), aff'd 306 F.2d 422 (2nd Cir. 1962). In the instant case, Ross acquired the warrants in issue more than six months prior to their conversion and sale, and there is nothing in the record to indicate that he was "selling short" or engaging in any other conduct prohibited by § 16(c). Therefore, the extent of Ross' liability is controlled by 17 C.F.R. & 240.16b-6(b).

The term "proceeds of sale" as used in that section has been interpreted to mean the sale price of the stock sold. Abbe v. Goss, 411 F.Supp. 923 (S.D.N.Y. 1975); Lewis v. Arcara, 401 F.Supp. 449 (S.D.N.Y. 1975); Selas Corporation of America v. Voogd, 365 F.Supp. 1268 (E.D. Penn. 1973). The parties agree that Ross sold the 900 shares of common stock for a total price of \$38,139.20. Because only one-half of each share sold constituted a sale in violation of § 16(b), the applicable "proceeds of sale" were one-half of the total sale price, or \$19,069.60. An uncontroverted affidavit filed by Ross shows that during the period commencing six months prior to February 28 1972 and ending six months subsequent to March 25, 1972, the lowest price at which Mapco common stock was traded on the New York Stock Exchange was \$28.25 per share. Multiplied by the 450 shares "sold", this figure becomes \$12,712.50. The "profits inuring to the issuer" under § 16(b) are therefore the difference between \$19,069.60 and \$12,712.50, or \$6,357.10.

The plaintiff also asks the Court to assess against Ross interest from the time of realization of profit. The allowance of prejudgment interest in § 16(b) cases is within the discretion of the Court. Occidental Life Insurance Co. of North Carolina v. Pat Ryan & Associates, Inc., 496 F.2d 1255 (4th Cir. 1974). The United States Supreme Court discussed the issue in Blau v. Lehman, 368 U.S. 403, 82 S.Ct. 451, 7 L.Ed.2d 403 (1962).

"Section 16(b) says nothing about interest one way or the other. This Court has said in a kindred situation that 'interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable.'" (citation omitted) 368 U.S. at 414.

Since that date, courts have denied interest based upon considerations of fairness and equity, Abbe v. Goss, supra; Lewis v. Wells, 325 F.Supp. 382 (S.D.N.Y. 1971), and have held that the deterrent effect of § 16(b) is not served by assessing interest where the violation is not wilful. Gold v. Sloan, 486 F.2d 340 (4th Cir. 1973); Lewis v. Realty Equities Corporation of New York, 396 F.Supp. 1026 (S.D.N.Y. 1975). This Court has previously held that Ross' violation was not wilful. Under the circumstances of this case, the assessment of prejudgment interest would be inequitable.

For the foregoing reasons, the plaintiff's motion for summary judgment is hereby sustained as to the issue of liability, and is hereby sustained as to the issue of damages, to the extent of \$6,357.10.

It is so Ordered this 9<sup>th</sup> day of September, 1977.

  
H. DALE COOK  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

CATHY HOWARD, )  
)  
Plaintiff, )  
)  
vs. )  
)  
TULSA HOUSING AUTHORITY, )  
J. THOMAS HARES, individually )  
and in his capacity as an employee )  
of the Defendant Corporation, and )  
CHARLES PAYNE, individually and )  
in his capacity as an employee of )  
the Defendant Corporation, )  
)  
Defendants. )

No. 77-C-78-C

**FILED**

SEP. 9 1977 *ph*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

Now on this 9<sup>th</sup> day of September, 1977 the court  
has for its consideration Stipulation for Dismissal jointly  
filed in the above-styled and numbered cause by plaintiff  
and defendants. Based upon the representations and requests  
of the parties as set forth in the foregoing stipulation,  
it is

ORDERED that plaintiff's complaint and claim for relief  
against all defendants be and the same are hereby dismissed  
with prejudice.

*W. Dale Cook*  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

*Daniel Doris*  
Daniel Doris  
1501 Fourth National Bank Bldg.  
Tulsa, Oklahoma 74119

Attorney for the Plaintiff

*Joel L. Wohlgemuth*  
Joel L. Wohlgemuth  
1100 Philtower Building  
Tulsa, Oklahoma 74103

Attorney for the Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

BRENDA FERGUSON, and )  
CHIQUITA FOSTER, and )  
MARVIN FOSTER, Individually )  
and as Surviving Next of Kin, )  
For and On Behalf of the Heirs, )  
Executors, and Administrators of )  
the Estates of Clotiel Foster )  
and Dale Foster, Deceased, )  
Plaintiffs, )

vs. )

THE UNITED STATES OF AMERICA, )  
and THE CITY OF SAND SPRINGS, )  
OKLAHOMA, a municipal corporation, )  
Defendants. )

NO. 77-C-27  
77-C-364-C

**FILED**

SEP. 9 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

This matter coming on for hearing before the undersigned Judge on a Motion For Consolidation filed in Case No. 77-C-364 on this 7th day of September, 1977, all parties being present at the status conference by their attorneys and the Court being advised that the Defendant, City of Sand Springs, filed a Motion to Dismiss on September 7, 1977 as against it as Defendant in Case No. 77-C-364, and the Court being further advised that heretofore on the 14th day of April, 1977 an Order was entered in Case No. 77-C-27 dismissing the City of Sand Springs in that numbered case, the Court finds that jurisdictional facts are the same in each case and that the Motion to Dismiss should be sustained as against the City of Sand Springs in Case No. 77-C-364 and that the Order entered in the 77-C-27 case is hereby incorporated by reference into Case No. 77-C-364.

Dated this 7th day of September, 1977.

  
\_\_\_\_\_  
H. Dale Cook  
United States District Judge



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

M-L & ASSOCIATES, LTD., a )  
Limited Partnership, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
C.I.T. CORPORATION, a New )  
York Corporation, )  
 )  
Defendant. )

NO. 74-C-165-C

FILED

SEP 9 1977

*ph*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

J U D G M E N T

The Court on September 9<sup>th</sup>, 1977 filed its Findings of Fact and Conclusions of Law which are hereby incorporated herein and made a part of the Judgment of the Court.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that as to the cause of action brought by M-L & Associates, Ltd. against C.I.T. Corporation, Judgment be entered in favor of C.I.T. Corporation and against M-L & Associates, Ltd.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that as to the First Counterclaim of C.I.T. Corporation against M-L & Associates, Ltd. Judgment be entered in favor of C.I.T. Corporation and against M-L & Associates, Ltd. in the amount of \$43,614.98, and as to the Second Counterclaim of C.I.T. Corporation, that Judgment be entered in favor of M-L & Associates, Ltd. and against C.I.T. Corporation.

It is so Ordered this 9<sup>th</sup> day of September, 1977.

*H. Dale Cook*  
H. DALE COOK  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

M-L & ASSOCIATES, LTD., a )  
Limited Partnership, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
C.I.T. CORPORATION, a New )  
York Corporation, )  
 )  
Defendant. )

NO. 74-C-165-C

**FILED**

SEP 9 1977 *ph*

J U D G M E N T M E M O R A N D U M Jack C. Silver, Clerk  
U. S. DISTRICT COURT

Plaintiff, M-L & Associates, Ltd. (hereinafter M-L) brings this action for breach of contract against the defendant, C.I.T. Corporation (hereinafter C.I.T.). Defendant counterclaims for (1) enforcement of a provision of the contract between the parties relating to a commitment fee on the unused credit line and (2) damages for fraud in the inducement of the contract. This Court has jurisdiction of the action based upon diversity and amount pursuant to 28 U.S.C. § 1332. The plaintiff, M-L, is a limited partnership organized under the laws of the State of Oklahoma and located in Tulsa, Oklahoma. The defendant, C.I.T., is a New York corporation with its principal place of business in New York City, and does business in the State of Oklahoma. The amount in controversy exceeds the sum of \$10,000. The action came on for non-jury trial on February 22, 1977. Based upon the testimony and exhibits presented, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. M-L is an Oklahoma limited partnership organized in 1973 by Glen Michael and J. C. Lampton for the purpose of purchasing computer equipment from Telex Computer Products, Inc., (herinafter Telex).

2. In order to finance this endeavor, M-L contacted

C.I.T.; and in February of 1973 C.I.T. agreed to loan M-L up to \$5,250,000 to purchase equipment valued at \$7,000,000. The loan was to be secured by \$7,000,000 in specified new Telex computer products "and assignment of twenty-four month firm term leases with acceptable lessees."

3. It was agreed that C.I.T. would lend 75 percent of the purchase price of the equipment and M-L would pay 5 percent down and give Telex a note for 20 percent which would be subordinated to C.I.T.'s first mortgage of \$5,250,000.

4. Thereafter on April 9, 1973, M-L entered into a written agreement with Telex captioned Restated Agreement of Purchase and Sale (hereinafter Purchase Agreement).

5. On May 15, 1973 M-L and C.I.T. executed a Collateral Note Agreement (hereinafter Loan Agreement) which provided that "the maximum aggregate amount of loans which may be made . . . hereinunder shall be \$5,250,000 and no loan shall be made after October 1, 1973."

6. Under the terms of the agreement between the parties, C.I.T. had the sole discretion to determine the acceptability as collateral of each lease submitted. In this regard, the Loan Agreement provides:

"You [C.I.T.] shall have the right to determine, in your sole discretion, the acceptability of each lease, including but not limited to the acceptability of the credit of the lessee thereunder and the nature of the equipment described therein and in making such determination you shall in no event be bound by any standards of acceptability of the leases of the equipment which may be set forth in the Purchase Agreement."

7. After the effective date of the agreement, Telex forwarded directly to C.I.T. copies of leases on equipment proposed for sale to M-L.

#### M-L's Claim Against C.I.T.

##### Introduction

M-L contends that C.I.T. breached the agreement between the parties with respect to the leases remaining in issue by failing to act in good faith or reasonably in regard to

funding the leases. In order for the Court to determine whether C.I.T. breached the contract, it is necessary to first ascertain the duty of C.I.T. under the contract. The contract between the parties provides that C.I.T. has the right to determine, in its sole discretion, the acceptability of each lease. The parties have each cited cases touching on the issue of the duty, if any, implied in a contract in which the performance of certain acts rests within the sole discretion of one party thereto. While none cited appear precisely in point, it would appear that C.I.T. had the duty to act in good faith or reasonably in considering leases submitted by C.I.T. and in notifying M-L in regard to the status of the lease submittals. In regard to the decision to accept or reject, however, C.I.T. had sole discretion. In order to determine whether C.I.T. acted in good faith in its relationship with M-L, the following issues must be resolved:

(1) Did C.I.T. act in good faith in examining the leases forwarded to them for consideration by Telex? (2) Whose responsibility was it to set closings? (3) Were closings set which C.I.T. representatives failed to attend? (4) Did C.I.T. act in good faith in regard to the October 1, 1974 deadline? (5) Did C.I.T. act in good faith in regard to apprising M-L of its decisions in regard to the leases forwarded to C.I.T.? The Court finds the following factual determinations to be relevant to a decision on these issues.

Did C.I.T. Act in Good Faith in Examining the Leases Forwarded to Them for Consideration?

8. No lease copies were forwarded to C.I.T. for consideration in May of 1973. Leases on a total of approximately \$1,100,000 in equipment were submitted during the months of June and July, and two leases on approximately \$45,000 in equipment were received by C.I.T. in August. Therefore, prior to September 1, 1973 less than \$1,200,000 in equipment leases had been received of the \$7,000,000 anticipated representing loan requests totaling less than \$900,000.

9. The general procedure utilized by C.I.T. in considering the leases was as follows. The lease copies were received by C.I.T. from Telex at C.I.T.'s Oklahoma City division. The leases not rejected there for credit reasons were then sent to C.I.T.'s New York office for further review. In New York, the lease copies were reviewed by David Riggs for acceptability of the type of equipment, by C. S. Alcutt and Joe Haffey for credit and product mix and by Jules Roth for legal sufficiency. In general the lease copies were then returned to Oklahoma City with a letter from Roth specifying in what manner the lease copy failed to conform to the agreement and setting out what changes, corrections or additions would be required to make the lease acceptable to C.I.T. for funding. Earl Garrett would, thereafter, discuss the status of the leases and the findings of C.I.T.'s New York office with the Telex representative in charge of submittals on behalf of M-L. The Court here notes that M-L had Telex send lease copies directly to C.I.T. and did not actively participate in securing or forwarding the lease copies. In regard to submittals, Telex acted as the agent of M-L and communication with Telex in regard to the adequacy of submittals acted as notice to M-L likewise. In addition, Glen Michael and Lampton both testified that they were in frequent communication with Garrett at C.I.T.

10. Between September 4, 1973 and September 12, 1973 Telex forwarded over 50 lease copies to C.I.T. on almost \$6,000,000 in equipment.

11. In determining whether C.I.T. acted in good faith in regard to these leases, the type of leases submitted and the method and purpose in making the submittals is relevant. On August 27, 1973 Jack James, Telex executive, by memorandum directed Grant Goodman, head of the third-party leasing department of Telex, to "pull together paperwork on all possible contracts even those in the past which have funding clauses or other non-acceptable clauses and forward these

requests to C.I.T." James further stated that he wanted to make sure that Telex had submitted for C.I.T.'s review at least \$7,000,000 of potential leases even though he recognized Telex couldn't sell the full \$7,000,000 by September 30, 1973. Thereafter on August 29, 1973 Goodman supplied James a list of leases, which according to the testimony included all leases available on the types of equipment M-L had contracted to buy. Goodman stated therein in regard to these leases: "I doubt, however, if C.I.T. will count it towards the 7 million commitment." James thereafter directed Goodman to "submit all of it and document total dollars that have been submitted." An examination of these memoranda and the type and amount of leases forwarded to C.I.T., in light of past submittals by Telex on behalf of M-L, leads to several conclusions. Prior to September, C.I.T. had received relatively few lease copies on an intermittent irregular basis which would give no indication to C.I.T. to be prepared for the deluge in September. The submittal by Telex of every possible lease, regardless of whether it conformed to the conditions of the contract, no doubt made it more difficult, time-consuming and frustrating for C.I.T. to cull out the unacceptable leases in order to ascertain if any were fundable. M-L refers to a memorandum from Garrett to J. T. Haffey dated December 11, 1972 indicating that at that time Garrett considered it possible to get funding for M-L to order \$3,000,000 or \$4,000,000 in equipment within a two-week period. M-L asserts this indicates C.I.T. could have processed the funding on the lease copies submitted in September in an equally short time frame. Based upon the exhibits and testimony it is clear, however, that C.I.T. initially anticipated that each lease would be in a substantially greater amount than those actually submitted. While C.I.T. could possibly have acted upon three \$1,000,000 leases in a short period, it does not necessarily follow that it should be expected to examine and determine funding on over 50 leases in a three-

week period.

12. The Court finds that C.I.T. did, in fact, examine each of the lease copies received by C.I.T. Those lease copies that were approved for credit by the Oklahoma City office were then forwarded to New York for further consideration. On September 26, 1973 Ted Bajo, a C.I.T. staff attorney in New York, discussed the lease copies submitted with Hanna of the Oklahoma City office. To confirm the conversation, Bajo sent a memorandum to Hanna setting out specifically the recommended corrections, changes and additional documentation required as to each lease. Garrett was attending a convention in Tulsa from September 27 until September 30 and no further action was taken in regard to these leases. Although M-L would no doubt have preferred that C.I.T. and its employees devote their time and energies solely to funding M-L submittals, the Court does not find that in order to act in good faith and reasonably in regard to the submittals C.I.T. was required to ignore other accounts and commitments. Clearly C.I.T. at all times made a conscientious effort to determine the appropriateness of funding the lease copies submitted and to inform M-L in regard to C.I.T.'s qualification requirements.

Whose Responsibility was it to Set Closings?

13. Although M-L asserts that C.I.T. did not act in good faith in that C.I.T. failed to set closings on leases that could have been made acceptable, the written agreements between the parties contain no requirements in regard to which party was responsible to set closings nor do they specify the procedure to be followed.

14. In this regard, the Collateral Note Agreement provides that M-L "will purchase certain computer peripheral equipment from . . . Telex pursuant to the . . . Purchase Agreement and will lease the equipment, in Telex' name, to end-user lessees." The agreement thereafter further provides that M-L would not borrow against the leases without first

offering them to C.I.T. as collateral for loans. The agreement contemplates a sale of equipment from Telex to M-L followed by M-L's borrowing of funds from C.I.T. with the leases as collateral for the loans.

15. In regard to how closings were structured, Glen Michael, general partner in M-L, recognized in testimony that C.I.T. had to be satisfied or there would be no closing. Although M-L asserts that it could and would have met C.I.T.'s requirements in regard to specific leases if C.I.T. had set them for closing, in light of the fact that M-L recognized that funding was at the discretion of C.I.T. and that comments regarding insufficiencies had been made in regard to certain leases, M-L reasonably should have acted to make the leases conform to the comments made.

16. Although C.I.T. officials testified that after approval of lease copies Garrett was to follow through on funding, the Court finds that this indicates nothing more than that Garrett was the C.I.T. representative responsible for handling C.I.T.'s portion of each transaction and not an indication that he was responsible for coordinating the efforts of M-L and Telex to meet C.I.T.'s requirements or to arrange the closings.

17. The best indication of the responsibilities of the parties in regard to closings is the procedure actually followed by the parties in the one transaction that was funded. Contrary to the testimony of Glen Michael to the effect that the Missouri Pacific closing was a simultaneous closing, the Court finds, based upon the exhibits of record, that it was not. The Bill of Sale between M-L and Telex was executed on July 2, 1973. In addition, the check from M-L to Telex for \$20,142, representing 5 percent of the purchase price of the equipment is dated July 2, 1973. The reverse side of that check shows

that it was negotiated by Continental Illinois Bank and deposited on July 5, 1973. The promissory notes executed by M-L to Telex covering the 20 percent balance of the down payment are dated March 7, 1973, April 1, 1973 and June 8, 1973. On July 10, 1973 J. B. Bailey, Vice President and General Counsel of Telex notified Jules Roth of C.I.T. by letter that M-L believed "all the necessary steps have been taken between Telex Computer Products, Inc. and M-L & Associates, Ltd. to authorize payment by C.I.T. Corporation of the sum of \$302,130.00 as the final cash payment due in these transactions." The letter further provided:

"I also enclose xerox copies of the three original Promissory Notes executed and delivered to Telex on behalf of M-L & Associates, Ltd. against the three invoices. I also enclose a copy of the three invoices in question and a xerox copy of the check issued to Telex Computer Products, Inc. by M-L & Associates, Ltd. in the aggregate amount of \$20,142. We hereby certify on behalf of Telex Computer Products, Inc. that we have received a check and the three Promissory Notes and in order to fully consummate the transaction we await the receipt of the sum of \$302,130."

Bailey concludes the letter with the statement that Telex would appreciate having the funds as soon as possible. Thereafter on July 18, 1973 Michael and Lampton as general partners assigned the Missouri Pacific lease to C.I.T. Also on July 18, 1973 Michael and Lampton signed an authorization for C.I.T. to disburse the sum of \$302,130 to Telex' account at the Continental Illinois National Bank & Trust Company of Chicago. The Court finds that there was not a simultaneous closing and that prior to closing, M-L met all C.I.T. requirements and transacted the sale from Telex.

18. Based upon these facts the Court finds that C.I.T. was not responsible for setting the closings on the leases submitted, particularly when M-L had not yet made the changes and additions indicated by C.I.T. Even if M-L could have met the conditions specified by C.I.T. in regard to certain leases, the fact remains that they did not do so. As previously stated, in regard to the Missouri Pacific lease,

Telex General Counsel advised C.I.T. in the letter of July 10, 1973 that all necessary steps had been taken between Telex and M-L to authorize payment by C.I.T. These same necessary steps simply were not taken by Telex and M-L in regard to any other lease submittals.

Were Closings Set Which C.I.T. Failed to Attend?

19. The Court does not find any probative evidence to support M-L's contention that Telex, M-L and C.I.T. New York attempted to set closings and that the C.I.T. representatives failed or refused to attend. It is doubtful that any closings would be set for August since at that time only \$69,120 in leases had been approved over and above the loan previously made in regard to the Missouri-Pacific lease. The Collateral Note Agreement provides that each funding transaction between C.I.T. and M-L would be a minimum amount of \$100,000. The Court further finds that no definite closing was set for October 1, 1973 as contended by M-L. Although certain work papers of Mike McKenzie indicate that a possible closing was contemplated, his recollection in regard to the setting of a definite closing was hazy at best. Mr. Garrett of C.I.T. testified no such closing was set. There was no showing that any sale of equipment had been completed between Telex and M-L and no evidence showing that all of the requirements of C.I.T. as set out in the comments of C.I.T.'s legal staff had been complied with.

Did C.I.T. Act in Good Faith in Regard to the October 1, 1973 Deadline?

20. The Court finds that C.I.T. did not represent to M-L that the October 1, 1973 cut-off date would be extended. While Garrett may have indicated to M-L that C.I.T. could extend the time period set out in the agreement and that he could recommend such an extension, Garrett did not have the authority to personally modify the terms of the agreement, and the evidence does not show that he or any other C.I.T. representative informed M-L that C.I.T. would,

in fact, extend the deadline. C.I.T. certainly had the right to limit its performance to the terms and conditions of the agreement between the parties and had no duty to waive the requirements set out therein.

Did C.I.T. Act in Good Faith in Apprising M-L of Its Decisions in Regard to Leases Forwarded to C.I.T.?

21. The Court finds that C.I.T. regularly informed M-L, through Telex, by telephone of the status of the lease submittals and of the comments made in regard thereto. In addition, the exhibits include letters from C.I.T. to M-L and from Telex to M-L forwarding information in regard to the status of the leases and numerous status reports prepared by Telex showing which lease submittals had been rejected and the reasons therefore. Obviously, Telex had been furnished this information by C.I.T. Based upon the evidence it is the finding of the Court that C.I.T. made a good faith effort to inform M-L of the status of the leases submitted. In addition, the Court notes that even if M-L had received immediate notification by C.I.T. in regard to rejection of non-conforming leases, Telex had no other remaining leases to submit. M-L was therefore not injured in regard to the leases submitted which could not have been modified to meet C.I.T. requirements.

Counterclaims of C.I.T.

First Counterclaim

22. Paragraph 4 of the Collateral Note Agreement executed by Glen Michael and J. C. Lampton on behalf of M-L provides:

"In the event we have not borrowed from you the full amount of \$5,250,000 by October 1, 1973, we shall pay to you, promptly upon your request therefor, as compensation for your commitments hereunder and not as a penalty, a sum equal to 1% of the difference between \$5,250,000 and the aggregate amount borrowed hereunder, except however that the payment of such compensation shall not be borrowed from you by reason of your having determined that the applicable leases therefor are unacceptable."

23. C.I.T. did not expressly modify the agreement between the parties to provide that the contract requirements would be waived as to government leases.

24. The Court finds that M-L forwarded to C.I.T. leases constituting submittals in keeping with the contractual agreement for \$586,372 in equipment that were not funded because C.I.T. determined that the leases were unacceptable and that \$302,130 in equipment was funded. The unused credit line amounts to \$4,361,498.

#### Second Counterclaim

25. In a memorandum prepared by S. E. Hanna, C.I.T. Oklahoma City office to the Executive Credit Committee dated December 15, 1972, Hanna states that the borrower is a limited partnership and that it was "contemplated" that there would be ten individual partners and the initial cash investment in the partnership would be \$500,000 to be used as a down payment on equipment purchased from Telex. In the Comments portion of the memorandum, Hanna points out that in addition to the firm leases on excellent customers, C.I.T. would also have the unconditional guarantees of the individual partners.

26. Thereafter, changes were made as to the individuals comprising the partnership and the number was reduced to eight.

27. The inter-office communications of C.I.T. regarding whether funding should be made available do not mention the initial investment of the individual partners. A memorandum of February 23, 1973 concerning the reduction in the number of partners primarily concerns the net worth of the individual partners. It further provides:

"Our initial dependence on the partnership credit was secondary in our approval, and with the reduction in the amount of credit plus the joint and several guarantee of partners having a combined net worth of \$6,164, we recommend approval on this basis."

28. The Limited Partnership Articles of M-L executed

February 28, 1973 states that eight individuals had contributed \$50,000 to the partnership capital.

29. The Certificate of Limited Partnership dated February 26, 1977 filed with the State of Oklahoma states that six individuals contributed \$50,000 to the partnership capital and two individuals contributed \$25,000 each.

30. In the letter from E. E. Garrett to Glen Michael advising approval of the loan request, Garrett stated that the partnership agreement had to be acceptable to C.I.T. and properly registered and recorded in the State of Oklahoma.

31. C.I.T. required that each partner submit a complete audited financial statement and further that each partner and his wife execute personal guarantees.

32. The testimony shows that the major considerations of C.I.T. in regard to funding the venture were that the twenty-four month firm term leases with credit worthy lessees would be held by C.I.T. as security and that the individual partners and their wives had executed personal guarantees.

#### CONCLUSIONS OF LAW

##### M-L's Claim Against C.I.T.

1. The Court finds that C.I.T. had an implied duty to act in good faith in regard to the funding of the leases submitted to it for consideration. In the cases submitted by the parties in regard to the standard to be applied, the courts speak in terms of both reasonableness and good faith. M-L has taken the position that the term reasonable should be interpreted as implying that the standard should be that of the "reasonable man" which would incorporate a concept of standard in the industry. The Court finds no cases applying the term reasonable in this manner, but rather finds that the term is used either synonymously with the concept of good faith or at most is used to mean upon reasonable grounds. In the two cases M-L cites as most relevant to this issue, the issue before the Court was whether the contract in issue in the case was illusory. In Boston Roads Shopping Center v.

(N.Y. 1961) the Court in holding that the contract in question was not illusory; stated:

"It seems reasonable to believe that if defendant had rejected the leases as unsatisfactory, it would have been required to do so on reasonable grounds resting on the forms of the leases themselves . . . But even if the test of defendant's rejection of the leases be good faith, rather than reasonableness, the contract is enforceable according to its terms and is not illusory."

The Court in Commercial Mortgage Finance Corporation v. Greenwich Savings Bank, 145 S.E.2d 249 (Ga. 1965) considered a satisfaction contract to require "a performance which shall be satisfactory to him in the exercise of an honest judgment," and later spoke in terms of good faith. The majority of cases appear to speak in terms of good faith. For example, in United Wholesalers, Inc. v. A. J. Armstrong Co., Inc., 251 F.2d 860 (4th Cir. 1958), the Court stated:

"The validity of contracts which require performance by one party to the satisfaction of the other is well established because there is always the implied obligation upon the party to be satisfied that the privilege be exercised in fairness and good faith."

It is the determination of the Court that the duty on C.I.T. should be considered in terms of good faith and not in terms of a reasonable man concept.

2. The cases cited by the parties concern the duty of one who has entered into a "satisfaction" contract and do not concern contracts which provide for performance at the "sole discretion" of a party. Certainly the provision in the contract allowing acceptance or rejection by C.I.T. at its "sole discretion" should not be considered as meaningless. It was a material and important part of the agreement. Yet in order for the contract not to be illusory and for there to be a mutuality of duties, the good faith duty implied in every contract must be applied to this contract, thereby creating a duty upon C.I.T. to not act in bad faith

by refusing to even consider the submittals but rather in good faith to examine the submittals made to determine their acceptability and after doing so to either accept or reject the submittals. It appears to the Court that the application of good faith conduct in a sole discretion contract goes to the duty of the party to in fact exercise its discretion and does not vitiate the party's right to reject at its sole discretion once it has acted in good faith in considering the application submitted.

3. The Court finds that C.I.T. acted in good faith in considering the leases it received and further acted in good faith in apprising M-L directly, and through Telex, as to the acceptability of the leases it received.

4. Although M-L asserts that the requirements contained in the comments made by C.I.T. in regard to the leases were unnecessary and unreasonable, the Court finds that C.I.T. had the contractual right to require the leases to meet the legal standards of C.I.T. The Court further finds that the requirements as set out in the comments were reasonable and that C.I.T. acted in good faith in making such requirements.

5. As previously stated, the Court finds that while C.I.T. had a duty to act in good faith in "processing" each submittal, the decision as to whether a particular lease was to be funded was within the sole discretion of C.I.T. However, even if the good faith duty of C.I.T. went to a consideration of the merits of each lease and C.I.T. could not reject a lease except upon reasonable grounds, the Court finds, based upon the evidence that C.I.T. had reasonable grounds to reject the leases which it did, and that C.I.T. acted in good faith in regard to funding.

6. In regard to whether the contract between the parties required that the leases submitted be 24-month firm-term leases, the Court makes the following findings. On February 22, 1973, a Commitment Letter was written in which the following requirement was stated:

"The loan is to be secured by \$7,000,000 in specified new Telex computer products and assignments of 24-month firm term leases with acceptable lessees."

Said letter further provided that "the agreement between Telex Computer Products, Inc. and the partnership must be acceptable to and assigned to C.I.T. Corporation." It would therefore appear that from the inception of the relationship of the parties, they contemplated and specifically agreed that any contractual agreements between M-L and Telex would have to meet C.I.T.'s requirements and that the M-L - Telex agreement was an integral part of the M-L - C.I.T. agreement. C.I.T. conditioned its willingness to provide financing on its requirement that the agreement between M-L and Telex would be acceptable to C.I.T. The interest of C.I.T. in the M-L - Telex agreement and C.I.T.'s recognized status as a participant in the negotiations and contractual agreements between M-L and Telex is exemplified by the statement of M-L in its Amended Complaint to the effect that C.I.T. "essentially rewrote plaintiff's contract with the seller of the computer products." The Purchase Agreement between M-L and Telex was thereafter executed on April 9, 1973. Said agreement defines the term "equipment lease" or "lease" as "a lease of equipment originally entered into in the name of Telex, as lessor, and a lessee, as lessee, in the form of Exhibit B annexed hereto." The use of a required form was thereby made a part of the agreement. In addition, the agreement provided that M-L was obligated to pay only for equipment "subject to an equipment lease having a minimum of 24-monthly lease payments." Thereafter, on May 15, 1973, M-L and C.I.T. executed a Collateral Note Agreement which provided that M-L would purchase certain computer equipment from Telex "pursuant to a restated agreement of purchase and sale between the undersigned (M-L) and Telex dated April 9, 1973 and would lease the equipment in Telex name to end user lessees." This loan Agreement stated that M-L "desired to borrow such sums of money upon the security of such leases."

The Loan Agreement also specifically provided that M-L agreed to execute and deliver to C.I.T. in form and substance satisfactory to C.I.T. an assignment of M-L's rights under the purchase agreement. Such assignment was made on May 15, 1973. Also on May 15, 1973, M-L advised Telex of the assignment and that no modifications were to be made in the purchase agreement without the written consent of C.I.T. The rule is well established that although not executed at the same time, where two written instruments refer to the same subject matter and on their face show that each was executed as a means of carrying out the intent of the other, both should be construed as one contract. Strickland v. American Bakery & Confectionery Workers Union and Industry National Welfare Fund, 527 P.2d 10 (Okla. 1974). This cannon of construction applies with particular force in situations where one document requires the execution of the second to accomplish its purpose. The rationale of the rule is that by construing the instruments together, the intent of the parties can be perceived and enforced. Its application is generally recognized to extend to instruments relating to the same subject matter even though some of the documents are executed by parties who have no part in executing the others. 3 Corbin on Contracts, Sec. 549 (1951). It is the finding of the Court that the loan agreement between M-L and Telex should be construed as one contract. In addition, the Court finds that in accordance with the contractual agreement between M-L and C.I.T., the provisions of the M-L - Telex purchase agreement having been made a part thereof, M-L was to submit to C.I.T. 24-month firm term leases on the required lease form.

7. The Court finds that C.I.T. did not waive the provisions of the contract in regard to the October 1, 1973 deadline, nor did it waive the 24-month term lease requirement in regard to government leases. Waiver is the intentional relinquishment of a known right. The constituent elements

of waiver are an existing right, knowledge of that right, and an intention to relinquish or surrender it. One party to a contract, who is entitled to demand performance in accordance with a contractual provision, may waive such performance by acts evidencing such intention. Waiver is of two kinds, express or implied. To constitute an implied waiver, there must be unequivocal and decisive acts of conduct of the party clearly evincing an intent to waive. The Court finds there was no implied waiver and no express waiver by C.I.T.

8. It is the determination of the Court that judgment should be entered on behalf of the defendant C.I.T. and against the plaintiff M-L as to the cause of action brought by M-L.

First Counterclaim of C.I.T.

9. The contract agreement of the parties providing that M-L is required to pay to C.I.T. as compensation for its commitment to loan \$5,250,000 to M-L a sum equal to 1 percent of the difference between that amount and the amount actually borrowed is a valid and binding provision. While the Court recognizes that 15 O.S. § 213 provides that penalties imposed by contract for any non-performance thereof are void, the Court finds that the contract provision in issue was not a penalty. As stated in the syllabus by the Court in Knapp v. Ottinger, 240 P.2d 1083 (Okla. 1951):

"When it is reasonably certain that damages will result from delay in the performance of the contract, and when those damages are incapable of ascertainment or based upon matters which are uncertain, and when the amount stipulated is not on the face of the agreement out of all proportion to the probable loss, a contract agreeing to pay a stipulated sum as the damages to be sustained upon its breach is valid and enforceable and is not a contract for a penalty."

In the case at bar the actual damages sustained by C.I.T. are incapable of ascertainment and the 1 percent agreed to is not out of proportion to the probable loss to C.I.T. by

virtue of its commitment to make the \$5,200,000 in funds available.

10. The Court agrees with M-L's statement that C.I.T. could have approved any leases submitted by M-L. Carried to an extreme, M-L could have submitted leases for typewriters or general office equipment for which C.I.T. could have loaned funds. However, C.I.T. would have no duty under the agreement to consider such submittals for funding and certainly the submittal of nonconforming leases would not discharge M-L's duty to submit leases conforming to the terms and conditions of the agreement.

11. M-L having forwarded to C.I.T. conforming lease submittals in the sum of \$888,502, the Court finds that the sum of \$43,614.98 is due and owing from M-L to C.I.T.

Second Counterclaim of C.I.T.

12. A misrepresentation is material where it would be likely to affect the conduct of a reasonable man with reference to a transaction with another person. RESTATEMENT OF CONTRACTS § 470(2) (1932). Furthermore, while the fact of reliance may be inferred from other facts in evidence, the character of the representations may be considered in determining whether they were probably relied upon. Varn v. Maloney, 516 P.2d 1328 (Okla. 1973).

13. The Court finds that C.I.T. based its decision to enter into the agreement with M-L on the quality of the leases held as collateral and upon the personal guarantees of the partners. The Court further finds that the misrepresentation in regard to payment of \$50,000 by each partner at the inception of the partnership was not a material consideration viewing all the circumstances of the transaction and finds that C.I.T. did not rely on this factor in entering into the agreement.

14. Judgment should be entered on behalf of M-L in regard to the Second Counterclaim of C.I.T.

It is so Ordered this 9<sup>th</sup> day of September, 1977.

  
H. DALE COOK  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

BRENDA FERGUSON, and )  
CHIQUITA FOSTER, and )  
MARVIN FOSTER, Individually )  
and as Surviving Next of Kin, )  
For and On Behalf of the Heirs, )  
Executors, and Administrators of )  
the Estates of Clotiel Foster )  
and Dale Foster, Deceased, )  
Plaintiffs, )

vs. )

THE UNITED STATES OF AMERICA, )  
and THE CITY OF SAND SPRINGS, )  
OKLAHOMA, a municipal corporation, )  
Defendants. )

NO. 77-C-27  
77-C-364-C

FILED

SEP. 9 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

This matter coming on for hearing before the undersigned Judge on a Motion For Consolidation filed in Case No. 77-C-364 on this 7th day of September, 1977, all parties being present at the status conference by their attorneys and the Court being advised that the Defendant, City of Sand Springs, filed a Motion to Dismiss on September 7, 1977 as against it as Defendant in Case No. 77-C-364, and the Court being further advised that heretofore on the 14th day of April, 1977 an Order was entered in Case No. 77-C-27 dismissing the City of Sand Springs in that numbered case, the Court finds that jurisdictional facts are the same in each case and that the Motion to Dismiss should be sustained as against the City of Sand Springs in Case No. 77-C-364 and that the Order entered in the 77-C-27 case is hereby incorporated by reference into Case No. 77-C-364.

Dated this 7th day of September, 1977.

*H. Dale Cook*

H. Dale Cook  
United States District Judge



the cause proceeds before this Court on interrogatory. Being fully advised in the premises after having carefully reviewed the entire file including the transcript of the pleas and sentencings on the 24th day of March, 1971, in CRF-71-6 and CRF-71-7, and the transcript of the evidentiary hearing held September 17, 1974, in a post-conviction proceeding, PC-74-675, and the answers to interrogatories, the Court finds:

The trial Judge did not advise the Defendant, Petitioner herein, of the maximum sentence in either case, CRF-71-6 or CRF-71-7. In fact, as appears at page No. 5 of the transcript, lines 2 through 13, the prosecuting attorney recommended a sentence of ten years on the possession of a stolen vehicle charge in CRF-71-6, and the trial Judge asked:

[Judge Adams] ". . . Upon the defendant's plea of guilty and upon recommendation of the State, it will be the judgment and sentence of the Court in 71-6 that he be sentenced to 10 years. Does that go that high? Possession of a stolen vehicle?"

"Mr. Wise: I will have to check the Statutes, Your Honor.

"Judge Adams: I think we had better. 71-7, we will get a plea in that first and then take this up later."

Later in the proceedings, as reflected in the transcript at page No. 7, lines 11 through 14:

"Judge Adams: O.K. Do you have a recommendation sir?"

"Mr. Wise: If it please the Court, the State would recommend 5 years and would suggest to the Court that this 5 years may run concurrently if such is possible."

From the transcript of the evidentiary hearing held September 17, 1974, in the post-conviction proceeding, appellate case No. PC-74-675, the Court-appointed defense counsel for the original charges stated to the Court as appears at page No. 4, lines 6 through 13:

[Mr. Brown] ". . . I will testify that it is my recollection that the defendant did considerable of his own negotiating in connection with these charges. And that he instructed me what he wanted done.

"Court: Did I hear the case? |

"Mr. Brown: Yes sir you were the presiding Judge."

At page No. 20 of the transcript, lines 3 through 14, the testimony of the trial prosecuting attorney, Sidney D. Wise, was in pertinent part as follows:

". . . And it would be my recollection that this [parole consideration] was discussed, and 10 years is the only figure that was ever mentioned, I think that the transcript will bear out that it

was my recommendation to the Court that he get 10 years on each of these counts, the Court called my attention, I believe to the fact that on one account the Court didn't believe the 10 years was called for within the limitation of the crime in the statute, the statutes had turned out the one charge the maximum was 5 years, that is why there was a discrepancy. Our original agreement as I recall it was for two concurrent 10 year sentences, . . ."

Further, from the record, it appears that Everett D. Crutchfield had yet another charge in addition to the two he challenges in this Court pending against him at the time of the convictions under consideration. That charge was in Craig County and he was represented by another attorney in that case. It was through that attorney that the prosecutor was called regarding plea bargaining in the cases before this Court, and Mr. Crutchfield made his arrangements for himself without relying on his counsel. See, post-conviction evidentiary hearing transcript at page No. 22.

Petitioner's trial defense counsel does state in his answers to interrogatories that although he has no specific recollection of discussing the maximum sentences on these charges with the Defendant Crutchfield, he believes and feels sure that he did. However, had the defendant known the maximum possible sentence, he surely would not have bargained for a sentence in CRF-71-6 in excess of the maximum provided by the Oklahoma Statute, and beyond question the prosecuting attorney, had he been aware of the statutory maximum sentence, he would not have agreed to a plea based on a sentence recommendation above the statutory maximum. Thus, this Court is forced from the record to the common-sense, logical conclusion that the defendant both prior to and during his pleas was not advised by defense counsel, the prosecuting attorney, or the Court as to the consequences of his pleas, that is, the maximum sentences that could be imposed if convicted. A plea that does not meet this minimum requirement cannot under the law be held voluntarily given with knowledge of the consequences of the plea. Boykin v. Alabama, 395 U. S. 238 (1969); Moore v. Anderson, 474 F.2d 1118 (10th Cir. 1973); Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973).

The Petitioner's pleas were entered March 24, 1971, after Boykin v. Alabama, Supra., and the Boykin constitutional principles apply. As our appellate Court stated in Stinson v. Turner, Supra., "The main purpose

[of Boykin] is '. . . to make sure [the accused] has full understanding of what the plea connotes and of its consequences.'" It is the practical range of punishment that must be brought out, and knowledge of the maximum sentence is sufficient. Kemp v. Snow, 464 F.2d 579 (10th Cir. 1972).

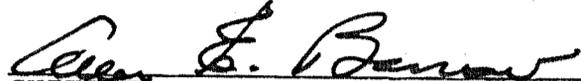
The Court recognizes that Petitioner had counsel available to him, but rather chose to proceed on his own; and, on his own made a bargain with which he is now displeased. The trial Judge clearly protected the Defendant by refusing to impose the sentence for which Petitioner had bargained in excess of the maximum term provided by statute in the possession of a stolen vehicle case. In the shooting with intent to kill case, the maximum sentence under the Oklahoma Statute is 20 years; and the actual sentence imposed was to no more than provided by the statute in the one case and to half that provided by the statute in the other, and they were made to run concurrently. Under these circumstances, it does seem incongruous that Petitioner should be allowed to complain. See, Bachner v. United States, 380 F.Supp. 193 (N.D.Ill.E.D. 1974) affirmed 517 F.2d 589 (7th Cir. 1975); United States ex rel Smith v. Johnson, 403 F.Supp. 1381 (E.D.Pa. 1975) affirmed 538 F.2d 322 (3rd Cir. 1976). Yet, the Court, faced with the present record which clearly indicates that the Petitioner was not advised of the maximum sentences he faced, and which does not affirmatively disclose that the Petitioner's guilty pleas were entered with full understanding of their consequences, must under a strict application of the law direct that the convictions and sentences of Everett D. Crutchfield be set aside and held for naught on the technical ground that he was not advised of the consequences of his pleas; and the Petitioner must be permitted to plead anew.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 of Everett D. Crutchfield be sustained and the convictions and sentences in the State of Oklahoma of Everett D. Crutchfield in Cases No. CRF-71-6 and No. CRF-71-7 be and they are set aside and held for naught and the said Everett D. Crutchfield permitted to plead anew.

IT IS FURTHER ORDERED that the execution of this Order be held in abeyance for a period of sixty (60) days to provide the State of Oklahoma time and opportunity to re-arraign Everett D. Crutchfield in cases

No. CRF-71-6 and No. CRF-71-7. . If at the expiration of sixty (60) days from the date hereof the Petitioner has not been re-arraigned on said charges, this Order shall take effect forthwith and the Petitioner released from custody and to suffer no detriment under said convictions.

Dated this 8th day of September, 1977, at Tulsa, Oklahoma.

  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

SEP - 8 1977 *ly*

Jack C. Silver  
Clerk, U. S. District Court

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

OLD RELIABLE FIRE INSURANCE )  
COMPANY, a Missouri Corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JERRY MAYS, )  
 )  
Defendant. ) No. 77-C-241-B

DEFAULT JUDGMENT

The plaintiff having moved for an order directing the clerk of this court to enter the default of the defendant Jerry Mays in this action and granting to the plaintiff judgment against the said defendant for the relief prayed for in plaintiff's complaint herein, to wit, that this Honorable Court enter a declaratory judgment determining the following:

1. That defendant Jerry Mays expected or intended that the firing of a weapon by Jerry McCorkle under the directions of defendant Jerry Mays would bring about an injury to Gary R. and Kay Marie Strock;

2. That any liability incurred by the defendant by reason of the discharge of the weapon was outside the coverage afforded by the policy of insurance issued by this plaintiff to defendant and his wife;

3. That plaintiff has no obligation to furnish either a defense or insurance coverage by reason of the discharge of McCorkle's weapon, at the advice of the defendant Mays, or by

reason of the lawsuit filed in Tulsa County,  
State of Oklahoma, Cause No. CT-76-498 against  
defendant Jerry Mays;

Together with plaintiff's costs and disbursements, the Court  
having heard the argument of counsel, and due deliberation  
having been had, it is hereby

ORDERED, that the clerk of this court enter the  
default of the defendant Jerry Mays in this action, and it  
is further

ORDERED, that in view of the default of the  
defendant Jerry Mays, that no further issues remain to  
be determined with reference to this action, and it is  
further

ORDERED, that a judgment be made and entered  
herein in favor of the plaintiff against the defendant  
Jerry Mays by reason of the matters and things alleged by  
the plaintiff in its complaint against the defendant Jerry  
Mays, for the relief as determined at the aforesaid hearing.

Dated: Sept. 8, 19 77

  
THE HONORABLE ALLEN E. BARROW  
CHIEF UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
IN OPEN COURT

SEP - 8 1977

ALFARD MAUTE, et al., )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 LOCAL UNION NO. 318, UNITED )  
 RUBBER, CORK, LINOLEUM AND )  
 PLASTIC WORKERS OF AMERICA, )  
 et al., )  
 )  
 Defendants. )

Jack C. Silver  
Clerk, U. S. District Court

NO. 76-C-611

ORDER OF DISMISSAL WITHOUT PREJUDICE

Plaintiffs Alfard Maute, et al., by their attorneys Boyd & Parks, by John W. Moody, having moved this day that the Court dismiss this action under the provisions of Rule 41 (a) (1) of the Federal Rules of Civil Procedure and for the reason that no service has been obtained upon the defendants, nor has any service of an answer or motion for summary judgment been made, and good cause appearing therefor,

IT IS HEREBY ORDERED that the above entitled action be, and it is hereby dismissed without prejudice.

Dated September 8<sup>th</sup>, 1977.

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Honorable Allen E. Barrow  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FABRICUT, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 TULSA GENERAL DRIVERS, )  
 WAREHOUSEMEN AND HELPERS )  
 LOCAL 523, and MELVIS )  
 MINTER, RAPHAEL STOKES, )  
 CHARLES T. FRAZIER and )  
 JACKSON CATO, Individuals, )  
 )  
 Defendants. )

No. 77-C-3-C

FILED  
SEP 8 1977  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

This is an action to set aside an arbitrator's award, brought pursuant to Title 29 U.S.C. § 185. Plaintiff contends that the arbitrator's award is void as a matter of law and equity, in that the arbitrator acted outside the scope of his authority under the collective bargaining agreement between the plaintiff and the defendant union and in contravention of its specific terms. All parties have agreed to submit the matter on cross-motions for summary judgment, which are now before the Court.

The dispute which resulted in this action arose after the plaintiff assigned mandatory overtime to all of its employees on September 3, 1975. Several of the employees left the premises at the end of normal working hours without obtaining prior approval. When these employees arrived for work the following day, they found that they had been discharged by the plaintiff. Pursuant to the collective bargaining agreement, grievance procedures were instituted which culminated in a submission of the dispute to an arbitrator, selected by both the company and the union under the terms of the agreement. In his award, the arbitrator held that the company did not have just cause for the discharge of the grievants. He therefore reduced their penalty to a one-month suspension and directed the company to reinstate

the grievants with retroactive seniority and to compensate them for lost pay and accrued benefits retroactive to the end of the suspension period.

The source of the arbitrator's authority is found in Article XVI, Section 3, of the collective bargaining agreement, which provides in part as follows:

"The powers of the Arbitrator are limited as follows:

- (1) He shall have no power to decide any grievance not subject to arbitration.
- (2) He shall have no power to change the wages, hours, or conditions of employment set forth in this Agreement.
- (3) He shall have no power to add to, subtract from, or modify any of the terms of this Agreement.
- (4) He shall have no power to substitute his discretion for the Company's discretion in cases where the Company is given discretion in this Agreement.
- (5) He shall deal only with the grievance, or grievances, which occasioned his appointment."

The provisions of the agreement which are primarily in issue in the action before this Court are Sections 1 and 2 of Article XXVII, entitled "NO STRIKE - NO LOCKOUT", which provide:

Section 1. The union agrees that, during the term of this Agreement, it will not authorize, ratify, encourage, or otherwise support any strikes, slowdowns, refusals to work overtime, picketing, or any other form of work stoppage or interference with the business of the Company, and will cooperate with the Company in preventing and/or halting any such action. The Company agrees that it will not authorize, ratify, encourage, or otherwise support any lockout during the term of this Agreement.

Section 2. The Company may discipline and/or discharge any employee who instigates, participates, or gives leadership to any actions of conduct prohibited by Section 1. of this Article."

The arbitrator held that Section 2 permitted discharge only if an employee was participating in a "concerted" action. He found as a matter of fact that there was no concerted action on the part of the grievants, but imposed a disciplinary suspension upon them because of their resort to self-

help rather than to the established grievance procedures. Plaintiff contends that Section 2 unambiguously provides that the company may discharge any employee who individually refuses to work overtime, and that the arbitrator therefore exceeded his authority by modifying a term of the agreement in violation of Article XVI, Section 3(3).

The scope of this Court's review of the arbitrator's award is extremely narrow.

"The court is not entitled to judge the award independently. So long as the arbitrator reasons from his factual findings to his conclusion, and limits himself to interpreting and applying the agreement, a court must give great deference to the arbitrator's decision." Campo Machining Co. v. Local Lodge No. 1926, Etc., 536 F.2d 330 (10th Cir. 1976).

The United States Supreme Court was even more explicit in its construction of the scope of review in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960):

". . . [T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." 363 U.S. at 599.

Article XVI of the agreement, entitled "GRIEVANCE & ARBITRATION" provides in Section 1 as follows:

"The purpose of this article is to provide an orderly method for the settlement of disputes between the parties upon whom this Agreement is binding, arising after the execution of this Agreement, over the interpretation, application, or claimed violation of any of the provisions of this Agreement."

The United States Supreme Court has held that

"[t]he function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. . . . The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court

will deem meritorious." United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 568, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960).

The arbitrator found, as a matter of fact, that the action of the grievants was not "concerted." This Court is bound by that finding. NF&M Corp. v. United Steelworkers of America, 524 F.2d 756 (3rd Cir. 1975). The arbitrator issued a well-reasoned, written opinion of 71 pages, in which he analyzed the facts as he found them and applied the facts to the issues raised, and in which he held:

"The language 'refusal to work overtime', when standing alone, is perfectly clear, but here it must be read in context with the obviously intended meaning of the entire Article as well as the entire Contract."

In light of the language employed in Sections 1 and 2 of Article XXVII, it is clear to the Court that in concluding that "refusal to work overtime" means a "concerted" refusal, the arbitrator was interpreting the language employed by the parties in their agreement and was not modifying any of its terms. For that reason, the arbitrator's award is hereby affirmed.

The defendants have asked the Court to award them attorneys' fees. The Court has the authority to award attorneys' fees where it determines that a party has without justification, or in bad faith, refused to abide by an arbitrator's award. International Union of Dist. 50, U.M.W. v. Bowman Transportation, Inc., 421 F.2d 934 (5th Cir. 1970). As a prerequisite to an award of attorneys' fees, Courts generally require a showing that the party against whom the fee is assessed has acted frivolously, arbitrarily, capriciously or in total disregard of prior rulings. See Western Electric Co. v. Communication Equipment Workers, Inc., 409 F.Supp. 161 (D. Maryland 1976); Sheeder v. Eastern Express, Inc., 375 F.Supp. 655 (W.D. Penn. 1974); American Federation of Television and Radio Artists v. Taft Broadcasting Company, 368 F.Supp. 123 (W.D. Mo. 1973). An award of attorneys' fees is often refused when an employer comes into court

promptly and in good faith to litigate its disagreement with the arbitrator's decision. See e.g. NF&M Corporation v. United Steelworkers of America, 390 F.Supp. 266 (W.D. Penn. 1975). In the instant case, the Court has reviewed the transcript of the arbitration proceedings, the arbitrator's award, and all of the pleadings and has concluded that the plaintiff did not act in bad faith and was not without justification for challenging the arbitrator's award. Therefore, defendants' request for attorneys' fees is denied.

IT IS ORDERED that the plaintiff's motion for summary judgment is overruled and the defendants' motion for summary judgment is sustained.

IT IS FURTHER ORDERED that the defendants' request for attorneys' fees is denied.

It is so Ordered this 7<sup>th</sup> day of September, 1977.

  
H. DALE COOK  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

CATHY ANN McFAY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SOUTHPARK WEE CARE )  
 CENTER, INC., )  
 a corporation, )  
 )  
 Defendant. )

Civil Action File No. 77-C-124-C

FILED

SEP 8 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

It appearing to the Court that the above entitled action has been fully settled, adjusted and compromised and based on stipulation; therefore,

IT IS ORDERED AND ADJUDGED that the above entitled action be and it is hereby dismissed without cost to either party and with prejudice to the plaintiff.

DATED this 8<sup>th</sup> day of September, 1977.

  
UNITED STATES DISTRICT JUDGE

Paul E. Vestal  
Attorney for Defendant  
Suite 725, City Plaza-West  
5310 East 31st Street  
Tulsa, Oklahoma 74135  
(918) 663-2500

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

SKELLY OIL COMPANY, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 FEDERAL ENERGY )  
 ADMINISTRATION, et al., )  
 )  
 Defendants. )

No. 76-C-238-C

**FILED**

SEP 8 1977

Jack C. Silver, Clerk  
ORDER U. S. DISTRICT COURT

This is an action brought pursuant to the Economic Stabilization Act of 1970 (ESA), Title 12 U.S.C. § 1904 note § 211, as incorporated by § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. § 754(a)(1), and the Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiff, Skelly Oil Company (Skelly) seeks judicial review of a Decision and Order of the Federal Energy Administration, (FEA) Office of Exceptions and Appeals, and a declaration that the regulations of the FEA purporting to control the pricing and allocation of solvents are "improper, illegal and in excess of the agency's authority." Now before the Court are cross-motions for summary judgment, as well as plaintiff's motions to strike certain affidavits filed by the defendants in support of their motion for summary judgment.

Plaintiff has moved to strike the affidavits of Lon W. Smith and Dr. J. Lisle Reed, on the ground that they contain irrelevant testimony, self-serving opinions, conclusions of law and purported facts which are not within the personal knowledge of the affiants. In the alternative, Skelly asks the Court to disregard the "offensive" portions of the affidavits. Motions to strike are not favored, Vinita Broadcasting Company v. Colby, 320 F.Supp. 902 (N.D. Okla. 1971), and plaintiff's motions are not directed toward any

specific portions of the affidavits. The Court has read the affidavits and is of the opinion that they certainly are not completely defective. Therefore, the Court will consider the affidavits insofar as the testimony contained therein is admissible and will disregard any inadmissible matter. See Perma Research & Development Co. v. Singer Co., 410 F.2d 572 (2nd Cir. 1969).

The substantive issues raised by the cross-motions for summary judgment arise from the following undisputed facts. On November 27, 1973, the EPAA, 15 U.S.C. §§ 751 et seq. was enacted. That statute directed the President to promulgate a regulation allocating crude oil, residual fuel oil and refined petroleum products by amount and price. The price of petroleum and certain petroleum products was also being controlled at that time by regulations promulgated by the Cost of Living Council (CLC) pursuant to authority derived from the ESA. The President's authority under the EPAA and the ESA was delegated to the Federal Energy Office (FEO) on December 6, 1973. The FEO first published its pricing regulations on January 15, 1974 in 10 C.F.R. Part 212. The term "covered product" was defined in 10 C.F.R. § 212.31 as follows:

"'Covered product' means a product described in the 1972 edition, Standard Industrial Classification Manual, Industry Code 1311 (except natural gas), 1321, or 2911."

At that time, Skelly began to treat its solvents, which are the products at issue in this case, as "covered products" for purposes of the regulation and priced them accordingly. On February 4, 1974, 10 C.F.R. § 212.31 was amended to read as follows:

"'Covered products' means a product described in the 1972 edition, Standard Industrial Classification Manual, Industry Code 1311 (except natural gas), 1321 (except ethane) or 2911 (including benzene and toluene, but excluding ortho-xylene, meta-xylene, para-xylene and butadienes), and all forms of benzene and toluene."

Skelly continued to price its solvents in accordance with

this regulation. On April 5, 1974, 10 C.F.R. § 212.31 was again amended by the FEO to read as follows:

"'Covered products' means crude oil, residual fuel oil and refined petroleum products."

"Refined petroleum product" was defined at that time as follows:

"'Refined petroleum product' means gasoline, kerosene, middle distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel."

Skelly determined that its solvents did not fall within this definition of "covered products", and effective May 1, 1974, Skelly began to price its solvents as non-covered products. In June, 1974, pursuant to the Federal Energy Administration Act of 1974, the FEA was created and assumed the regulatory duties previously exercised by the FEO. On October 31, 1974, the FEA issued a Notice of Probable Violation (NOPV) to Skelly, in which it took the position that solvents remained "covered products" under the April 5, 1974 amendments to the regulations and that Skelly was in violation of the regulations by treating its solvents as non-covered after May 1, 1974. On November 12, 1974 Skelly filed with the FEA its reply to the NOPV, in which it made essentially the same arguments now urged upon this Court. On January 16, 1975, 10 C.F.R. § 212.31 was again amended to read as follows:

"'Covered products' means aviation fuels, benzene, butane, crude oil, gas oil, gasoline, greases, hexane, kerosene, lubricant base oil stocks, lubricants, naphthas, natural gas liquids, natural gasoline, No. 1 heating oil and No. 1-D diesel fuel, No. 2 heating oil and No. 2-D diesel fuel, No. 4 fuel oil and No. 4-D diesel fuel, propane, residual fuel oil, special naphthas (solvents), toluene, unfinished oils, xylene, and other finished products. A blend of two or more particular covered products is considered to be that particular covered product constituting the major proportion of the blend."

Following this amendment, Skelly once again began to price its solvents as covered products. On November 24, 1975, the

FEA issued a Remedial Order to Skelly, in which it again found that solvents were "covered products" between May 1, 1974 and January 14, 1975. Skelly was ordered to refund to purchasers of its solvents during that time period a total of approximately \$2,594,000.00, plus interest. On December 4, 1975, Skelly filed with the FEA its appeal from the Remedial Order. The appeal was denied in all material respects by the FEA's Office of Exceptions and Appeals on March 19, 1976. It is this decision by the FEA which Skelly now asks this Court to review.

In considering the validity of the regulation in question, this Court is limited to a determination of whether the regulation is in excess of FEA's authority under the EPAA, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in Title 5 U.S.C. § 706(2). Air Transport Association of America v. Federal Energy Office, 382 F.Supp. 437 (D.C. 1974), affirmed 520 F.2d 1339 (Em.App. 1975). Skelly's first contention is that the FEA does not have the statutory authority under the EPAA to regulate the pricing of solvents. Such authority, if it exists, would arise from Title 15 § 753(a), which provides in pertinent part as follows:

". . . [T]he President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product . . . ."

Title 15 § 752(5) defines "refined petroleum product" as follows:

"The term 'refined petroleum product' means gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel."

All parties agree that if solvents are within the scope of the EPAA, it would be as "refined petroleum products", and further as "distillates". The issue is therefore whether Congress intended the term "distillates" to encompass solvents.

In interpreting the authority granted by the EPAA,

Title 15 U.S.C. § 753(a) must be read together with the objectives which the exercise of that authority is to accomplish. Cities Service Company v. Federal Energy Administration, 529 F.2d 1016 (Em.App. 1975). This is merely an extension of the well-settled doctrine that a statute should be read, ". . . assuming that is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." Shapiro v. United States, 335 U.S. 1, 31, 68 S.Ct. 1375, 92 L.Ed. 1787 (1948), rehearing denied 335 U.S. 836, 69 S.Ct. 9, 93 L.Ed. 388 (1948). See also Shultz v. Louisiana Trailer Sales, Inc., 428 F.2d 61 (5th Cir. 1970), cert. denied 400 U.S. 902, 91 S.Ct. 139, 27 L.Ed. 2d 139 (1970). The major purpose of the EPAA is expressed in Title 15 U.S.C. § 751(b), which provides:

"The purpose of this chapter is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this chapter shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy."

This purpose is to be accomplished through regulations, which Congress intended to provide for:

"(A) protection of public health (including the production of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of --

(i) fuels, and  
(ii) minerals essential to the requirements of the United States,

and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms."

Title 15 U.S.C. § 753(b)(1).

The legislative history of the EPAA, as well as the language of the Act itself, are the best indications of the intent of Congress regarding the scope of the EPAA. Skelly does not seriously contend that solvents are not refined from petroleum; rather, its argument is based primarily upon technical definitions of "distillates", under which it contends solvents do not fall. (See affidavit of Edward D. Evans). However, Congress expressly rejected such technical restrictions on the definition of "distillates".

"Special mention should be made of the term "refined petroleum product" which is taken from the House amendment. This term is defined to mean kerosene, gasoline, distillates (including Number 2 fuel oil), LPG (as further defined to mean propane and butane), refined lubricating oils, or diesel fuel. . . . It is understood that the term "distillates" when applied in a technical sense would encompass only Numbers 1, 2, and 4 fuel oils. It is the committee's intent, however, that this term also reach to include naphtha (sic) and benzene so as to require the allocation of these products as may be necessary to accomplish the objective of restoring and fostering competition in the petrochemical sector of industry. In this respect the conference committee wishes to emphasize that, in expressing congressional concern with fostering competition in the petrochemical industry, the committee intends to also identify petrochemical feedstock needs as important end-uses for which allocation should be made."

Conference Report 93-628, 1973

U.S. Code Cong. & Admn. News, p. 2693.

Skelly argues that Congress did not intend the terms "naphtha" and "benzene" to include solvents because those substances "generally" or "most commonly" have other uses. (See affidavit of Edward D. Evans). However, even a cursory review of industry and lay publications indicates that those terms are commonly understood to include solvents. Webster's Third New International Unabridged Dictionary (1971) defines "naphtha" as "any of various volatile often flammable liquid hydrocarbon mixtures used chiefly as solvents and diluents and as raw materials for conversion to gasoline." "Benzene" is also defined as having a chief use as a solvent. In Guthrie, Petroleum Products Handbook (1st ed. 1960), "naphtha" is defined as "[l]iquid hydrocarbon fractions, generally boiling within the gasoline range, recovered by the distillation of crude petroleum. Used as solvents, dry-cleaning agents, and charge stocks to reforming units to make high-octane gasoline." The same term is defined in Langenkamp, Handbook of Oil Industry Terms and Phrases (1974) as "[a] volatile, colorless liquid obtained from petroleum distillation; used as a solvent in the manufacture of paint, as dry-cleaning fluid, and for blending with casinghead gasoline in producing motor gasoline." The terms "naphtha" and "solvent" are used interchangeably in Nelson, Petroleum Refining Engineering (4th ed.). The EPA itself provides, in Title 15 U.S.C. § 753(a), that the mandatory allocation shall extend to "each refined petroleum product." The Conference Committee emphasized the all-inclusive scope of the products intended to be regulated when it said:

"It is the Committee's understanding that an allocation program, if it is to work at all, must be comprehensive in scope and therefore must include the major refined components of a barrel of crude oil." Id. at 2697.

Skelly has, through the affidavit of its chief chemist, described the importance of its solvents to the national economy.

"Skellysolves are used by many industries in a variety of ways. They are used in the vegetable oil extraction industry for extracting materials such as soybean oil, cottonseed oil, and other edible and non-edible oils and greases. The pharmaceutical industry uses Skellysolves in the extraction of vitamins and hormones and as solvents for certain edible waxes. Some Skellysolves are sold as laboratory reagents for a variety of laboratory applications. The rubber industry uses Skellysolves for rubber solvents, special rubber cements and for chemical processing applications. These solvents are also used for such applications as the preparations of sealants for cans, adhesives for home and industrial tapes, printing inks, home and industrial wax preparations, polishes and cloth impregnation chemicals. The paint and varnish industry uses a number of Skellysolves for thinners and diluents. Skellysolves are also used in the dry cleaning industry and for metal and tool cleaning and degreasing. . . . [T]hey are favored for industrial applications such as oil extraction, chemical processing and dry cleaning."

Affidavit of Edward D. Evans at p. 2-3.

Based upon the Congressional declarations of the comprehensive nature of the products covered by the EPAA, the existence of definitions of "naphtha" and "benzene", available to Congress at the time the Act was passed, which indicate that those products are used as solvents, and Skelly's own statements as to the importance of solvents to the national economy, this Court has concluded that the major purpose and goals of the EPAA would clearly be advanced by a construction of the Act which places solvents in the category of "refined petroleum products" and that such purpose and goals would be frustrated by attributing to Congress a contrary intent. It is therefore the determination of the Court that solvents are covered by the mandatory allocation provisions of Title 15 U.S.C. § 753.

Skelly argues that "[i]f FEA had the authority to regulate solvents during the period April 5, 1974, to January 16, 1975, it expressly failed to exercise such authority. . . ." Skelly initially recognized the FEA's "authority" to regulate solvents, and it priced its solvents as "covered products" beginning with the January 15, 1974 regulations. However, it contends that with the amendment of April 5,

1974, the FEO removed solvents from the list of "covered products" and in effect exempted them until January 16, 1975, when Skelly again began pricing its solvents as "covered products". By construing the FEA's responsibility under the EPAA as "authority to regulate", Skelly has misinterpreted the Act. Title 15 U.S.C. § 753(a) provides that ". . . the President shall promulgate a regulation providing for the mandatory allocation . . ." of the relevant products, in this case solvents. The Act thus imposes a mandatory, non-discretionary duty to promulgate a regulation allocating petroleum products. Consumers Union of United States, Inc., v. Sawhill, 512 F.2d 1112 (Em.App. 1975), vacated on other grounds 525 F.2d 1068 (Em.App. 1975). This duty extends to all products covered at the time the EPAA was enacted, including solvents. Products can be exempted from the coverage of the Act only by Congress after the procedures specified in Title 15 U.S.C. § 760a have been complied with. Those procedures include a Presidential finding that such exemption will not have an adverse impact on the supply or price of any petroleum product and will not be inconsistent with the attainment of the stated objectives of the Act. There is no contention in this case that such a procedure was utilized to exempt solvents from the coverage of the EPAA. It is well settled that the authority of an administrative agency to promulgate regulations is limited by the statute authorizing the regulations, and that regulations which exceed Congressional authority are void. Real v. Simon, 510 F.2d 557 (5th Cir. 1975), rehearing denied 514 F.2d 738 (5th Cir. 1975); Federal Maritime Commission v. Anglo-Canadian Shipping Co., 335 F.2d 255 (9th Cir. 1964). Thus, to the extent that the FEO's regulation of April 5, 1974 purported to exempt solvents from the EPAA without complying with Title 15 U.S.C. § 760a, it was in excess of Congressional authority and therefore void. See Consumers Union of United States, Inc., v. Sawhill, supra. In its

Memorandum in Support of its Motion for Summary Judgment, Skelly twice recognizes the possibility that the purported exemption was unlawful:

"It appears that FEA further reasons that solvents, had they been exempted by the April 5 amendment, should have, a fortiori, appeared in the list in Section 210.34(a) as exempt products. If this were not the case, then FEA would have, by its own words, unlawfully exempted solvents from the coverage of its pricing regulations. Skelly suggests that not only is this observation fully within the realm of possibility, but it probably is an apt characterization of what actually occurred." Skelly Memorandum, p. 25.

"It appears to Skelly that in the confusion surrounding the transition from those products regulated under the ESA to those regulated under the EPAA, solvents were deleted from the definition of the term "covered products". Perhaps this omission, as FEA suggests, did result in an unlawful exemption of solvents from FEA's pricing regulations. In any event, solvents were no longer covered products for the purposes of FEA's pricing regulations." Id. at p. 26.

Because solvents are within the scope of the mandatory allocation provisions of the EPAA, the FEO and FEA had the non-discretionary duty to include them in their definitions of "covered products". Solvents were so included in the first regulations, issued January 15, 1974, and Skelly priced its solvents as "covered products" at that time. Assuming, as Skelly contends, that the FEO's regulation of April 5, 1974 could be interpreted as entirely excluding or exempting solvents from its coverage, such exemption was in excess of the FEO's authority and therefore void. The purported exemption being void, it is clear that solvents remained, as a matter of law, "covered products" between April 5, 1974 and January 16, 1975. Therefore, Skelly was incorrect in treating its solvents as non-covered products during the period of May 1, 1974 to January 14, 1975. The Court does not mean to attribute any degree of bad faith to Skelly for its interpretation of the April 5, 1974 regulation, and it would agree that "Skelly is not a seer nor can it divine the intent of FEA underlying its own regulatory definitions." The Court has not found it necessary to weigh

the merits of the conflicting interpretations because it has determined as a matter of law that the FEO and FEA had a duty to treat solvents as "covered products" in the absence of compliance with the statutory exemption procedures defined in Title 15 U.S.C. § 760a. The Remedial Order which is the subject of this review does not attempt to punish Skelly for its interpretation of the April 5, 1974 regulation; it merely seeks from Skelly a refund of the moneys it would not have received had the FEO and FEA clearly and correctly followed the mandates of the EPAA. The Court is not expressing any opinion regarding the merits of any possible future action for civil or criminal penalties brought against Skelly based upon an alleged violation of the April 5, 1974 regulation.

For the foregoing reasons,

IT IS ORDERED that the plaintiff's motions to strike are overruled.

IT IS FURTHER ORDERED that the plaintiff's motion for summary judgment is overruled and the defendants' motion for summary judgment is sustained.

It is so Ordered this 8<sup>th</sup> day of September, 1977.

  
H. DALE COOK  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and )  
LARRY W. COTTON, Revenue Agent, )  
Internal Revenue Service, )

Petitioners, )

vs. )

ROBERT A. FLOYD, )

Respondent. )

Civil No. 77-C-306-C

FILED

SEP 7 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER DISCHARGING RESPONDENT  
AND DISMISSAL

On this 7<sup>th</sup> day of September, 1977, Petitioners' Motion To Discharge Respondent And For Dismissal came for hearing and the Court finds that Respondent has now complied with the Internal Revenue Service Summons served upon him April 1, 1977, that further proceedings herein are unnecessary and that the Respondent, Robert A. Floyd, should be discharged and this action dismissed upon payment of \$48.56 costs by Respondent.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the Respondent, Robert A. Floyd, be and he is hereby discharged from any further proceedings herein and this cause of action and Complaint are hereby dismissed upon payment of \$48.56 costs by said Respondent.

W. Dale Book  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA and )  
LARRY W. COTTON, Revenue Agent, )  
Internal Revenue Service, )  
 )  
 ) Petitioners, )  
 )  
vs. )  
 ) Civil No. 77-C-307-C  
 )  
SIBYL E. FLOYD, )  
 )  
 ) Respondent. )

✓  
**FILED**  
SEP 7 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

*ph*

ORDER DISCHARGING RESPONDENT  
AND DISMISSAL

On this 7<sup>th</sup> day of September, 1977, Petitioners' Motion To Discharge Respondent And For Dismissal came for hearing and the Court finds that Respondent has now complied with the Internal Revenue Service Summons served upon her April 1, 1977, that further proceedings herein are unnecessary and that the Respondent, Sibyl E. Floyd, should be discharged and this action dismissed upon payment of \$52.76 costs by Respondent.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the Respondent, Sibyl E. Floyd, be and she is hereby discharged from any further proceedings herein and this cause of action and Complaint are hereby dismissed upon payment of \$52.76 costs by said Respondent.

*W. Dale Book*  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MATILDA HOLMES, )  
)  
Plaintiff, )  
)  
vs. )  
)  
DAVID S. MATTHEWS, Secretary, )  
UNITED STATES DEPARTMENT OF )  
HEALTH, EDUCATION AND WELFARE, )  
)  
Defendant. )

No. 76-C-531-C

**FILED**

SEP 7 1977

J U D G M E N T

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

This is an action brought by the plaintiff, Matilda Holmes, to review the final determination of the defendant, Secretary of the Department of Health, Education and Welfare, denying disability benefits under Sections 216(i) and 223 of the Social Security Act, as amended. (42 U.S.C. §§ 416(i) and 423.)

The Court in its review has been granted power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the case for a rehearing period. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive. In this action, the plaintiff alleges the record does not support the determination of the Secretary by substantial evidence. In the alternative, plaintiff asks the Court to remand this action to the Secretary for the taking of additional evidence.

This matter was first heard, on record, by an Administrative Law Judge of the Bureau of Hearings and Appeals of the Social Security Administration whose written decision was issued January 2, 1976, in which it was found that the claimant was not entitled to a period of disability or to disability insurance benefits under §§ 216(i) and 223,

respectively, of the Social Security Act, as amended. Thereafter the decision of the Administrative Law Judge denying permanent disability was appealed to the Appeals Council of the Bureau of Hearings and Appeals which Council on August 23, 1976 issued its Order finding that the decision of the Administrative Law Judge was correct and that further action by the Council would not result in any change which would benefit the plaintiff. Thus the decision of the Administrative Law Judge became the final decision of the Secretary of the Department of Health, Education and Welfare.

Judicial review of the Secretary's denial of Social Security disability benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo. Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Atteberry v. Finch, supra. Substantial evidence has been defined as ". . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and it must be based on the record as a whole." Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300, 59 S.Ct. 501, 83 L.Ed. 660 (1939), the Court, interpreting what constitutes substantial evidence, stated:

"It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Atteberry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957).

The transcript of the entire record of proceedings relating to the application of the plaintiff, Matilda Holmes, and filed of record in this cause has been carefully reviewed. The principal issue presented herein is whether the record, by substantial evidence, sustains the finding that the plaintiff is not under a disability as defined by the Social Security Act at any time prior to the date of that decision.

Section 223(d)(1) of the Social Security Act defines disability, as pertinent to the matters here in issue, as the "inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." Section 223(d)(2)(A) further provides that "an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any kind of substantial gainful work which exists in the national economy, regardless of whether he would be hired if he applied for work." If the claimant sustains the burden of showing that she is incapable of working at her former job, the burden shifts to the Secretary to show that there is another kind of substantial gainful activity in the national economy that the claimant could perform. Russell v. Secretary of Health, Education & Welfare, 540 F.2d 353 (8th Cir. 1976); McLamore v. Weinberger, 538 F.2d 572 (4th Cir. 1976); Noe v. Weinberger, 512 F.2d 588 (6th Cir. 1975).

A review of the record discloses that all of the medical evidence indicates that the plaintiff is not capable of working at her former job as a secretary. At page 116, Dr. P. R. Shurtleff states that the plaintiff's "[r]esponse was fair and progress has been made, but when she tries to go back to work the condition is agravated (sic) and returns so

that she has to quit her job." On page 118, the same doctor reports:

"She tells me that when she works that there is a return of symptoms and when I check her I find a return of the subluxations and tenderness to pressure. This would indicate that she would not hold up under profitable, gainful employment for any period of time."

Dr. Norman L. Dunitz reports, at page 170, that,

"[t]his patient can sit, stand, walk, bend, lift or bear weight. Her problem is that with constant sitting with the neck in a flexed position, she does get neck discomfort, pain and symptoms which apparently prevent her from carrying out her occupation."

To the same effect is Dr. Dunitz' report on page 204:

"She had attempted to return to light work, as I had asked her to try, sometime ago, but because of continued severe pain, she has been forced to even give up such activity as this. She has returned to her exercise program and does well as long as she does not attempt any physical type of employment."

Dr. Averill Stowell concludes, at page 172, that "[a]t the present time I would feel this patient is temporarily totally disabled from the performance of ordinary manual labor." In October of 1975 that doctor stated, at page 203, that "[i]t is felt the patient is disabled at the present time for the performance of ordinary manual labor. The patient has worked as a secretary and holding her arms outstretched unquestionably aggravates the scalene syndrome." The testimony of the plaintiff, at pages 51 to 63, indicates that she tried repeatedly to return to the type of work with which she was familiar, only to be forced by pain to resign or be fired from each position. The Court has been unable to find any medical evidence which supports the Administrative Law Judge's determination that the plaintiff is able to perform her previous work. This finding is therefore not supported by substantial evidence. There is no evidence whatsoever in the record of any other substantial gainful activity that the claimant could perform, and the Secretary has therefore failed to carry his burden of proving the existence of such other activity.

The Administrative Law Judge also made a finding that the claimant had refused prescribed medical treatment without providing a reasonable explanation for such refusal. The medical treatment referred to is a scalenotomy, which was recommended at one point by Dr. Stowell. It has been held that disability claimants are not required to undergo this type of painful operation where it has not been unequivocally declared by any medical authority as likely to permit the claimant to return to work. Purdham v. Celebrezze, 349 F.2d 828 (4th Cir. 1965); Ratliff v. Celebrezze, 338 F.2d 978 (6th Cir. 1964). In the instant case, the plaintiff testified, at p. 50, that Dr. Stowell did not tell her what, if anything, the operation would do for her, and that she refused the operation in part because she had no pain in the area in which the surgery was to be performed. She also testified, at p. 51, and stated in a report submitted to the Social Security Administration, at p. 148, that Dr. Dunitz recommended that she not undergo the operation because it might actually worsen her condition. The Court finds that the Administrative Law Judge's finding regarding prescribed medical treatment is not supported by substantial evidence.

The defendant opposes plaintiff's motion to remand, and has stated in its brief that,

"The test of whether a remand is necessary in an action for review is whether more evidence is necessary to develop the facts necessary to determine the cause. Hupp v. Celebrezze, 220 F.Supp. 463 (D.C. Iowa 1962). It is apparent that the record reflects a substantial and supportable basis for the Secretary's findings of fact."

The Secretary has thus taken the position that all of the evidence is in and that there is no further evidence to be considered. Therefore, plaintiff's motion to remand is hereby overruled.

For the foregoing reasons, it is the determination of the Court that the findings of the Administrative Law Judge are not supported by substantial evidence and that the plaintiff is in fact entitled to the establishment of a

period of disability and to disability benefits under the Social Security Act. Judgment is so entered on behalf of the plaintiff.

It is so Ordered this 7<sup>th</sup> day of September, 1977.



H. DALE COOK  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JESSE RAY BROWN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 RICHARD CRISP, Warden, State )  
 Penitentiary; J. M. SUNDERLAND, )  
 Warden, State Reformatory, Granite, )  
 Oklahoma; and JOHN ROHMILLER, )  
 District Court Clerk, Craig )  
 County, Vinita, Oklahoma, )  
 )  
 Defendants. )

No. 77-C-234-C

**FILED**

SEP 7 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

The Court has before it for consideration a Motion to Dismiss filed by the defendant John Rohmiller. Plaintiff, Jesse Ray Brown, brings this action alleging violation of his civil rights and seeks redress pursuant to 42 U.S.C. § 1983. Plaintiff prays that the Court order defendants to pay \$1,000,000 in damages for the violation of his civil rights and that the Court order the expungement of a prior conviction.

The following facts are indicated by the exhibits attached to the Complaint and by the allegations of the plaintiff. In June of 1966 plaintiff was convicted in the District Court of Craig County of the crime of Grand Larceny and was sentenced to a term of three years in the Oklahoma State Penitentiary at McAlester, Oklahoma. Upon his commitment to said penitentiary, fingerprint cards were prepared. Thereafter, on July 6, 1966 plaintiff was transferred to the State Reformatory at Granite, Oklahoma to serve the remainder of his sentence and was again fingerprinted. On August 19, 1970 the Governor of the State of Oklahoma signed a Certificate of Pardon granting to plaintiff a full and free pardon, restoring all the rights of citizenship. Four years later, plaintiff was arrested for an "after former felony conviction." (The F.B.I. records

attached as an exhibit indicate he was charged with a fire-arms violation.) On October 4, 1976 plaintiff filed an application for Writ of Mandamus in the District Court of Craig County asking that the arrest and incarceration records in regard to the grand larceny charge be expunged. Upon said filing on October 4, 1976, a notice was sent from the office of the Court Clerk of Craig County advising plaintiff that the matter would be heard on October 20, 1976. However, apparently having determined a hearing was not necessary on the matter, the Court filed a Journal Entry of Judgment on October 6, 1976 denying the petition. Plaintiff then filed an Application for Writ of Mandamus apparently in the Oklahoma State Supreme Court. On December 9, 1976 the Court of Criminal Appeals of the State of Oklahoma entered its Order Dismissing Petition for Writ of Mandamus. The Court stated that after consideration of the application and the order denying the relief in the District Court, it found that the Petition had failed to allege facts sufficient to invoke the jurisdiction of the Court.

Plaintiff makes the following allegation in the Complaint:

"That as a matter of record the petitioner was also like wise denied the same right of hearing by the State Court of Appelals. This thereby showing a means of Conspiracy to deprive the petitioner of his equal and just rights by the Craig County District Court, and is why the Clerk of the Court of the Craig County District Court is so named in this petition as a defendant, as he is the custodian of the records of that court, as is the Two other defendants are custodians of the records that are keep and issued in reference to incarcerations."

The Court recognizes that in considering a pro se pleading, leniency is necessary to counteract the plaintiff's lack of legal expertise. Serna v. O'Donnell, 70 F.R.D. 618 (D.C. Mo. 1976). Therefore, in considering defendant's Motion to Dismiss, the Court not only considers the factual allegations of the Complaint to be true, but also makes every effort to interpret the Complaint to ascertain whether a cause of action has been stated.

The Court finds that it was within the discretion of

the District Court of Craig County and the Oklahoma Court of Criminal Appeals to enter judgment on plaintiff's applications for Writ of Mandamus without conducting a hearing. Plaintiff has not alleged a cause of action in this regard for the reason that there is no constitutional right to a hearing prior to a Court determination on such an application.

In determining the propriety of an order directing expungement, the Court must attempt to balance the harm caused to the individual by the existence of such records against the interest of the State in maintaining them. Paton v. LaPrade, 524 F.2d 862 (3rd Cir. 1975); United States v. Linn, 513 F.2d 925 (10th Cir. 1975). The fact that the records are maintained by the State injects policy considerations into such a balancing process but does not put the records outside the scope of federal control. Wilson v. Webster, 467 F.2d 1282 (9th Cir. 1972). Federal courts have the power to expunge records when necessary to preserve basic legal rights. United States v. McMains, 540 F.2d 387 (8th Cir. 1976); Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973), cert. denied 414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1973). However, such power is of extremely narrow scope and is to be exercised only under extraordinary circumstances. United States v. McMains, supra; Rogers v. Slaughter, 469 F.2d 1084 (5th Cir. 1972); United States v. Dooley, 364 F.Supp. 75 (E.D. Penn. 1973); Wheeler v. Goodman, 306 F.Supp. 58 (W.D.N.C. 1969).

In order to balance the interest of the individual against the interest of the State, it is necessary to determine the validity and basis of the State interest and whether the maintaining of the records serves a valid function. Under the law of the State of Oklahoma, "a conviction is not wiped out by a pardon, as the pardon by the executive power does not blot out the solemn act of the judicial branch of the government." Kellogg v. State, 504 P.2d 440 (Okla.Cr. 1972). Thus a pardoned felony conviction may be used to

increase punishment on a subsequent conviction under the habitual criminal statute in the State of Oklahoma. Kellogg v. State, supra; Scott v. Raines, 373 P.2d 267 (Okla.Cr. 1962).

In addition, a gubernatorial pardon does not relieve disabilities imposed by certain provisions of the Omnibus Crime Control and Safe Streets Act of 1968, concerning transportation and receipt of firearms. The Court in Thrall v. Wolfe, 503 F.2d 313 (7th Cir. 1974) stated:

"We conclude that, in imposing on convicted felons an otherwise appropriate disqualification from regulated activity, Congress has the power to accord a state pardon differing effects in differing contexts, depending on its objectives in creating the disqualification. Neither the inherent nature of a pardon nor full faith and credit require that a state pardon automatically relieve federal disabilities."

Based upon the foregoing it is clear that the maintenance of plaintiff's record of conviction as a matter of law serves a valid legal purpose. It would, therefore, be improper for this Court to direct the defendant John Rohmiller to expunge the conviction in issue from the State records. Defendant's Motion to Dismiss is therefore hereby sustained for the reason that plaintiff has failed to state a cause of action.

It is so Ordered this 7<sup>th</sup> day of September, 1977.

  
H. DALE COOK  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

WGVI FINANCIAL ADVISORS, INC., )  
a corporation, )

Plaintiff, )

vs. )

PACIFIC BAY CONSTRUCTION )  
CORPORATION, a corporation, )

Defendant. )

No. 76-C-636

**FILED**

SEP 6 1977

JOURNAL ENTRY

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

NOW ON THIS 23rd day of August, 1977, the above-styled matter comes on for disposition before this Court and the Court, after hearing testimony and argument of counsel, orders that if service is not obtained upon the Defendants within ten (10) days of date, that the above matter should be dismissed without prejudice.

121 H. Dale Cook  
H. Dale Cook

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ELLIS LORRAINE THOMPSON, #76929

Petitioner,

v.

RICHARD A. CRISP,

Respondent,

and

THE ATTORNEY GENERAL OF  
THE STATE OF OKLAHOMA,

Additional Respondent.

No. 77-C-165

**FILED**

SEP 6 1977 *pl*

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER DISMISSING PETITION  
FOR WRIT OF HABEAS CORPUS

This is a proceeding brought pursuant to the provisions of Title 28 U.S.C. § 2254, by a state prisoner confined at the Oklahoma State Penitentiary, McAlester, Oklahoma. Petitioner attacks the validity of the judgment and sentence rendered and imposed by the District Court of Tulsa County, State of Oklahoma, in Case Nos. 23-244 and 23-245 on grounds of collateral estoppel and double jeopardy, claiming that the offenses in each case arose out of the same episode for which he had been previously convicted in Case No. 22-898 in the District Court of Tulsa County, Oklahoma. Respondents have filed a response, pursuant to an order of the Court, directing them to show cause why the Writ of Habeas Corpus should not be granted.

The petitioner was charged by information in the District Court of Tulsa County, Oklahoma, with the crime of Murder and was found guilty by a jury verdict of Manslaughter in the First Degree, Case No. 22898. On April 22, 1968, the petitioner was sentenced to not less than one hundred (100) years, no more than three hundred (300) years imprisonment. Petitioner then perfected an appeal of that judgment and sentence and on November 12, 1969, the Court of Criminal Appeals of the State of Oklahoma affirmed the conviction but reduced the petitioner's sentence to fifty (50) years. On June 6, 1968, the defendant pleaded guilty to the crime of Burglary in the First Degree, After Former Conviction of a Felony, Case No. 23244, and received a sentence of ten (10) years imprisonment. On that same date, the petitioner entered a plea of

guilty to the crime of Carrying Firearms, After Former Conviction of a Felony, Case No. 23245, and received a sentence of ten (10) years imprisonment, said sentence to run concurrent with the sentence in Case No. 23244. The crimes charged in Case Nos. 23244 and 23245 arose in connection with the crime committed in Case No. 22898.

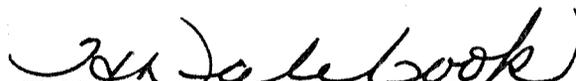
The petitioner filed an Application for Post Conviction Relief in the District Court of Tulsa County, Oklahoma, attacking the conviction obtained in Case No. 22898. The District Court issued an order denying post conviction relief. An appeal was perfected to the Oklahoma Court of Criminal Appeals, Case No. A-17787. That Court affirmed the lower court's order denying post conviction relief on October 4, 1972. On November 15, 1972, petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of Oklahoma, Case No. 72228, attacking the conviction in Case No. 22898. On July 2, 1973, the United States District Court issued an order denying habeas corpus relief. Said Order was appealed to the United States Court of Appeals for the Tenth Circuit where the judgment of the District Court was affirmed, June 5, 1974.

The petitioner then filed an Application for Post Conviction Relief in the District Court of Tulsa County, Oklahoma, attacking the convictions obtained in Case Nos. 23244 and 23245. The petitioner alleged that the convictions obtained in those cases violated his Fifth and Fourteenth Amendment Rights protected by the Double Jeopardy Clause of the United States Constitution. The District Court considered that issue and determined that the petitioner was not entitled to post conviction relief. The determination was affirmed by the Court of Criminal Appeals of the State of Oklahoma on July 27, 1976, Case No. PC-76-235. The petitioner then sought review of that decision in the United States Supreme Court by Writ of Certiorari Case No. 76-5283. On January 10, 1977, the Supreme Court entered an Order denying the Petition for Writ of Certiorari. Thompson v. Oklahoma 429 US 1053 (1977).

The petitioner contends that having been convicted in Case No. 22898, the convictions in 23244 and 23245 were obtained in violation of the double jeopardy provision of the United States Constitution. However, the crimes of First Degree Burglary and Carrying Firearms, After Former Conviction of a felony to which the petitioner pleaded guilty, are separate and distinct from the crime of Manslaughter in the First Degree of which the petitioner had been convicted. While all three crimes arose out of the same circumstances, the elements of each is separate and distinct. See 21 O.S. 1971, §701(1); 21 O.S. 1971, §1283 and 21 O.S. 1971, §1431. There is no requirement in the double jeopardy clause of the Fifth Amendment nor the cases decided thereunder that all crimes arising out of the same set of circumstances be tried at one proceeding. That clause prohibits the State from placing the defendant twice in jeopardy for the same offense. Ash v. Swenson, 397 U.S. 436, 25L.Ed.2d 469 90 S.Ct. 1189 (1970). See Blockburger v. U.S., 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Bell v. State of Kansas (10th Circuit, 1971) 452 F.2d 783, certiorari denied 92 S.Ct. 2421, 406 U.S. 974, 32 L.Ed.2d 674. Since the elements of the crimes in Case Nos. 22898, 23244 and 23245 are separate, distinct and unique, jeopardy did not attach in the manslaughter trial except with the crime charged in Case No. 22898. The convictions obtained in the last two cases were not for the same crime or offense that was the subject of the Manslaughter trial. Therefore, jeopardy did not attach in those two cases until the proceedings on June 6, 1968, when the defendant entered his pleas of guilty to those crimes. The petitioner's arguments to the contrary are without merit. Ash, Supra.

For the reasons stated herein, the Petition for Writ of Habeas Corpus should be and is hereby dismissed.

It is so ordered this 6<sup>th</sup> day of September, 1977.

  
H. Dale Cook  
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JOHN FREDRICK SHELTON, #90212 )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 STATE OF OKLAHOMA )  
 )  
 Respondent. )

No. 76-C-482-C

FILED

SEP 6 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER DISMISSING PETITION  
FOR WRIT OF HABEAS CORPUS

The Court has before it for reconsideration the Petition of John Fredrick Shelton for a Writ of Habeas Corpus filed pro se pursuant to Title 28 U.S.C. § 2254.

On June 23, 1977 the Court entered an Order Dismissing the Petition for Writ of Habeas Corpus. On the same date the Clerk of the Court mailed a copy of the Court's Order to the Petitioner and the Respondent.

In the Order Dismissing Petition for Writ of Habeas Corpus the Court Stated:

"As to the fourth issue, petitioner states in the supplement to his Petition for Writ of Habeas Corpus as follows: 'Moreover, I allege that I was denied the effective assistance of Trial Court and that I did not acquiesce in the purported waiver by the defense counsel' \* \* \* 'I told my lawyer to object but he did not. My request does not appear on the record.'"

As to the issue of ineffective counsel the Court held:

"The record reflects that the petitioner has failed to present the question of ineffective counsel to the Oklahoma Courts and therefore has failed to exhaust his state court remedies. This Court must dismiss this claim without prejudice for failure to exhaust the remedies available in the Oklahoma Courts."

On June 28, 1977 the Court received a letter from the Petitioner in which he claims that the issue of ineffective counsel was raised by him in his Application for Post-Conviction Relief in the District Court which was denied and that he appealed the District Court's denial for post-conviction relief to the Oklahoma Court of Criminal Appeals in Case No. PC-76-589 where the District Court's judgment was affirmed. On July 8, 1977 the Court entered an order directing Respondent to show cause why the Writ of Habeas Corpus should not be granted on the basis of Petitioner's claim of

ineffective counsel. Respondent has now filed a response to the order of the Court in which it is stated that the petitioner has exhausted available state remedies on the issue of ineffective counsel.

In determining whether an evidentiary hearing is necessary prior to ruling upon the validity of petitioner's allegations, this Court must look to the requirements established by the United States Supreme Court in Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9L.Ed.2d 770 (1963).

"Where the facts are in dispute, the federal Court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding".  
372 U.S. at 312.

Petitioner claims that his retained counsel was ineffective because of his failure to object to the introduction into evidence of State Exhibits No. 1, a butcher knife which was found near the sink in the kitchen of petitioner's apartment and State's Exhibit No. 2, two five dollar bills, found in a bathroom cabinet of the petitioner's apartment. Petitioner contends that State's Exhibits Nos. 1 and 2 were the fruits of an unlawful search and seizure and inadmissible. Although defendant did interpose an objection to testimony regarding the discovery and identification of State's Exhibit No. 2 (Tr. 65), no objection was made to such testimony regarding State's Exhibit No. 1 (Tr. 6 and 62), and even before the exhibits were formally offered into evidence defense counsel expressly abandoned any objection to the introduction or admission of these exhibits in stating, "Your Honor, if he wants to enter 1 and 2 and 3, we have no objection to it being received in evidence." (Tr. 83) Petitioner claims that he did not acquiesce in the purported waiver by his defense counsel and that in fact he told his lawyer to object, although such request does not appear in the record. The petitioner's attorney did challenge the search of the bathroom. (Tr. 63 - 65). In the Order Denying Application for Post-Conviction Relief the District Judge stated:

"4. This Court after reviewing the trial transcript finds that the exhibits had previously been testified to by the witnesses for the State and that the admission of the exhibits into evidence was proper. The Court would note for the record that the exhibits admitted into evidence were beneficial to the defendant and that the exhibits showed a possible conflict with the exhibits and the testimony of the State's witnesses.

"5. The Court finds that the privately retained counsel of the defendant is a learned lawyer in the field of criminal law and well respected by his fellow lawyers and this Court. That offering no objection to the admission of the exhibits did not make the trial a sham or farce.

"6. This Court after reviewing the transcript in this cause finds that the defendant was well represented by privately retained learned counsel who vigorously defended the defendant's rights.

"7. As to the allegation of ineffective counsel on appeal for not raising the question of ineffective trial counsel, this Court finds that based upon the foregoing findings that this allegation is without merit."

The guidelines for determining when defense counsel was ineffective or incompetent were set forth in Ellis v. State, 430 F.2d 1352, 1356 (10th Cir. 1970).

"It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation. Goforth v. United States (10th Cir. 1963), 314 F.2d 868 \*\*\*. Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965). And this test is applicable to cases in which counsel is retained by or for an accused as well as to cases in which counsel is appointed to represent an indigent defendant. Bell v. State of Alabama, 367 F.2d 243 (5th Cir. 1966)."

The record shows that Petitioner's counsel provided effective legal assistance to the Petitioner throughout the course of the trial. The contention of Petitioner to the contrary is without merit and therefore fails to support his Petition for relief. Moreover, it is unnecessary to conduct an evidentiary hearing with respect to petitioner's claim of ineffective assistance of counsel. Townsend, supra.

Accordingly, Petition for Writ of Habeas Corpus is denied.

It is so Ordered this 6<sup>th</sup> day of September, 1977.



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H. DALE COOK  
UNITED STATES DISTRICT JUDGE

SEP 6 1977

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	Plaintiff,	)
v.	)	NO. 76-CR-108-C
	)	77-C-265
WILLIAM JAMES McALPINE,	)	
	Defendant.	)

O R D E R

The Court has for consideration the pro se, in forma pauperis instrument entitled "Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody Pursuant to 28 U.S.C. 2255" filed by William James McAlpine and assigned civil case No. 77-C-265 and docketed in this criminal case No. 76-CR-108-C.

Movant is a prisoner in the Federal Correctional Institution, Texarkana, Texas, pursuant to conviction herein on his plea of guilty to a Dyer Act in violation of 18 U.S.C. § 2312 and sentence November 3, 1976, to 18 months. At sentencing, the Court also ordered that a psychiatric evaluation be conducted on the Defendant, and if it was found that the Defendant was applicable for psychiatric treatment, then such treatment should be commenced. Petitioner did not appeal his conviction and admits in his present motion that he did not because he was guilty as charged and wanted help with his problem.

Petitioner asserts as grounds for his motion that he has not been given the psychological test as ordered by the sentencing Court; and he further states that he was denied due process of law by the Parole Commission in hearing to determine his eligibility for parole in that the parole guidelines discriminate between married and unmarried persons and he was not given a thorough, unbiased parole review.

The Court has carefully reviewed the pending motion and file, and being fully advised in the premises, the Court finds that ruling may properly be made without the necessity of a response or an evidentiary hearing.

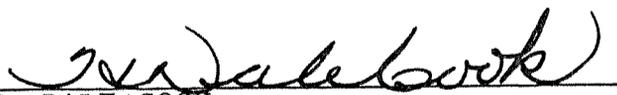
Considering the motion as made pursuant to Rule 35, Federal Rules of Criminal Procedure, for modification of sentence, the motion was filed June 24, 1977, and it is out of time. The 120-day jurisdictional period within which a Rule 35 motion may be considered expired March 2, 1977. See United States v. Kirkland No. 75-1559, P. 3 (10th Cir. 1976).

Considering the motion as a § 2255 proceeding, it is true as Petitioner contends that the Court directed, as appears on the Judgment and Commitment Order, that a psychiatric evaluation be conducted on the defendant, and it was left to the appropriate officials of the Bureau of Prisons to determine following the evaluation whether psychiatric treatment of the Defendant was applicable. The Court takes judicial notice from the file of this Court regarding the Defendant, and in the customary procedure maintained in the Probation Office rather than the public file, that the Defendant during his confinement at the Federal Correctional Institution, Texarkana, Texas, did receive a psychological evaluation and it was determined that he did not need personal attention on a counseling level.

Defendant does not in any way challenge the validity of his plea, conviction or sentence in this Court. Rather, he challenges the Parole Commission's application of its guidelines to his case which is an administrative responsibility unrelated to the sentencing process. Petitioner must first exhaust the administrative remedies provided by the United States Parole Commission and available to him. See Owens v. Alldridge, 311 F. Supp. 667 (W.D. Okla. 1970); Hess v. Blackwell, 409 F.2d 362 (5th Cir. 1969). Additionally, his Petition for Writ of Habeas Corpus must be filed with the United States District Court having jurisdiction over his place of incarceration. Olsen v. U.S., (D.C.Minn.1975) 390 F.Supp. 1264, appeal dismissed 521 F.2d 1404, certiorari denied 96 S.Ct. 860, 423 U.S. 1075, 47 L.Ed.2d 86. Williams v. U. S., (D.C.Pa.1976) 412 F.Supp. 277.

For the reasons stated defendant's motion for relief herein is denied.

It is so Ordered this 6<sup>th</sup> day of September, 1977.

  
H. DALE COOK  
United States District Judge

SEP 6 1977

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

WILLIAM JAMES McALPINE; )  
 )  
 ) Petitioner, )  
 )  
 ) v. )  
 )  
 ) WARDEN R. A. OSBORN, Federal )  
 ) Correctional Institution, )  
 ) Texarkana, Texas, et al., )  
 ) Respondents. )

NO. 77-C-293

ORDER

The Court has for consideration a pro se, in forma pauperis petition for writ of habeas corpus filed by William James McAlpine. Petitioner is a prisoner in the Federal Correctional Institution, Texarkana, Texas. The Court having carefully reviewed the petition finds that response or evidentiary hearing is not required and the petition should be denied and the case dismissed.

The only grounds presented to this Court in the Northern District of Oklahoma in support of the petition are that petitioner was not given serious parole consideration, and the decision of the South Central Regional Parole Commission denying his parole was arbitrary and capricious in that the criteria applied was vague and ambiguous as well as discriminatory between married and unmarried persons.

First, the petition should be denied as second and subsequent as the identical allegation has been made in case No. 77-C-265 and docketed in case No. 76-CR-108-C. Second, Petitioner's challenge of the Parole Commission's application of its guidelines to his case is an administrative responsibility. This issue should be presented by way of habeas corpus to the United States District Court having jurisdiction over the place of his incarceration, if administrative remedies have been exhausted.

IT IS, THEREFORE, ORDERED that the petition herein of William James McAlpine be and it is hereby denied, without prejudice to his presenting his challenge of the Parole Commission's application of its guidelines to his case in the proper forum in Texas, and the case before this Court is dismissed.

Dated this 6th day of September, 1977, at Tulsa, Oklahoma.

  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FARMERS INSURANCE COMPANY, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 LANTZ McCLAIN, Administrator of )  
 the Estate of Gary Watson, De- )  
 ceased, and MARIANNE MONTGOMERY, )  
 )  
 Defendants. )

No. 76-C-369-B

**FILED**

**SEP 6 1977**

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER

The Court has for consideration plaintiff's Motion for Summary Judgment and has carefully perused the entire file, the briefs and the recommendations concerning said motion and being fully advised in the premises, finds:

That the plaintiff's Motion for Summary Judgment should be sustained for the reasons stated herein.

This is an action for declaratory judgment brought under the provisions of Title 28 §2201 of the United States Code for the purpose of determining a question in actual controversy between the parties regarding a determination of a policy of insurance and its coverage for alleged injuries resulting from an automobile accident. Plaintiff denies liability claiming defendant Marianne Montgomery is excluded from the provisions of said insurance policy on the grounds that defendant Marianne Montgomery was a member of the household of Gary Watson at the time of the accident and is, therefore, barred from any recovery under the provisions of the policy issued by plaintiff herein. Defendant Montgomery claims that her husband Gary Watson was an insured under the policy and claims benefits thereunder.

The plaintiff argues that there is no genuine issue as to any material fact concerning coverage in that the depositions, admissions and pleadings on file show that defendant Montgomery and Gary Watson lived together as husband and wife and considered themselves married and that defendant Montgomery was a member of the

household of Gary Watson at the time of the accident and was therefore barred and precluded under the provisions of the policy issued by plaintiff herein; that plaintiff issued to Dan F. Montgomery automobile insurance policy #08-2908-75-47 effective January 31, 1974 to July 31, 1974 insuring 1972 Dodge Colt automobile; that the described policy provides under exclusions:

"(12) to the liability of any insured for bodily injury to (a) any member of the same household of such insured except a servant, or (b) the named insured;"

that in the summer of 1973, Marianne Montgomery and Gary Watson began living together as husband and wife in Tulsa, Oklahoma, and established a common law marriage relationship; that they maintained a household as husband and wife up to and including July 5, 1974, the date of the accident; that on July 5, 1974, defendant Montgomery was a passenger in automobile being driven by Gary Watson on U. S. Highway '66 north of Sapulpa, Creek County, Oklahoma; and that Gary Watson permitted the vehicle he was driving to veer from and leave the travel portion of the roadway surface causing collision as a result of which defendant Montgomery claimed injury.

The defendant Montgomery claims that Gary Watson was a permissive user and as such, was insured under the policy. Therefore, she claims that she was covered under the policy by virtue of the omnibus clause. Additionally, the defendant contends that the above exclusion provision can be construed both in favor of coverage and against coverage and that where ambiguity is present in an exclusionary clause of a policy of insurance, any doubt should be resolved in favor of coverage. 45 CJS Insurance §834 P. 906, Notes 88 & 89, Heltcel v. Skaggs, 234 F.2d 66.

The deposition of defendant Marianne Montgomery establishes that she and Gary Watson lived together as husband and wife and considered themselves married at a time prior to and including July 5, 1974, the date of the accident. In the case of Indemnity Insurance Company of North America v. Sanders, 36 P.2d 271 (Oklahoma, 1934) the Court used the following language to define the household:

"Those who dwell under the same roof and compose a family, a domestic establishment family."

In reviewing the deposition of defendant Montgomery, she could accurately be described as "a member of the same household of "Gary Watson."

In State Farm Mutual Automobile Insurance Company v. James, 80 F.2d 802 (Fourth Circuit, 1936) the Court said:

"A person in the same household is not limited to persons related by blood or marriage nor has it the same meaning."

The term household is customarily used to mean a number of persons who dwell together as a family. The policy exclusion in the State Farm Mutual Automobile Insurance Company case was reported as follows:

". . . other than the insured or persons in the same household of the assured, or those in the service or employment of the assured."

The plaintiff was denied recovery for the reason that she constituted a member in the same household of the assured.

In the case of Hunter v. Southern Farm Bureau Casualty Insurance Company, 129 S.E. 2d 59 (SC, 1962) the Court noted that the automobile liability policy exclusion with respect to injury or death to any member of the family of the insured residing in the same household uses the term family to include persons habitually residing under one roof in forming one domestic circle. Therefore, a woman who lives under the same roof with the insured was a member of his family. The exclusion provision in Hunter was similar to the present case, and plaintiff therein was denied coverage.

It is evident by established law that family and household exclusion provisions in liability policies have been upheld and where not ambiguous should be construed to give effect to the words used in the insurance contract. In Henderson v. State Farm Mutual Automobile Insurance Company, 208 N.W. 2d 423, (Wisconsin, 1973) State Farm's policy used words family and household in the exclusion. The Court

construed the contract to give effect to the intent of the parties and words in the insurance contract and said that they must give the meaning they ordinarily convey to the popular mind.

Under the exclusion provisions of the policy issued by the plaintiff it is specifically provided that "any insured" (covered by the policy) is not liable for bodily injury to any member of the same household of "such insured". In the same provision and in other provisions of the policy the words "named insured" are used. If it were the intent of the parties to the insurance agreement to exclude from coverage only members of the same household of the "named insured" as contended by the defendant Montgomery, such words could have been used. Instead the agreement specifically excludes such insured's household, referring to any insured, not just the named insured. The language is not ambiguous and should therefore be interpreted so as to give effect to the words used by the parties to the insurance agreement. See Hercules Casualty Ins. Co. v. Preferred Risk Ins. Co., 337 F.2d 1 (10th Cir.1964).

IT IS, THEREFORE, ORDERED that Plaintiff's Motion for Summary Judgment be and is hereby sustained.

Dated this 6<sup>th</sup> day of September, 1977.

  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA.

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

In the Matter of the Application of )  
)  
MERRILL LYNCH, PIERCE, FENNER )  
& SMITH, INC. )  
)  
to Compel Arbitration, pursuant to )  
the United States Arbitration Act, )  
Title 9 U.S.C. §4, )  
)  
Petitioner, )  
)  
-against- )  
)  
MILTON M. MOORE and SUE KENDALL )  
MOORE, )  
)  
Respondents. )

FILED

SEP 6 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

No. 76-C-145-B *only*

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MILTON M. MOORE and SUE KENDALL )  
MOORE, )  
)  
Plaintiffs, )  
)  
vs. )  
)  
MERRILL LYNCH, PIERCE, FENNER & )  
SMITH, INC., a corporation, and )  
CHUCK BULAND, an individual, )  
)  
Defendants. )

No. 76-C-192-B

ORDER DIRECTING ARBITRATION

The Findings and Recommendations of the Magistrate, having been filed in case No. 76-C-145-B on the 27<sup>th</sup> day of August, 1977, and having recited and been based upon the Stipulation of the Parties in Lieu of Hearing on Order to Show Cause, are hereby approved and adopted as the findings of the Court. It is therefore

ORDERED that the Respondents proceed to arbitrate those disputes forming the basis of their claim for relief in case No. 76-C-192-B, in arbitration proceedings to be held in Tulsa, Oklahoma, before a NASD arbitration tribunal; and it is

FURTHER ORDERED that the stay pending arbitration heretofore entered in case No. 76-C-192-B be continued in force until such time as any appeal in case No. 76-C-145-B is finally determined

or until such time as the arbitration proceedings directed in that case are finally concluded, whichever time is later.

DATED this <sup>10<sup>th</sup></sup> day of <sup>September</sup> ~~August~~, 1977.



Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

SEP 6 1977 H/S

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

CHARLES HOBART TUTTLE, a minor, )  
by his next friend, CHARLES T. )  
TUTTLE, )

Plaintiff )

vs. )

CHARLES DOHN; DARREL COURLEY; )  
JOHN PAUL CHAMBERS; and ROGER )  
STEEL, )

Defendants )

Civil Action

File No. 77-C-103-B ✓

JOURNAL ENTRY OF JUDGMENT

This cause came on for hearing on the 7th day of July, 1977, upon the failure of defendant, ROGER STEEL, to answer plaintiff's Complaint herein, and the Court being fully advised in the premises and fully familiar with the files and records herein, and having heard the statements of counsel for the plaintiff and having three times called defendant in open court, and the defendant having failed to appear personally or by counsel or other representative, the Court finds as follows:

That the defendant, ROGER STEEL, was duly served with a copy of the Petition and the Summons in this action, as required and directed by law, on the 15th day of April, 1977. In spite of such service, the Court finds that the defendant, ROGER STEEL, has not appeared herein, and that no answer, motion, or other pleading has been served or filed in this action by the said defendant, and that the time to appear, answer, move, or serve or file any other pleading has fully expired.

That the defendant, ROGER STEEL, was called three times in open court on July 7, 1977, and he appeared not, neither in person nor by any person in his behalf, whereupon the Court entered a default judgment against the defendant, ROGER STEEL, and referred the matter to the United States Magistrate for the purpose of taking testimony as to the amount of the judgment to be entered.

Based upon the findings and recommendations of the Magistrate as determined on the 19th day of August, 1977, the Court finds that the plaintiff, CHARLES HOBART TUTTLE, should have judgment in the amount of \$5,000.00 actual damages and \$15,000.00 punitive damages against the defendant, ROGER STEEL; that the

plaintiff should have judgment for his costs herein accrued and accruing; and that this judgment should carry interest at the rate of 10 per cent per annum from July 7, 1977, until fully paid.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that judgment be and is hereby entered in favor of the plaintiff, CHARLES HOBART TUTTLE, and against the defendant, ROGER STEEL.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, CHARLES HOBART TUTTLE, have judgment in the amount of \$5,000.00 actual damages and \$15,000.00 punitive damages against the defendant, ROGER STEEL; and that the plaintiff have judgment for his costs herein accrued and accruing; and that this judgment carry interest at the rate of 10 per cent per annum from July 7, 1977, until fully paid.

  
\_\_\_\_\_  
CHIEF JUDGE, UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

PHILLIP ALLAN FLANAGAN,

Plaintiff,

vs.

G.L. SIMPSON, MIKE LESTER, R.  
RASKA, OFFICER LEAMON, SERGEANT  
BRYANT, R. BATCHELDER, AND  
INVESTIGATOR WALKER, Individually  
and as police officers in the  
City of Tulsa, Oklahoma; and the  
CITY OF TULSA, a municipal  
corporation,

Defendants.

NO. 77-C-135-B

**FILED**

SEP 2 1977

Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

The Court has for consideration the Combined Motions of the defendants to Dismiss the Complaint against each of them for failure of the plaintiff to state a claim and to Strike from the Complaint the prayer for recovery of attorney's fees, and the brief in support thereof; the amendment to the Motion to Dismiss filed by the defendants and the brief in support thereof; and the plaintiff's brief in response to defendants' motion to dismiss and the amendment thereto; and, having carefully perused the entire file and being fully advised in the premises, finds:

This is a civil rights action against the individual defendants, individually and as police officers of the City of Tulsa, Oklahoma, and against the City of Tulsa, Oklahoma, for the alleged deprivation of plaintiff's right to due process of law and his right to a speedy trial. Plaintiff alleges that on or about June 17, 1976, a preliminary information numbered CRF 76-1630 was issued in his name based upon a robbery which took place on or about May 23, 1976 at the Redbud Grocery Store in Tulsa, Oklahoma. Plaintiff alleges that the defendant officers named herein were the officers named in the preliminary information and plaintiff believes

that these are the officers assigned to investigate and process case number CRF 76-1630. Plaintiff alleges that he was not arrested, and that he did not have full notice of this warrant and charge until approximately December 5, 1976, when he attempted to enlist in the U.S. Army and a warrant check revealed the outstanding arrest warrant. Plaintiff further alleges that he turned himself into the Tulsa Police Department, that he was arraigned and a preliminary hearing was held, and that the District Court in and for the County of Tulsa, Oklahoma sustained his motion to dismiss based upon a violation of his right to due process of law. Plaintiff contends that the acts or omissions of the individual defendants herein were done in the defendants' official capacities, were performed under color of the statutes and ordinances of the City of Tulsa and the State of Oklahoma, and that the defendants were the servants, agents, and employees of the City of Tulsa, so that their acts are imputed to the defendant City of Tulsa. Plaintiff alleges damages in excess of this Court's jurisdictional requirement, and also prays this Court for an award of attorney's fees.

Defendants move this Court to dismiss the complaint against each of them on the ground that the complaint fails to state any act or omissions on the part of the defendants which would confer jurisdiction. The Court will deal first with the motion of the City of Tulsa, and then with the motion of the individual defendants:

In the motion to dismiss and the amended motion to dismiss, the defendant City of Tulsa asserts that this Court lacks jurisdiction of the defendant City for the following reasons:

- 1) That the City of Tulsa, Oklahoma is a municipal corporation and a political subdivision of the State of Oklahoma, and is not a "person" within the purview of 42 U.S.C. §1983 and is therefore not a proper party defendant;
- 2) That the City of Tulsa, Oklahoma is a municipal corporation and a political subdivision of the State of Oklahoma, and is not subject to pendent jurisdiction in an action brought pursuant to the provisions of 42 U.S.C. §1983 or under 28 U.S.C. §1331;
- 3) That the plaintiff has failed to plead facts sufficient to

invoke this Court's jurisdiction against the defendant City of Tulsa under 28 U.S.C. §1331; and

4) That the plaintiff has failed to satisfy the jurisdictional prerequisite set forth in the Oklahoma Governmental Tort Liability Act, 11 O.S. §1756.

The Court finds that the Motion to Dismiss filed by the defendant City of Tulsa should be sustained on all of the four abovementioned grounds. It is now an established rule of law that a municipality is not a "person" within the meaning of 42 U.S.C. §1983, and therefore is not a proper party defendant in this case under §1983. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973), reh. denied, 412 U.S. 963 (1973).

Plaintiff amended his complaint, seeking to invoke the jurisdiction of this Court against the City of Tulsa under 28 U.S.C. §1331, by alleging that the City of Tulsa by its acts or omissions violated plaintiff's rights under the Fourteenth Amendment by negligently hiring and employing the individual defendant officers, by failing to enforce the internal regulation that the individual officers follow constitutional guidelines, by failing to train the individual officers with regard to constitutional rights, or by failing to establish departmental guidelines implementing constitutional rights. The weight of authority in cases similar to the one at hand is that the judiciary should not undertake to create a new and independent remedy directly under the Constitution when by so doing the legislative scheme would be subverted. Deference should be given to Congress' decision not to extend §1983 liability to municipalities. *Jones v. McElroy*, 429 F. Supp. 848 (E.D. Pa. 1977); *Crosley v. Davis*, 426 F. Supp. 389 (E.D. Pa. 1977); *Jamison v. McCurrie*, 388 F. Supp. 990 (N.D. Ill. 1975); *Perry v. Linke*, 394 F. Supp. 323 (N.D. Ohio 1974); *Perzanowski v. Salvio*, 369 F. Supp. 223 (D. Conn. 1974); *Washington v. Brantley*, 352 F. Supp. 559 (M.D. Fla. 1972). Additionally, the type of claim necessary to invoke jurisdiction under Section 1331 is a constitutional deprivation and not a mere negligence tort action. The Court finds that the plaintiff herein has failed to allege facts sufficient to state a claim under Section 1331 for violation of a constitutional right.

The Court therefore finds that there is no federal claim against the defendant City of Tulsa, under either Section 1983 or under Section 1331. This Court will not accept pendent jurisdiction of the claim against the City based upon the state statute, 76 O.S. § 6, when the federal claim has been dismissed. *Aldinger v. Howard*, 427 U.S. 1 (1976); *United Mine Workers v. Gibbs*, 338 U.S. 715 (1966).

Finally, the claim against the City of Tulsa is jurisdictionally defective in that plaintiff has failed to satisfy the 30-day claim requirement of 11 O.S. § 1756. That statute requires any person with a claim against a municipality to present to the governing body of the municipality within 30 days after the alleged loss or injury, a written notice stating the time, place and circumstances thereof, and the amount of compensation or other relief demanded. The statute is explicit in stating that "[n]o action for any cause arising under this Act shall be maintained, unless such valid notice has been given . . . ." In the instant action, plaintiff complains of the acts or omissions of the individual defendants from the date of the issuance of the preliminary information number CRF 76-1630 until the date plaintiff was apprised of the existence of the outstanding arrest warrant-December 5, 1976. The injury to the plaintiff was complete on that last date. The written claim was not received by the defendant City of Tulsa until March 11, 1977, long after the 30-day period had expired. Therefore, the claim against the City of Tulsa must be dismissed.

In their Motion to Dismiss, the individual defendants allege that the plaintiff has failed to allege damages under either Section 1983 or Section 1331, and that the plaintiff has failed to allege conduct of constitutional magnitude under Section 1331. The Court finds that it is without sufficient facts or information at this time to grant such a motion, and the Motion to Dismiss as to the individual defendants will be overruled at this time. Defendants are given 20 days from this date to plead or answer.

The Court also has under consideration the Motion to Strike plaintiff's prayer for award of attorney's fees under 42 U.S.C. § 1988. It is within the discretion of the Court to award attorney's fees in an action under

42 U.S.C. § 1983 when the circumstances warrant such recovery. Therefore, the Motion to Strike will be overruled at this time, subject to renewal at a later date.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss as to the defendant City of Tulsa should be and the same is hereby sustained.

IT IS FURTHER ORDERED that the Motion to Dismiss as to the individual defendants should be and the same is hereby overruled. These defendants are given twenty (20) days from this date to plead or answer.

IT IS FURTHER ORDERED that the Motion to Strike plaintiff's prayer for award of attorney's fees should be and the same is hereby overruled, subject to renewal at a later date.

ENTERED this 2<sup>nd</sup> day of September, 1977.

  
\_\_\_\_\_  
CHIEF UNITED STATES DISTRICT JUDGE



attempted to serve the arrest warrant upon the plaintiff; and that the plaintiff then informed them that the warrant had been served upon him by the Tulsa County Sheriff's Office and that he was released on bond. Plaintiff contends that the acts of the individual defendants herein were done in the defendants' official capacities, were performed under color of the statutes and ordinances of the City of Tulsa and the State of Oklahoma, and that the defendants were the servants, agents, and employees of the City of Tulsa, so that their acts are imputed to the defendant City of Tulsa. Plaintiff alleges damages in excess of this Court's jurisdictional requirement, and also prays this Court for an award of attorney's fees.

Defendants move this Court to dismiss the complaint against each of them on the ground that the complaint fails to state any act or omissions on the part of the defendants which would confer jurisdiction. The Court will deal first with the motion of the City of Tulsa, and then with the motion of the individual defendants:

In the motion to dismiss and the amended motion to dismiss, the defendant City of Tulsa asserts that this Court lacks jurisdiction of the defendant City for the following reasons:

- 1) That the City of Tulsa, Oklahoma is a municipal corporation and a political subdivision of the State of Oklahoma, and is not a "person" within the purview of 42 U.S.C. § 1983 and is therefore not a proper party defendant;
- 2) That the plaintiff has failed to plead facts sufficient to invoke this Court's jurisdiction against the defendant City of Tulsa under 28 U.S.C. § 1331; and
- 3) That the City of Tulsa, Oklahoma is a municipal corporation and a political subdivision of the State of Oklahoma, and is not subject to pendent jurisdiction in an action brought pursuant to the provisions of 42 U.S.C. § 1983 or under 28 U.S.C. § 1331.

The Court finds that the Motion to Dismiss filed by the defendant City of Tulsa should be sustained on all of the three abovementioned grounds. It is now an established rule of law that a municipality is

not a "person" within the meaning of 42 U.S.C. § 1983, and therefore is not a proper party defendant in this case under § 1983. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973), reh. denied, 412 U.S. 963 (1973).

Plaintiff amended his complaint, seeking to invoke the jurisdiction of this Court against the City of Tulsa under 28 U.S.C. § 1331, by alleging that the City of Tulsa by its acts or omissions violated plaintiff's rights under the Fourteenth Amendment by negligently hiring and employing the individual defendant officers, by failing to enforce the internal regulation that the individual officers follow constitutional guidelines, by failing to train the individual officers with regard to constitutional rights, or by failing to establish departmental guidelines implementing constitutional rights. The weight of authority in cases similar to the one at hand is that the judiciary should not undertake to create a new and independent remedy directly under the Constitution when by so doing the legislative scheme would be subverted. Deference should be given to Congress' decision not to extend §1983 liability to municipalities. *Jones v. McElroy*, 429 F. Supp. 848 (E.D. Pa. 1977); *Crosley v. Davis*, 426 F. Supp. 389 (E.D. Pa. 1977); *Jamison v. McCurrie*, 388 F. Supp. 990 (N.D. Ill. 1975); *Perry v. Linke*, 394 F. Supp. 323 (N.D. Ohio 1974); *Perzanowski v. Salvio*, 369 F. Supp. 223 (D. Conn. 1974); *Washington v. Brantley*, 352 F. Supp. 559 (M.D. Fla. 1972). Additionally, the type of claim necessary to invoke jurisdiction under Section 1331 is a constitutional deprivation and not a mere negligence tort action. The Court finds that the plaintiff herein has failed to allege facts sufficient to state a claim under Section 1331 for violation of a constitutional right.

The Court therefore finds that there is no federal claim against the defendant City of Tulsa, under either Section 1983 or under Section 1331. This Court will not accept pendent jurisdiction of the claim against the City based upon the state statute, 76 O.S. § 6, when the federal claim has been dismissed. *Aldinger v. Howard*, 427 U.S. 1 (1976); *United Mine Workers v. Gibbs*, 338 U.S. 715 (1966). Therefore, the claim against the City of Tulsa must be dismissed.

In their Motion to Dismiss, the individual defendants allege that the plaintiff has failed to allege damages under either Section 1983 or Section 1331, and that the plaintiff has failed to allege conduct of constitutional magnitude under Section 1331. The Court finds that it is without sufficient facts or information at this time to grant such a motion, and the Motion to Dismiss as to the individual defendants will be overruled at this time. Defendants are given 20 days from this date to plead or answer.

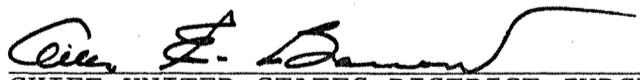
The Court also has under consideration the Motion to Strike plaintiff's prayer for award of attorney's fees under 42 U.S.C. § 1988. It is within the discretion of the Court to award attorney's fees in an action under 42 U.S.C. § 1983 when the circumstances warrant such recovery. Therefore, the Motion to Strike will be overruled at this time, subject to renewal at a later date.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss as to the defendant City of Tulsa should be and the same is hereby sustained.

IT IS FURTHER ORDERED that the Motion to Dismiss as to the individual defendants should be and the same is hereby overruled. These defendants are given twenty (20) days from this date to plead or answer.

IT IS FURTHER ORDERED that the Motion to Strike plaintiff's prayer for award of attorney's fees should be and the same is hereby overruled, subject to renewal at a later date.

ENTERED this 2<sup>nd</sup> day of September, 1977.

  
CHIEF UNITED STATES DISTRICT JUDGE



Headquarters of the City Police Department located at 600 Civic Center Street, City of Tulsa, Oklahoma, without probable cause and caused to be there imprisoned. Plaintiff contends that the acts of the individual defendants herein were done in the defendants' official capacities, were performed under color of the statutes and ordinances of the City of Tulsa and the State of Oklahoma, and that the defendants were the servants, agents, and employees of the City of Tulsa, so that their acts are imputed to the defendant City of Tulsa. Plaintiff alleges damages in excess of this Court's jurisdictional requirement, and also prays this Court for an award of attorney's fees.

Defendants move this Court to dismiss the complaint against each of them on the ground that the complaint fails to state any act or omissions on the part of the defendants which would confer jurisdiction. The Court will deal first with the motion of the City of Tulsa, and then with the motion of the individual defendants:

In the motion to dismiss and the amended motion to dismiss, the defendant City of Tulsa asserts that this Court lacks jurisdiction of the defendant City for the following reasons:

- 1) That the City of Tulsa, Oklahoma is a municipal corporation and political subdivision of the State of Oklahoma, and is not a "person" within the purview of 42 U.S.C. § 1983 and is therefore not a proper party defendant;
- 2) That the plaintiff has failed to plead facts sufficient to invoke this Court's jurisdiction against the defendant City of Tulsa under 28 U.S.C. § 1331;
- 3) That the City of Tulsa, Oklahoma is a municipal corporation and a political subdivision of the State of Oklahoma, and is not subject to pendent jurisdiction in an action brought pursuant to the provisions of 42 U.S.C. § 1983 or under 28 U.S.C. § 1331; and
- 4) That the plaintiff has failed to satisfy the jurisdictional prerequisites set forth in the Oklahoma Governmental Tort Liability Act, 11 O.S. § 1756.

The Court finds that the Motion to Dismiss filed by the defendant City of Tulsa should be sustained on all of the four abovementioned grounds. It is now an established rule of law that a municipality is not a "person" within the meaning of 42 U.S.C. § 1983, and therefore is not a proper party defendant in this case under § 1983. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973), reh. denied, 412 U.S. 963 (1973).

Plaintiff amended his complaint, seeking to invoke the jurisdiction of this Court against the City of Tulsa under 28 U.S.C. § 1331, by alleging that the City of Tulsa by its acts or omissions violated plaintiff's rights under the Fourteenth Amendment by negligently hiring and employing the individual defendant officers, by failing to enforce the internal regulation that the individual officers follow constitutional guidelines, by failing to train the individual officers with regard to constitutional rights, or by failing to establish departmental guidelines implementing constitutional rights. The weight of authority in cases similar to the one at hand is that the judiciary should not undertake to create a new and independent remedy directly under the Constitution when by so doing the legislative scheme would be subverted. Deference should be given to Congress' decision not to extend § 1983 liability to municipalities. *Jones v. McElroy*, 429 F. Supp. 848 (E.D. Pa. 1977); *Crosley v. Davis*, 426 F. Supp. 389 (E.D. Pa. 1977); *Jamison v. McCurrie*, 388 F. Supp. 990 (N.D. Ill. 1975); *Perry v. Linke*, 394 F. Supp. 323 (N.D. Ohio 1974); *Perzanowski v. Salvio*, 369 F. Supp. 223 (D. Conn. 1974); *Washington v. Brantley*, 352 F. Supp. 559 (M.D. Fla. 1972). Additionally, the type of claim necessary to invoke jurisdiction under Section 1331 is a constitutional deprivation and not a mere negligence tort action. The Court finds that the plaintiff herein has failed to allege facts sufficient to state a claim under Section 1331 for violation of a constitutional right.

The Court therefore finds that there is no federal claim against the defendant City of Tulsa, under either Section 1983 or under Section 1331. This Court will not accept pendent jurisdiction of the claim

against the City based upon the state statute, 76 O.S. § 6, when the federal claim has been dismissed. Aldinger v. Howard, 427 U.S. 1 (1976); United Mine Workers v. Gibbs, 338 U.S. 715 (1966).

Finally, the claim against the City of Tulsa is jurisdictionally defective in that plaintiff has failed to satisfy the 6-month filing requirement of 11 O.S. § 1756. That statute requires any person with a claim against a municipality to commence the action within six (6) months after giving the required 30-day notice of claim to the City. The plaintiff herein gave the 30-day notice of claim, but failed to commence this action within six months of that notice. The statute is explicit in stating that "[n]o action for any cause arising under this Act shall be maintained, unless such valid notice has been given and unless the action is commenced within six (6) months after such notice." Therefore, the claim against the City of Tulsa must be dismissed.

In their Motion to Dismiss, the individual defendants allege that the plaintiff has failed to allege damages under either Section 1983 or Section 1331, and that the plaintiff has failed to allege conduct of constitutional magnitude under Section 1331. The Court finds that it is without sufficient facts or information at this time to grant such a motion, and the Motion to Dismiss as to the individual defendants will be overruled at this time. Defendants are given 20 days from this date to plead or answer.

The Court also has under consideration the Motion to Strike plaintiff's prayer for award of attorney's fees under 42 U.S.C. § 1988. It is within the discretion of the Court to award attorney's fees in an action under 42 U.S.C. § 1983 when the circumstances warrant such recovery. Therefore, the Motion to Strike will be overruled at this time, subject to renewal at a later date.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss as to the defendant City of Tulsa should be and the same is hereby sustained.

IT IS FURTHER ORDERED that the Motion to Dismiss as to the individual defendants should be and the same is hereby overruled. These defendants are given twenty (20) days from this date to plead or answer.

IT IS FURTHER ORDERED that the Motion to Strike plaintiff's prayer for award of attorney's fees should be and the same is hereby overruled, subject to renewal at a later date.

ENTERED this 2<sup>nd</sup> day of September, 1977.

  
\_\_\_\_\_  
CHIEF UNITED STATES DISTRICT JUDGE



The Court finds that the Motion to Dismiss filed by the defendant City of Tulsa should be sustained on all of the four abovementioned grounds. It is now an established rule of law that a municipality is not a "person" within the meaning of 42 U.S.C. § 1983, and therefore is not a proper party defendant in this case under § 1983. City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973), reh. denied, 412 U.S. 963 (1973).

Plaintiff amended his complaint, seeking to invoke the jurisdiction of this Court against the City of Tulsa under 28 U.S.C. § 1331, by alleging that the City of Tulsa by its acts or omissions violated plaintiff's rights under the Fourteenth Amendment by negligently hiring and employing the individual defendant officers, by failing to enforce the internal regulation that the individual officers follow constitutional guidelines, by failing to train the individual officers with regard to constitutional rights, or by failing to establish departmental guidelines implementing constitutional rights. The weight of authority in cases similar to the one at hand is that the judiciary should not undertake to create a new and independent remedy directly under the Constitution when by so doing the legislative scheme would be subverted. Deference should be given to Congress' decision not to extend § 1983 liability to municipalities. Jones v. McElroy, 429 F. Supp. 848 (E.D. Pa. 1977); Crosley v. Davis, 426 F. Supp. 389 (E.D. Pa. 1977); Jamison v. McCurrie, 388 F. Supp. 990 (N.D. Ill. 1975); Perry v. Linke, 394 F. Supp. 323 (N.D. Ohio 1974); Perzanowski v. Salvio, 369 F. Supp. 223 (D. Conn. 1974); Washington v. Brantley, 352 F. Supp. 559 (M.D. Fla. 1972). Additionally, the type of claim necessary to invoke jurisdiction under Section 1331 is a constitutional deprivation and not a mere negligence tort action. The Court finds that the plaintiff herein has failed to allege facts sufficient to state a claim under Section 1331 for violation of a constitutional right.

The Court therefore finds that there is no federal claim against the defendant City of Tulsa, under either Section 1983 or under Section 1331. This Court will not accept pendent jurisdiction of the claim

against the City based upon the state statute, 76 O.S. § 6, when the federal claim has been dismissed. *Aldinger v. Howard*, 427 U.S. 1 (1976); *United Mine Workers v. Gibbs*, 338 U.S. 715 (1966).

Finally, the claim against the City of Tulsa is jurisdictionally defective in that the plaintiff has failed to satisfy the 30-day claim requirement of 11 O.S. § 1756. That statute requires any person with a claim against a municipality to present to the governing body of the municipality within 30 days after the alleged loss or injury, a written notice stating the time, place and circumstances thereof, and the amount of compensation or other relief demanded. The statute is explicit in stating that "[n]o action for any cause arising under this Act shall be maintained, unless such valid notice has been given and unless the action is commenced within six (6) months after such notice." In the instant action, the defendant City of Tulsa has no records indicating that the plaintiff at any time prior to the commencement of these proceedings filed a claim with the City of Tulsa involving the subject matter presently before this Court. Further, the complaint in this action was not filed for over ten months subsequent to the alleged incident of June 3, 1976. Therefore, the claim against the City of Tulsa must be dismissed.

In their Motion to Dismiss, the individual defendants allege that the plaintiff has failed to allege damages under either Section 1983 or Section 1331, and that the plaintiff has failed to allege conduct of constitutional magnitude under Section 1331. The Court finds that it is without sufficient facts or information at this time to grant such a motion, and the Motion to Dismiss as to the individual defendants will be overruled at this time. Defendants are given 20 days from this date to plead or answer.

The Court also has under consideration the Motion to Strike plaintiff's prayer for award of attorney's fees under 42 U.S.C. § 1988. It is within the discretion of the Court to award attorney's fees in an action under 42 U.S.C. § 1983 when the circumstances warrant such recovery. Therefore, the Motion to Strike will be overruled at this time, subject to renewal at a later date.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss as to the defendant City of Tulsa should be and the same is hereby sustained.

IT IS FURTHER ORDERED that the Motion to Dismiss as to the individual defendants should be and the same is hereby overruled. These defendants are given twenty (20) days from this date to plead or answer.

IT IS FURTHER ORDERED that the Motion to Strike plaintiff's prayer for award of attorney's fees should be and the same is hereby overruled, subject to renewal at a later date.

ENTERED this 2<sup>nd</sup> day of September, 1977.

Alan F. Bonar  
CHIEF UNITED STATES DISTRICT JUDGE



to the Tulsa Police Headquarters of the City Police Department located at 600 Civic Center Street, City of Tulsa, Oklahoma, and caused him to be there imprisoned. Plaintiff contends that the acts or omissions of the individual defendants herein were done in the defendants' official capacities, were performed under color of the statutes and ordinances of the City of Tulsa and the State of Oklahoma, and that the defendants were the servants, agents, and employees of the City of Tulsa, so that their acts are imputed to the defendant City of Tulsa. Plaintiff alleges damages in excess of this Court's jurisdictional requirement, and also prays this Court for an award of attorney's fees.

Defendants move this Court to dismiss the complaint against each of them on the ground that the complaint fails to state any act or omissions on the part of the defendants which would confer jurisdiction. The Court will deal first with the motion of the City of Tulsa, and then with the motion of the individual defendants:

In the motion to dismiss and the amended motion to dismiss, the defendant City of Tulsa asserts that this Court lacks jurisdiction of the defendant City for the following reasons:

- 1) That the City of Tulsa, Oklahoma is a municipal corporation and political subdivision of the State of Oklahoma, and is not a "person" within the purview of 42 U.S.C. § 1983 and is therefore not a proper party defendant;
- 2) That the plaintiff has failed to plead facts sufficient to invoke this Court's jurisdiction against the defendant City of Tulsa under 28 U.S.C. § 1331;
- 3) That the City of Tulsa, Oklahoma is a municipal corporation and a political subdivision of the State of Oklahoma, and is not subject to pendent jurisdiction in an action brought pursuant to the provisions of 42 U.S.C. § 1983 or under 28 U.S.C. § 1331; and
- 4) That the plaintiff has failed to satisfy the jurisdictional prerequisites set forth in the Oklahoma Governmental Tort Liability Act, 11 O.S. § 1756.

The Court finds that the Motion to Dismiss filed by the defendant City of Tulsa should be sustained on all of the four abovementioned grounds. It is now an established rule of law that a municipality is not a "person" within the meaning of 42 U.S.C. § 1983, and therefore is not a proper party defendant in this case under § 1983. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973), reh. denied, 412 U.S. 963 (1973).

Plaintiff amended his complaint, seeking to invoke the jurisdiction of this Court against the City of Tulsa under 28 U.S.C. § 1331, by alleging that the City of Tulsa by its acts or omissions violated plaintiff's rights under the Fourteenth Amendment by negligently hiring and employing the individual defendant officers, by failing to enforce the internal regulation that the individual officers follow constitutional guidelines, by failing to train the individual officers with regard to constitutional rights, or by failing to establish departmental guidelines implementing constitutional rights. The weight of authority in cases similar to the one at hand is that the judiciary should not undertake to create a new and independent remedy directly under the Constitution when by so doing the legislative scheme would be subverted. Deference should be given to Congress' decision not to extend § 1983 liability to municipalities. *Jones v. McElroy*, 429 F. Supp. 848 (E.D. Pa. 1977); *Crosley v. Davis*, 426 F. Supp. 389 (E.D. Pa. 1977); *Jamison v. McCurrie*, 388 F. Supp. 990 (N.D. Ill. 1975); *Perry v. Linke*, 394 F. Supp. 323 (N.D. Ohio 1974); *Perzanowski v. Salvio*, 369 F. Supp. 223 (D. Conn. 1974); *Washington v. Brantley*, 352 F. Supp. 559 (M.D. Fla. 1972). Additionally, the type of claim necessary to invoke jurisdiction under Section 1331 is a constitutional deprivation and not a mere negligence tort action. The Court finds that the plaintiff herein has failed to allege facts sufficient to state a claim under Section 1331 for violation of a constitutional right.

The Court therefore finds that there is no federal claim against the defendant City of Tulsa, under either Section 1983 or under Section 1331. This Court will not accept pendent jurisdiction of the claim

against the City based upon the state statute, 76 O.S. § 6, when the federal claim has been dismissed. *Aldinger v. Howard*, 427 U.S. 1 (1976); *United Mine Workers v. Gibbs*, 338 U.S. 715 (1966).

Finally, the claim against the City of Tulsa is jurisdictionally defective in that the plaintiff has failed to satisfy the 30-day claim requirement of 11 O.S. § 1756. That statute requires any person with a claim against a municipality to present to the governing body of the municipality within 30 days after the alleged loss or injury, a written notice stating the time, place and circumstances thereof, and the amount of compensation or other relief demanded. The statute is explicit in stating that "[n]o action for any cause arising under this Act shall be maintained, unless such valid notice has been given . . . ." In the instant action, plaintiff complains of the alleged deprivations of his civil rights on December 19, 1976. The written claim was not received by the defendant City of Tulsa until January 19, 1977, thirty-one (31) days from the date of the supposed injury. Therefore, the claim against the City of Tulsa must be dismissed.

In their Motion to Dismiss, the individual defendants allege that the plaintiff has failed to allege damages under either Section 1983 or Section 1331, and that the plaintiff has failed to allege conduct of constitutional magnitude under Section 1331. The Court finds that it is without sufficient facts or information at this time to grant such a motion, and the Motion to Dismiss as to the individual defendants will be overruled at this time. Defendants are given 20 days from this date to plead or answer.

The Court also has under consideration the Motion to Strike plaintiff's prayer for award of attorney's fees under 42 U.S.C. § 1988. It is within the discretion of the Court to award attorney's fees in an action under 42 U.S.C. § 1983 when the circumstances warrant such recovery. Therefore, the Motion to Strike will be overruled at this time, subject to renewal at a later date.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss as to the defendant City of Tulsa should be and the same is hereby sustained.

IT IS FURTHER ORDERED that the Motion to Dismiss as to the individual defendants should be and the same is hereby overruled. These defendants are given twenty (20) days from this date to plead or answer.

IT IS FURTHER ORDERED that the Motion to Strike plaintiff's prayer for award of attorney's fees should be and the same is hereby overruled, subject to renewal at a later date.

ENTERED this 2<sup>nd</sup> day of September, 1977.

  
CHIEF UNITED STATES DISTRICT JUDGE



the defendant officers caused plaintiff to be carried in an automobile to the Tulsa Police Headquarters of the City Police Department located at 600 Civic Center Street, City of Tulsa, Oklahoma, and caused him to be there imprisoned. Plaintiff contends that the acts or omissions of the individual defendants herein were done in the defendants' official capacities, were performed under color of the statutes and ordinances of the City of Tulsa and the State of Oklahoma, and that the defendants were the servants, agents, and employees of the City of Tulsa, so that their acts are imputed to the defendant City of Tulsa. Plaintiff alleges damages in excess of this Court's jurisdictional requirement, and also prays this Court for an award of attorney's fees.

Defendants move this Court to dismiss the complaint against each of them on the ground that the complaint fails to state any act or omissions on the part of the defendants which would confer jurisdiction. The Court will deal first with the motion of the City of Tulsa, and then with the motion of the individual defendants:

In the motion to dismiss and the amended motion to dismiss, the defendant City of Tulsa asserts that this Court lacks jurisdiction of the defendant City for the following reasons:

- 1) That the City of Tulsa, Oklahoma is a municipal corporation and political subdivision of the State of Oklahoma, and is not a "person" within the purview of 42 U.S.C. § 1983 and is therefore not a proper party defendant;
- 2) That the plaintiff has failed to plead facts sufficient to invoke this Court's jurisdiction against the defendant City of Tulsa under 28 U.S.C. § 1331;
- 3) That the City of Tulsa, Oklahoma is a municipal corporation and a political subdivision of the State of Oklahoma, and is not subject to pendent jurisdiction in an action brought pursuant to the provisions of 42 U.S.C. § 1983 or under 28 U.S.C. § 1331; and
- 4) That the plaintiff has failed to satisfy the jurisdictional prerequisites set forth in the Oklahoma Governmental Tort Liability Act, 11 O.S. § 1756.

The Court finds that the Motion to Dismiss filed by the defendant City of Tulsa should be sustained on all of the four abovementioned grounds. It is now an established rule of law that a municipality is not a "person" within the meaning of 42 U.S.C. § 1983, and therefore is not a proper party defendant in this case under § 1983. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973), reh. denied, 412 U.S. 963 (1973).

Plaintiff amended his complaint, seeking to invoke the jurisdiction of this Court against the City of Tulsa under 28 U.S.C. § 1331, by alleging that the City of Tulsa by its acts or omissions violated plaintiff's rights under the Fourteenth Amendment by negligently hiring and employing the individual defendant officers, by failing to enforce the internal regulation that the individual officers follow constitutional guidelines, by failing to train the individual officers with regard to constitutional rights, or by failing to establish departmental guidelines implementing constitutional rights. The weight of authority in cases similar to the one at hand is that the judiciary should not undertake to create a new and independent remedy directly under the Constitution when by so doing the legislative scheme would be subverted. Deference should be given to Congress' decision not to extend § 1983 liability to municipalities. *Jones v. McElroy*, 429 F. Supp. 848 (E.D. Pa. 1977); *Crosley v. Davis*, 426 F. Supp. 389 (E.D. Pa. 1977); *Jamison v. McCurrie*, 388 F. Supp. 990 (N.D. Ill. 1975); *Perry v. Linke*, 394 F. Supp. 323 (N.D. Ohio 1974); *Perzanowski v. Salvio*, 369 F. Supp. 223 (D. Conn. 1974); *Washington v. Brantley*, 352 F. Supp. 559 (M.D. Fla. 1972). Additionally, the type of claim necessary to invoke jurisdiction under Section 1331 is a constitutional deprivation and not a mere negligence tort action. The Court finds that the plaintiff herein has failed to allege facts sufficient to state a claim under Section 1331 for violation of a constitutional right.

The Court therefore finds that there is no federal claim against the defendant City of Tulsa, under either Section 1983 or under Section 1331. This Court will not accept pendent jurisdiction of the claim

against the City based upon the state statute, 76 O.S. § 6, when the federal claim has been dismissed. *Aldinger v. Howard*, 427 U.S. 1 (1976); *United Mine Workers v. Gibbs*, 338 U.S. 715 (1966).

Finally, the claim against the City of Tulsa is jurisdictionally defective in that plaintiff has failed to satisfy the 6-month filing requirement of 11 O.S. § 1756. That statute requires any person with a claim against a municipality to commence the action within six (6) months after giving the required 30-day notice of claim to the City. The plaintiff herein gave the 30-day notice of claim, but failed to commence this action within six months of that notice. The notice of claim was filed with the City of Tulsa on May 3, 1976, and this action was not commenced until April 11, 1977 -- more than ten months following the written notice of claim. The statute is explicit in stating that "[n]o action for any cause arising under this Act shall be maintained, unless such valid notice has been given and unless the action is commenced within six (6) months after such notice." Therefore, the claim against the City of Tulsa must be dismissed.

In their Motion to Dismiss, the individual defendants allege that the plaintiff has failed to allege damages under either Section 1983 or Section 1331, and that the plaintiff has failed to allege conduct of constitutional magnitude under Section 1331. The Court finds that it is without sufficient facts or information at this time to grant such a motion, and the Motion to Dismiss as to the individual defendants will be overruled at this time. Defendants are given 20 days from this date to plead or answer.

The Court also has under consideration the Motion to Strike plaintiff's prayer for award of attorney's fees under 42 U.S.C. § 1988. It is within the discretion of the Court to award attorney's fees in an action under 42 U.S.C. § 1983 when the circumstances warrant such recovery. Therefore, the Motion to Strike will be overruled at this time, subject to renewal at a later date.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss as to the defendant City of Tulsa should be and the same is hereby sustained.

IT IS FURTHER ORDERED that the Motion to Dismiss as to the individual defendants should be and the same is hereby overruled. These defendants are given twenty (20) days from this date to plead or answer.

IT IS FURTHER ORDERED that the Motion to Strike plaintiff's prayer for award of attorney's fees should be and the same is hereby overruled, subject to renewal at a later date.

ENTERED this 2<sup>nd</sup> day of September, 1977.

  
CHIEF UNITED STATES DISTRICT JUDGE



alleges that, at the conclusion of these events, without probable cause, the individual defendants caused plaintiff to be carried in an automobile to the Tulsa Police Headquarters of the City Police Department, located at 600 Civic Center Street, Tulsa, Oklahoma and caused him to be there imprisoned. Plaintiff contends that the acts or omissions of the individual defendants herein were done in the defendants' official capacities, were performed under color of the statutes and ordinances of the City of Tulsa and the State of Oklahoma, and that the defendants were the servants, agents, and employees of the City of Tulsa, so that their acts are imputed to the defendant City of Tulsa. Plaintiff alleges damages in excess of this Court's jurisdictional requirement, and also prays this Court for an award of attorney's fees.

Defendants move this Court to dismiss the complaint against each of them on the ground that the complaint fails to state any act or omissions on the part of the defendants which would confer jurisdiction. The Court will deal first with the motion of the City of Tulsa, and then with the motion of the individual defendants:

In the motion to dismiss and the amended motion to dismiss, the defendant City of Tulsa asserts that this Court lacks jurisdiction of the defendant City for the following reasons:

- 1) That the City of Tulsa, Oklahoma is a municipal corporation and political subdivision of the State of Oklahoma, and is not a "person" within the purview of 42 U.S.C. § 1983 and is therefore not a proper party defendant;
- 2) That the plaintiff has failed to plead facts sufficient to invoke this Court's jurisdiction against the defendant City of Tulsa under 28 U.S.C. § 1331;
- 3) That the City of Tulsa, Oklahoma is a municipal corporation and a political subdivision of the State of Oklahoma, and is not subject to pendent jurisdiction in an action brought pursuant to the provisions of 42 U.S.C. § 1983 or under 28 U.S.C. § 1331; and
- 4) That the plaintiff has failed to satisfy the jurisdictional prerequisites set forth in the Oklahoma Governmental Tort Liability Act, 11 O.S. § 1756.

The Court finds that the Motion to Dismiss filed by the defendant City of Tulsa should be sustained on all of the four abovementioned grounds. It is now an established rule of law that a municipality is not a "person" within the meaning of 42 U.S.C. § 1983, and therefore is not a proper party defendant in this case under § 1983. City of Kenosha v. Bruno, 412 U.S. 507 (1973); Moor v. County of Alameda, 411 U.S. 693 (1973), reh. denied, 412 U.S. 963 (1973).

Plaintiff amended his complaint, seeking to invoke the jurisdiction of this Court against the City of Tulsa under 28 U.S.C. § 1331, by alleging that the City of Tulsa by its acts or omissions violated plaintiff's rights under the Fourteenth Amendment by negligently hiring and employing the individual defendant officers, by failing to enforce the internal regulation that the individual officers follow constitutional guidelines, by failing to train the individual officers with regard to constitutional rights, or by failing to establish departmental guidelines implementing constitutional rights. The weight of authority in cases similar to the one at hand is that the judiciary should not undertake to create a new and independent remedy directly under the Constitution when by so doing the legislative scheme would be subverted. Deference should be given to Congress' decision not to extend § 1983 liability to municipalities. Jones v. McElroy, 429 F. Supp. 848 (E.D. Pa. 1977); Crosley v. Davis, 426 F. Supp. 389 (E.D. Pa. 1977); Jamison v. McCurrie, 388 F. Supp. 990 (N.D. Ill. 1975); Perry v. Linke, 394 F. Supp. 323 (N.D. Ohio 1974); Perzanowski v. Salvio, 369 F. Supp. 223 (D. Conn. 1974); Washington v. Brantley, 352 F. Supp. 559 (M.D. Fla. 1972). Additionally, the type of claim necessary to invoke jurisdiction under Section 1331 is a constitutional deprivation and not a mere negligence tort action. The Court finds that the plaintiff has failed to allege facts sufficient to state a claim under Section 1331 for violation of a constitutional right.

The Court therefore finds that there is no federal claim against the defendant City of Tulsa, under either Section 1983 or under Section 1331. This Court will not accept pendent jurisdiction of the claim

against the City based upon the state statute, 76 O.S. § 6, when the federal claim has been dismissed. *Aldinger v. Howard*, 427 U.S. 1 (1976); *United Mine Workers v. Gibbs*, 338 U.S. 715 (1966).

Finally, the claim against the City of Tulsa is jurisdictionally defective in that plaintiff has failed to satisfy the 6-month filing requirement of 11 O.S. § 1756. That statute requires any person with a claim against a municipality to commence the action within six (6) months after giving the required 30-day notice of claim to the City. The plaintiff herein gave the 30-day notice of claim, but failed to commence this action within six months of that notice. The notice of claim was filed with the City of Tulsa on November 6, 1975, and this action was not commenced until April 11, 1977 -- more than a year and five months following the written notice of claim. The statute is explicit in stating that "[n]o action for any cause arising under this Act shall be maintained, unless such valid notice has been given and unless the action is commenced within six (6) months after such notice." Therefore, the claim against the City of Tulsa must be dismissed.

In their Motion to Dismiss, the individual defendants allege that the plaintiff has failed to allege damages under either Section 1983 or Section 1331, and that the plaintiff has failed to allege conduct of constitutional magnitude under Section 1331. The Court finds that it is without sufficient facts or information at this time to grant such a motion, and the Motion to Dismiss as to the individual defendants will be overruled at this time. Defendants are given 20 days from this date to plead or answer.

The Court also has under consideration the Motion to Strike plaintiff's prayer for award of attorney's fees under 42 U.S.C. § 1988. It is within the discretion of the Court to award attorney's fees in an action under 42 U.S.C. § 1983 when the circumstances warrant such recovery. Therefore, the Motion to Strike will be overruled at this time, subject to renewal at a later date.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss as to the defendant City of Tulsa should be and the same is hereby sustained.

IT IS FURTHER ORDERED that the Motion to Dismiss as to the individual defendants should be and the same is hereby overruled. These defendants are given twenty (20) days from this date to plead or answer.

IT IS FURTHER ORDERED that the Motion to Strike plaintiff's prayer for award of attorney's fees should be and the same is hereby overruled, subject to renewal at a later date.

ENTERED this 2<sup>nd</sup> day of September 1977.

  
CHIEF UNITED STATES DISTRICT JUDGE



City Police Department located at 600 Civic Center Street, Tulsa, Oklahoma, and caused her to be there imprisoned. Plaintiff further alleges that on her arrival at the Police Headquarters at approximately 8:00 p.m., she was booked into the jail by the defendant N.L. Thompson, over her protests that she was not intoxicated; that she was placed in a locked and barred jail cell in the Tulsa County Jail, and was there imprisoned for approximately 14 hours; that defendant Thompson abused his discretion; and that she was never brought before a judge, court, or magistrate; and that she was never able to make bail, post a bond, be released on her own recognizances, or on her attorney's recognizance, because she was being held on a public intoxication charge for 6 hours. Plaintiff contends that the acts of the individual defendants herein were done in the defendants' official capacities, were performed under color of the statutes and ordinances of the City of Tulsa and the State of Oklahoma, and that the defendants were the servants, agents, and employees of the City of Tulsa, so that their acts are imputed to the defendant City of Tulsa. Plaintiff alleges damages in excess of this Court's jurisdictional requirement, and also prays this Court for an award of attorney's fees.

Defendants move this Court to dismiss the complaint against each of them on the ground that the complaint fails to state any act or omissions on the part of the defendants which would confer jurisdiction. The Court will deal first with the motion of the City of Tulsa, and then with the motion of the individual defendants:

In the motion to dismiss and the amended motion to dismiss, the defendant City of Tulsa asserts that this Court lacks jurisdiction of the defendant City for the following reasons:

- 1) That the City of Tulsa, Oklahoma is a municipal corporation and a political subdivision of the State of Oklahoma, and is not a "person" within the purview of 42 U.S.C. § 1983 and is therefore not a proper party defendant;
- 2) That the plaintiff has failed to plead facts sufficient to invoke this Court's jurisdiction against the defendant City of Tulsa under 28 U.S.C. § 1331; and

3) That the City of Tulsa, Oklahoma is a municipal corporation and a political subdivision of the State of Oklahoma, and is not subject to pendent jurisdiction in an action brought pursuant to the provisions of 42 U.S.C. § 1983 or under 28 U.S.C. § 1331.

The Court finds that the Motion to Dismiss filed by the defendant City of Tulsa should be sustained on all of the three abovementioned grounds. It is now an established rule of law that a municipality is not a "person" within the meaning of 42 U.S.C. § 1983, and therefore is not a proper party defendant in this case under § 1983. *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Moor v. County of Alameda*, 411 U.S. 693 (1973), reh. denied, 412 U.S. 963 (1973).

Plaintiff amended her complaint, seeking to invoke the jurisdiction of this Court against the City of Tulsa under 28 U.S.C. §1331, by alleging that the City of Tulsa by its acts or omissions violated plaintiff's rights under the Fourteenth Amendment by negligently hiring and employing the individual defendant officers, by failing to enforce the internal regulation that the individual officers follow constitutional guidelines, by failing to train the individual officers with regard to constitutional rights, or by failing to establish departmental guidelines implementing constitutional rights. The weight of authority in cases similar to the one at hand is that the judiciary should not undertake to create a new and independent remedy directly under the Constitution when by so doing the legislative scheme would be subverted. Deference should be given to Congress' decision not to extend § 1983 liability to municipalities. *Jones v. McElroy*, 429 F. Supp. 848 (E.D. Pa. 1977); *Crosley v. Davis*, 426 F. Supp. 389 (E.D. Pa. 1977); *Jamison v. McCurrie*, 388 F. Supp. 990 (N.D. Ill. 1975); *Perry v. Linke*, 394 F. Supp. 323 (N.D. Ohio 1974); *Perzanowski v. Salvio*, 369 F. Supp. 223 (D. Conn. 1974); *Washington v. Brantley*, 352 F. Supp. 559 (M.D. Fla. 1972). Additionally, the type of claim necessary to invoke jurisdiction under Section 1331 is a constitutional deprivation and not a mere negligence tort action. The Court finds that the plaintiff herein has failed to allege facts sufficient to state a claim under Section 1331 for violation of a constitutional right.

The Court therefore finds that there is no federal claim against the defendant City of Tulsa, under either Section 1983 or under Section 1331. This Court will not accept pendent jurisdiction of the claim against the City based upon the state statute, 76 O.S. § 6, when the federal claim has been dismissed. *Aldinger v. Howard*, 427 U.S. 1 (1976); *United Mine Workers v. Gibbs*, 338 U.S. 715 (1966). Therefore, the claim against the City of Tulsa must be dismissed.

In their Motion to Dismiss, the individual defendants allege that the plaintiff has failed to allege damages under either Section 1983 or Section 1331, and that the plaintiff has failed to allege conduct of constitutional magnitude under Section 1331. The Court finds that it is without sufficient facts or information at this time to grant such a motion, and the Motion to Dismiss as to the individual defendants will be overruled at this time. Defendants are given 20 days from this date to plead or answer.

The Court also has under consideration the Motion to Strike plaintiff's prayer for award of attorney's fees under 42 U.S.C. § 1988. It is within the discretion of the Court to award attorney's fees in an action under 42 U.S.C. § 1983 when the circumstances warrant such recovery. Therefore, the Motion to Strike will be overruled at this time, subject to renewal at a later date.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss as to the defendant City of Tulsa should be and the same is hereby sustained.

IT IS FURTHER ORDERED that the Motion to Dismiss as to the individual defendants should be and the same is hereby overruled. These defendants are given twenty (20) days from this date to plead or answer.

IT IS FURTHER ORDERED that the Motion to Strike plaintiff's prayer for award of attorney's fees should be and the same is hereby overruled, subject to renewal at a later date.

ENTERED this 2<sup>nd</sup> day of September, 1977.

  
CHIEF UNITED STATES DISTRICT JUDGE