

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

FILED

JACK CAMPBELL,

Plaintiff,

vs.

FABSCO, INC., an Oklahoma  
corporation, and GENERAL  
AMERICAN LIFE INSURANCE  
COMPANY OF ST. LOUIS,  
MISSOURI,

Defendants.

)  
)  
)  
)  
)  
)  
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)  
)  
)  
)  
)

DEC 30 1977

No. 77-C-481

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

ORDER

UPON plaintiff's Application to Dismiss Without Prejudice, for leave  
and cause of action  
to discontinue with this action, it is ordered that the complaint/be dismissed  
without prejudice, with costs to plaintiff.

DATED this 30<sup>th</sup> day of December, 1977.

*Allen E. Barrow*

JUDGE OF THE U. S. DISTRICT COURT.

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

LEONARD MCFARLAND, )  
 )  
 Plaintiff, )  
 )  
 vs. ) No. 77-C-160-C  
 )  
 I.T.T. CONTINENTAL BAKING )  
 COMPANY, INC., )  
 )  
 Defendant. )

**FILED**

DEC 30 1977

O R D E R

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

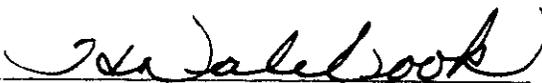
The Court has before it for consideration the motion of the plaintiff for reconsideration of the Court's order of October 12, 1977, in which the Court sustained the defendant's motion for summary judgment. Plaintiff did not respond to defendant's motion for summary judgment, and he now asserts that he did not receive the evidence needed to respond to the motion until October 13, 1977. He now asks the Court to reconsider its order in light of this "new evidence." The motion for reconsideration was filed on November 14, 1977.

There is no provision in the Federal Rules of Civil Procedure for a motion for reconsideration, and the Court will therefore treat plaintiff's motion as one for a new trial pursuant to Rule 59. That rule provides that such a motion must be filed not later than ten (10) days after the entry of the judgment. Plaintiff's motion was not filed within this ten-day period, and this Court has no authority to enlarge the period of time required for the filing of a motion pursuant to Rule 59. Fairway Center Corporation v. U.I.P. Corporation, 491 F.2d 1092 (8th Cir. 1974); Nugent v. Yellow Cab Company, 295 F.2d 794 (7th Cir. 1961). Rule 60(b) provides that the Court may relieve a party from a final judgment on the ground of newly discovered evidence, but only such evidence ". . . which by due diligence could not have been discovered in time to move for a new trial

under Rule 59(b)." Plaintiff has stated that he discovered the "new evidence" on October 13, 1977, one day after the judgment was entered against him. Consequently, such evidence was discovered in time to move for a new trial under Rule 59(b), and the Court cannot consider plaintiff's motion on its merits. However, the Court has reviewed the affidavit furnished by plaintiff in support of his motion and is convinced that even if it had the power to consider plaintiff's motion, such motion would be overruled. Under the circumstances of this case, the Court's order of October 12, 1977 was an appropriate one.

For the foregoing reasons, plaintiff's motion for reconsideration is hereby overruled.

It is so Ordered this 30<sup>th</sup> day of December, 1977.

  
H. DALE COOK  
United States District Judge



Having carefully reviewed the petition, response, and complete file of the State proceedings, including the transcripts of the preliminary hearing and trial in CRF-72-886, the Court being fully advised in the premises finds:

The only issue properly before this Court by exhaustion of State remedies is the first one wherein Petitioner seeks this Court to direct that he be provided transcripts of his State trials so that he may perfect additional appeals. This the Court, on the present State of the record based on conclusory allegations supported by no facts, declines to do. The Oklahoma Court of Criminal Appeals in its Order of March 14, 1975, filed March 15, 1975, clearly informed Petitioner:

"Petitioner is advised that this order is not in derogation of his right to proceed under the Post Conviction Procedure Act, 22 O.S., § 1080, et seq., and that he may proceed to challenge each conviction by filing in the District Court a separate application for Post Conviction Relief stating with particularity the grounds of his collateral attack, that such grounds fall within the provisions of the Post Conviction Procedure Act, and specifying with reasonable particularity which portions of the trial transcripts tend to support those allegations. Upon such showing he may seek an order of the District Court granting him, at public expense, a transcript of those specific portions of the trial proceedings which support his allegations."

This Petitioner has failed to do, and he may not by-pass adequate and available State remedies. He may not obtain transcripts and Court records without payment therefore to comb the records for possible errors to use in proposed or prospective litigation. See, Sides v. Tinsley, 333 F.2d 1002, 1003 (10th Cir. 1964); Hines v. Baker, 422 F.2d 1002, 1006 (10th Cir. 1970); Jackson v. Turner, 442 F.2d 1303 (10th Cir. 1971).

On the two remaining conclusory issues, Petitioner has failed to exhaust State remedies by direct appeal and he has not availed himself of the State of Oklahoma post-conviction procedure act, 22 O.S.A. § 1080, et seq.

Until Petitioner has availed himself of the adequate and available procedures through the highest State Court, his State remedies are not exhausted and his petition to this Court is premature. No principle in the realm of Federal habeas corpus is better settled than that State remedies must be exhausted. Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U. S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U. S. 944 (1973). Further, the probability of success is not the standard to determine whether a matter should

first be determined by the State Courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971). No hearing herein is at this time required and the petition should be denied, without prejudice, and the case dismissed.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Allen Ray Livingston be and it is hereby denied, without prejudice, and the case is dismissed.

Dated this 30<sup>th</sup> day of December, 1977, at Tulsa, Oklahoma.

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

JBW:mw  
12/29/77

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

FILED

DEC 30 1977 NO

Jack C. Silver, Clerk  
U. S. DISTRICT COURT  
No. 77-C-491-B

BASF SYSTEMS DIVISION OF BASF )  
WYANDOTTE CORPORATION, )  
a corporation, )  
  
Plaintiff, )  
  
vs. )  
  
DATA PROCESSING SERVICES, INC., )  
a corporation, )  
  
Defendant. )

JOURNAL ENTRY OF JUDGMENT

This matter comes on for hearing on this 30  
day of December, 1977, on motion of Plaintiff for  
default judgment pursuant to Rule 55 of the Federal Rules of  
Civil Procedure. Plaintiff filed a complaint in this action on  
November 23, 1977, and the service of the summons and complaint  
was had on Defendant as required by law. Defendant has defaulted  
in that he has not answered the complaint herein on file and the  
time to answer such complaint has expired. The Court, having  
examined the file herein and being fully advised in the premises  
finds that Plaintiff is entitled to recover damages from Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by  
the Court that Plaintiff recover from Defendant the sum of  
\$16,891.44 with interest thereon at the rate of 10% per annum  
from date of judgment until paid, together with an attorney's fee  
in the amount of \$4,000.00 and all costs of this action as taxed  
by the Clerk of this Court.

Dated this 30 day of December, 1977.

*Allen E. Bennett*

UNITED STATES DISTRICT JUDGE

LAW OFFICES  
UNGERMAN,  
UNGERMAN,  
MARVIN,  
WEINSTEIN &  
GLASS  
  
SIXTH FLOOR  
WRIGHT BUILDING  
TULSA, OKLAHOMA

**FILED**

DEC 11 1977

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

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

Robert H. Mitchell, #90293	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 77-C-193-B
	)	
Richard Crisp, Warden, et al.	)	
	)	
Respondents.	)	

O R D E R

This is a proceeding pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Petitioner Robert H. Mitchell. He is confined in the Oklahoma State Penitentiary, McAlester, Oklahoma, pursuant to conviction by jury of first degree burglary in Case No. CRF-75-151 in the District Court of Tulsa County, Tulsa, Oklahoma, and sentence to 18 years imprisonment.

Petitioner presents to this Court as grounds for his petition that he is incarcerated in violation of his rights guaranteed by the Constitution of the United States in that he was denied effective assistance of counsel and that there was insufficient evidence to support his conviction. These issues were presented to the State Courts by direct appeal, Case No. F-75-701, wherein the Oklahoma Court of Criminal Appeals affirmed the conviction. Mitchell v. State, Okl. Cr., 549 P.2d 96 (1976). Also, Petitioner filed an application for post-conviction relief which was denied by Order dated October 14, 1976, of the District Court of Tulsa County, and on appeal the Oklahoma Court of Criminal Appeals affirmed the District Court's Order, Case. No. PC-76-857. Therefore, Petitioner's State remedies have been exhausted.

The Court has carefully reviewed the petition, response, files in the State proceedings including the transcripts of the preliminary

hearing and trial challenged in the instant habeas corpus proceeding. Therefrom, being fully advised in the premises, the Court finds that an evidentiary hearing is not required and the petition for writ of habeas corpus should be denied and the case dismissed.

Petitioner's allegation that he was denied effective assistance of counsel is without merit. In Ellis v. State of Oklahoma, 430 F.2d 1352, 1356 (10th Cir. 1970), cert. denied, 401 U.S. 1010 (1971), cited with approval in Johnson v. United States, 485 F.2d 240 (10th Cir. 1973), the Court stated:

"The burden on appellant to establish his claim of ineffective assistance of counsel is heavy. Neither hindsight nor success is the measure for determining adequacy of legal representation. '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 vs. United States (10th Cir. 1963), 314 F.2d 868; Williams vs. Beto, 354 F.2d 698, 704 (5th Cir. 1965)."

See also Gillihan v. Rodriguez, 551 F.2d 1182 (10th Cir. 1972); Linebarger v. State of Oklahoma, 404 F.2d 1092 (10th Cir. 1968), cert. denied, 394 U.S. 938 (1969). Mistakes in judgment or trial practice by the defense counsel do not deprive the accused of constitutional rights and are not reviewable in federal habeas corpus proceedings. Pierce v. Page, 352 F.2d 534 (10th Cir. 1966). Nor do mistakes in strategy render the assistance of counsel ineffective in the constitutional sense. Frاند v. United States, 301 F.2d 102 (10th Cir. 1962). Review of the record conclusively shows that there is no indication of incompetence on the part of petitioner's attorney rendering the trial a farce, mockery of justice, or shocking to the conscience of this Court.

Petitioner asserts in his second allegation that the evidence against him was hearsay and insufficient to sustain a conviction. Alleged insufficiency of evidence is not reviewable by habeas corpus in Federal Courts. Sufficiency of the evidence to support a state

conviction raises no federal constitutional question. Capes v. State of Oklahoma, 412 F. Supp. 1111 (W.D. Okl. 1975). The sufficiency of the evidence to sustain a conviction is not subject to review in federal habeas corpus unless the conviction is so devoid of evidentiary support as to raise a due process issue. Johnson v. Turner, 429 F.2d 1152 (10th Cir. 1970); Mathis v. Colorado, 425 F.2d 1165 (10th Cir. 1970). When this same issue has been presented to the Oklahoma Court of Criminal Appeals and found to be without merit, in which this Court concurs, it is not incumbent on this Court to make an additional finding on this issue. The sole constitutional question is whether the conviction rests upon any evidence at all, and this court, after a thorough review of the record, finds that petitioner's conviction does rest upon the evidence presented at trial.

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

Dated this 30<sup>th</sup> day of December, 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

**FILED**

**DEC 30 1977**

JOHN D. MAXWELL, )  
)  
Plaintiff, )  
)  
v. )  
)  
THE WILLIAMS COMPANIES, and )  
subsidiary thereof, AGRICO )  
CHEMICAL COMPANY and ROY )  
SPACE, )  
)  
Defendants. )

No. 76-C-596-B

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

ORDER

This action came on for trial on December 15, 1977 before the United States Magistrate after previous agreement between the parties that the matter be referred to the United States Magistrate as Special Master pursuant to the provisions of 28 U.S.C. § 636(b)(2), Rule 53 of the Federal Rules of Civil Procedure and the provisions of Miscellaneous Order M-128 and Rule 34 of the Rules of this Court. Plaintiff appeared through his counsel, Charlie Phipps, Jr. and Defendants appeared through their counsel, J. Patrick Cremin. Plaintiff requested leave to file a motion to Dismiss the action. Defendants did not offer objection thereto, provided that the action be dismissed with prejudice.

IT IS, THEREFORE, ORDERED that the above entitled *Cause of* ~~action~~ *and complaint are* and the same ~~is~~ hereby dismissed with prejudice as to all Defendants with all parties to bear their own costs incurred in the matter.

Dated this 30<sup>th</sup> day of December, 1977.

*Allen E. Barrow*  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA.

FILED

DEC 30 1977

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

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

JAMES C. BOONE, # 93623 )  
 )  
 Movant, )  
 )  
 v. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Respondent. )

No. 77-C-434 ✓  
No. 76-CR-113

ORDER

The Court has for consideration a motion pursuant to 28 U.S.C. § 2255 filed pro se by James C. Boone.

Movant is a prisoner at the Regional Treatment Center, Lexington, Oklahoma, pursuant to conviction and sentence in the District Court of Tulsa County, Oklahoma, in two cases, CRF-76-1205, possession of unlawful controlled drugs and CRF-76-1871, delivery of marijuana after former conviction of a felony. The sentence is ten years split sentence -- four years to be served in the penitentiary and six years to be served on probation in Case No. CRF-76-1205, and ten years split sentence -- four years to be served in the penitentiary and six years to be served on probation in Case No. CRF-76-1871, the sentence in CRF-76-1871 to run concurrently with the sentence in CRF-76-1205.

In this Federal Court, Movant entered a plea of guilty on the 9th day of September, 1976, to a one-count indictment charging possession with intent to distribute approximately 1700 secobarbital tablets, a Schedule II non-narcotic controlled substance, in violation of Title 21, United States Code, § 841(a)(1). He was sentenced November 3, 1976 to Two (2) Years imprisonment and a special parole term of Six (6) Years, to commence at the expiration of and run consecutive to any term imposed by the State Court.

Movant challenges his Federal conviction and sentence as being in violation of his rights as guaranteed by the Constitution of the United States upon the following grounds:

1. That he was "sentenced under the wrong statute, in that he was charged with two counts of violation of 21 U.S.C. sec. 841(a)(1) which is a violation of controlled substance in schedule 1 or 2 which a norctac (sic) druge.(sic) But the record reflects that he pled guilty to knowingly and with intention to sell and distribute 1,700 secobarbital a red downer type non-norctic (sic) drug. Therefore (sic) he should have been convicted sentenced and/or charged under Title 21 U.S.C. 841(1)(b)"
2. That he was never advised of his right to appeal the judgment and sentence nor that he had a right to have counsel appointed to perfect his appeal if he did not have funds with which to employ counsel.

Movant's first claim for relief is without merit. From his petition it appears that the defendant is confused in that he apparently assumes that he was sentenced under the provisions of Title 21, § 841(b)(1)(A). The sentence of the Court was less than the maximum sentence authorized under § 841(a)(1)(B). U. S. v. Rich, 518 F.2d 980, 986-987 (8th Cir. 1975); United States v. Simpson, 481 F.2d 582, 583 (5th Cir. 1973), Cert. Den., 414 U.S. 1095; United States v. Scales, 464 F.2d 371, 376 (6th Cir. 1972). The record in in this case shows conclusively that the defendant was indicted and convicted on his plea of guilty under the provisions of Title 21, § 841(a)(1) and that defendant was sentenced under the provisions of Title 21, 841(b)(1)(B).

Likewise, Movant's second claim for relief should be denied. Rule 32(a)(2) provides in part as follows:

"There shall be no duty on the Court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant."

The Court is only required to advise the defendant of his right to appeal in a case which has gone to trial on a plea of not guilty. Rule 32, Federal Rules of Criminal

Procedure; Barber v. United States, 427 F.2d 70 (10th Cir. 1970).

For the reasons stated herein, Movant's motion is denied.

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

  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

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

ROBERT STEVE LEPKE, #94536 )  
 )  
 ) Petitioner, )  
 )  
 ) v. )  
 )  
 ) RICHARD CRISP, WARDEN, )  
 ) ET AL., )  
 )  
 ) Respondents. )

No. 77-C-244-C

FILED

DEC 30 1977

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

ORDER

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 Washington County, State of Oklahoma in Case No. CRF-74-452, wherein petitioner was convicted by a jury of the offense of Robbery By Fear, and was sentenced to a term of eleven years in the custody of the Department of Corrections. A direct appeal was made to the Court of Criminal Appeals for the State of Oklahoma, Case No. F-76-359, which affirmed the judgment and sentence on January 24, 1977. Robert Steve Leppke v. State of Oklahoma, Okl. Cr., 559 P.2d 459 (1977). Petitioner filed a Petition for Rehearing on February 2, 1977, which was denied by the Court of Criminal Appeals for the State of Oklahoma by order dated February 8, 1977. Petitioner then filed an Application to Recall and Stay Mandate and Continue Bond Pending Review on Certiorari to the United States Supreme Court. On February 16, 1977, an Order Denying Application to Recall Mandate was issued by the Court of Criminal Appeals for the State of Oklahoma. Application by petitioner to the United States Supreme Court for a Writ of Certiorari was denied June 3, 1977.

The Court has reviewed the transcript of the petitioner's trial in state court, the record of the trial court and the pleadings, orders and opinions of the trial and appellate courts.

Petitioner demands his release from custody and as grounds therefor claims that he is being deprived of his liberty in violation of his rights under the Constitution of the United States of America. In particular, petitioner claims:

- 1) That the trial court should have suppressed the in court identification of the petitioner, due to improper pretrial identification of the petitioner.
- 2) That the trial court abused its discretion in overruling the petitioner's application for continuance based on the state's endorsement of an additional witness two days prior to trial.
- 3) That the accumulation of errors and irregularities in the trial, including improper conduct of the prosecutor, identification problems, denial of effective cross-examination and inconsistent statements, when considered as a whole, deprived the petitioner of a fair trial in violation of constitutional due process guarantees.
- 4) That he was denied a speedy trial.

The only issues raised in the direct state appeal of the petitioner's conviction were claims (1), (2) and (3) above. The fourth claim raised by the petitioner has 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 his 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, 44 L.Ed.2d 317, 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 (10th Cir. 1972). Moles v. State of Oklahoma, 384 F. Supp. 1148 (W.D. Okl. 1974).

Thus the issue raised by the petitioner in his fourth claim, having not been presented to the state courts, is not properly before this Court for adjudication and should be dismissed without prejudice. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970).

Additionally, for the reasons stated below, petitioner's first claim for relief should be denied. Petitioner asserts that the identification procedures were improper in that the identification was based upon photographs presented in such a way as to taint the identification; that the identification was a one-on-one identification while viewing petitioner through a one-way mirror; that identification was tainted because the offenders were wearing ski masks and clothes covering most of their bodies during the robbery; that the petitioner was identified in the court room as a result of the other identifications by body style, walk and shape of head; and that the identifications were made after prior statements of victims which were inconsistent.

The question of admissibility of evidence is not a matter for review in a federal habeas corpus proceeding. See, Schechter v. Waters, 199 F.2d 318 (10th Cir. 1952). The admissibility of the in-court identification complained of by the petitioner was an evidentiary question for the trial court. Mercado v. Massey, 536 F.2d 107 (5th Cir. 1976). Alleged errors in admission of evidence in State courts are cognizable only on direct appeal and not on collateral attack in habeas corpus proceedings. Ellis v. Raines, 294 P.2d 414 (10th Cir. 1961), cert. den. 368 U.S. 1,000, 82 S.Ct. 628, 7 L.Ed.2d 538; Cassell v. People of the State of Oklahoma, 373 F.Supp. 815 (E.D. Okla.1973);

Carrillo v. U.S., 332 F.2d 202 (10th Cir. 1964). The only question considered on an application for habeas corpus is whether the admission of evidence constituted a denial of due process. U.S., ex rel. Mertz v. State of New Jersey, 423 F.2d 537, 540 (3rd Cir. 1970); 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 on 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, 320 F.Supp. 824 (D.C. S.C. 1970).

In the instant case, the in-court identifications of the witnesses were admitted into evidence. On appeal, this evidence was determined to have been properly admitted in light of the totality of the surrounding circumstances. Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The pre-trial identification procedures challenged by petitioner were not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247, 1253 (1968); or were "so unnecessarily suggestive and conducive to irreparable mistaken identification that he [appellant] was denied due process of law." Stovall v. Denno, supra at 302. The in-court identifications complained of were not tainted by the pre-trial identification procedures and were of an independent origin, thus meeting the requirements set out in United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). Recognizing that the appropriate constitutional standard was the test expressed in Neil v.

Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 382, 34 L.Ed.2d 401, 411 (1972), and based upon a review of the record as a whole, the Court of Criminal Appeals concluded:

"[W]e find Mr. and Mrs. Richardson were in the presence of the defendant for about twenty minutes, during which time they testified they had ample time to observe his physical characteristics. Their testimony at trial was very specific. They also testified that their in-court identification was based upon their personal observations at the time of the robbery, not on the pre-trial identifications." Leppke, supra.

The Court further concluded that there was no "substantial likelihood of irreparable misidentification" in this case:

[B]ased on the long time the Richardsons had to observe the defendant and their detailed identification they gave at the trial. The photograph identification was conducted in an unprejudicial manner, and while the viewing in the police station through the one-way mirror perhaps should not have taken place, we view it as harmless error in light of all the other circumstances." Leppke, supra.

This Court has carefully reviewed the record in the instant case and agrees with the legal conclusions reached by the Oklahoma Court of Criminal Appeals.

In his second claim for relief the petitioner asserts that he was denied his right to effective cross-examination, due process of law, and a fair trial as a result of the trial court's denial of a continuance upon the endorsement of an additional witness by the State.

In Robinson v. State of Oklahoma, 404 F.Supp. 1168, 1171 (W.D. Okla. 1975) the Court held that no federal questions are presented by such claims and stated:

"There is no federal constitutional requirement for a list of witnesses to be furnished by the prosecution. See United States v. Hughes, 429 F.2d 1293 (CA10 1970). It was a matter of the trial court's discretion whether to grant a continuance. See United States v. Spoonhunter, 476 F.2d 1050 (CA10 1973). In Latham v. Crouse, 320 F.2d 120, 123 (CA10 1963), the Court stated:

"Further objections go to the denial of the motion of the local counsel, appointed to assist the original counsel, for a continuance, motion for second psychiatric examination, the instructions, and the closing argument of prosecution counsel. These were resolved by the Kansas Supreme

Court. Our examination of the record convinces us that none of these points relate to any constitutional rights. Habeas corpus may not be used for the review of claimed trial errors unrelated to basic constitutional rights."

Finally, petitioner claims that the accumulation of errors and irregularities in the trial, including improper conduct of the prosecutor, identification problems, denial of effective cross examination and inconsistent statements, when considered as a whole, deprived him of a fair trial under constitutional due process guarantees. In dealing with the question of the conduct of the prosecutor in this case, the Oklahoma Court of Criminal Appeals stated:

"The defendant's third assignment of error is that the prosecutor's conduct during the trial and his improper statements appealed to the passion and prejudice of the jury and so denied the defendant a fair and impartial trial. We disagree. Defendant points to the witness Vermeulen taking the Fifth Amendment while on the stand and argued this 'appealed to the passions and prejudice of the jury.' There is no evidence in the record indicating the prosecutor knew that the witness would plead the Fifth Amendment on the stand, so we cannot say he was guilty of misconduct. But even if the prosecutor had known, we have not been convinced that the witness' statement and the prosecutor's conduct 'influenced the verdict against the defendant.' Samples v. State, Okl.Cr., 337 P.2d 756 (1959).

"Counsel points to questioning of defendant's wife as to why she did not report to authorities the fact that the defendant had been in the club all during the night in question. The Court, on numerous occasions, has distinguished the right of an accused to remain silent from the assertion of that right as applied to third persons. See, Walker v. State, Okl.Cr., 550 P.2d 1339 (1976). Counsel points to comments in the closing argument of the prosecutor. However, no proper defense objections were made to the statements by the prosecutor and if proper objections are not made during the course of the trial, the defendant is deemed to have waived any right to raise his objections on appeal."

In Robinson, supra at 1172, Chief Judge Daugherty said:

"The issue in this type of proceeding, however, is not whether the actions of the district attorney were error but whether the conviction

of the petitioner was the result of an unfair trial in violation of the Fourteenth Amendment. Sampsell v. People of the State of California, 191 F.2d 721 (CA9 1951). It is only where criminal trials in state courts are conducted in such a manner as amounts to a disregard of that fundamental fairness essential to the very concept of justice that due process is offended and federal court interference is warranted. Chavez v. Dickson, 280 F.2d 727 (CA9 1960)."

See also Redford v. Smith, 543 F.2d 726 (10th Cir. 1976).

From a review of the record, it cannot be said that petitioner was denied a fair and impartial trial in violation of his constitutional rights.

Accordingly, for the reasons stated herein, the Petition for Writ of Habeas Corpus should be denied.

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



H. DALE COOK  
UNITED STATES DISTRICT JUDGE



the amount of \$265,107.73, plus interest accruing from September 17, 1966. On August 31, 1971, plaintiffs and the other beneficiaries of the estate paid the Government the sum of \$95,000.00. Of this amount, \$25,000.00 was applied against accrued interest, and \$70,000.00 was applied against the principal amount of the deficiency. Each of the plaintiffs claimed as a deduction on his 1971 income tax return his proportionate share of the interest paid. The District Director of Internal Revenue subsequently disallowed the deductions of the interest payments.

The defendant contends that the interest expense was not upon an indebtedness of the plaintiffs and, therefore, is not deductible pursuant to 26 U.S.C. § 163. Plaintiffs argue that the estate tax deficiency was their personal indebtedness, under both federal and state law, and therefore properly deductible under § 163.

Title 26 U.S.C. § 163 provides in pertinent part:

"(a) General Rule -- There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness."

Under this statute, the interest deduction may not be taken unless the interest was owed on an indebtedness of the one seeking the deduction. United States v. Norton, 250 F.2d 902 (5th Cir. 1958); Nunan v. Green, 146 F.2d 352 (8th Cir. 1945). Plaintiffs appear to argue that 26 U.S.C. § 6901 imposes personal liability upon them for the estate taxes in question. That statute provides, in pertinent part, as follows:

"(a) Method of collection. -- The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, paid, and collected in the same manner and subject to the same provisions and limitations as in the case of the taxes with respect to which the liabilities were incurred:

(1) Income, estate, and gift taxes.--

(A) Transferees.-- The liability, at law or in equity, of a transferee of property --

(ii) of a decedent in the case of a tax imposed by chapter 11 (relating to estate taxes) . . ."

However, this section imposes no substantive personal liability on the transferee, but merely provides a remedy for enforcing the existing liability at law or in equity of transferees of property. United States v. Floersch, 276 F.2d 714 (10th Cir. 1960); Nunan v. Green, supra; Koch v. United States, 138 F.2d 850 (10th Cir. 1943). For purposes of § 6901, the existence and extent of personal liability must be determined by state law. Commissioner v. Stern, 357 U.S. 39, 78 S.Ct. 1047, 2 L.Ed.2d 1126 (1958).

In Oklahoma, liability for the debts of a decedent is governed by 58 O.S. § 381, which provides:

"All the property of decedent, except as otherwise provided for the homestead and personal property set apart for the surviving wife or husband and minor child or children, shall be chargeable with the payment of the debts of the deceased, the expenses of the administration, and the allowance to the family. And the property, personal and real, may be sold as the court may direct, in the manner hereinafter prescribed. There shall be no priority as between personal and real property for the above purposes."

The Oklahoma Supreme Court, in construing the predecessors to § 381, has held that a transferee is not personally liable for the debts of a decedent, but can only be held responsible for such debts to the extent of the value of the assets received. Earnest v. Earnest, 102 P.2d 602 (Okla. 1940); Harmon v. Nofire, 267 P. 650 (Okla. 1928); Chitty v. Gillett, 148 P. 1048 (Okla. 1915). In other words, by virtue of § 381, the property of a decedent is impressed with a lien for the payment of the debts of the decedent. In Chitty v. Gillett, supra, the Court cited with approval the following statement from the case of Cooper v. Ives, 63 P. 434 (Kan. 1901):

"[T]he heir at law inheriting property is chargeable with the debts of the ancestor to the value of the property received. Under this rule, Mrs. Ives, being the sole heir under our law, can be held liable as an individual up to the value of the property. . . . In no event can the inheritor be compelled to pay more than the value of the property." 148 P. at 1050.

Under Oklahoma law, the estate taxes involved in the instant cases are debts of the estate, for which the assets transferred to the plaintiffs are liable, but for which the plaintiffs themselves are not personally liable. Therefore, because the estate tax indebtedness is not owed by the plaintiffs, they may not claim the interest paid on that indebtedness as a deduction on their personal income tax returns under 26 U.S.C. § 163. See United States v. Norton, supra; Commissioner v. Henderson, 147 F.2d 619 (5th Cir. 1945); Nunan v. Green, supra; Koch v. United States, supra.

For the foregoing reasons, the plaintiffs' motions for summary judgment in both cases are hereby overruled, and the defendant's motions for summary judgment in both cases are hereby sustained. Judgment is hereby entered in favor of the defendant and against the plaintiff in case number 77-C-224-C and in case number 77-C-225-C.

It is so Ordered this 30<sup>th</sup> day of December, 1977.

  
H. DALE COOK  
United States District Judge

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

TULSA MACHINE WORKS, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CHAMBERSBURG ENGINEERING CO., )  
A & A MACHINERY CORP. and )  
R. L. JEFFRIES TRUCKING CO., INC., )  
 )  
Defendants. )

No. 76-C-388-C ✓

**FILED**

DEC 30 1977

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

J U D G M E N T

The Court on December 30, 1977, filed its Findings of Fact and Conclusions of Law which are hereby incorporated herein and made a part of its Judgment. The parties are referred to as they were in the Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Judgment be entered as follows:

1. On CEC's Cross-Claim Against A&A -- Judgment is entered in favor of Chambersburg Engineering Co. and against A&A Machinery Corp., and total damages are entered in favor of Chambersburg Engineering Co. and against A&A Machinery Corp. in the amount of \$3,890.63, plus interest on \$3,890.63 at the rate of six percent (6%) per annum, from July 9, 1976 to this date, plus a reasonable attorney fee representing services rendered in the prosecution of this cross-claim.

2. On A&A's Cross-Claim Against CEC -- Judgment is entered in favor of Chambersburg Engineering Co. and against A&A Machinery Corp., and Chambersburg Engineering Co. is awarded against A&A Machinery Corp. a reasonable attorney fee representing services rendered in the defense of this cross-claim.

3. A&A's Counterclaim Against TMW -- Judgment is entered in favor of A&A Machinery Corp. and against Tulsa

Machine Works, Inc., and total damages are entered in favor of A&A Machinery Corp. and against Tulsa Machine Works, Inc. in the amount of \$6,500.00, plus interest on \$6,500.00 at the rate of six percent (6%) per annum, from July 19, 1976 to this date, plus an amount equal to the judgments entered in favor of Chambersburg Engineering Co., and against A&A Machinery Corp. in items (1) and (2), supra, plus a reasonable attorney fee representing services rendered in the prosecution of this counterclaim.

4. On TMW's Claim Against A&A - Judgment is entered in favor of A&A Machinery Corp. and against Tulsa Machine Works, Inc., and A&A Machinery Corp. is awarded against Tulsa Machine Works, Inc. a reasonable attorney fee representing services rendered in the defense of this claim.

5. On TMW's Claim Against CEC -- Judgment is entered in favor of Chambersburg Engineering Co. and against Tulsa Machine Works, Inc.

6. On TMW's Claim Against Jeffries -- Judgment is entered in favor of R. L. Jeffries Trucking Co, Inc. and against Tulsa Machine Works, Inc.

7. On A&A's Cross-Claim against Jeffries -- Judgment is entered in favor of R. L. Jeffries Trucking Co., Inc. and against A&A Machinery Corp.

8. On CEC's Cross-Claim Against Jeffries -- Judgment is entered in favor of R. L. Jeffries Trucking Co., Inc. and against Chambersburg Engineering Co.

9. On CEC's Counterclaim Against TMW -- Judgment is entered in favor of Tulsa Machine Works, Inc. and against Chambersburg Engineering Co.

The parties in whose favor attorney fees have been awarded are hereby given ten (10) days from this date to submit verified statements of services rendered, allocated in the manner set forth in this Judgment. Adverse parties are given ten (10) days thereafter to respond to any statements filed.

It is so Ordered this 30<sup>th</sup> day of December, 1977.

  
H. DALE COOK  
United States District Judge

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

OKLAHOMA TIRE AND SUPPLY )  
COMPANY, a corporation, )  
)  
)  
Plaintiff, )  
)  
)  
vs. )  
)  
)  
CENTRAL PARTS DEPOT, Division )  
of Kelvinator, Inc., a Dela- )  
ware corporation; WHITE )  
CONSOLIDATED INDUSTIRES, INC., )  
a Delaware corporation; )  
TRAVELER'S INSURANCE COMPANY, )  
a Connecticut Corporation; )  
KELVINATOR, INC., a Delaware )  
corporation; AMERICAN MOTORS )  
SALES CORPORATION, a Delaware )  
corporation, )  
)  
)  
Defendants. )

No. 77-C-326-B

FILED

DEC 29 1977

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 ~~case~~ *cause of action & Complaint are* should be and the same ~~is~~ hereby dismissed with prejudice and the matter fully, finally, and completely disposed of hereby.

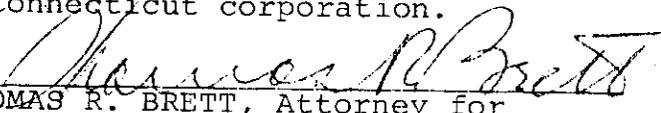
Dated this 29<sup>th</sup> day of December, 1977.

*Allen E. Barrow*  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
MICHAEL P. ATKINSON,  
Attorney for Plaintiff.

  
RICHARD CARPENTER, Attorney for  
Defendants, Central Parts Depot,  
Division of Kelvinator, Inc., a  
Delaware Corporation; White  
Consolidated Industries, Inc.,  
a Delaware Corporation, and  
Travelers Insurance Company,  
a Connecticut corporation.

  
THOMAS R. BRETT, Attorney for  
Defendant, American Motors Sales  
Corporation.

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

DEC 29 1977

CHARLES RALPH CRAIG, )  
Petitioner, )  
v. )  
CHARLIE CARTER, Warden, )  
McLeod Honor Farm, et al., )  
Respondents. )

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

NO. 77-C-146-B

ORDER

This is a proceeding pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Petitioner, Charles Ralph Craig. Petitioner is confined in the State of Oklahoma at the McLeod Honor Farm, pursuant to convictions and concurrent sentences to life imprisonment by the District Court of Tulsa County rendered upon Petitioner's pleas of guilty to robbery with firearms in Cases No. CRF-69-694, No. CRF-69-695 and No. CRF-69-728. In CRF-69-694 and CRF-69-728, the offenses included the charge "after former conviction of a felony."

Petitioner did not file a direct appeal in the State Courts, but he did file a post-conviction proceeding, Case No. PC-76-843, which was denied by the District Court and Oklahoma Court of Criminal Appeals. Petitioner asserts to this Federal Court the same issues presented to the State Courts and his State remedies have been exhausted.

Petitioner contends that his rights guaranteed by the Constitution of the United States were violated in the State convictions and demands his release from custody based on the following grounds:

1. Inadequate and ineffective assistance of counsel in that the weapons used were not firearms under State law as they were not capable of firing a projectile. One was a starter pistol and the shotgun was without a firing mechanism. The public defender knew, or should have known, that petitioner could not be convicted under the State robbery with firearms statute, but told petitioner he should accept the deal offered by the prosecutor and plead guilty.
2. Coercion by the prosecuting attorney to obtain the plea in that the prosecutor threatened to seek the death penalty and file additional charges if petitioner did not plead; further, the prosecutor knew, or should have known, that the weapons were not firearms under State law and filed charges he knew he could not prove and withheld evidence favorable to the accused from the trial Court.
3. Denied right to appeal in that foregoing and giving up appellate rights was a condition of the plea imposed by the prosecutor.
4. Invalid plea of guilty in that trial Court did not fully advise petitioner of his constitutional rights and no factual determination as basis of the plea was made.
5. Cruel and unusual punishment to impose life sentences when weapons used were not firearms and no one was threatened, endangered or injured.

The petition, response, and complete file including the transcript of the pleas and sentences have been carefully reviewed, and being fully advised in the premises, the Court finds that an evidentiary hearing is not required and the petition should be denied and the case dismissed.

Petitioner contends that his counsel was inadequate and ineffective based on the claim that Petitioner was encouraged to plead guilty to the charges when the weapons used in the offenses were not firearms under State law because they were not capable of firing a projectile, one being a starter pistol and the shotgun having no firing mechanism. This contention is without merit. In Coleman v. State, Okl. Cr., 506 P.2d 558 (1972) it was held that in order for a person to be convicted of robbery with firearms the instrument to be a firearm must meet the statutory definition set forth in the Oklahoma Firearms Act of 1971. However, the Coleman decision specifically holds that the definition of firearm established therein applies prospectively only and has no application to cases filed prior to December 7, 1972. Petitioner was convicted July 31, 1969, over three years prior to December 7, 1972, and even if his claim is true, that the weapons in question were not firearms under State law, he is provided no relief from his convictions in 1969. "It is a general rule that the Federal Courts will follow the interpretation of the constitution and laws of a State by the highest Court of that State, unless such interpretation is inconsistent with the fundamental principles of liberty and justice." Pearce v. Cox, 354 F.2d 884, 891 (10th Cir. 1965) cert. denied 384 U. S. 976, 384 U. S. 977 (1966); Goldsmith v. Cheney, 447 F.2d 624 (10th Cir. 1971). At his plea, Petitioner stated to the Court, as appears at page No. 4 of the transcript, that he was satisfied with the advice and representation of his counsel and that opportunity had been given him to discuss each of the cases with his lawyer. At page No. 10 of the transcript, the following statements were made:

"THE COURT: Mr. Craig, do you have anything you would like to say to the Court as to anything?"

"CHARLES R. CRAIG: Other than that my lawyer has been most fair in all this and extremely helpful, and I would like to thank him."

It has been firmly established that to sustain a claim of incompetent counsel it is necessary to demonstrate "that the representation was such as to make the trial a mockery, a sham or a farce." Linebarger v. State of Oklahoma, 404 F.2d 1092 (10th Cir. 1968) cert. denied 394 U. S. 938 (1969); Ellis v. State of Oklahoma, 430 F.2d 1352 (10 Cir. 1970) cert. denied 401 U. S. 1010 (1971); Johnson v. United States, 485 F.2d 240 (10th Cir. 1973); Gillihan v. Rodriguez, 551 F.2d 1182 (10th Cir. 1977).

A reading of the transcript of the proceedings in the District Court of Tulsa County at the time of the entering of the pleas and the imposition of sentences clearly shows that Petitioner's allegation that the trial Court did not properly advise him of his constitutional rights and that no factual determination was made as a basis of the pleas is without merit. The trial Judge thoroughly advised Petitioner of the charges against him; the sentences that could be imposed; of his rights to a jury trial, to call witnesses, and that he could take the witness stand but would not be required to do so. The trial Judge determined that no promises or threats of any kind had been made and that Petitioner had not been abused, mistreated or threatened by anyone to induce his pleas, and that his pleas were because he was guilty as charged. The Judge also carefully explained that any recommendation as to sentence by the District Attorney was only a recommendation and not binding on the Court and the Court could sentence to any period provided by law, including the death sentence. From a reading of the transcript, there can be no question but that Petitioner's plea was voluntarily and intelligently entered with full knowledge of the consequences thereof. Further, the trial Judge fully explained to Petitioner his appellate rights, that a transcript would be provided, and that an attorney would be appointed to represent him in appeal if he needed one. The trial Court clearly and carefully explained to Petitioner his rights of appeal, and the time and steps necessary to perfect an appeal. Since Petitioner agreed to forego the appeal after discussion with counsel and having been fully advised by the Court, see transcript pages No. 11-13, there was no constitutional infringement to invoke the jurisdiction of this Court in a §2254 proceeding. See, Hall v. Peyton, 229 F.Supp. 613 (W.D.Va. 1969); Hines v. Baker, 422 F.2d 1002, 1004 (10th Cir. 1970).

Petitioner's assertion that his pleas were coerced by the prosecutor is without merit. Petitioner makes no allegation that the prosecuting attorney failed to perform in accordance with any agreement he may have made; and, there is no showing of any breach of constitutionally approved procedures as established by the United States Supreme Court in Santobello v. New York, 404 U. S. 257 (1971). Further, the United States Supreme Court has held that "an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial." Parker v. North Carolina, 397 U. S. 790, 795 (1970); Brady v. United States, 397 U. S. 742 (1970).

Petitioner's claim that his sentence is excessive does not raise a Federal constitutional question. Karlin v. State of Oklahoma, 412 F.Supp. 635, 637 (W.D.Okl. 1976). The sentences imposed were within the limits prescribed by the Statutes of the State of Oklahoma and are not regarded as cruel and unusual. See, Edwards v. United States, 206 F.2d 855, 857 (10th Cir. 1953).

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

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

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

DEC 29 1977

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

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

DEWAYNE JOSEPH SHORT, )  
 )  
 ) Petitioner, )  
v. )  
 ) )  
DAVE FAULKNER, ET AL., )  
 ) Respondents. )

NO. 77-C-242-B

ORDER

This is a proceeding pursuant to 28 U.S.C. § 2254 filed pro se, in forma pauperis, by Dewayne J. Short, challenging as unconstitutional a sentence imposed in the District Court of Tulsa County, State of Oklahoma.

Petitioner was convicted by jury of manslaughter in the first degree in Case No. CRF-75-2931. On direct appeal, the Oklahoma Court of Criminal Appeals held that proof of reckless driving, a misdemeanor, could not subject the driver to first degree manslaughter and the instruction thereon by the trial Court constituted reversible error. The conviction was reversed with directions to the trial Court to modify the sentence to one year in the County Jail with credit for time served under a new judgment and sentence of negligent homicide. Short v. State, Okl. Cr., 560 P.2d 219 (1977). The trial Court complied with the mandate of the appellate Court, but the trial Judge in his discretion directed the Sheriff not to allow the defendant, Petitioner before this Court, trustee status or good-time credits on the 190 days remaining to be served.

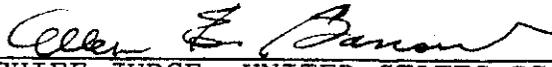
Petitioner asserts to this Court that his rights guaranteed by the 14th Amendment to the Constitution of the United States were violated by the trial Court's requiring that he serve flat time without good-time credit or trustee status on the remainder of his amended sentence. Petitioner misconstrues the basis of a § 2254 petition for writ of habeas corpus, which he originally attempted to present as a writ of mandamus, as matters relating to sentencing and service of sentence as presented by the Petitioner are governed by State law and are not cognizable in a Federal habeas corpus proceeding. Cf., Burns v. Crouse, 339 F.2d 883 (10th Cir. 1964) cert. denied 380 U. S. 925 (1965); Harris v. Department of Corrections, 426 F.Supp. 350 (W.D.Okl. 1977).

Further, Petitioner claims to have exhausted his State remedies by Petition for Writ of Prohibition, Case No. F-76-740, to the Oklahoma

Court of Criminal Appeals. The appellate Court declined to assume jurisdiction in said matter and dismissed the petition by Order dated April 21, 1977. Petitioner did not thereafter file a State post-conviction proceeding pursuant to 22 O.S.A. § 1080, et seq., or a State habeas corpus pursuant to 12 O.S.A. § 1331, et seq. Until Petitioner has availed himself of the adequate and available procedures through the highest State Court, his State remedies are not exhausted and his petition to this Court is premature. No principle in the realm of Federal habeas corpus is better settled than that State remedies must be exhausted. Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, 411 U. S. 475 (1973); Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U. S. 944 (1973). Further, the probability of success is not the standard to determine whether a matter should first be determined by the State Courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971). No hearing herein is required and the petition should at this time be denied, without prejudice, for failure to exhaust adequate and available state remedies.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of Dewayne Joseph Short be and it is hereby denied, without prejudice, and the case is dismissed.

Dated this 29th day of December, 1977, at Tulsa, Oklahoma.

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



duly filed its Answer and Disclaimer on August 15, 1977; and, that Defendants, James Paul Johnson a/k/a James P. Johnson, Paulette D. Johnson, and Ronald C. Bennett, Attorney-at-Law, 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-Three (23), Block Sixty (60), VALLEY VIEW ACRES THIRD ADDITION to the City of Tulsa, Tulsa County, Oklahoma, according to the recorded plat thereof.

THAT the Defendants, James Paul Johnson and Paulette D. Johnson, did, on the 27th day of July 1972, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$11,000.00 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, James Paul Johnson and Paulette D. Johnson, 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 \$10,426.57 as unpaid principal with interest thereon at the rate of 4 1/2 percent per annum from August 27, 1976, until paid, plus the cost of this action accrued and accruing.

The Court further finds that Defendant, Court Clerk, Tulsa County District Court, is entitled to judgment against Paulette D. Johnson in the amount of \$20.00, 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, James Paul Johnson and Paulette D. Johnson, for the sum of \$10,426.57 with interest thereon at the rate of 4 1/2 percent per annum from August 27, 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 Court Clerk, Tulsa County District Court, have and recover judgment, in rem, against the Defendant, Paulette D. Johnson, in the amount of \$20.00, 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 Defendant, Ronald C. Bennett, Attorney-at-Law.

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 L. Barron  
UNITED STATES DISTRICT JUDGE

APPROVED

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

Andrew B. Allen  
ANDREW B. ALLEN  
Attorney for Defendant,  
Court Clerk, Tulsa County  
District Court

FILED

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

DEC 29 1977

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 77-C-274-B
	)	
TIMOTHY WADE DUNKIN, JANICE	)	
DUNKIN, FREDERICK I. ROSE,	)	
PATRICIA L. ROSE, BLAZER FINANCIAL	)	
SERVICES, INC., OTASCO #V, A	)	
Division of McCrory Corporation,	)	
An Oklahoma Corporation, COUNTY	)	
TREASURER, Tulsa County, Oklahoma,	)	
and BOARD OF COUNTY COMMISSIONERS,	)	
Tulsa County, Oklahoma,	)	
	)	
Defendants.	)	

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 29th day of December, 1977, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; and the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appearing by their attorney, Kenneth L. Brune, Assistant District Attorney; the Defendant, Otasco #V, a Division of McCrory Corporation, an Oklahoma Corporation, appearing by its attorney, Jerry L. Goodman; and, the Defendants, Timothy Wade Dunkin, Janice Dunkin, Frederick I. Rose, Patricia L. Rose, and Blazer Financial Services, Inc., appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Frederick I. Rose and Patricia L. Rose, were served by publication as shown on the Proof of Publication filed herein; and, that Defendants, Timothy Wade Dunkin, Janice Dunkin, Blazer Financial Services, Inc., Otasco #V, a Division of McCrory Corporation, an Oklahoma Corporation, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, were served with Summons and Complaint on July 5, 1977, as appears on the United States Marshal's Service herein.

It appearing that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, have duly filed their Answers herein on August 1, 1977; that Defendant, Otasco #V, a Division of McCrory Corporation, an Oklahoma Corporation, has duly filed its Notice of Appearance and Disclaimer of Interest herein on July 12, 1977; and, that Defendants, Timothy Wade Dunkin, Janice Dunkin, Frederick I. Rose, Patricia L. Rose, and Blazer Financial Services, Inc., 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 Three (3), Block Three (3), MARYLAND HEIGHTS ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Timothy Wade Dunkin and Janice Dunkin, did, on the 21st day of November, 1975, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$13,500.00 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, Frederick I. Rose and Patricia L. Rose, were the grantees in a deed from Defendants, Timothy Wade Dunkin and Janice Dunkin, dated July 26, 1976, filed July 28, 1976, in Book 4225, Page 1244, records of Tulsa County, wherein Defendants, Frederick I. Rose and Patricia L. Rose, assumed and agreed to pay the mortgage indebtedness being sued upon herein.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Donald E. Gough

and Nancy Gough, former owners, the sum of \$ NONE plus interest according to law for personal property taxes for the year(s) \_\_\_\_\_ 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 Defendants, Timothy Wade Dunkin, Janice Dunkin, Frederick I. Rose, and Patricia L. Rose, 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 \$13,506.16 as unpaid principal with interest thereon at the rate of 9 percent per annum from September 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, Timothy Wade Dunkin and Janice Dunkin, in personam, and Frederick I. Rose and Patricia L. Rose, in rem, for the sum of \$13,506.16 with interest thereon at the rate of 9 percent per annum from September 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 Donald E. Gough and Nancy Gough, former owners, for the sum of \$ NONE 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 the Plaintiff have and recover judgment, in rem, against Blazer Financial Services, Inc.

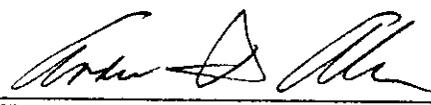
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property 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.

  
UNITED STATES DISTRICT JUDGE

APPROVED

  
ROBERT P. SANTEE  
Assistant United States Attorney

  
ANDREW B. ALLEN  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County

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

SHARON K. DOTSON,

Plaintiff,

-vs-

MFA MUTUAL INSURANCE COMPANY,

Defendant.

FILED  
DEC 28 1977  
Jack G. Silver, Clerk  
U. S. DISTRICT COURT  
No. 77-C-273-C

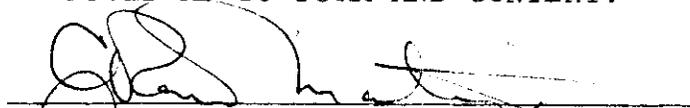
ORDER OF DISMISSAL WITHOUT PREJUDICE

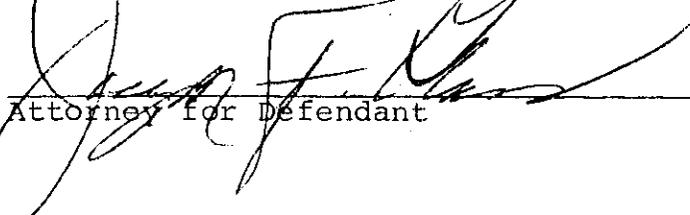
Upon the joint application of the plaintiff and defendant herein being submitted for leave to dismiss without prejudice, the Court has considered the same and finds that no cause exists which would warrant said application being denied, and

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff be, and she is hereby permitted to dismiss her claim for relief without prejudice to any future refiling thereof, and without prejudice to any other claim which may now exist, or may hereafter arise, upon the insurance policy sued upon.

  
United States District Judge

APPROVED AS TO FORM AND CONTENT:

  
Attorney for Plaintiff

  
Attorney for Defendant



alcohol, stimulant or depressant. The Petitioner admitted that he entered his plea because he was guilty of the acts charged against him, and that he had not been mistreated, abused or threatened by anyone to enter his plea. The Trial Court advised Petitioner of his right to appointed counsel if he could not afford retained counsel, and of his right to appeal, a transcript of the proceedings at State expense, and the appointment of counsel, if necessary, to appeal.

Boykin, upon which Petitioner relies, imposed the requirement of an affirmative record showing that the plea of guilty is made understandingly and voluntarily. See, Brady v. United States, 397 U. S. 742 (1970). Boykin does not require the enumeration of rights and multiple waivers of said rights for an effective and valid guilty plea. Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973). In Moore v. Anderson, 474 F.2d 1118 (10th Cir. 1973), the Court stated at page No. 1119:

"Undoubtedly the accused is entitled to have the judge address him personally on the occasion of his arraignment and he is entitled to know of his right to a jury trial, and if he attempts to enter a plea of guilty, he is entitled to know the consequences of his plea, and the judge must satisfy himself that the plea is given voluntarily and with knowledge of its consequences."

In the matter before this Court, these minimum requirements are met. The record affirmatively shows that petitioner's plea was made voluntarily, knowingly and understandingly. An evidentiary hearing is not required in this Court and the petition for writ of habeas corpus should be denied.

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

Dated this 28<sup>th</sup> day of December, 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

**FILED**

**DEC 28 1977**

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

FIREMAN'S FUND INSURANCE )  
COMPANY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
LORENZO FREEMAN, JR., et al. )  
 )  
Defendants. )

No. 75-C-483-C

JUDGMENT AND ORDER OF DISTRIBUTION AND APPROVAL  
OF SETTLEMENT

This matter came on for hearing this 28<sup>th</sup> day of December  
1977, pursuant to Motions of the Plaintiff and those Defendants having  
made claim herein, and pursuant to Stipulations entered into by those  
parties and representatives made by duly filed pleadings and Answers  
herein this Court makes the following findings:

1. That this interpleader action was filed by the Plaintiff,  
and named therein all persons involved in that automobile accident  
as described in Plaintiff's Complaint that occurred August 25, 1974.  
That this Court due to diversity of citizenship and amounting controversy  
did acquire proper venue and jurisdiction of this matter, and each  
Defendant herein was duly and properly served with Summons and a copy  
of Plaintiff's Complaint.

2. That there has been heretofore no Order of Restraint  
against any party prohibiting their filing an action at law, and that  
by reason of the substantive law of the State of Oklahoma any cause  
of action existing on behalf of my adult, or the estate of Lorenzo  
Freeman, Sr., is now barred by the statutory period of limitations  
as no suit was commenced within the two year period provided for in  
Title 12, Section 96 et seq., of the Oklahoma Statutes.

3. That the only parties that have made claim herein are

the Defendants, Frederick Freeman, a minor, Gina Earlene Griffin, a no-emancipated minor, Vera Mae Wilson and Deborah Wilson, a minor, and that all other minor Defendants have by their duly appointed guardian ad litem and counsel of record filed notice with this Court that they were in no manner injured nor possessed of any cause of action heretofore or that could be made in the future. That the estate of Lorenzo Freeman, Sr., has answered in this Court and specifically disclaims any right of action of said estate as duly approved by the Probate Court having said administration.

4. That the Plaintiff insurance company had issued an automobile liability policy of insurance to Lorenzo Freeman, Jr., which policy insured against liability of Lorenzo Freeman, Jr., to the maximum amount of TWENTY THOUSAND AND NO/100 DOLLARS (\$20,000.00); said policy also contained therein uninsured motorists provisions providing insurance coverage of a maximum exposure of TEN THOUSAND AND NO/100 DOLLARS (\$10,000.00). That there has been made Application to this Court, with due notice to all other parties, that the Plaintiff was desirous of settling any disputed claims to that portion of its policy pertaining to uninsured motorists coverage, and Application has been made to this Court to approve settlement of said disputed coverage in the amount of EIGHT THOUSAND AND NO/100 DOLLARS (\$8,000.00). Said Application is hereby approved by the Court and found to be in the best interest of all parties involved, with this Court recognizing the disclaimer heretofore filed by Vera Mae Wilson and her children herein as well as the approval and disclaimer filed on behalf of all other Defendants with the exception of Frederick Freeman and Gina Earlene Griffin who have agreed to a reasonable distribution of said sum. That all claims and Cross-Petitions filed herein are hereby dismissed with prejudice to refiling of same.

5. That the only parties before this Court, who have not specifically and legally disclaimed any right of contribution to the proceeds of said policy are the following named parties who are

entitled to distribution of the proceeds on deposit with this Clerk, said distribution to be made in the following manner:

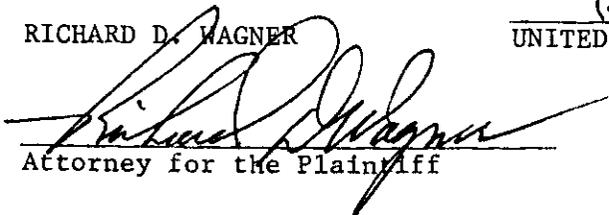
- A. Frederick Freeman, a minor, by his mother and next friend, Viola Freeman and their attorney Frank Greer, who shall receive the total sum of FOURTEEN THOUSAND SIX HUNDRED AND NO/100 DOLLARS (\$14,600.00).
- B. Gina Earlene Griffin, now certified as an adult, and her attorney, Frank Greer, the total amount of EIGHT THOUSAND FOUR HUNDRED AND NO/100 DOLLARS (\$8,400.00).
- C. Vera Mae Wilson, and her attorney, O. B. Graham, the amount of ONE THOUSAND SIX HUNDRED AND NO/100 DOLLARS (\$1,600.00).
- D. Deborah Wilson, a minor, by and through her mother and next friend, Vera Mae Wilson, and their attorney O. B. Graham, the amount of THREE THOUSAND FOUR HUNDRED AND NO/100 DOLLARS (\$3,400.00).

6. That in accordance with the Stipulation of the parties hereto, and the Application for Approval of Settlement and Distribution of Funds, it is the findings of this Court that the Clerk of this Court should and is hereby ordered to distribute said funds as aforestated, and that all other parties Defendants herein, the minor Defendants having in each case had due and proper guardian ad litem appointed to represent their interests, are hereby precluded and forever barred from making claim against the insurance policy of Fireman's Fund Insurance Company as described in the Complaint herein which might have been payable in any manner or respect as a result of the automobile accident that occurred on the 25th day of August, 1974, as set forth in the Complaint and Amended Complaint.

IT IS FURTHER ORDERED, that the Defendants above named are liquidating the claims herein by agreement and upon receipt of the funds distributed by this Order are forever barred from executing against, or making further claim against, the Plaintiff as a result of the insurance policy as described in Plaintiff's Complaint.

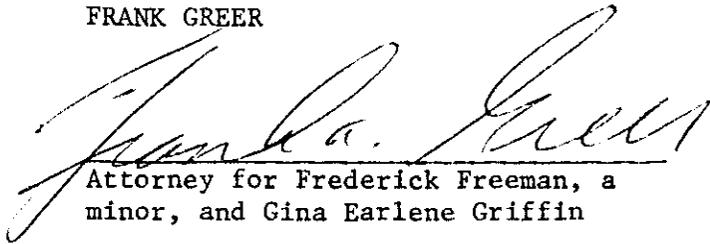
APPROVALS AS TO FORM:

RICHARD D. WAGNER

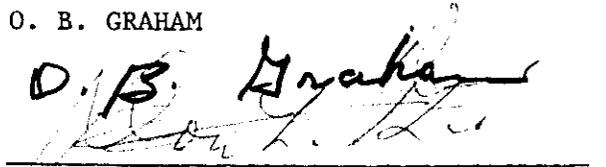
  
Attorney for the Plaintiff

(Signed) H. Dale Cook  
UNITED STATES DISTRICT JUDGE

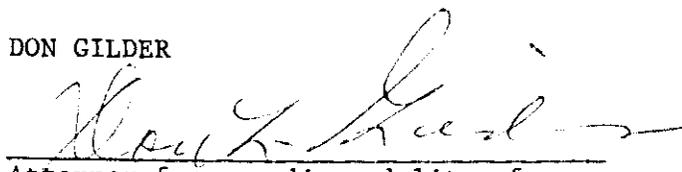
FRANK GREER

  
Attorney for Frederick Freeman, a  
minor, and Gina Earlene Griffin

O. B. GRAHAM

  
Attorney for Deborah Wilson, a minor,  
by and through her mother and next  
friend Vera Mae Wilson.

DON GILDER

  
Attorney for guardian ad litem for  
Myrtle Freeman, Johnny Earl Freeman,  
Lorene Freeman, Michael Wilson and  
LaDonna Wilson, a/k/a LaDonna  
Powdrill, all being minors.

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

DOMINIC I. OBIELI, )  
 )  
 Plaintiff, )  
 )  
 vs ) NO 77 C 58  
 )  
 CAMPBELL SOUP COMPANY, )  
 a foreign corporation, )  
 )  
 Defendant. )

**FILED**

**DEC 23 1977**

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

JOURNAL ENTRY OF JUDGMENT

Now on the 16th day of December, 1977, the cause came on for trial before a jury of six (6) good people, who being duly impaneled and sworn, well and truly to try the issues joined between the Plaintiff and Defendant and a true verdict rendered according to the evidence; and having heard the evidence, the charges of the Court, and the argument of counsel upon their oath say that they the jury find in favor of the Plaintiff, DOMINIC I. OBIELI, and against the Defendant, CAMPBELL SOUP COMPANY, in the amount of TWENTY-THREE THOUSAND, FIVE HUNDRED and THIRTY-TWO DOLLARS and 82/100. (\$23,532.82).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff, DOMINIC I. OBIELI, have and recover from the Defendant, CAMPBELL SOUP COMPANY, the sum of TWENTY-THREE THOUSAND, FIVE HUNDRED and THIRTY-TWO DOLLARS and 82/100 (\$23,532.82).

(Signed) H. Dale Cook

\_\_\_\_\_  
JUDGE OF THE NORTHERN DISTRICT

DEC 22 1977

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMAJack C. Silver, Clerk,  
U. S. DISTRICT COURT

JOHN KELLY, # 85878,

Petitioner,

v.

PETER A. DOUGLAS, Superintendent,  
Lexington Treatment Center,

Respondent.

NO. 77-C-227-B

O R D E R

This is a proceeding filed pro se, in forma pauperis, by a prisoner in the Lexington Treatment Center, Lexington, Oklahoma. Although the petition is presented as a civil rights complaint pursuant to 42 U.S.C. § 1983, the only relief sought is immediate or speedier release from imprisonment. Therefore, the petition is considered as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. See, Preiser v. Rodriguez, 411 U. S. 475 (1973); Henderson v. Secretary of Corrections, 518 F.2d 694 (10th Cir. 1975).

Petitioner presents to this Court as grounds for his petition only issues as to his competency at the time of the offense, specifically stated as follows:

1. He was incompetent at the time of his State trial in Case No. CRF-72-1341.
2. The State of Oklahoma had no jurisdiction to try him on the charges in Case No. CRF-72-1341 because he was under the care of a mental institution and on probation from the State Hospital at Challahoochee, Florida.

Petitioner asserts in support of his claim that he has exhausted his Oklahoma State remedies that he filed a petition for writ of habeas corpus in the District Court of Tulsa County which was denied by Order dated August 9, 1974. Petitioner did not appeal that ruling, but filed an application for mandamus with the Oklahoma Court of Criminal Appeals which was dismissed for lack of original jurisdiction by Order dated November 26, 1974.

This Court has carefully reviewed the petition, response, and complete file herein, and being fully advised in the premises, the Court finds:

It is the procedural law of the State of Oklahoma that the question of whether a petitioner was insane at the time he committed the offense charged is reviewable only on appeal and not by habeas corpus. Taylor v.

Oklahoma County Dist. Court, Okl. Cr., 418 P.2d 112 (1966). Petitioner did not take a direct appeal and has not availed himself of the State of Oklahoma post-conviction procedure act, 22 O.S.A. § 1080, et seq., which provides in part, "Excluding a timely appeal, this act encompasses and replaces all common law and statutory methods of challenging a conviction and sentence." Petitioner should not be allowed to deliberately by-pass appropriate State procedures.

Until Petitioner has availed himself of the adequate and available procedures through the highest State Court, his State remedies are not exhausted and his petition to this Court is premature. No principle in the realm of Federal habeas corpus is better settled than that State remedies must be exhausted. See, Hoggatt v. Page, 432 F.2d 41 (10th Cir. 1970); Preiser v. Rodriguez, Supra.; Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) cert. denied 410 U. S. 944 (1973). Further, the probability of success is not the standard to determine whether a matter should first be determined by the State Courts. Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); Daegele v. Crouse, 429 F.2d 503 (10th Cir. 1970) cert. denied 400 U. S. 1010 (1971). No hearing herein is at this time required and the petition should be denied, without prejudice, for failure to exhaust adequate and available state remedies.

IT IS, THEREFORE, ORDERED that the petition for writ of habeas corpus of John Kelly be and it is hereby denied, without prejudice, and the case is dismissed.

Dated this 22<sup>nd</sup> day of December, 1977, at Tulsa, Oklahoma.

Allen J. Bassant  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

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

RICKY D. CHOATE, )  
 )  
 ) Petitioner, )  
v. )  
 ) )  
 ) )  
OTTAWA COUNTY, STATE OF OKLAHOMA, )  
AND MARTHA SUE THOMPSON, )  
 ) Respondents. )

NO. 77-C-232-B ✓

**FILED**

DEC 22 1977 *hm*

ORDER

This is a proceeding pursuant to 28 U.S.C. § 2254, filed *Jack C. Silver, Clerk*  
*U. S. DISTRICT COURT*  
a prisoner in the Jasper County Jail, Carthage, Missouri. Petitioner  
originally filed his petition in the United States District Court for the  
Western District of Missouri, Southwestern Division. It was there by Or-  
der of the Court transferred to the United States District Court for the  
Western District of Missouri, Western Division. In that Court, the pro-  
ceeding was transferred to this United States District Court for the  
Northern District of Oklahoma, since the only relief sought by Petitioner  
is release from the detainer lodged against him in Missouri on a warrant  
issued on charges in the State of Oklahoma, Case No. CRF-76-514, in Ottawa  
County, Miami, Oklahoma. Said release from the Oklahoma detainer is sought  
by Petitioner on the alleged ground that he has been denied a speedy trial  
on the Oklahoma charges.

The petition, response, and complete file have been carefully re-  
viewed, and being fully advised in the premises, the Court finds:

The challenged State action, Case No. CRF-76-514, State of Oklahoma  
v. Ricky Dane Choate, was dismissed by Order dated June 21, 1977, of the  
Court for Ottawa County, Oklahoma, on motion of the Acting District At-  
torney in and for said County.

Although this Court in the circumstances before it would normally  
hold the petition under consideration premature in the Federal Court and  
require that the Petitioner first exhaust adequate and available State of  
Oklahoma remedies, the petition in this instance is moot in that the only  
relief sought has been granted by dismissal of the State of Oklahoma  
charges, and no further action is necessary by either the State or Federal  
Courts regarding the relief sought on the petition.

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

Dated this 22<sup>nd</sup> day of December, 1977, at Tulsa, Oklahoma.

*Allen E. Bann*  
CHIEF JUDGE, UNITED STATES DISTRICT  
COURT FOR THE NORTHERN DISTRICT OF  
OKLAHOMA

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

FILED

JOANN MCDONALD,

Plaintiff,

-vs-

JESS O. WALKER, ROBERT M. THOMPSON,  
FLOYD MOSS, HAROLD D. MORGAN,  
KENNETH MCDONALD, ARCHIE JONES,  
EMMETT HULL, JOE DAVENPORT,  
LARRY D. STUART, JOHN DOE, Unknown  
Police Officer for the City of Vinita,  
Oklahoma, and SOUTHWESTERN BELL  
TELEPHONE COMPANY,

Defendants)

No. 75-C-469-B ✓

DEC 22 1977

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

ORDER

This Court has for consideration defendant Joe Davenport's motion to dismiss or in the alternative summary judgment; defendant Emmett Hull's motion to dismiss or in the alternative for summary judgment; defendant Jess O. Walker's motion for summary judgment; defendant Floyd Moss' motion for summary judgment; plaintiff's motion to strike portions of affidavit of Linda Mosley; and motion of defendants, Walker, Moss and Hull to strike affidavit of plaintiff in their entirety and has carefully perused the entire file, supporting briefs and the recommendations concerning said motion, and being fully advised in the premises, finds:

That the motions for summary judgment by defendants Joe Davenport and Emmett Hull should be sustained; motions for summary judgment by defendants Jess Walker and Floyd Moss should be overruled; and motions to strike the affidavits of Linda Mosley and plaintiff should also be overruled.

This is an action to recover damages against the defendants for alleged deprivation of plaintiff's civil rights by defendants in the following situations pertinent to the above-mentioned motions:

1. Plaintiff alleges that on October 11, 1974, she was taken to Eastern State Hospital under a petition for commitment which was allegedly signed by defendant Jess O. Walker, which on its face indicated that plaintiff did not need to be taken into custody and detained pending final hearing on the petition; that she was held at Eastern State Hospital until the 23rd day of October, 1974, twelve (12) days after confinement, at which time a hearing was held by the Sanity Commission resulting in a finding that

she was not mentally ill and that the matter should be dismissed; and that she did not receive any notice of the reason for her detainment.

2. Plaintiff further alleges that on December 4, 1974, she drove down a county road outside Vinita, Oklahoma, at which time defendant Kenneth McDonald blocked the county road; that he fired several rounds of ammunition at her car; that subsequently, defendants Jess Walker and Floyd Moss took her into custody without a warrant; and that she was confined in County Jail in Vinita for two days.

DEFENDANT JOE DAVENPORT'S MOTION TO DISMISS  
OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

There have been detailed in neither the petition nor the affidavit of plaintiff any allegations as to involvement of defendant Joe Davenport in the October 11, 1974, confinement. Defendant Joe Davenport denies participation in the December 4, 1974, incident. He bases his motion to dismiss or in the alternative motion for summary judgment on the ground that he was not employed as a deputy sheriff on December 4, 1974, and therefore was not present during the incident. In support of his claim, he furnishes an affidavit of Maxine Highsmith, Clerk of Craig County, Oklahoma, declaring that the payroll records kept under her control reveal that Joe Davenport was not a deputy sheriff for Craig County on December 4, 1974. In addition, defendant Joe Davenport produced his own affidavit stating that he was employed as a deputy sheriff for Craig County until May 1, 1974. Plaintiff did not file a brief opposing defendant Joe Davenport's motion to dismiss or in the alternative motion for summary judgment. Defendant Joe Davenport's motion has been treated as a motion for summary judgment since matters outside the pleadings must be considered. There appearing no fact question regarding defendant Joe Davenport, defendant's motion for summary judgment should be sustained.

DEFENDANT EMMETT HULL'S MOTION TO DISMISS  
OR IN THE ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Defendant Emmett Hull denies liability as to either of the above-mentioned events. He bases his motion to dismiss or in the alternative motion for summary judgment on the grounds that he did not participate in any of the events of the night of December 4, 1974, when plaintiff was allegedly wrongfully taken into custody. In support of his claim, defendant Emmett Hull furnishes his own affidavit by which he affirms that he was a deputy sheriff of Craig County in 1974, but that he did not participate in transporting plaintiff to Craig County Jail on the night of December 4,

1974. To further support defendant's claim, he furnishes the affidavit of Jess O. Walker, Undersheriff of Craig County, Oklahoma, who affirms that Emmett Hull was not present at the events of the night of December 4, 1974.

Defendant argues that there is no genuine issue as to any material fact concerning his participation in the events of December 4, 1974, since plaintiff in her affidavit indicates only that "It is my belief that Emmett Hull . . . (was) present at the time of this incident."

As to the confinement of plaintiff in Eastern State Hospital on October 11, 1974, defendant Emmett Hull denies liability and asserts that his sole purpose for being at said hospital on that date was to give defendant Jess Walker a ride back to the Craig County Sheriff's Office. In support of this claim, he supplies his own affidavit and that of defendant Jess Walker which both confirm the reason for his presence.

Defendant argues that there is no genuine issue as to any material fact concerning his involvement in the confinement of plaintiff in Eastern State Hospital on October 11, 1974, since plaintiff affirms in her own affidavit at paragraph 6, "That Emmett Hull did attempt to serve papers on me at the lobby of Eastern State Hospital, . . ."

Defendant Emmett Hull's motion has been treated as a motion for summary judgment since matters outside the pleadings must be considered. There appearing no genuine fact question as to any material fact regarding defendant Emmett Hull, defendant's motion for summary judgment should be sustained.

#### DEFENDANT JESS WALKER'S MOTION FOR SUMMARY JUDGMENT

Defendant Jess O. Walker denies liability as to either of the above-mentioned incidents. As to the October 11, 1974, event when plaintiff was taken to Eastern State Hospital, defendant Walker admits signing and causing to be filed the petition for order of admission to the hospital against plaintiff. However, defendant Walker argues that he had probable cause to think that plaintiff was mentally ill at the time of her detention. In support of his argument, defendant supplied his own affidavit indicating he believed plaintiff to be mentally ill because of complaints of defendant Kenneth McDonald, and former defendant Archie Jones and others. However, in her own affidavit, plaintiff swears that she did not do those acts of which she is accused and that at all times in the presence of defendant Walker "did I act in a normal and reasonable, rational manner". Defendant argues that the test for probable cause is the

same as that applied to an officer making an arrest without a warrant or "(I)f facts are such that a reasonable, prudent man would have believed accused guilty and would have acted upon that belief." Wilson v. State, 458 P. 2d 315 (Okla. 1969). Even assuming that this is the correct standard to be applied to a civil commitment under 43A OKLA. STAT. § 55, which is clearly an arguable position, plaintiff argues that there remain the following issues of fact to be decided: a) What facts did defendant Walker know of his own personal knowledge when he drew up the petition by which plaintiff was committed to Eastern State Hospital? b) Did defendant Walker ever check for himself, at first hand, whether any of the accusations made by defendant McDonald were true? c) Why and upon what basis was an order of detention issued after defendant Walker's petition clearly showed on its face that plaintiff did not require detention?

Turning to the events of December 4, 1974, defendant Walker indicates that he did not participate in the arrest of plaintiff on that night. He argues that plaintiff was subject to a citizen's arrest by defendant McDonald prior to the arrival of defendant Walker who merely transported plaintiff to jail. In support of these arguments, he filed his own affidavit and that of Linda Mosley. However, plaintiff urges and supports by affidavit that her car was blocked on the highway, that she was fired at by defendant McDonald, that she was never told why she was being detained or that she was under citizen's arrest. She also indicates that defendant Walker did arrive and take her to jail; that he did not ask her what had happened and did not tell her why she was being taken to jail. Plaintiff argues that there are clearly factual issues remaining as follows: a) Were the legal requirements of a valid citizen's arrest met? b) Was a public offense committed in defendant McDonald's presence? c) Was plaintiff ever informed by defendant McDonald that she was under arrest and why? d) Was plaintiff subjected to more force than was necessary for her arrest and detention. The resolution of each of these factual issues is needed in order to determine whether or not indeed defendant McDonald's arrest was invalid so as to determine whether defendant Walker could legally hold plaintiff or whether defendant Walker is chargeable with false arrest.

There appearing to be many genuine issues of material fact regarding the involvement of defendant Jess O. Walker, defendant's motion for summary judgment should be overruled.

### DEFENDANT FLOYD MOSS' MOTION FOR SUMMARY JUDGMENT

Defendant Floyd Moss denies liability on either of the above-mentioned events. As to the jailing of plaintiff on the night of December 4, 1974, defendant Moss asserts the same argument enumerated previously under the discussion of defendant Jess O. Walker; and plaintiff responds with her same discussion, affidavit and assertions of factual issues remaining.

Concerning the detention of plaintiff in Eastern State Hospital, defendant Moss argues that there is no showing of any connection between defendant Moss and the petition for order of detention filed against plaintiff. In addition he urges that he allegedly acted pursuant to a court order in assisting the delivery of plaintiff to Eastern State Hospital. He also indicates that "the exhibits attached to plaintiff's complaint reveal that the notice of hearing pursuant to mental health petition was served on plaintiff by defendant Jess O. Walker on October 11, 1974". The exhibit, plaintiff's Exhibit 5, recites that defendant Walker did so serve the notice on plaintiff; however, plaintiff in her affidavit indicates that she never received a copy of the petition or notice of hearing, because defendant Moss grabbed the petition from her. In defendant Moss' brief, he further states that "There is no allegation in the plaintiff's complaint to show that this defendant abused his position in any way to deprive this plaintiff of her civil rights." Title 43A OKLA. STAT. § 55 requires that a person alleged to be mentally ill be personally served with notice of the petition for admission to hospital. Plaintiff alleges that she was never served with notice because defendant Moss grabbed it from her. Plaintiff urges that a genuine fact issue remains as to whether notice of the petition of commitment was ever really served on her. Plaintiff also argues that in a suit for deprivation of civil rights, the issue of whether defendant denied plaintiff due process by withholding notice of a sanity commission hearing from her is a material one.

There appearing to be several genuine issues of material fact regarding the involvement of defendant Floyd Moss, defendant's motion for summary judgment should be overruled.

### MOTIONS TO STRIKE AFFIDAVITS

Because there appear to be genuine issues of material fact which will require trial, the motion of defendants Walker, Moss and Hull to strike affidavit of plaintiff, and plaintiff's motion to strike portions of affidavit of Linda Mosley should be overruled at this time.

Although the evidence as reflected by the case may at this time indicate that the defendant would prevail at the trial on the merits, nevertheless as noted by the Court in Pierce v. Ford Motor Company, 190 F. 2d 910, 915 (4th Cir. 1951):

"Even in cases where the judge is of opinion that he will have to direct a verdict for one party or the other on the issues that have been raised, he should ordinarily hear the evidence and direct the verdict rather than attempt to try the case in advance on a motion for summary judgment, which was never intended to enable parties to evade jury trials or have the judge weigh evidence in advance of its being presented."

In determining whether the record presents an issue of material fact, "all doubts and all favorable inferences which may be reasonably drawn from the evidence will be resolved against the party moving for summary judgment." Ottis v. Brough, 409 P. 2d 95, 98, Idaho (1965).

As pointed out by the Court in Doehler Metal Furniture Co. v. United States, 149 F. 2d 130, 135 (2nd Cir., 1945):

"We take this occasion to suggest that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts, and a denial of that right is reviewable; but refusal to grant a summary judgment is not reviewable. Such a judgment, wisely used, is a praiseworthy time-saving device. But although prompt despatch of judicial business is a virtue, it is neither the sole nor the primary purpose for which courts have been established. Denial of a trial on disputed facts is worse than delay. Cf. Arenas v. United States, 322 U.S. 419, 429, 433, 64 S. Ct. 1090, 88 L. Ed. 1363. The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered." (Citations omitted)

In Zig Zag Spring Co. v. Comfort Spring Corporation, 89 F. Supp. 410, 412, (D.C.D.N.J. 1950) the Court stated:

"It seems necessary to emphasize once again that Rule 56 of the Rules of Civil Procedure, 29 U.S.C.A., vests the court a Limited Authority to enter summary judgment only if it clearly appears from the record that 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' The complete absence of any genuine issue of fact must be apparent and all doubts thereon must be resolved against the moving party." (Citations omitted)

The Supreme Court in Sartor v. Arkansas Gas Corp., 321 U.S. 620, 627 (1943) said:

The Court of Appeals below heretofore has correctly noted that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." (Citations omitted)

See also United States v. Kansas Gas and Electric Company, 287 F. 2d 601 (10th Cir., 1961); Blood v. Fleming, 161 F. 2d 292 (10th Cir., 1947); Orrick v. Rockman & Envelope Co., 155 F. 2d 568, (10th Cir. 1946).

IT IS, THEREFORE, ORDERED that the motions for summary judgment of Joe Davenport and Emmett Hull be and are sustained; motions for summary judgment of Jess O. Walker and Floyd Moss be and are overruled; and motion of defendants Walker, Hull and Moss to strike affidavit of plaintiff and plaintiff's motion to strike portions of affidavit of Linda Mosley are also overruled.

Dated this 2nd day of December, 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

FILED

MIAMI STONE, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CENTEX CORPORATION and )  
 CENTEX MATERIALS, INC., )  
 )  
 Defendants. )

DEC 22 1977

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

No. 77-C-229-BV

O R D E R

The Court has for consideration the Motion to Dismiss, or in the Alternative, Motion for a More Definite Statement of the defendant, Centex Corporation, and the Response to Centex Corporation's Motion to Dismiss and its Alternative Motion for a More Definite Statement filed by the plaintiff, Miami Stone, Inc., which confesses the Motion to Dismiss on the ground of lack of jurisdiction over the person of the defendant, Centex Corporation. Based upon the plaintiff's Response, the Court FINDS that the Motion to Dismiss in accordance with Rule 12(b)(2), Federal Rules of Civil Procedure, for lack of jurisdiction over the person of Centex Corporation should be sustained. The Court further finds that the Motion for a More Definite Statement of defendant, Centex Corporation, should be overruled as moot.

IT IS THEREFORE ORDERED that the Motion to Dismiss of Centex Corporation be, and the same is hereby, sustained.

IT IS FURTHER ORDERED that the Alternative Motion for a More Definite Statement of Centex Corporation be, and the same is hereby, overruled as moot.

DATED this 22<sup>nd</sup> day of December, 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

CAROL SUE JACOBSON, )  
 )  
 Plaintiff, )  
 )  
 vs. ) No. 77-C-404-C ✓  
 )  
 STUART IRV JACOBSON, )  
 )  
 Defendant. )

**FILED**

DEC 22 1977 *per*

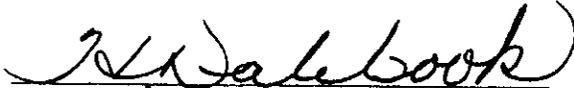
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

O R D E R

Defendant removed this divorce action, alleging that the Oklahoma law as to child custody would deprive him of his Equal Protection rights under the 14th Amendment to the United States Constitution, and that it also would deprive him of certain of his civil rights which he would be unable to enforce in State courts. Removal jurisdiction was predicated upon 28 U.S.C. §§ 1441(b) and 1443(1). Plaintiff filed a motion to remand this case to the State court. Defendant has concurred in this motion by filing with the Court a written request for remand.

It is therefore ordered that this cause be remanded to the State court for disposition therein.

It is so Ordered this 22<sup>nd</sup> day of December, 1977.

  
H. DALE COOK  
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-258-C )  
)  
)

BILLY E. NICHOLS, SUSAN B. )  
NICHOLS, BILLIE R. HILL, )  
COUNTY TREASURER, Tulsa County, )  
Oklahoma, and BOARD OF COUNTY )  
COMMISSIONERS, Tulsa County, )  
Oklahoma, )

) Defendants. )

**FILED**

DEC 22 1977

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

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 22<sup>nd</sup>  
day of December, 1977, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney; the Defendants,  
County Treasurer, Tulsa County, Oklahoma, and Board of County  
Commissioners, Tulsa County, Oklahoma, appearing by their  
attorney, Kenneth L. Brune, Assistant District Attorney; and,  
the Defendants, Billy E. Nichols, Susan B. Nichols, and Billie R.  
Hill, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendant, Billie R. Hill, was served  
by publication as shown on the Proof of Publication filed herein;  
that Defendant, Billy E. Nichols, was served with Summons and  
Complaint on August 9, 1977; that Defendant, Susan B. Nichols,  
was served with Summons and Complaint on August 10, 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  
on the United States Marshal's Service herein.

It appearing that the 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, Billy E. Nichols, Susan B. Nichols, and Billie R. Hill, 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 Thirty-Five (35), Block Six (6), NORTHRIDGE, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Billy E. Nichols and Susan B. Nichols, did, on the 7th day of August, 1973, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$12,400.00 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, Billie R. Hill, was the grantee in a deed from Defendants, Billy E. Nichols and Susan B. Nichols, dated March 1, 1976, filed March 22, 1976, in Book 4207, Page 1142, records of Tulsa County, wherein Defendant, Billie R. Hill, assumed and agreed to pay the mortgage indebtedness being sued upon herein.

The Court further finds that Defendants, Billy E. Nichols, Susan B. Nichols, and Billie R. Hill, 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 \$11,597.54 as unpaid principal with interest thereon at the rate of 4 1/2 percent per annum from July 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,

Billy E. Nichols and Susan B. Nichols, the sum of \$        plus interest according to law for personal property taxes for the year(s)        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 there is due and owing to the County of Tulsa, State of Oklahoma, from Ray E. Martin and Judith G. Martin (former owners), the sum of \$ NONE plus interest according to law for personal property taxes for the year(s)        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.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Billy E. Nichols and Susan B. Nichols, in personam, and Billie R. Hill, in rem, for the sum of \$11,597.54 with interest thereon at the rate of 4 1/2 percent per annum from July 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, Billy E. Nichols and Susan B. Nichols, for the sum of \$        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 the County of Tulsa have and recover judgment, in rem, against Ray E. Martin and Judith G. Martin (former owners), for the sum of \$ NONE 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.

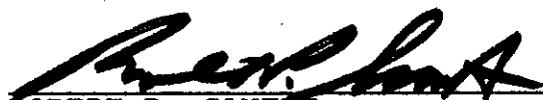
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property 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.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED

  
ROBERT P. SANTEE  
Assistant United States Attorney

  
ANDREW B. ALLEN  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County

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

CHARLES C. GROOM, )  
)  
Plaintiff, )  
)  
vs. )  
)  
FORD MOTOR CREDIT COMPANY, )  
a corporation; )  
AAACON AUTO TRANSPORT, INC., )  
a corporation; and )  
JOHN DOE, an individual, )  
)  
Defendants. )

No. 76-C-541-C ✓

**FILED**

DEC 22 1977 *lum*

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

O R D E R

Plaintiff in this action has requested money damages for conversion and gross negligence. This is a removed action, jurisdiction being founded upon diversity of citizenship and amount in controversy under 28 U.S.C. § 1332(a). Now before the Court is the defendant Ford Motor Credit Company's Motion for Summary Judgment.

At a hearing on this motion held on July 7, 1977, the parties to this action admitted certain facts which are as follows:

That plaintiff as the debtor and Ford as the secured party entered into a security agreement, where plaintiff pledged a 1972 Pantero automobile as the collateral. That plaintiff defaulted under this agreement. That the defendant Ford as a result exercised its legal and contractual right to repossess this automobile, and did so without a breach of the peace. That Ford employed S. & S. Recovery Service of Tulsa, Oklahoma to effect this repossession. That Ford then employed the defendant Aaacon Auto Transport, a licensed interstate carrier, to transport the automobile to Ford's office in Houston, Texas. That Aaacon has the reputation of being a respected and reliable business enterprise. That Aaacon directed one of its employees, the defendant John Doe, to pick up the automobile in Tulsa and drive it to Houston. That this

employee picked up the automobile in Tulsa and drove it to the Dallas-Ft. Worth, Texas area, where it was inspected at Aaacon's office and where the employee was directed to continue on to Houston. That the employee thereupon diverted from the designated destination of the automobile and it was not delivered to Ford's office in Houston. That the automobile was later found in California by the FBI, and was at that time in a damaged condition having salvage value only. That Ford was notified by the FBI of this fact and subsequently sold the automobile for its salvage value. That this sale was carried out in a commercially reasonable manner.

The conversion, insofar as the defendant Ford was concerned, was alleged to have arisen out of the repossession of plaintiff's automobile by Ford's Tulsa agent. However, in light of the admitted facts and the case of Helfinstine v. Martin, 561 P.2d 951 (Okla. 1977), plaintiff has conceded that the repossession was not a conversion.

Plaintiff further alleges that Ford is guilty of gross negligence in that it knew or had reason to know that the defendant John Doe would convert the automobile to his own use. Subsequent to its repossession, the automobile was in the possession and under the control of Ford by and through its Tulsa agent. The Uniform Commercial Code defines the duties of a secured party in possession of the collateral: "A secured party must use reasonable care in the custody and preservation of the collateral in his possession. . . ." 12A O.S. § 9-207(1). Ford's possession and control at least continued up until the time the automobile was delivered to the defendant John Doe. There is no indication that Ford failed to exercise reasonable care during this period, and in particular, there are no facts showing that Ford knew or should have known that John Doe might convert the automobile.

There is also no indication that Ford failed to exercise reasonable care in its selection of Aaacon to transport the automobile. It has been admitted by the parties that Aaacon

is a reputable and reliable business concern and has a reputation as such.

This fact also relieves Ford of any further liability for the negligence of Aaacon, if any. The defendant Aaacon can, under the facts here, be classified as an independent contractor, insofar as its relationship to the defendant Ford is concerned. Under Oklahoma law, "an independent contractor is one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work." Albina Engine and Machine Works, Inc., v. Abel, 305 F.2d 77, 81 (10th Cir. 1962) [Citations omitted].

"The general rule is that an owner is not liable for the negligence of its independent contractor, except where the work is inherently dangerous or unlawful or in cases where the principal contractor owes a contractual or a defined legal duty to the injured party in the performance of the work." Allied Hotels, Ltd. v. Barden, 389 P.2d 968, 971 (Okla. 1964), citing from Oklahoma City v. Caple, 187 Okl. 600, 105 P.2d 209 (1940).

As has already been discussed, a secured party in possession of the collateral has a defined legal duty under the Uniform Commercial Code to use reasonable care to preserve the collateral. However,

"One of the conditions under which the employer is relieved of liability for the negligent acts of an independent contractor which he has employed is when the employer has borne the duty which requires him to exercise due care in selecting a competent contractor for the necessary work. . . .

'Competent contractor' is defined as one who possesses the knowledge, skill, experience, personal characteristics, and available equipment which a reasonable man would realize that an independent contractor must have in order to do the work which he contracts to do without creating unreasonable risk of injury to others." Hudgens v. Cook Industries, Inc., 521 P.2d 813, 816 (Okla. 1974) [Citations omitted].

Likewise, Ford would be relieved of liability for any negligence of the defendant John Doe, which might be imputed to his employer, Aaacon, under the doctrine of respondeat superior.

For the foregoing reasons, it is therefore ordered that

the defendant Ford Motor Credit Company's Motion for Summary Judgment be and the same is hereby sustained.

It is so Ordered this 22<sup>nd</sup> day of December, 1977.

  
H. DALE COOK  
United States District Judge

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

EDDIE SCOTSKI,

Plaintiff,

vs.

HOUSING AUTHORITY OF THE CITY OF TULSA;  
TOM HARES, individually and in his  
capacity as Director of the Housing  
Authority of the City of Tulsa;  
JOE GRIMES, individually and his capacity  
as Manager of the Osage Hills Housing  
Project; and PATRICIA ROBERT HARRIS, in her  
official capacity as Secretary of the  
United States Department of Housing and  
Urban Development,

Defendants.

No. 77-C-197-102

FILED

DEC 20 1977

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

ORDER OF DISMISSAL

NOW, on this 26th day of December, 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 <sup>and cause of</sup> <sub>action</sub>  
against all defendants be and the same are hereby dismissed with  
prejudice.

Alan E. Barrow  
United States District Judge

APPROVED AS TO FORM:

Charles Hogshead  
Charles Hogshead  
Attorney for Eddie Scotski

Robert P. Santee  
Robert P. Santee, Asst. U. S. Attorney  
Attorney for Patricia Roberts  
Harris, in her official capacity  
as Secretary of the United States  
Department of Housing and Urban  
Development

PRICHARD, NORMAN, REED & WOHLGEMUTH

By Jerry Reed  
Jerry Reed  
Attorneys for Housing Authority  
of the City of Tulsa, J. Thomas  
Hares and Joe Grimes

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

LOCAL UNION 584, INTERNATIONAL )  
BROTHERHOOD OF ELECTRICAL WORKERS, )  
AFL-CIO, a labor organization, )  
VIRGINIA BEEKMAN and CLIFFORD )  
EDGAR, )  
 )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
GOULD, INC., SWITCHGEAR DIVISION, )  
 )  
 )  
Defendant. )

No. 77-C-337-C

**FILED**  
DEC 20 1977

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

O R D E R

Plaintiffs in this action have requested the enforcement of an arbitrator's award. Defendant has counterclaimed for money damages for the plaintiff's alleged breach of a collective bargaining agreement. Jurisdiction of plaintiff's cause of action is founded upon § 301 of the National Labor Relations Act (29 U.S.C. § 185). Defendant's counterclaim is compulsory under Rule 13(a) of the Federal Rules of Civil Procedure, and so falls within this Court's ancillary jurisdiction. Now before the Court are the plaintiffs' motion for summary judgment, the defendant's motion for partial summary judgment on its counterclaim, and the defendant's motion to strike the plaintiff's answer to its counterclaim.

The claims of the plaintiffs and the defendant arose out of a walkout by members of the plaintiff union from defendant's plant. Plaintiffs Beekman and Edgar participated in this walkout and were discharged from their employment with the defendant as a result. This discharge was processed through the proper grievance procedure and was ultimately submitted for arbitration. The arbitrator ordered a suspension for plaintiffs Beekman and Edgar, after which they were to be reinstated with full seniority and retirement benefits.

They have since been reinstated with full seniority and retirement benefits, but defendant has failed to comply with the remainder of the award, granting them full pay as of the date they were to be reinstated, in contravention of the collective bargaining agreement between plaintiff union and the defendant. Defendant alleges that he suffered damages as the result of this same walkout, which walkout was also contrary to the terms of the collective bargaining agreement.

Plaintiffs' Motion for

Summary Judgment

Defendant contends that the arbitrator's award is void as a matter of law, in that the arbitrator acted outside the scope of his authority under the collective bargaining agreement.

The source of the arbitrator's authority is found in Article XX, Section 2, of the collective bargaining agreement, which provides as follows:

"e. The arbitrators will have power only to interpret the provisions of this Agreement that are in dispute, and will have no power to add to, subtract from, alter, modify or disregard any of the terms of this Agreement or amendments or supplements hereto.

f. An arbitration decision or award will be based only on the specific provisions of this Agreement."

The provisions of the agreement which are primarily in dispute in the action before the Court are found in Article XXII, entitled "STRIKES AND LOCKOUTS," which provides:

"In view of the procedure for the orderly settlement of grievances provided under the terms of this Agreement, the Union agrees that there will be no strike, work interference, or other stoppage or slowdown of work, total or partial, during the term of this Agreement.

An employee or employees who participate in any such action in violation of this Agreement may be disciplined or discharged from the Company's service, subject to the employee's right to submit a grievance alleging improper discharge in accordance with the provisions of Article XX, Section

3, paragraph (c) of this Agreement. The Union agrees that it will take immediate positive action to forestall or suppress any action on the part of employees in violation of this Agreement."

The arbitrator held that a discharge of plaintiffs Beekman and Edgar was too severe under the circumstances, and since the agreement provided for "discipline or discharge," he was not acting outside the scope of the agreement by ordering discipline rather than discharge.

The scope of this Court's review of the arbitrator's award is extremely narrow. An arbitration award will be enforced if "it draws its essence from the collective bargaining agreement." Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597. The 10th Circuit has held that

"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, 332 (10th Cir. 1976).

The arbitrator found, as a matter of fact, that management and labor both were partly to blame for the walkout. He felt that their joint action could have prevented the walkout. He further found that the walkout was a prohibited act and that Beekman and Edgar were guilty of insubordination for participating in it, but that under the circumstances discharge was too severe a penalty. The arbitrator's decision is well-reasoned and thoroughly researched. He analyzed the facts as he found them and applied the facts to the issues raised. In light of the language employed in Article XXII, allowing discipline or discharge it is clear to the Court that the arbitrator's order of discipline was not a modification of the terms of the agreement and that it was reasonably based upon his factual findings. This is not a situation where the agreement provides that the decision to discharge is the responsibility of management alone. See Amanda Bent

Bolt Co. v. Internat'l U., U.A., A., A.I.W., 451 F.2d 1277 (6th Cir. 1971); Magnavox Co. v. Internat'l U. of E., R. & M. W., 410 F.2d 388 (6th Cir. 1969). In fact, Article XXII provides that a discharge under that section is subject to the employee's right to submit such action to the grievance procedure, which may ultimately result in arbitration, as it did here. For the foregoing reasons, the arbitrator's award is hereby affirmed.

The plaintiffs 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 arbitrator's award, all of the pleadings, and all the briefs submitted to the arbitrator and to this Court, and has concluded that the defendant did not act in bad faith and was not without justification for challenging the arbitrator's award. Therefore, plaintiffs' request for attorneys' fees is denied.

Defendant's Motion for  
Partial Summary Judgment

Defendant in its counterclaim alleges that plaintiffs violated Article XXII of the collective bargaining agreement which prohibits interference with work, or other stoppage of work. The arbitrator conclusively found that plaintiffs Beekman and Edgar violated the agreement by their participation in the walkout. However, he did not specifically find that the union violated the agreement. Whether or not the union violated the collective bargaining agreement is an important factual question still left to be resolved.

Defendant's counterclaim also falls within the purview of § 301 of the National Labor Relations Act (29 U.S.C. § 185). This section is procedurally a basis for jurisdiction of federal district courts in cases alleging a violation of a collective bargaining agreement. However, it has also been held that § 301 is substantive in nature such that federal law must always be applied in suits for violation of collective bargaining agreements. Textile Workers U. v. Lincoln Mills, 353 U.S. 448 (1957). Section 301 (29 U.S.C. § 185(b)) provides in part: "Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." The Supreme Court in Atkinson v. Sinclair Refining Co., 370 U.S. 238, 249 (1962), held that "when a union is liable for damages for violation of the no-strike clause, its officers and members are not liable for these damages." In that case, liability was sought to be imposed upon a union, and some of its members acting as agents of the union, under § 301. The Court dismissed the cause of action insofar as it sought to impose liability upon the individual union members as agents of the union. The identical situation is presented here. Defendant's counterclaim alleges liability of the union and

liability of plaintiffs Beekman and Edgar as "officers, agents and members of Plaintiff Union." Therefore, defendant's claims against Beekman and Edgar cannot be maintained and the Union's liability becomes the central question to be resolved.

Defendant's Motion

to Strike

It has been consistently held in federal courts that motions to strike

"are not favored and should not be granted, even in cases where the averments complained of are literally within the provisions of Rule 12(f) of the Federal Rules of Civil Procedure, in the absence of a demonstration that the allegations attacked have no possible relation to the controversy and may prejudice the other party." Gilbert v. Eli Lilly & Co., Inc., 56 F.R.D. 116, 121 (D.P.R. 1972)[Citations omitted].

The Court has examined plaintiffs' answer to the counterclaim and defendant's objections thereto and finds that plaintiffs' answer relates to the controversy and presents no possibility of prejudice to the defendants.

For the foregoing reasons, it is therefore ordered that plaintiffs' motion for summary judgment is sustained; that defendant's motion for partial summary judgment on its counterclaim is overruled; that defendant's counterclaim against the plaintiffs Beekman and Edgar is dismissed; and that defendant's motion to strike plaintiffs' answer to its counterclaim is overruled.

It is so Ordered this 20<sup>th</sup> day of December, 1977.

  
H. DALE COOK  
United States District Judge

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JACK B. SMITH, CAROL E. SMITH, )  
 COUNTY TREASURER, Washington )  
 County, Oklahoma, and BOARD OF )  
 COUNTY COMMISSIONERS, Washington )  
 County, Oklahoma, )  
 )  
 Defendants. )

CIVIL ACTION NO. 77-C-291-C ✓

**FILED**

DEC 19 1977 *hm*

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

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 19<sup>th</sup>  
day of December, 1977, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney; and the Defendants,  
Jack B. Smith, Carol E. Smith, County Treasurer, Washington  
County, Oklahoma, and Board of County Commissioners, Washington  
County, Oklahoma, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, County Treasurer, Washington  
County, Oklahoma, and Board of County Commissioners, Washington  
County, Oklahoma, were served with Summons and Complaint on  
July 28, 1977, as appears on the United States Marshal's Service  
herein; and, that Defendants, Jack B. Smith and Carol E. Smith,  
were served by publication as shown on the Proof of Publication  
filed herein.

It appearing that the Defendants, Jack B. Smith,  
Carol E. Smith, County Treasurer, Washington County, Oklahoma,  
and Board of County Commissioners, Washington County, Oklahoma,  
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 Washington County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twenty-Seven (27), in Block Twenty-Four (24), of OAK PARK VILLAGE, SECTION II, an Addition to the City of Bartlesville, Washington County, Oklahoma.

THAT the Defendants, Jack B. Smith and Carol E. Smith, did, on the 17th day of August, 1973, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$9,250.00 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, Jack B. Smith and Carol E. Smith, 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 \$9,042.72 as unpaid principal with interest thereon at the rate of 7 1/2 percent per annum from November 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 Washington, State of Oklahoma, from Defendants, Jack B. Smith and Carol E. Smith, the sum of \$26.34 plus interest according to law for personal property taxes for the year 1976 and that Washington 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.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants, Jack B. Smith and Carol E. Smith, in rem, for the sum of \$9,042.72 with interest thereon at the rate of 7 1/2 percent per annum from November 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.

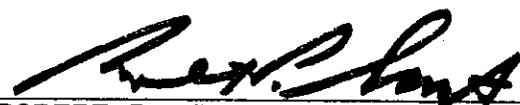
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the County of Washington have and recover judgment, in rem, against Defendants, Jack B. Smith and Carol E. Smith, for the sum of \$26.34 as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that 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.

  
UNITED STATES DISTRICT JUDGE

APPROVED

  
ROBERT P. SANTEE  
Assistant United States Attorney

DEC 19 1977

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

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

INTERSTATE COMMERCE COMMISSION, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
JERRY INMAN TRUCKING, INC., )  
 )  
Defendant )

77-C-527-C

CIVIL ACTION NO. \_\_\_\_\_

CONSENT DECREE

This cause having come on for consideration on the Stipulation of the parties:

It is hereby ORDERED, ADJUDGED and DECREED that there be judgment in favor of plaintiff Interstate Commerce Commission and;

That the defendant Jerry Inman Trucking, Inc., its agents, employees and representatives, and all persons, firms, companies, and corporations, and their respective officers, agents, servants, employees, and representatives, in active concert or participation with it, be perpetually enjoined and restrained from, in any manner or by any device, directly or indirectly, transporting or holding themselves out to transport property, other than exempt and non-regulated commodities, in interstate or foreign commerce by motor vehicle for compensation, on public highways as a for-hire common, or contract carrier by motor vehicle, unless and until such time, if at all, as there is in force with respect to said defendant a certificate of public convenience and necessity or a permit issued by the Interstate Commerce Commission authorizing such transportation.

Dated at Tulsa, Oklahoma, this 19<sup>th</sup> day of December, 1977.

[Signature]  
United States District Judge

Approved as to form:

[Signature]  
Wilburn L. Williamson

[Signature]  
Simon W. Oderberg

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

UNITED STATES FIDELITY AND )  
GUARANTY COMPANY, a corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
EVERETT S. COLLINS, d/b/a )  
INTERSTATE PAINTING COMPANY, )  
 )  
Defendant. )

No. 77-C-46-C

**FILED**

DEC 16 1977 *pen*

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

ORDER

On October 25, 1977, the Court sustained plaintiff's motion for summary judgment and entered judgment on its behalf. Defendant has requested the Court to reconsider its order of that date, on the ground that material issues of fact remain outstanding. Specifically, the defendant contends that the facts are disputed on the issues of actual default and the good faith of the plaintiff. The Court has reviewed its Order in light of defendant's motion and is convinced that the issues raised by defendant were adequately decided as a matter of law based upon undisputed facts. For that reason, defendant's motion to reconsider is hereby overruled.

Plaintiff has requested an award of attorneys' fees in the amount of \$2,850.00. Defendant has not responded to this application. Therefore, pursuant to the contract between the parties, plaintiff is hereby awarded attorneys' fees in the amount of \$2,850.00.

It is so Ordered this 15<sup>th</sup> day of December, 1977.

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

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

BROADCAST MUSIC, INC., et al., )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 SPECIALIZED SERVICE, INC., )  
 d/b/a THE STAGE DOOR, )  
 )  
 Defendant. )

No. 77-C-211-C

**FILED**

**DEC 16 1977**

CONSENT DECREE

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

This matter comes on for hearing on the 16<sup>th</sup> day of December, 1977, pursuant to the Stipulation for Consent Decree filed herein by the parties. And the Court, after having carefully reviewed the said Stipulation (to include the attached Exhibit "A") and the court file, and after noting that this Court on November 8, 1977, entered a minute order declaring the facts included in plaintiffs' Requests for Admission admitted, and the documents attached thereto genuine, finds that the facts alleged in the Complaint filed herein have been fully established, and that plaintiffs are entitled to judgment as prayed for in the Complaint, and as agreed to by the parties in the Stipulation for Consent Decree filed herein:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS  
FOLLOWS:

(a) That defendant, its agents and employees, and all persons acting under the direction, control, permission or

license of defendant be enjoined from infringing the copy-  
rights of plaintiffs in any manner.

(b) That plaintiffs have judgment against  
defendant for \$400.00 for each of the established infringe-  
ments, for a total amount of \$2,400.00, its costs of \$19.60,  
and a reasonable attorney's fee of \$750.00.

Done this \_\_\_\_\_ day of \_\_\_\_\_, 1977.

UNITED STATES DISTRICT JUDGE

APPROVED:

  
PETER T. VAN DYKE  
Attorney for Plaintiffs

  
LARRY S. HARRAL  
Attorney for Defendant

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

SAFECO INSURANCE COMPANIES, )  
a Washington corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
STEPHEN MARTIN HIGGINBOTHAM, )  
 )  
Defendant. )

No. 77-C-5-C

FILED

DEC 16 1977

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

J U D G M E N T

Plaintiff in this action requests, under 28 U.S.C. § 2201, a declaration of its non-liability to defendant, one of its insureds under Policy No. OJ32117. The controversy here revolves around the interpretation of an exclusionary clause in said policy which excepts coverage for injuries arising out of "business pursuits" of the insured. See Exhibit "B" to the Complaint. Defendant contends that plaintiff has the obligation to defend him and furnish insurance coverage in regard to an injury which gave rise to a lawsuit which has been filed in Tulsa County. Now before the Court is the parties' Stipulation of Facts, submitted for a decision by the Court in this matter. The relevant stipulated facts are as follows.

The defendant had been employed to act as a security guard for a fraternity party and dance at the Hilton Inn in Tulsa, Oklahoma on May 3, 1975. He was to be paid on this occasion as he had been on previous occasions when working as a security guard. He held a Tulsa City license permitting him to work as a security guard. He was also a special bonded Tulsa County deputy which permitted him to carry a firearm while on the job. He was carrying a gun on this particular evening. His job on this occasion was to make sure things ran smoothly and to keep out unwanted guests. He arrived at the scene of the fraternity party at 8:00 p.m.

Some guests were already present at this time. A band was to commence playing at 9:00 p.m. One of the band members asked the defendant if he could see his service revolver. The defendant unloaded the revolver and allowed the band member to examine it. The band member returned the revolver to the defendant. At approximately 8:55 p.m. the defendant began to reload the revolver, during which time the revolver discharged injuring a member of the band.

The question to be decided is whether, at the time of the injury to the band member, defendant was engaged in a "business pursuit", or in an activity "therein . . . ordinarily incident to non-business pursuits." Injuries arising out of activities "therein [referring to "business pursuits"] . . . ordinarily incident to non-business pursuits," are covered under an exception to the "business pursuit" exclusion. See Exhibit "B" to the Complaint. The terms of an insurance contract, if unambiguous, must be accepted in their plain, ordinary, and popular sense. Wiley v. Travelers Ins. Co., 534 P.2d 1293, 1295 (Okla. 1974); Penley v. Gulf Ins. Co., 414 P.2d 305, 308 (Okla. 1966).

There is no question but that defendant had embarked upon his "business pursuit" at the time he arrived at the Hilton Inn. It has been stipulated that there were already guests in attendance at the time he arrived and that one of his duties that evening was to keep out undesirables. Because there were already people arriving, he was obligated to keep out those who were unwanted and was thus at that time carrying out his employment. It has been stipulated that defendant was to be paid for his efforts on this particular evening and had been paid in the past for acting as a security guard. "'Business' . . . has been defined as that which 'occupies the time, attention and labor of men for the purpose of a livelihood or profit.'" Wiley v. Travelers Ins. Co., supra, citing Kelley v. United States,

202 F.2d 838, 841 (10th Cir. 1953). Defendant's employment as a security guard was a "business pursuit" in the plain, ordinary, and legal sense of the words.

By the same token, it is clear that at the time defendant was showing his revolver to the band member, he was engaged in an activity "therein . . . ordinarily incident to non-business pursuits." This act was purely a social one. He had departed temporarily from his "business pursuit" and was absorbed enough in this "non-business pursuit" that he thought to unlaod his weapon to protect the other party.

On the other hand, defendant's activities at the time of the injury do not lend themselves to such a simple interpretation. It has been argued that defendant was engaged in a "business pursuit" in that he was preparing his weapon for possible use in his employment. "Incident", as used in an insurance policy exclusion very similar to the one in question, has been defined as meaning "that which appertains to something else which is primary." Security Nat'l Ins. Co. v. Sequoyah Marina, 246 F.2d 830, 833 (10th Cir. 1957). In line with this definition, it could be said that the defendant was engaged in an activity "incident" to a business pursuit. But the exclusion does not read in this way. Those activities "arising" out of business pursuits fall within the exclusion. Clearly, the defendant's reloading of his gun arose out of his "non-business" act of showing the gun to the band member. He would not have needed to reload his gun had he not unloaded it for this purpose. In addition, when one considers what defendant's stipulated duties were -- making sure the party ran smoothly and that there were no unwanted guests -- it is clear that loading a gun was outside these duties and therefore defendant was not at that time engaged in a "business pursuit."

Judgment is hereby entered in behalf of the defendant, Stephen Martin Higginbotham, and against the plaintiff, Safeco Insurance Companies.

It is so Ordered this 16<sup>th</sup> day of December, 1977.

  
H. DALE COOK  
United States District Judge

FILED

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

DEC 15 1977

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

BROADCAST MUSIC, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 77-C-353-B
	)	
REFLECTIONS OF TULSA, INC.,	)	
	)	
Defendant.	)	

JOURNAL ENTRY OF JUDGMENT

This matter comes on for hearing on the 15<sup>th</sup> day of December, 1977, upon the motion for default judgment filed on behalf of plaintiffs, the plaintiffs appearing by and through their attorney, Peter T. Van Dyke, of Lytle Soule & Emery, Oklahoma City, Oklahoma. After hearing the arguments of counsel, reviewing the citations of authority, and the affidavit submitted on behalf of plaintiffs, and after reviewing the court file, the Court finds that the defendant was properly served with a copy of the complaint and the summons on August 17, 1977; that an answer or other pleading was required to be filed by defendant on or before September 6, 1977, twenty days after service of the summons and complaint on it; that the records of the Court Clerk, United States District Court for the Northern District of Oklahoma reveal that no answer, pleading, or entry of appearance has been filed on behalf of defendant, and that the defendant is wholly in default.

The Court further finds that the plaintiffs' claim arises under 17 U.S.C. §101, and that the complaint alleges violations of the copyright laws by reason of

alleged copyright infringements by defendant at a local club known as "Reflections." The Court further finds that all of the musical compositions alleged in the complaint were properly copyrighted, and that plaintiff, Broadcast Music, Inc., was at the time of the alleged infringements (March 2, 1977 and May 26, 1977) the sole licensee of the right publicly to perform said musical compositions for profit. The Court further finds that the defendant was not licensed or authorized by any of the plaintiffs, to include Broadcast Music, Inc., to publicly perform for profit any of the musical compositions alleged in the complaint.

The Court therefore finds that it is proper that judgment be entered as prayed for in the complaint, with damages assessed in the amount of \$500.00 per infringement, for a total sum of \$3,500.00, plaintiffs' costs and a reasonable attorney's fee of \$750.00, along with an injunction enjoining future infringements by defendant.

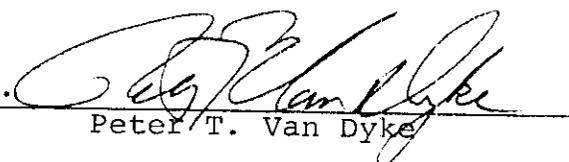
IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

1. That defendant, Reflections of Tulsa, Inc., its agents, servants, and other persons acting under the direction, control, permission or license of defendant, be permanently enjoined from infringing the copyrights of plaintiffs in any manner.

2. That plaintiffs have damages in the amount of \$3,500.00 against defendant, said sum being on the basis of \$500.00 for each of the infringements found by the Court, its costs, and an attorney's fee of \$750.00.

  
United States District Judge

O.K.

  
Peter T. Van Dyke

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

WALTER LEE TOLE, )  
 )  
 Plaintiff, )  
 )  
 vs. ) No. 77-C-519-C  
 )  
 DAVE FAULKNER, ET AL., )  
 )  
 Defendants. )

FILED

DEC 15 1977

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

O R D E R

This is an action brought pro se pursuant to 42 U.S.C. § 1983 by a prisoner in the Tulsa County Jail. Plaintiff was permitted to file his complaint in forma pauperis, but was advised that any further proceedings must be specifically authorized in advance by the Court. Plaintiff has named as defendants the Tulsa County Sheriff and two of his employees who are alleged to have the responsibility of supervising and guarding the Tulsa County Jail. Liberally construed, the complaint alleges violations by the defendants of plaintiff's rights under the Fourth and Fourteenth Amendments to the United States Constitution, in that on October 31, 1977, during a shakedown at the jail, defendant Gene Long arbitrarily removed the batteries from plaintiff's radio. Plaintiff seeks a preliminary and permanent injunction restraining the defendants from violating his rights, punitive damages against two defendants, in the sum of \$100,000.00 each, and actual damages against defendant Long in the amount of \$1.40, the value of the batteries.

Title 28 U.S.C. § 1915, the statute authorizing proceedings in forma pauperis, provides in subsection (d) that "[t]he court . . . may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." Under this statute,

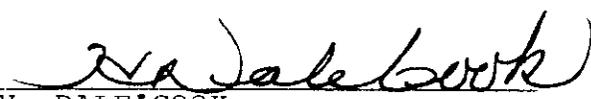
"It is preferable procedure for a federal district court to authorize the commence-

ment and prosecution of an action without the prepayment of costs, if the requirements of § 1915(a) are satisfied on the face of the papers submitted, and if the court thereafter discovers that the allegation of poverty is untrue, or if it is satisfied that the action is frivolous or malicious, then to dismiss the action."

Duhart v. Carlson, 469 F.2d 471, 473 (10th Cir. 1972), cert. denied 410 U.S. 958, 93 S.Ct. 1431, 35 L.Ed.2d 692 (1973); Oughton v. United States, 310 F.2d 803 (10th Cir. 1962) cert. denied 373 U.S. 937, 83 S.Ct. 1542, 10 L.Ed.2d 693 (1963). Once filed, the complaint may be dismissed by the Court on its own motion, prior to the issuance of summons, if it determines that the action is frivolous. Conway v. Fugge, 439 F.2d 1397 (9th Cir. 1971); Williams v. Field, 394 F.2d 329 (9th Cir. 1968).

The deprivation of property, as well as injury to the person, may be the basis for a civil rights action. Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972). However, that does not mean that every deprivation of property constitutes a denial of due process rights. There are instances where the property interests involved are so de minimis that a confiscation does not rise to the level of a constitutional violation. Nickens v. White, 536 F.2d 802 (8th Cir. 1976); Clark v. Brandom, 415 F.Supp. 883 (W.D. Mo. 1976). The Court believes that the instant case presents one of those instances. Under the circumstances of this case, plaintiff's claim of the confiscation of radio batteries does not rise to the level of a constitutional violation and is therefore frivolous. Consequently, under the authority of 28 U.S.C. § 1915(d), this action is hereby dismissed.

It is so Ordered this 15<sup>th</sup> day of December, 1977.

  
H. DALE COOK  
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**

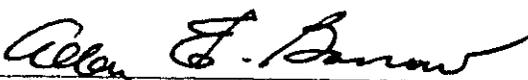
**DEC 14 1977**

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

ORDER OF DISMISSAL

On this the 14<sup>th</sup> day of December, 1977, it appearing to the Court from the Stipulation for Dismissal With Prejudice, with costs taxed against plaintiff, filed by the plaintiff herein that the above entitled case has been fully settled and compromised by the parties thereto;

IT IS ORDERED that all said causes of action contained therein are hereby dismissed with prejudice.

  
United States District Judge

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

OVEL W. OHLER,  
Plaintiff,

vs.

SECRETARY OF HEALTH, EDUCATION  
AND WELFARE OF THE UNITED  
STATES OF AMERICA,

Defendant.

75-C-183-B

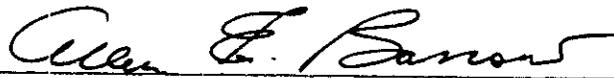
FILED

DEC 14 1977

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

JUDGMENT

Pursuant to the Memorandum entered this date,  
IT IS ORDERED that judgment be and the same is hereby  
entered in favor of the defendant and against the plaintiff.  
ENTERED this 14<sup>th</sup> day of December, 1977.



CHIEF UNITED STATES DISTRICT JUDGE

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

OVEL W. OHLER,  
Plaintiff,

vs.

SECRETARY OF HEALTH, EDUCATION  
AND WELFARE OF THE UNITED  
STATES OF AMERICA,

Defendant.

75-C-183-B

**FILED**

**DEC 14 1977**

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

MEMORANDUM

This matter comes on for consideration by the Court upon an agreed Pre-Trial Order for disposition.

This action was commenced by plaintiff for judicial review of a decision of the defendant denying him benefits for Black Lung Benefits for an alleged disability due to pneumoconiosis under Title IV, Section 411(a) 30 U.S.C. §921(a) (Federal Coal Mine Health & Safety Act, as amended).

The transcript submitted reveals the following:

Plaintiff filed an Application for Benefits Under the Federal Coal Mine Health and Safety Act of 1969, as amended, on October 20, 1972 (TR 19-22). In said application he listed his disability as "black lung". He listed that he had been a miner for Gillie Coal Company of Bokoshe, Oklahoma from 1929 to 1948. The application further reveals that he was born on January 6, 1908.

On March 29, 1973, said claim was denied (TR 24-26). On page 26 of the Transcript, under "Additional Information About Your Claim" the following statement was made:

"Evidence submitted in connection with your claim does not show that you have pneumoconiosis or a severely disabling chronic lung impairment that could be pre-

sumed to be due to pneumoconiosis. Therefore, you do not meet the requirements of the law and your claim must be denied."

On March 6, 1974, a Notice of Proposed Reconsidered Determination was entered (TR 29-31) denying plaintiff's claim. On page 31 of the Transcript it is stated:

"As part of the reconsideration process, all the evidence in your case was reexamined by a special staff different from the one who initially reviewed your claim. The evidence in your case includes an X-ray taken February 2, 1973, the results of special breathing tests and reports of physical examinations.

"This evidence does not show you have pneumoconiosis or a disabling lung condition. Accordingly, on the basis of all of the evidence in your file it has been determined that you do not meet the requirements of the law for entitlement to benefits. Therefore, it is necessary to again deny your claim."

It appears that the claimant waived his right to appear personally before the Administrative Law Judge at a hearing and requested that a decision be made on the written evidence of the record. (TR-12)

On August 19, 1974, the Administrative Law Judge rendered his decision (TR 12-17).

On March 3, 1975, notice of the action of the Appeals Council on request for review was entered denying plaintiff's claim. (TR-3)

Title 30 U.S.C. §921(a) provides:

"(a) The Secretary shall, in accordance with the provisions of this part, and the regulations promulgated by him under this part, make payments of benefits in respect of total disability of any miner due to pneumoconiosis, and in respect of the death of any miner whose death was due to pneumoconiosis or who at the time of his death was totally disabled by pneumoconiosis."

Subsection (b) provides, in pertinent part:

"(b) The Secretary shall by regulation prescribe standards for purposes of subsection (a) of this section whether a miner is totally disabled due to pneumoconiosis. \*\*\*

Subsection (d) provides, in pertinent part:

"(c) for purposes of this section ---

"(1) if a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines there shall be a rebuttable presumption that his pneumoconiosis arose out of such employment;

"(3) if a miner is suffering or suffered from a chronic

dust disease of the lung which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B), then there shall be an irrebuttable presumption that he is totally disabled due to pneumoconiosis \*\*\*; and

"(4) If a miner was employed for fifteen years or more in one or more underground coal mines, and if there is a chest roentgenogram submitted in connection with such miner's \*\*\* claim under this subchapter and it is interpreted as negative with respect to the requirements of paragraph (3) of this subsection, and if other evidence demonstrates the existence of a totally disabling respiratory or pulmonary impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis \*\*\*. In the case of a living miner, a wife's affidavit may not be used by itself to establish the presumption. The Secretary shall not apply all or a portion of the requirement of this paragraph that the miner work in an underground mine where he determines that conditions of a miner's employment in a coal mine other than an underground mine were substantially similar to conditions of an underground mine. The Secretary may rebut such presumption only by establishing that (A) such miner does not, or did not, have pneumoconiosis, or that (B) his respiratory or pulmonary impairment did not arise out of, or in connection with employment in a coal mine."

The medical report of John E. Highland, M.D., dated 12/18/73 (TR 44-45) reflects the following:

Under History:

"COUGH:

Does the applicant have a significant cough in the morning? Yes.

Does the cough persist throughout the day? No.

If the applicant has a significant cough, does it appear as much as 3 months a year? Yes.

Approximately how many years has there been a cough? 3 to 4 years."

Under Phlegm the following appears:

"Does the miner bring phlegm from his chest (not nose or back of throat) in the morning? Yes. Throughout the day? Yes. (Until about 10 a.m.)

If the answer to the above is 'Yes', does the above occur as much as 3 months a year? Yes.

Approximately how many years has there been such sputum production? 3 to 4 years.

Under Shortness of Breath:

"Does the applicant complain of shortness of breath? Yes.

If 'Yes', does it occur when walking on level ground? Yes.

When walking up a slight hill or climbing stairs? Yes

Does the applicant complain of shortness of breath at other

times. Yes. Explain: When hurrying about."

The physical findings were B.P. 150/98; Resp. rate 16 per min. The report further shows a history of umbilical hernia, degenerative arthritis and being overweight--with the notation that he was first seen 1-12-73.

The diagnosis was:

1. Pulmonary emphysema;
2. Degenerative arthritis of spine and extremities;
3. Obesity

In an undated medical report of H. Wendelkin (TR 46-47) it was revealed that the lungs were found clear; the heart normal; and blood pressure 130/80, with an additional finding that plaintiff is obese. The diagnosis was "very mild emphysema".

In an x-ray exam, dated 2-2-73, it is noted (TR 48):

"PA EXAM OF THE CHEST reveals the lung fields to be well expanded and free from active localized infiltrate. The heart is within normal limits. The mediastinum is not widened. There is no free pleural effusion.

"CONCLUSION: Chest is negative for active disease."

Pulmonary function studies were made and a report rendered dated February 2, 1973. The FEV1 of plaintiff was 2.5 liters and his MVV was 55.8 liters per minute (TR 52).

A report of the Oklahoma State Sanatorium dated 10/29/74 (TR 58) shows vital capacity as follows: TVC, 3.1=75.6%; FVC, 2.9=70.7%; FEV1, 2.0=64.5% of TVC. The diagnosis was "Pulmonary insufficiency due to chronic restrictive and obstructive pulmonary disease."

Attached to the complaint filed herein by the plaintiff was a medical report dated April 14, 1975, submitted by Dr. Frank L. Bradley, which plaintiff alleged was "new and material evidence, not heretofore considered by the defendant herein" and asked for remand. The history of Dr. Bradley contained in the report is as follows:

"Mr. Ohler documents 33 years work in coal-mines, the last year of which was 1946. He states that his nose and throat burned because of fumes and thick dust from cutting coal. While in the mines he noticed being short of breath and at the same time he coughed and raised large quantities of coal dust. He quit the mines once

because of breathing difficulty, later resumed mine work only to find that breathing was too difficult. After leaving the coal mines he worked at carpentering but was short of breath all during this time. After this worked with wrecked cars, thinking that driving a truck only would be more satisfactory because of the same problem. He was in the army during the war for three months but was discharged because he was not able to do duty because of lack of air. He states that he has not been able to work for four years and at the present time there is no work that he is able to do on account of air hunger."

After detailing his examination, Dr. Bradley submitted the following summary and diagnosis:

"Summary: We have in this case both observed and in the history of extreme shortness of breath for which one must discover the reason. In obesity one would expect to find dyspnea for the simple reason of his weight. Perhaps, this is true to some extent, but then we have to consider the definite lung pathology and the history of coal-mine work for an extended period of time. One must admit that when every breath is loaded with poisonous coal dust and eroding fumes, some kind of pathology is certain to follow. Consequently, it is not a miracle that he has pneumoconiosis, it would be a great miracle if he did not. The two definite diagnostic points are what is seen on the x-ray and his history of being under ground in coal mines for a period of 33 years. Cor pulmonale is another fact of the physical examination that lends support to the following diagnosis.

"Diagnosis:

1. Coal-miners pneumoconiosis
2. Cor pulmonale from number one."

In his report Dr. Bradley reported that the pulmonary function tests revealed a MVV of 51L/M and his one second vital capacity was 2.39 L. Blood gas analysis revealed a pCO<sub>2</sub> of 33 mm/Hg. and a pO<sub>2</sub> of 78 mm/Hg.

Heretofore, the Court did not remand this case due to said report, having found the same to be cumulative. (See order of May 13, 1976, subsequently appealed to the Tenth Circuit Court of Appeals)

Plaintiff is receiving Veterans Administration Benefits. (TR 59-60). The Administrative Law Judge found that plaintiff "never filed a claim with any state Workmen's Compensation Commission for a respirable impairment". (TR-5)

The Administrative Law Judge made the following Findings and Decision. (TR-16-17)

"The Administrative Law Judge has carefully considered the entire record in this case, including the claimant's contentions, and, based upon all the credible evidence and the applicable law, makes the following specific findings:

1. The evidence of record establishes that the claimant was born on January 6, 1908, and the highest grade he completed in school was the 5th.
2. The claimant alleges that he worked in the coal mining industry for approximately 30 years and it appears that he last worked in the mining industry around 1948.
3. The claimant has engaged in various types of substantial gainful activity since leaving the mines up to 1971.
4. There is no medical evidence in the record establishing that the claimant has pneumoconiosis or any significant or severe respiratory impairment of any kind.
5. Pulmonary function studies given the claimant do not show that the claimant's respiratory impairments are so severe as to be considered of a disabling nature.
6. In view of all of the foregoing the Administrative Law Judge does not feel he can rule in favor of the claimant with respect to his claim for black lung benefits.

Decision: It is the decision of the Administrative Law Judge that the claimant, based on his application filed on October 20, 1972, is not entitled to black lung benefits for total disability due to pneumoconiosis under Title IV, section 411(a) (30 USC 921(a)) of the Federal Coal Mine and Safety Act, as amended."

The duty of this Court is limited to determining whether the findings of the Secretary are supported by substantial evidence. This is the test under the Social Security Act, 42 U.S.C. §405(g) and (h), as incorporated into the Coal Mine Health and Safety Act, 30 U.S.C. §923(b). *Cusatis v. Mathews*, 405 F.Supp. 619 (USDC E.D.Pa., 1976).

Additionally, in reviewing the decision of the Secretary under 42 U.S.C. §405(g), the district court is bound by those factual findings of the Secretary which are based on substantial evidence. It is not the function of the court to substitute its judgment for that of the Secretary if his decision is supported by substantial evidence. *Laws v. Celebrezze*, 368 F.2d 640 (4th Cir.

1966); Mullins v. Mathews, 414 F.Supp. 874 (USDC WD Va. 1976)

As stated in Mullins v. Mathews, supra:

"The Act provides that the Secretary shall pay benefits to any miner who is totally disabled due to pneumoconiosis. 30 U.S.C. §921(a). Pursuant to §411(b) of the Act, 30 U.S.C. §921(b), the Secretary has promulgated regulations prescribing the standards for determining whether a claimant has established his entitlement to benefits. \*\*\*."

See also Campbell v. Weinberger, 402 F.Supp. 1147 (USDC ND. W.Va. 1975).

This Court is of the opinion that substantial evidence in the record as a whole supports the opinion of the Secretary.

IT IS, THEREFORE, ORDERED that judgment be entered in favor of the defendant and against the plaintiff.

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



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CHIEF UNITED STATES DISTRICT JUDGE

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

BETTY S. PAINTER, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ROCKWELL INTERNATIONAL, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Case No. 76-C-2-B ✓

**FILED**

DEC 14 1977 H.O.

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

ORDER

This cause having come before the Court upon Defendant's Motion to Dismiss, and the Court having reviewed the pleadings, briefs and record in this case, and having further reviewed the Findings and Recommendations of the Magistrate with respect to such Motion, and the Court being fully advised in the premises, it is the finding of this Court that such Motion should be granted for the reasons set forth below.

This case involves an action brought by the Plaintiff pursuant to 42 U.S.C. § 2000e, et seq., charging that Defendant unlawfully denied her request for transfer to another division of Defendant because of her sex (female).

Certain facts, as set forth below, are not in dispute. These facts include matters set forth in the pleadings, Admissions of Plaintiff, and an Affidavit of Defendant's Manager of Personnel Administration. Plaintiff was given notice, pursuant to Rule 12(c), that the Court intended to consider matters outside the pleadings for the purpose of deciding the statute of limitations issue. Plaintiff advised the Court by a pleading dated September 13, 1977, that she had no objection to a ruling on the Motion to Dismiss without further discovery.

The Court therefore finds that Plaintiff applied for a transfer with the Aerospace Division plant of Defendant in April of 1973. It is the policy of Defendant's Aerospace Division to process applications for interdivisional transfers on the same basis as applications from non-employees. When Plaintiff applied, the Aerospace Division plant of Defendant had several thousand employees on layoff, and that plant was, therefore, not hiring anyone in the position of General Clerk (which was Plaintiff's position with the division of Defendant at which she was employed). Accordingly, Plaintiff was refused employment by the Aerospace Division plant at the time of her transfer request in April of 1973. Plaintiff admits that she made no further application for transfer with the Aerospace Division plant after April of 1973. Plaintiff thereafter terminated her employment with Defendant on August 31, 1974.

Prior to the termination of her employment, Plaintiff filed a charge against Defendant with the Oklahoma Human Rights Commission, alleging that the refusal to grant her transfer request discriminated against her because of her sex (female). This charge, which was filed on January 18, 1974, was made more than 180 days after the rejection by Defendant of her transfer request.

On April 24, 1974, Plaintiff filed charges against Defendant with the U.S. Equal Employment Opportunity Commission, raising the same allegations of sex discrimination. This charge was filed more than 300 days after denial of Plaintiff's transfer request. The E.E.O.C. investigated the charge, and issued a Right-to-Sue letter to Plaintiff on or about October 31, 1975, upon finding that the charge was without merit. Plaintiff applied for appointment of counsel on January 6, 1976, within the 90-day Right-to-Sue period. Counsel was appointed for her on February 9, 1976, and the instant complaint

was filed on March 24, 1976. Thus, the complaint was filed after the 90-day Right-to-Sue period had expired.

Defendant moved to dismiss the action on three grounds. First, Defendant claimed that this action is barred by 12 O.S. § 95(3), in that the action was filed more than two years after the cause of action accrued. Secondly, Defendant claimed that this Court lacks subject matter jurisdiction of the action, because its rejection of the transfer request of Plaintiff was not a "continuing" violation and Plaintiff did not file timely charges against Defendant as required by Title VII. Third, Defendant claims that Plaintiff failed to bring suit against it within the 90-day Right-to-Sue period, and her action is, therefore, barred.

With respect to the first grounds, the parties are in dispute as to: (1) whether state statutes of limitations apply to actions under 42 U.S.C. § 2000e; (2) whether, if such state statutes apply, the limitation period is tolled during the pendency of a charge before E.E.O.C.; and (3) if such state statutes apply, which Oklahoma limitation period is applicable.

This Court finds, in agreement with the District Court in Clayton v. McDonnell Douglas Corp., 419 F. Supp. 28, 12 EPD ¶ 11,165 (C.D. Cal. 1976), that state statutes of limitations apply to private actions brought under Title VII. An analysis of that statute reveals that there is no set time limit for the institution of an action in federal district court under the statute. Therefore, absent conflict with compelling federal interests, the most closely analogous state limitation period should apply. Johnson v. Railway Express Agency, Inc., 421 U.S. 454; Holmberg v. Armbrecht, 327 U.S. 392; Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696.

Plaintiff argues that precisely such compelling federal interests apply here, and urges that the decision by the Supreme Court in Occidental Life Insurance Co. v. EEOC, \_\_\_\_\_ U.S. \_\_\_\_\_, 97 S. Ct. 2447 (1977) mandates the conclusion that there are no time limitations on an individual Title VII action, other than the filing of a timely EEOC charge and the institution of suit within the 90-day Right-to-Sue period. In Occidental, the Supreme Court held that state statutes of limitations were not applicable to suits brought by E.E.O.C. under Title VII, because E.E.O.C. is powerless to bring suit until after conciliation measures are exhausted, and because E.E.O.C. has a significant backlog of cases which would make exhaustive conciliation and suit within a relatively short time period virtually impossible. From these two factors, and especially because forcing E.E.O.C. into premature suit would conflict with its conciliation responsibilities, the Court found that a Congressional intent to place no limitation on E.E.O.C. suits could be inferred.

However, simply because there is no time limitation on E.E.O.C. suits does not necessarily mean that there are no time limitations on individual actions under Title VII. Unlike the E.E.O.C., a private plaintiff is not forced to postpone the institution of suit until all E.E.O.C. administrative efforts have been exhausted. Rather, a private party remains free to request a Right-to-Sue letter and to institute his or her suit in federal court, once E.E.O.C. has been accorded an initial 180-day period in which to act on his or her charge.

Thus, under Title VII, a private party has two avenues for possible relief. Plaintiff had the option to leave her charge with E.E.O.C., and to rely upon E.E.O.C. to investigate

and possibly litigate on her behalf. However, there was no requirement that she do so, and she remained free to institute her own action at any time after her charge had been filed with E.E.O.C. for the 180-day period.

Therefore, it is clear that Congress did not consider full resort to E.E.O.C. administrative action to be essential to a private Title VII action. Rather, full resort to such administrative remedies is an alternative course of action which a Title VII plaintiff may "elect" to pursue or to by-pass. Occidental, supra, 97 S. Ct. at 2452. Because resort to full E.E.O.C. administrative efforts is wholly optional and voluntary for a private individual, whereas it is mandatory for E.E.O.C., this Court concludes that there is no compelling federal policy comparable to that in Occidental to be preserved by refusal to apply state statutes of limitations to private Title VII actions.

This conclusion is buttressed by decisions of the Supreme Court as to the lack of availability of tolling of statutes of limitations during pursuit of permissive administrative remedies. It is a well-settled principle of law that, where one has an unfettered right to pursue a certain avenue of relief, but does not, the courts will decline to toll the running of a statute of limitations. Soriano v. U.S., 352 U.S. 270 (1957); Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); Electrical Workers v. Robbins & Myers, Inc., \_\_\_ U.S. \_\_\_, 97 S. Ct. 441 (1976). Congress was certainly aware of these principles when it made full resort to E.E.O.C. administrative processes optional. Absent some clear evidence of contrary intent from the Congress, this Court concludes that Congress intended that state statutes of limitations apply to private Title VII actions and that no tolling of such limitation

periods should occur during the time that a private plaintiff is pursuing optional E.E.O.C. administrative remedies.

Here, assuming arguendo that the state statute of limitations was tolled during the 180-day period of mandatory resort to E.E.O.C. (and possibly the 60-day period of mandatory resort to the state HRC), the action by Plaintiff would be barred if the two-year statute of limitations set forth in 12 O.S. § 95 (3) is applied. As was noted previously, the transfer request was denied in April of 1973. Suit was not filed until January 6, 1976 (assuming Plaintiff's contention is accepted that her application for counsel constituted commencement of her action). Thus, her action was not commenced until over two years and 240 days after the transfer request was denied.

Plaintiff argues that the proper statute of limitations is not the two-year tort limitation period of 12 O.S. § 95(3). Rather, she contends that either the three-year period set forth in 12 O.S. § 95(2) for unwritten contracts or for liabilities created by statute should apply. In the alternative, she claims that the five-year limitation period of 12 O.S. § 95(6) for actions not otherwise provided for should be applied.

This Court concludes that the two-year tort statute of limitations is applicable to actions for racial discrimination in employment. There is a split among the Judges of this District Court as to whether the two-year tort statute or the three-year contract statute should apply. This Court held in Allen v. St. John's Hospital, 76-C-11-B (unreported decision) that the two-year statute applied. Judge Cook, on the other hand, held that the three-year contract statute was applicable, in the case of Wright v. St. John's Hospital, 414 F. Supp. 1202, (N.D. Okla. 1976). However, Judge Thompson of the Western District of Oklahoma has joined this Court in concluding that the two-year

tort statute applies, in the case of Person v. St. Louis-San Francisco Ry. Co., \_\_\_\_ F. Supp. \_\_\_\_, 14 EPD ¶ 7713 (W.D. Okla. 1976).

The decision by Judge Cook in the Wright case was premised primarily upon dicta by the Fifth Circuit in the case of Boudreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971), as to the applicability of a contract limitation to employment discrimination under 42 U.S.C. § 1981. Thus, the rationale of the decision by Judge Cook is substantially undermined by the later Fifth Circuit decision in Ingram v. Steven Robert Corp., 547 F.2d 1260 (5th Cir. 1977), holding that an action for racial discrimination in employment is essentially a tort action to which a tort statute of limitations is applicable.

This Court finds the reasoning of Ingram to be persuasive. Further support for the application of the two-year tort limitation is found in Curtis v. Loether, 415 U.S. 189, at 195, wherein an action for racial discrimination in housing under Title VIII was described as being essentially tortious in character, and comparable to an action for defamation or intentional infliction of mental distress.

In addition, the Tenth Circuit has held that actions brought pursuant to 42 U.S.C. § 1983 are governed by the two-year tort limitation period. Crosswhite v. Brown, 424 F.2d 495 (10th Cir. 1970). Actions under 42 U.S.C. § 1983 are closely analogous to actions under 42 U.S.C. § 1981 and 42 U.S.C. § 2000e, as was recognized by Judge Thompson in the Person case, supra. This Court adheres to the holdings of Person and of Allen v. St. John's Hospital, and holds that the two-year tort statute of limitations applies to actions under Title VII (42 U.S.C. § 2000e).

Because of the foregoing findings and recommendations, it is the conclusion of the Court that the action by Plaintiff is time-barred. As a result, this Court holds that the Motion to Dismiss on this grounds must be granted.

There is an additional reason why the Motion to Dismiss must be granted, which this Court finds to be an alternative and independent basis for granting the Motion to Dismiss. The timely filing of a charge with E.E.O.C. is a jurisdictional prerequisite to suit under Title VII. Electrical Workers v. Robbins & Myers, Inc., supra; United Air Lines, Inc. v. Evans, \_\_\_ U.S. \_\_\_, 97 S. Ct. 1885, (1977).

Here, Plaintiff did not file a charge with HRC until well after the 180-day period allowed by 25 O.S. § 1502. Therefore, she was not entitled to the extended 300-day filing period under Title VII. Dubois v. Packard Bell Corp., 470 F.2d 973 (10th Cir. 1972). However, even if she would be, her EEOC charge was not filed within the extended 300-day period after her transfer request was denied.

Ms. Painter alleges that the denial of her transfer request was a "continuing" violation, and that her charges were timely. However, her application for a transfer to a separate division of Defendant is closely akin to an application for hire. The Tenth Circuit has held that the time for filing an EEOC charge runs from the date of rejection of the application, and is not a "continuing" violation. Molybdenum Corp. v. EEOC, 457 F.2d 935, at 936 (10th Cir. 1972). See also, United Air Lines, Inc. v. Evans, supra; Smith v. O.E.O. For Arkansas, 538 F.2d 226 (8th Cir. 1976); Collins v. United Air Lines, Inc., 514 F.2d 594 (9th Cir. 1975); Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972). Cf. Powell v. Southwestern Bell Telephone Co., 494 F.2d 485 (5th Cir. 1974).

This Court finds that no timely E.E.O.C. charge was filed by Ms. Painter. Because failure to file a timely charge is a fatal jurisdictional defect, this Court concludes that the Motion to Dismiss must be granted on such grounds.

Because there exist two independent bases upon which to grant the Motion to Dismiss, this Court finds it unnecessary to make any finding as to the third grounds advanced by Defendant in support of its Motions.

For the foregoing reasons, it is, therefore, ORDERED, ADJUDGED and DECREED that the Motion to Dismiss of Defendant be, and hereby is, GRANTED.

So Ordered this 14<sup>th</sup> day of December, 1977.

Celan E. Banow  
Chief U.S. District Court Judge

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

PUBLIC SERVICE COMPANY OF OKLAHOMA, )  
an Oklahoma corporation, )  
 )  
Plaintiff, )

vs. )

A 50 FOOT WIDE EASEMENT and right- )  
of-way for electric power trans- )  
mission line purposes to be located )  
upon, over and across a certain )  
tract of land in Osage County, )  
Oklahoma; )

AND )

NO. CIV-77-C-105-B

THE UNITED STATES OF AMERICA, as a )  
matter affecting the title to cer- )  
tain Osage Indian lands previously )  
allotted in fee with certain re- )  
straints on alienation and presently )  
owned by restricted Osage Indians, )  
and as Trustee for the Osage Tribe )  
of Indians; )

**FILED**

**DEC 14 1977**

AND )

DON HENRY BIG ELK (Osage, not )  
enrolled) and GRACE DAWN BIG ELK )  
(Osage, not enrolled); )

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

Defendants. )

FINAL DECREE AUTHORIZING TAKING IN CONDEMNATION

NOW, on this the 14th day of December, 1977, this cause comes on for hearing regularly to be heard. Plaintiff appearing by its attorney, P. Jay Hodges, and Defendants, The United States of America, Trustee for the Osage Tribe of Indians and Don Henry Big Elk and Grace Dawn Big Elk, Osage not enrolled, appearing by their attorney, Hubert A. Marlow, Assistant United States Attorney for the Northern District of the State of Oklahoma.

All parties having announced ready for hearing, the Court's attention was drawn to each and every one of the following pleadings heretofore filed in this proceeding, to-wit:

The Complaint and application for order directing manner of service, verified under oath; Order of this Court

dated March 22, 1977, directing manner of service of Notice; Notice by the Clerk of the Court to the Area Director, Muskogee Area Office, Bureau of Indian Affairs, U. S. Department of Interior, Muskogee, Oklahoma, and to Don Henry Big Elk and Grace Dawn Big Elk Sequeira; Notice to the Attorney General of the United States and the United States Attorney for the Northern District of Oklahoma, by attorneys for Plaintiff; minute order dated April 5, 1977; Affidavit of Mailing and Service of Notice executed under oath by Mary Von Drehle, attorney and agent for Plaintiff; Answer of Defendants; Order Appointing Commissioners; Oath of Commissioners; Report of Commissioners; Commissioners' Receipt; Certificate of Court Clerk as to deposit of amount of commissioners' award; Notice by Court Clerk of filing of Report of Commissioners; Demands for jury trial by Defendants and Plaintiff; and Stipulation as to Just Compensation filed August 31, 1977.

Whereupon Plaintiff, by and through its attorney, in open court, withdrew its demand for jury trial and said defendants, The United States of America, Trustee for the Osage Tribe of Indians, Don Henry Big Elk and Grace Dawn Big Elk now Sequeira, by and through their attorney, in open court, agreed and stipulated to accept the Report of Commissioners on file herein, per said Stipulation as to Just Compensation on file herein, whereby it is stipulated by all parties that judgment may be entered herein based upon said Complaint and said Stipulation, relative to the damages suffered by the parties in interest in and to the lands herein sought to be condemned and which will result from appropriation by Plaintiff of a perpetual easement and right-of-way for an electric power transmission line, all as hereinafter more particularly set out, and the Court having examined said Stipulation, the Report of Commissioners, and all other matters filed herein and thus being fully advised in the premises;

THE COURT FINDS: That the matters set out in the verified Complaint herein filed by Plaintiff are true and correct and said Plaintiff, a corporation organized under the laws of the State of Oklahoma, authorized and qualified to furnish light, heat and power by electricity, engaged in the generation and production of electricity for light, heat and power purposes, and for the distribution and sale thereof throughout Eastern and Southwestern areas of the State of Oklahoma, characterized by the laws of the said State as a public service corporation, and operating as such, is therefore endowed with the right of eminent domain in the appropriation and use of properties and interests therein necessary to or required by its proper purposes, and it further appearing that the taking and use of an easement and right-of-way for said purposes is a taking and use for a public purpose and that said Plaintiff should be granted the relief prayed in its said Complaint; and that this Court has proper jurisdiction of this cause by reason of the Act of Congress of March 3, 1901, Chap. 832, Section 3, 31 Stat. 1084, 25 USC Sec. 357; and that notice of this proceeding has been served according to law and the order of this Court upon all parties in interest in and to the land involved herein, including the United States of America which is an interested party by reason of the fact that this matter affects the title to certain Osage Indian lands previously allotted in fee with certain restraints on alienation which are still in effect with respect to said land and presently owned by restricted Osage Indians; that all necessary parties to this cause are now properly before the Court for final disposition of this proceeding; that Plaintiff has withdrawn its demand for jury trial; that all defendants have withdrawn or waived their right to jury trial and that Plaintiff and all defendants have joined in praying that final disposition be made of this proceeding and agree and stipulate that the Report

with said Stipulation of Commissioners/on file herein fairly and fully awards compensation for the easement and right-of-way sought to be condemned by Plaintiff herein; that by said taking and use of said right-of-way and easement, Plaintiff obtains no ownership of the oil, gas or minerals (if any) underlying the subject lands.

THE COURT FURTHER FINDS: That the description of the lands upon, over and across which Plaintiff seeks herein to condemn said easement and right-of-way together with the owners thereof, Defendants herein, and the reasonable and adequate damages/occurring to said lands as a result of said appropriation of said easement and right-of-way is as follows:

TRACT NO. 1:

S $\frac{1}{2}$  NE $\frac{1}{4}$  and NW $\frac{1}{4}$  NE $\frac{1}{4}$  and NE $\frac{1}{4}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  and S $\frac{1}{2}$  NE $\frac{1}{4}$  NE $\frac{1}{4}$  and SE $\frac{1}{4}$  NW $\frac{1}{4}$  SE $\frac{1}{4}$  and N $\frac{1}{2}$  NW $\frac{1}{4}$  SE $\frac{1}{4}$ , all in Section 24, Township 22 North, Range 9 East, Osage County, Oklahoma.

To construct upon, over and across said tract an electric power transmission line carrying an initial nominal voltage of 138 KV, having three conductors and one static wire mounted on single-pole davit-arm structures upon an easement 50 feet in width, the centerline of which is described as follows:

Entering said Tract at a point 635 feet South of the Northeast corner of the NW $\frac{1}{4}$  NE $\frac{1}{4}$ , thence running in a Westerly direction on a straight line and leaving said lands at a point 635 feet South of the Northwest corner of said NW $\frac{1}{4}$  NE $\frac{1}{4}$  thereof; traversing said tract a total distance of 80 rods.

Including the location of three single-pole, davit-arm structures.

OWNERS: Don Henry Big Elk (Osage, not enrolled; Account No. B-311) - 2/3 interest

Grace Dawn Big Elk Sequeira (Osage, not enrolled; Account No. B-338) - 1/3 interest

ORIGINAL ALLOTTEE: MARY BIG ELK, Osage Roll No. 707 (deceased)

TENANT AND LESSEE INTERESTS NOT INCLUDED.

TOTAL DAMAGES: Four Hundred Dollars (\$400.00) including damage, if any, to mineral estate.

THE COURT FURTHER FINDS: That the nature of the property and the rights with respect to said lands so to be taken and the uses for which such property is to be taken are:

A perpetual easement and right-of-way 50 feet in width for the purpose of erecting, constructing, reconstructing, operating and maintaining, repairing and removing, upon, over and along the route and across the lands hereinafter fully described, an electric power transmission line, consisting of single-pole, davit-arm structures carrying wires and fixtures, operating initially at a nominal voltage of 138 kilovolts carrying, for transmission, electrical power and energy, and telephone and telegraph messages necessary to the operation thereof, together with the right and privilege of ingress and egress from the nearest, convenient, accessible public road as well as such rights of ingress and egress as necessary to avoid and circumvent obstructions thereon for the purpose of erecting, constructing, reconstructing, operating, maintaining, repairing and removing said electric power transmission line at any time and including also the right to trim, chemically treat, cut down or remove trees and undergrowth, and to prohibit the placement of or remove other obstacles which may in Plaintiff's judgment interfere with or endanger said line, its maintenance or operation, within an area of 25 feet on both sides of the centerline thereof; PROVIDED, however, that Plaintiff does not herein seek ownership of the oil, gas or minerals themselves (if any) underlying the subject lands; AND RESERVING, nevertheless, to the landowners, lessees, and tenants of said lands, at all times, the right to make any use of said lands (both surface estate and mineral estate), including

the full width of said easement and right-of-way as is not inconsistent with or dangerous to the operation and maintenance of said electric power line.

THE COURT FURTHER FINDS that pursuant to the Report of Commissioners, Plaintiff has heretofore paid into the depository of this Court the sum of \$400.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the entry upon and taking forthwith of said rights, perpetual easement and right-of-way as found and described above herein, upon, over and across said lands as hereinbefore set out, by Plaintiff, for erecting, constructing, reconstructing, operating, maintaining, repairing and removing this electric power transmission line, all as prayed for in said Complaint is hereby authorized and confirmed in all things and said Plaintiff, Public Service Company of Oklahoma, is hereby vested with said rights, perpetual easement and right-of-way, together with perpetual right of ingress and egress, all free and clear of any and all claims of Defendants herein who are hereby perpetually enjoined and barred from hereafter claiming adversely to Plaintiff's said rights, privileges and estate ordered, adjudged, decreed and granted herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall forthwith pay into the depository of this Court the additional sum of \$1,200.00 as damages, and the Clerk of this Court thereafter make payable and disburse to the Bureau of Indian Affairs, Osage Agency, Pawhuska, Oklahoma, the total sum of \$1,600.00 to be distributed by the Bureau as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the perpetual easement and right-of-way taken by Plaintiff and described herein and the operation of said electric power transmission line does not convey any ownership of the oil, gas or minerals (if any) underlying the

subject lands, and further that the damages awarded herein shall not be construed as concluding the rights of any Defendant, to the extent of their interests therein, if entitled to claim, to sue for and recover damages, if any, that may occur, in the future, occasioned by the maintenance of said electric power transmission line.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount of the commissioners' fees shown in the Receipt of commissioners herein is hereby approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY the Court that the costs of this proceeding be taxed against the Plaintiff and the case be and hereby is closed.

(Signed) Allen E. Barrow

\_\_\_\_\_  
ALLEN E. BARROW  
CHIEF U. S. DISTRICT JUDGE

APPROVED FOR PLAINTIFF:

APPROVED FOR ALL DEFENDANTS:

\_\_\_\_\_  
P. Jay Hodges  
Its Attorney

\_\_\_\_\_  
Hubert A. Marlow, Assistant  
United States Attorney for the  
Northern District of Oklahoma

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

PUBLIC SERVICE COMPANY OF OKLAHOMA,  
an Oklahoma corporation,

Plaintiff,

vs.

A 50 FOOT WIDE EASEMENT and right-  
of-way for electric power trans-  
mission line purposes to be located  
upon, over and across a certain  
tract of land in Osage County,  
Oklahoma;

AND

THE UNITED STATES OF AMERICA, as a  
matter affecting the title to cer-  
tain Osage Indian lands previously  
allotted in fee with certain re-  
straints on alienation and presently  
owned by restricted Osage Indians,  
and as Trustee for the Osage Tribe  
of Indians;

AND

DARYLE KEMOHAH (unrestricted) and  
CLIFFORD KEMOHAH, JR. (Osage, not  
enrolled), each individually and  
as trustee for his respective un-  
born children and issue; and  
EULA KEMOHAH (Osage, not enrolled);

Defendants.

NO. CIV-77-C-107-B

**F I L E D**

**DEC 14 1977**

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

FINAL DECREE AUTHORIZING TAKING IN CONDEMNATION

NOW, on this the 14th day of December, 1977, this  
cause comes on for hearing regularly to be heard. Plain-  
tiff appearing by its attorney, P. Jay Hodges, and defen-  
dants The United States of America, Trustee for the Osage  
Tribe of Indians and Trustee to Clifford Kemohah, Jr.  
appearing by their attorney, Hubert A. Marlow, Assistant  
United States Attorney for the Northern District of the  
State of Oklahoma; defendants Daryle Kemohah and Eula  
Kemohah do not appear today, but all parties have hereto-  
fore stipulated that judgment may be entered herein based  
upon the Complaint and Stipulation as to Just Compensation  
on file herein.

All parties having announced ready for hearing, the Court's attention was drawn to each and every one of the following pleadings heretofore filed in this proceeding, to-wit:

The Complaint and application for order directing manner of service, verified under oath; Order of this Court dated March 22, 1977, directing manner of service of Notice, Notice filed March 22, 1977 by the Clerk of the Court to the Area Director, Muskogee Area Office, Bureau of Indian Affairs, U. S. Department of Interior, Muskogee, Oklahoma, and to Eula Kemohah, Clifford Kemohah, Jr., and Daryle Kemohah in their respective capacities therein stated; Notice filed March 24, 1977, to the Attorney General of the United States and the United States Attorney for the Northern District of Oklahoma, by attorneys for Plaintiff; Affidavit of Mailing and Service of Notice executed under oath by Mary Von Drehle, attorney and agent for Plaintiff; minute order dated April 5, 1977; Answer of Defendants; Order Appointing Commissioners; Oath of Commissioners; Report of Commissioners; Commissioners' Receipt; Certificate of Court Clerk as to deposit of amount of commissioners' award; Notice by Court Clerk of filing of Report of Commissioners; and Demand for a Jury Trial filed June 17, 1977 by defendants; Demand for Jury Trial filed July 22, 1977 by Plaintiff, Application by Plaintiff for Order authorizing Court Clerk to correct typographical error, and Order authorizing same; and Stipulation as to Just Compensation.

Whereupon Plaintiff, by and through its attorney, in open court, withdrew its demand for jury trial and the attorney for the United States of America called to the Court's attention the Stipulation as to Just Compensation, signed by all the parties herein, by which Stipulation all parties stipulated to the amount of just compensation and

and agreed that judgment may be entered herein based upon the Complaint and the terms of said Stipulation; and the Court having examined said Stipulation, the Report of Commissioners and all other matters filed herein and thus being fully advised in the premises;

THE COURT FINDS: That the matters set out in the verified Complaint herein filed by Plaintiff are true and correct and said Plaintiff, a corporation organized under the laws of the State of Oklahoma, authorized and qualified to furnish light, heat and power by electricity, engaged in the generation and production of electricity for light, heat and power purposes, and for the distribution and sale thereof throughout Eastern and Southwestern areas of the State of Oklahoma, characterized by the laws of the said State as a public service corporation, and operating as such, is therefore endowed with the right of eminent domain in the appropriation and use of properties and interests therein necessary to or required by its proper purposes, and it further appearing that the taking and use of an easement and right-of-way for said purposes is a taking and use for a public purpose and that said Plaintiff should be granted the relief prayed in its said Complaint; and that this Court has proper jurisdiction of this cause by reason of the Act of Congress of March 3, 1901, Chap. 832, Section 3, 31 Stat. 1084, 25 USC Sec. 357; and that notice of this proceeding has been served according to law and the order of this Court upon all parties in interest in and to the land involved herein, including the United States of America which is an interested party by reason of the fact that this matter affects the title to certain Osage Indian lands previously allotted in fee with certain restraints on alienation which are still in effect with respect to said land and presently owned in part by restricted Indians; that all necessary parties to this cause are now properly before the Court for final dis-

position of this proceeding; that all parties have withdrawn or waived their right to jury trial and that Plaintiff and all defendants have joined in praying that final disposition be made of this proceeding and agree and stipulate that the Report of Commissioners/<sup>with said Stipulation</sup> on file herein fairly and fully awards compensation for the easement and right-of-way sought to be condemned by Plaintiff herein; that by said taking and use of said right-of-way and easement, Plaintiff obtains no ownership of the oil, gas or minerals (if any) underlying the subject lands.

THE COURT FURTHER FINDS: That the description of the lands upon, over and across which Plaintiff seeks herein to condemn said easement and right-of-way together with the owners thereof, Defendants herein, and the reasonable and adequate damages/<sup>as found by the Commissioners,</sup> occurring to said lands as a result of said appropriation of said easement and right-of-way is as follows:

TRACT NO. 1:

Lots 2 and 3 and S $\frac{1}{2}$  NE $\frac{1}{4}$ , all in Section 6, Township 22 North, Range 9 East, Osage County, Oklahoma.

To construct upon, over and across said tract an electric power transmission line carrying an initial nominal voltage of 138 KV, having three conductors and one static wire mounted on single-pole, davit-arm structures upon an easement 50 feet in width, the centerline of which is described as follows:

Entering said tract at a point 30 feet West of the Southeast corner of said S $\frac{1}{2}$  NE $\frac{1}{4}$  of Section 6; thence running in a Northerly direction on a straight line and leaving said tract at a point 30 feet West of the Northeast corner of said S $\frac{1}{2}$  NE $\frac{1}{4}$  of Section 6, traversing said tract a total distance of 30 rods.

Including the location of two single-pole, davit-arm structures.

OWNERS: Eula Kemohah - Life Tenant

Remaindermen: Clifford Kemohah, Jr. (Osage, not enrolled; Account No. K-135); Daryle Kemohah and Eula Kemohah; and The Unknown Heirs, Executors, Administrators, Devisees, Trustees, and Assigns, immediate and remote, of said remaindermen.

ORIGINAL ALLOTTEE: KEMOHAH, Osage Roll No. 656 (deceased)

TENANT AND LESSEE INTERESTS NOT INCLUDED.

TOTAL DAMAGES: Four Hundred Dollars (\$400.00) including damage, if any, to mineral estate

THE COURT FURTHER FINDS: That the nature of the property and the rights with respect to said lands so to be taken and the uses for which such property is to be taken are:

A perpetual easement and right-of-way 50 feet in width for the purpose of erecting, constructing, reconstructing, operating and maintaining, repairing and removing, upon, over and along the route and across the lands hereinafter fully described, an electric power transmission line, consisting of single-pole, davit-arm structures carrying wires and fixtures, operating initially at a nominal voltage of 138 kilovolts carrying, for transmission, electrical power and energy, and telephone and telegraph messages necessary to the operation thereof, together with the right and privilege of ingress and egress from the nearest, convenient, accessible public road as well as such rights of ingress and egress as necessary to avoid and circumvent obstructions thereon for the purpose of erecting, constructing, reconstructing, operating, maintaining, repairing and removing said electric power transmission line at any time and including also the right to trim, chemically treat, cut down or remove trees and undergrowth, and to prohibit the placement of or remove other obstacles which may in Plaintiff's judgment interfere with or endanger said line, its maintenance or operation, within an area of 25 feet on both sides of the centerline thereof;

PROVIDED, however, that Plaintiff does not herein seek the right to fence all or any portion of said easement and right-of-way; AND PROVIDED, that Plaintiff does not herein seek ownership of the oil, gas or minerals themselves (if any) underlying the subject lands; AND RESERVING, nevertheless, to the landowners, lessees, and tenants of said lands, at all times, the right to make any use of said lands (both surface and and mineral estate), including the full width of said easement and right-of-way, as is not inconsistent with or dangerous to the operation and maintenance of said electric power line.

THE COURT FURTHER FINDS that pursuant to the Report of Commissioners, Plaintiff has heretofore paid into the depository of this Court the sum of \$400.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the entry upon and taking forthwith of said rights, perpetual easement and right-of-way as found and described above herein, upon, over and across said lands as hereinbefore set out, by Plaintiff, for erecting, constructing, reconstructing, operating, maintaining, repairing and removing this electric power transmission line, all as prayed for in said Complaint is hereby authorized and confirmed in all things and said Plaintiff, Public Service Company of Oklahoma, is hereby vested with said rights, perpetual easement and right-of-way, together with perpetual right of ingress and egress, all free and clear of any and all claims of Eula Kemohah, as life tenant, and Clifford Kemohah, Jr., Daryle Kemohah and Eula Kemohah, as remaindermen, and the unknown heirs, executors, Administrators, devisees, trustees, and assigns, immediate and remote, of said remaindermen, herein, who are hereby perpetually enjoined and barred from hereafter claiming adversely to Plaintiff's said rights,

privileges and estate ordered, adjudged, decreed and granted herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall forthwith pay into the depository of this Court the additional sum of \$1,200.00 as damages, ~~and the Clerk of this Court thereafter make payable and disburse to the Bureau of Indian Affairs, Osage Agency, Pawhuska, Oklahoma, the total sum of \$1,600.00 to be distributed by the Bureau as provided by law.~~

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the sum of \$1,600.00 heretofore paid into the depository of this Court by Plaintiff as damages be by the Clerk of this Court made payable and distributed to Eula Kemohah and agreed to as provided by all parties in said Stipulation as to Just Compensation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the perpetual easement and right-of-way taken by the Plaintiff and described herein and the operation of said electric power transmission line does not convey any ownership of the oil, gas or minerals (if any) underlying the subject lands, and further that the damages awarded herein shall not be construed as concluding the rights of any Defendant, to the extend of their interests therein, if entitled to claim, to sue for and recover damages, if any, that may occur, in the future, occasioned by the maintenance of said electric power transmission line.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount of the commissioners' fees shown in the Receipt of commissioners herein is hereby approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY the Court that the costs of this proceeding be taxed against the Plaintiff and the case be and hereby is closed.

(Signed) Allen E. Barrow

---

ALLEN E. BARROW  
UNITED STATES DISTRICT JUDGE  
CHIEF U.S. DISTRICT JUDGE

APPROVED FOR PLAINTIFF:

---

P. Jay Hodges  
Its Attorney

APPROVED FOR THE UNITED STATES  
OF AMERICA, TRUSTEE FOR THE  
OSAGE TRIBE OF INDIANS, AND  
TRUSTEE FOR CLIFFORD KEMOHAH,  
JR.:

---

Hubert A. Marlow, Assistant  
United States Attorney for the  
Northern District of Oklahoma

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

PUBLIC SERVICE COMPANY OF OKLAHOMA, )  
an Oklahoma corporation, )

Plaintiff, )

vs. )

A 50 FOOT WIDE EASEMENT and right- )  
of-way for electric power trans- )  
mission line purposes to be located )  
upon, over and across a certain )  
tract of land in Osage County, )  
Oklahoma; )

AND )

THE UNITED STATES OF AMERICA, as a )  
matter affecting the title to cer- )  
tain Osage Indian lands previously )  
allotted in fee with certain re- )  
straints on alienation and presently )  
owned by restricted Osage Indians, )  
and as Trustee for the Osage Tribe )  
of Indians; )

AND )

RUBY WEBB WILSON (Osage, not )  
enrolled), )

Defendants. )

NO. CIV-77-C-106-B

**FILED**

**DEC 14 1977**

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

FINAL DECREE AUTHORIZING TAKING IN CONDEMNATION

NOW, on this the 14th day of December, 1977, this cause comes on for hearing regularly to be heard. Plaintiff appearing by its attorney, P. Jay Hodges, and Defendants, The United States of America, Trustee for the Osage Tribe of Indians and Ruby Webb Wilson, Osage not enrolled, appearing by their attorney, Hubert A. Marlow, Assistant United States Attorney for the Northern District of the State of Oklahoma.

All parties having announced ready for hearing, the Court's attention was drawn to each and every one of the following pleadings heretofore filed in this proceeding, to-wit:

The Complaint and application for order directing manner of service, verified under oath; Order of this Court

dated March 22, 1977, directing manner of service of Notice; Notice by the Clerk of the Court to the Area Director, Muskogee Area Office, Bureau of Indian Affairs, U. S. Department of Interior, Muskogee, Oklahoma, and to Ruby Webb Wilson; Notice to the Attorney General of the United States and the United States Attorney for the Northern District of Oklahoma, by attorneys for Plaintiff; minute order dated April 5, 1977; Affidavit of Mailing and Service of Notice executed under oath by Mary Von Drehle, attorney and agent for Plaintiff; Answer of Defendants; Order Appointing Commissioners; Oath of Commissioners; Report of Commissioners; Commissioners' Receipt; Certificate of Court Clerk as to deposit of amount of commissioners' award; Notice by Court Clerk of filing of Report of Commissioners; Demands for jury trial by Defendants and Plaintiff; and Stipulation as to Just Compensation filed August 31, 1977.

Whereupon Plaintiff, by and through its attorney, in open court, withdrew its demand for jury trial and said defendants, The United States of America, Trustee for the Osage Tribe of Indians and Ruby Webb Wilson, by and through their attorney, in open court, agreed and stipulated to accept the Report of Commissioners on file herein, per said Stipulation as to Just Compensation on file herein, whereby it is stipulated by all parties that judgment may be entered herein based upon said Complaint and said Stipulation, relative to the damages suffered by the parties in interest in and to the lands herein sought to be condemned and which will result from appropriation by Plaintiff of a perpetual easement and right-of-way for an electric power transmission line, all as hereinafter more particularly set out, and the Court having examined said Stipulation, the Report of Commissioners, and all other matters filed herein and thus being fully advised in the premises;

THE COURT FINDS: That the matters set out in the verified Complaint herein filed by Plaintiff are true and

correct and said Plaintiff, a corporation organized under the laws of the State of Oklahoma, authorized and qualified to furnish light, heat and power by electricity, engaged in the generation and production of electricity for light, heat and power purposes, and for the distribution and sale thereof throughout Eastern and Southwestern areas of the State of Oklahoma, characterized by the laws of the said State as a public service corporation, and operating as such, is therefore endowed with the right of eminent domain in the appropriation and use of properties and interests therein necessary to or required by its proper purposes, and it further appearing that the taking and use of an easement and right-of-way for said purposes is a taking and use for a public purpose and that said Plaintiff should be granted the relief prayed in its said Complaint; and that this Court has proper jurisdiction of this cause by reason of the Act of Congress of March 3, 1901, Chap. 832, Section 3, 31 Stat. 1084, 25 USC Sec. 357; and that notice of this proceeding has been served according to law and the order of this Court upon all parties in interest in and to the land involved herein, including the United States of America which is an interested party by reason of the fact that this matter affects the title to certain Osage Indian lands previously allotted in fee with certain restraints on alienation which are still in effect with respect to said land and presently owned by a restricted Osage Indian; that all necessary parties to this cause are now properly before the Court for final disposition of this proceeding; that Plaintiff has withdrawn its demand for jury trial; that all defendants have withdrawn their right to jury trial and that Plaintiff and all defendants have joined in praying that final disposition be made of this proceeding and agree and stipulate that the Report of Commissioners/<sup>with said Stipulation</sup> on file herein fairly and fully awards compensation for the easement and right-of-way sought to be

condemned by Plaintiff herein; that by said taking and use of said right-of-way and easement, Plaintiff obtains no ownership of the oil, gas or minerals (if any) underlying the subject lands.

THE COURT FURTHER FINDS: That the description of the lands upon, over and across which Plaintiff seeks herein to condemn said easement and right-of-way together with the owners thereof, Defendants herein, and the reasonable and adequate damages/occurring to said lands as a result of said appropriation of said easement and right-of-way is as follows:

TRACT NO. 1:

NE $\frac{1}{4}$  NE $\frac{1}{4}$  of Section 23, and NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 24, all in Township 22 North, Range 9 East, Osage County, Oklahoma.

To construct upon, over and across said tract an electric power transmission line carrying an initial nominal voltage of 138 KV, having three conductors and one static wire mounted on single-pole, davit-arm structures upon an easement 50 feet in width, the centerline of which is described as follows:

Entering said tract at a point 635 feet South of the Northwest corner of said NE $\frac{1}{4}$  NE $\frac{1}{4}$ , Section 23; thence running in an Easterly direction on a straight line and leaving said NW $\frac{1}{4}$  NW $\frac{1}{4}$  of Section 24 at a point 635 feet South of the Northeast corner thereof, traversing said tract a total distance of 160 rods; as shown on the Exhibit attached hereto.

Including the location of six single-pole, davit-arm structures.

OWNERS: Ruby Webb Wilson (Osage, not enrolled; Account No. W-66)

ORIGINAL ALLOTTEE: EMAH MINTEA, Osage Roll No. 18 (deceased)

TOTAL DAMAGES: Eight Hundred Dollars (\$800.00) including damage, if any, to mineral estate.

THE COURT FURTHER FINDS: That the nature of the property and the rights with respect to said lands so to be taken and the uses for which such property is to be taken are:

A perpetual easement and right-of-way 50 feet in width for the purpose of erecting, constructing, reconstructing, operating and maintaining, repair-

ing and removing, upon, over and along the route and across the lands hereinafter fully described, an electric power transmission line, consisting of single-pole, davit-arm structures carrying wires and fixtures, operating initially at a nominal voltage of 138 kilovolts carrying, for transmission, electrical power and energy, and telephone and telegraph messages necessary to the operation thereof, together with the right and privilege of ingress and egress from the nearest, convenient, accessible public road as well as such rights of ingress and egress as necessary to avoid and circumvent obstructions thereon for the purpose of erecting, constructing, reconstructing, operating, maintaining, repairing and removing said electric power transmission line at any time and including also the right to trim, chemically treat, cut down or remove trees and undergrowth, and to prohibit the placement of or remove other obstacles which may in Plaintiff's judgment interfere with or endanger said line, its maintenance or operation, within an area of 25 feet on both sides of the centerline thereof; PROVIDED, however, that Plaintiff does not herein seek ownership of the oil, gas or minerals themselves (if any) underlying the subject lands; AND RESERVING, nevertheless, to the landowners, lessees, and tenants of said lands, at all times, the right to make any use of said lands (both surface estate and mineral estate), including the full width of said easement and right-of-way as is not inconsistent with or dangerous to the

operation and maintenance of said electric power line.

THE COURT FURTHER FINDS that pursuant to the Report of Commissioners, Plaintiff has heretofore paid into the depository of this Court the sum of \$800.00.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the entry upon and taking forthwith of said rights, perpetual easement and right-of-way as found and described above herein, upon, over and across said lands as hereinbefore set out, by Plaintiff, for erecting, constructing, reconstructing, operating, maintaining, repairing and removing this electric power transmission line, all as prayed for in said Complaint is hereby authorized and confirmed in all things and said Plaintiff, Public Service Company of Oklahoma, is hereby vested with said rights, perpetual easement and right-of-way, together with perpetual right of ingress and egress, all free and clear of any and all claims of Defendants herein who are hereby perpetually enjoined and barred from hereafter claiming adversely to Plaintiff's said rights, privileges and estate ordered, adjudged, decreed and granted herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff shall forthwith pay into the depository of this Court the additional sum of \$2,400.00 as damages, and the Clerk of this Court thereafter make payable and disburse to the Bureau of Indian Affairs, Osage Agency, Pawhuska, Oklahoma, the total sum of \$3,200.00 to be distributed by the Bureau as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the perpetual easement and right-of-way taken by Plaintiff and described herein and the operation of said electric power transmission line does not convey any ownership of the oil, gas or minerals (if any) underlying the subject lands, and further that the damages awarded herein shall not be construed as concluding the rights of any

Defendant, to the extent of their interests therein, if entitled to claim, to sue for and recover damages, if any, that may occur, in the future, occasioned by the maintenance of said electric power transmission line.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amount of the commissioners' fees shown in the Receipt of commissioners herein is hereby approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY the Court that the costs of this proceeding be taxed against the Plaintiff and the case be and hereby is closed.

(Signed) Allen E. Barrow  
ALLEN E. BARROW  
CHIEF U. S. DISTRICT JUDGE

APPROVED FOR PLAINTIFF:

APPROVED FOR ALL DEFENDANTS:

P. Jay Hodges  
Its Attorney

Hubert A. Marlow, Assistant  
United States Attorney for the  
Northern District of Oklahoma

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

FILED

WILLIAM V. REDBIRD, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 FORD MOTOR COMPANY, et al., )  
 )  
 Defendants. )

DEC 13 1977

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

No. 76-C-574-B

ORDER OF DISMISSAL

NOW on this 13th day of December, 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, *and cause of action*  
IT IS ORDERED that Plaintiff's Complaint and claim for relief be, and the same are hereby dismissed with prejudice.

(Signed) Allen E. Barrow

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

James M. Robertson  
JAMES M. ROBERTSON,  
Attorney for Plaintiff  
1635 East 15th  
Tulsa, Oklahoma 74120

Thomas G. Marsh  
THOMAS G. MARSH,  
Attorney for Defendants  
525 South Main, Suite 210  
Tulsa, Oklahoma 74103

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

POLYCHROME CORPORATION, )  
a corporation, )  
 )  
Plaintiff, )  
 )  
-vs- )  
 )  
ALLIED SALES CORPORATION, )  
a corporation, )  
 )  
Defendant. )

CASE NO. 77-C-439-C

**FILED**

**DEC 13 1977**

JUDGMENT

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

Pursuant to the Findings of Fact and Conclusions of Law on file herein, the plaintiff, Polychrome Corporation, a corporation, is entitled to a judgment against the Allied Sales Corporation, a corporation;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, Polychrome Corporation, is granted a judgment against the defendant, Allied Sales Corporation, in the principal sum of \$11,392.50 with interest at six percent (6%) per annum from May 31, 1977, until paid, together with a reasonable attorney fee of \$ 1250<sup>00</sup>.

Dated December 13<sup>th</sup>, 1977.

W. H. Dale Cook  
UNITED STATES DISTRICT JUDGE

OK: James M. Little  
JAMES M. LITTLE

of  
CONNER, LITTLE & CONNER  
1010 Hightower Building  
Oklahoma City, OK 73102  
Phone: 405-235-1404

ATTORNEY FOR PLAINTIFF

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

FILED

DEC 13 1977

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

POLYCHROME CORPORATION, )  
a corporation, )  
 )  
Plaintiff, )  
 )  
-vs- )  
 )  
ALLIED SALES CORPORATION, )  
a corporation, )  
 )  
Defendant. )

CASE NO. 77-C-439-C

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On December 13<sup>th</sup>, 1977 the Motion for Default Judgment of the plaintiff, Polychrome Corporation, came on for hearing and based upon the pleadings, the Court makes the following Findings Of Fact And Conclusions Of Law:

FINDINGS OF FACT

1. The plaintiff, Polychrome Corporation, a corporation is a citizen of the State of Pennsylvania. The Allied Sales Corporation, a corporation, is a citizen of the State of Oklahoma. The amount in controversy exceeds the sum of \$10,000.00 exclusive of interest and cost.

2. That at all times material to this action, the defendant, Allied Sales Corporation, was doing business as A-S-C Diazo Reproduction Materials in Tulsa, Oklahoma. That the defendant, Allied Sales Corporation, ordered and received from the plaintiff, goods and merchandise in the total amount of \$11,392.50.

That the defendant, Allied Sales Corporation, was served with Summons on November 7, 1977 and has failed to plead or otherwise defend in the action.

CONCLUSIONS OF LAW

3. Based upon the foregoing Findings of Fact, the Court concludes that a diversity of citizenship exists between the plaintiff and the defendant and the amount in controversy exceeds the sum of \$10,000.00 exclusive of interest and cost.

4. That the defendant, Allied Sales Corporation, is in default and the plaintiff is entitled to a judgment on open account for goods and merchandise furnished to the defendant in the principal amount of \$11,392.50 with interest from May 31, 1977 at six percent (6%) per annum and a reasonable attorney fee in the amount of \$ 1250<sup>00</sup>.

Judgment will be entered for the plaintiff, Polychrome Corporation, a corporation, in conformity with the foregoing Findings of Fact and Conclusions of Law.

Dated December 13<sup>th</sup>, 1977.

H. Dale Cook  
UNITED STATES DISTRICT JUDGE

OK.

James M. Little  
JAMES M. LITTLE

of  
CONNER, LITTLE & CONNER  
1010 Hightower Building  
Oklahoma City, OK 73102  
Phone: 405-235-1404

ATTORNEY FOR PLAINTIFF

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

JULIA K. LANE

Plaintiff

VS.

HARRY C. LANE

Defendant

§  
§  
§  
§  
§  
§  
§  
§

NO. 77-C-109(c)

FILED

DEC 12 1977

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

ORDER GRANTING DISMISSAL WITH PREJUDICE

On this day came on to be considered the Motion of Plaintiff, Julia K. Lane, for Dismissal with Prejudice of this action as to the Defendant, Harry C. Lane, and it appearing to the Court that said Motion is meritorious and should be granted; it is accordingly

ORDERED, ADJUDGED and DECREED that this action is dismissed, with prejudice to Plaintiff's right to again file the same or similar action in this or in any other Court of competent jurisdiction, and it is further

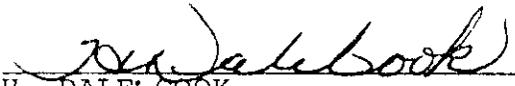
ORDERED, ADJUDGED and DECREED that all awards contained in the judgment of the District Court of Osage County, Oklahoma entered on or about April 17, 1972 in cause no. JFD-70-311, against Harry C. Lane and in favor of Julia K. Lane, including the award of \$5,000 as attorneys' fees therein, are hereby and in all things forever discharged as a personal liability of Harry C. Lane under §17a(7) of the Bankruptcy Act; and it is further

ORDERED, ADJUDGED and DECREED that Julia K. Lane and her heirs, successors, assigns and all other parties claiming by, through or under her are hereby and forever enjoined from instituting or continuing any suit or action of every type or character against Harry C. Lane based upon the prior marital relationship between such Parties or the dissolution thereof, including but not limited to any suit or action based upon the above-described Oklahoma judgment or any new action for alimony, support or maintenance due or to become due or for division of the Parties' marital estate, whether community or separate; and it is further

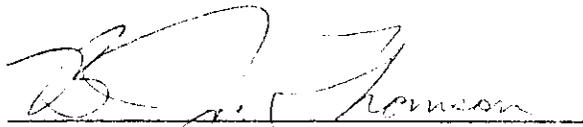
ORDERED, ADJUDGED and DECREED that all costs incurred

herein are taxed against the Party which incurred such costs, for which let execution issue if not timely paid.

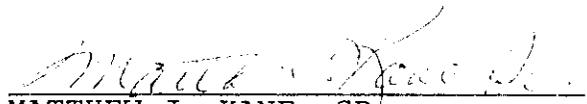
ENTERED this 12<sup>th</sup> day of December, 1977.

  
H. DALE COOK,  
United States District Court Judge

APPROVED FOR ENTRY:

  
B. JOE THOMSON  
Thomson & Bussey  
Eleventh Floor  
Lincoln Liberty Life Building  
Houston, Texas 77002  
(713) 651-1888

Attorney for Defendant, Harry C. Lane

  
MATTHEW J. KANE, SR.  
Kane, Kane, Wilson & Mattingly  
P.O. Box 1019  
Pawhuska, Oklahoma 74056

Attorney for Plaintiff, Julia K. Lane

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

MARILYN R. JONES, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE PLAZA NATIONAL BANK OF )  
 BARTLESVILLE, a Banking )  
 Corporation, )  
 )  
 Defendant. )

No. 76-C-487-C ✓

**FILED**

DEC 9 1977

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

ORDER OF DISMISSAL

Now on this 9<sup>th</sup> day of December, 1977, it appearing to the Court that the parties hereto have entered into a settlement of this controversy, and it further appearing that the Plaintiff has filed herein her Dismissal of said cause with prejudice to a future action;

IT IS, THEREFORE, HEREBY ORDERED AND DECREED that this cause be, and the same is hereby, dismissed with prejudice to a future action.

APPROVED:

GARRISON, BROWN & CARLSON

H. Dale Cook  
H. DALE COOK, UNITED STATES  
DISTRICT JUDGE

By: Donald D. Garrison  
Attorneys for Plaintiff

SELBY, CONNOR & COYLE

By: Donald M. Connor  
Attorneys for Defendant

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )

vs. )

FREDDIE L. PETE, LINDA L. PETE, )  
 and CITY FINANCE COMPANY, a )  
 corporation, )

Defendants. )

Civil Action no. 77-C-433-C<sup>v</sup>

**FILED**

DEC 9 1977

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

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 9<sup>th</sup>  
day of December, 1977, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney, and the Defendants,  
Freddie L. Pete, Linda L. Pete, and City Finance Company, a  
corporation, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants Freddie L. Pete, Linda  
L. Pete, and City Finance Company, a corporation, were served  
with Summons and Complaint on October 28, 1977, as appears from  
the United States Marshal's Service herein.

It appearing that the Defendants, Freddie L. Pete,  
Linda L. Pete, and City Finance Company, a corporation, 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 Creek County, Oklahoma, within the Northern  
Judicial District of Oklahoma:

Lots One (1) and Two (2) in Block Six (6),  
Highlands Addition, an Addition to the City  
of Bristow, in Creek County, State of Oklahoma,  
according to the recorded plat thereof.

THAT the Defendants, Freddie L. Pete and Linda L.  
Pete, did, on the 27th day of April, 1971, execute and deliver

to the United States of America, acting through the Farmers Home Administration, their mortgage and mortgage note in the sum of \$9,600.00, with 7-1/4 percent interest per annum, and further providing for the payment of annual installments of principal and interest.

The Court further finds that Defendants, Freddie L. Pete and Linda L. Pete, made default under the terms of the aforesaid mortgage note by reason of their failure to make annual 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 \$10,095.66 as unpaid principal with interest thereon at the rate of 7-1/4 percent per annum from July 20, 1977, 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 Freddie L. Pete and Linda L. Pete, in persona, for the sum of \$10,095.66 with interest thereon at the rate of 7-1/4 percent per annum from July 20, 1977, 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 Plaintiff have and recover judgment, in rem, against Defendant, City Finance Company, a corporation.

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.

  
UNITED STATES DISTRICT JUDGE

APPROVED

  
ROBERT P. SANTEE  
Assistant United States Attorney

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

**FILED**  
DEC 11 1977  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

JANELL WALLS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JOSEPH CALIFANO, Secretary )  
 of Health, Education and )  
 Welfare, )  
 )  
 Defendant. )

CIVIL ACTION NO. 77-C-189-C ✓

O R D E R

NOW ON THIS 9th day of December, 1977, there came on for pre-trial hearing this matter. The Plaintiff, Janell Walls, appearing by her attorney, Cecil Drummond, and the Defendant, Joseph Califano, Secretary of Health, Education and Welfare, appearing by his attorney, Hubert A. Marlow, Assistant United States Attorney for the Northern District of Oklahoma.

The Court finds, based upon statements of Plaintiff's counsel and further based upon the report of Harry E. Livingston, MD, that Plaintiff has recently undergone a back operation. As a result of such operation, new information is available to the Defendant for his consideration in Plaintiff's application for disability benefits. Therefore, the Court finds this matter should be remanded to the Defendant for further consideration.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that this case be and the same is hereby remanded to the Secretary of Health, Education and Welfare for further consideration.

*W. J. Salebrook*  
UNITED STATES DISTRICT JUDGE

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

HESS OIL VIRGIN ISLANDS CORP., a )  
United States Virgin Islands corpo- )  
ration; FEDERAL INSURANCE COMPANY, )  
a New Jersey corporation; and )  
INSURANCE COMPANY OF NORTH AMERICA, )  
a Pennsylvania corporation, )

Plaintiffs, )

vs. )

UOP, INC., a Delaware corporation; )  
WORD INDUSTRIES PIPE FABRICATING, INC., )  
an Oklahoma corporation; and FISHER )  
CONTROLS COMPANY, a subsidiary of )  
Monsanto Corporation, a Delaware )  
corporation, )

Defendants, )

vs. )

THE LITWIN CORPORATION, a )  
corporation, )

Third Party Defendant. )

No. 75-C-383-C

FILED

DEC 9 1977

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

ORDER OF DISMISSAL

ON this 9th day of December, 1977, upon the written Application of the Plaintiffs and the Defendant, Word Industries Pipe Fabricating, Inc., this Court did examine the Application made hereto for Dismissal, and finds that said parties have entered into an agreed settlement among themselves covering all claims, rights and causes of action asserted by Plaintiffs in the Complaint and this suit against the Defendant, Word Industries Pipe Fabricating, Inc., with Plaintiffs reserving unto themselves all claims, rights and causes of action against the remaining Defendants, and have requested this Court to dismiss from this

suit Word Industries Pipe Fabricating, Inc., and contemporaneous with such Dismissal a Covenant Not to Sue will be entered into between Plaintiffs and the Defendant, Word Industries Pipe Fabricating, Inc., more clearly reserving Plaintiffs' rights against the remaining Defendants, and the Court being fully advised in the premises, finds that said Word Industries Pipe Fabricating, Inc. should be dismissed pursuant to said Application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaint and all rights, claims and causes of action filed or asserted herein by the Plaintiff as against the Defendant, Word Industries Pipe Fabricating, Inc., be and the same are hereby dismissed with prejudice as to said Defendant only.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiffs shall be allowed to proceed against the remaining Defendants herein, UOP, Inc. and Fisher Controls Company, a subsidiary of Monsanto Corporation.

1/8/ H. Gale Cook  
Judge, Northern District of  
Oklahoma

APPROVED AS TO FORM:

[Signature]  
Attorney for Plaintiffs

[Signature]  
Attorney for the Defendant,  
Word Industries Pipe Fabricating, Inc.

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the above and foregoing Order of Dismissal was mailed to the following people with sufficient postage thereon, on this 6th day of December, 1977.

Mr. Don Hammer and Mr. T. Hillis Eskridge  
1300 National Bank of Tulsa Bldg.  
Tulsa, Oklahoma 74103

Attorneys for Word Industries

Mr. John H. Tucker  
2900 Fourth National Bank Building  
Tulsa, Oklahoma 74119

Attorney for Third Party Defendant, The Litwin Corporation

John J. Costanzo  
3345 Wilshire Blvd., Suite 1000  
Los Angeles, California 90010

Mr. John L. Osmond and Dale McDaniel  
Suite 410, City Plaza West  
5310 East 31st Street  
Tulsa, Oklahoma 74135

Attorneys for UOP, Inc.

Mr. Richard L. Carpenter  
Denver Building  
Tulsa, Oklahoma

Attorney for Fisher Controls Company

John J. Witous  
5400 Sears Tower  
Chicago, Illinois 60603

John S. Athens  
2400 1st National Tower  
Tulsa, Oklahoma 74103

1s/ Richard D. Wagner  
Richard D. Wagner



trial, which means that the Court granted the remittitur sua sponte, which would be error since not done with the 10-day limit dictated by Federal Rule of Civil Procedure 59(d); and in the alternative, that the jury's verdict of \$200,000. was well supported by the evidence and uncontradicted by the defendants, which would make the Court's remittitur an abuse of discretion.

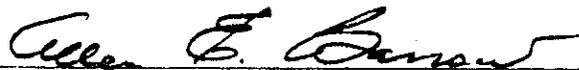
With regard to the first ground--that the remittitur was granted sua sponte and was therefore an error--the Court finds that it did not order the remittitur on its own initiative, and therefore the time limit imposed by Rule 59(d) is not applicable. In Moore's Federal Practice, Volume 6A, ¶59.03[3], at page 59-47, it is stated: "[Remittitur] is usually done on motion of the losing defendant for a new trial on the ground that the verdict is excessive . . . ." (footnote omitted). There is no question in this case that defendant filed a motion for a new trial on the ground that the verdict is excessive, and, therefore, the Court did not act on its own initiative. The Court finds that the first ground alleged in plaintiff's Motion to Reconsider is without merit.

The second ground alleged in plaintiff's Motion to Reconsider is that the Court abused its discretion in ordering remittitur. This Court found in its Order of September 29, 1977 that "the verdict rendered by the jury is excessive and not supported by the evidence." After further study of the case and consideration of the briefs filed by both parties, the Court still feels that the verdict of the jury is unsupported by the evidence and that its order of remittitur, or in the alternative, a new trial if plaintiff does not remit the stated sum, was and is proper, that this decision is based upon the evidence as adduced at trial, and is therefore within the discretion of a trial judge. The Court, therefore, finds that the second ground alleged by plaintiff is without merit, and the Motion to Reconsider filed by plaintiff should be overruled.

IT IS, THEREFORE, ORDERED that the Motion to Reconsider this Court's Order of September 29, 1977 should be, and the same is hereby, overruled.

IT IS FURTHER ORDERED, in conformity with the said Order of September 29, 1977, that plaintiff remit the sum of \$100,000. of the \$200,000. verdict within ten days in writing, or in the alternative the Court will grant defendant's Motion for New Trial. If plaintiff does remit the stated sum, then it is ORDERED that the Motion for New Trial be and the same is hereby overruled.

ENTERED this 9<sup>th</sup> day of December, 1977.



CHIEF UNITED STATES DISTRICT JUDGE

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

MIDCON FABRICATORS, INC., )  
 )  
Plaintiff, ) CIVIL ACTION  
 ) NO. 76-C-612(B)  
v. )  
 )  
INTERNATIONAL BROTHERHOOD OF )  
BOILERMAKERS, IRON SHIP BUILDERS, )  
BLACKSMITHS, FORGERS AND HELPERS, )  
LOCAL NO. 592, a labor associa- )  
tion, et al., )  
 )  
Defendants. )

**FILED**

DEC 8 1977

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

STIPULATION OF DISMISSAL

It is hereby stipulated and agreed by and between the undersigned attorney for Plaintiff, Richard L. Barnes, and the undersigned attorney for Defendants, Phil Frazier, that the above-entitled action is hereby dismissed without prejudice under Section 41(a)(1)(ii) of the Federal Rules of Civil Procedure, and that each party is to bear their own cost.

DATED this 8th day of December, 1977.

KOTHE, NICHOLS & WOLFE, INC.  
Attorneys for Plaintiff  
124 East Fourth Street  
Tulsa, Oklahoma 74103

By Richard L. Barnes  
RICHARD L. BARNES

FRAZIER, GRAHAM, SMITH & FARRIS  
Attorneys for Defendants  
1424 Terrace Drive  
Tulsa, Oklahoma 74104

By Phil Frazier  
PHIL FRAZIER



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

INDEPENDENT SCHOOL DISTRICT )  
 NUMBER ONE OF TULSA COUNTY, )  
 a public corporation; CITY OF )  
 TULSA, OKLAHOMA, a municipal )  
 corporation; and TULSA COUNTY )  
 AREA VOCATIONAL TECHNICAL SCHOOL )  
 DISTRICT NUMBER EIGHTEEN, a )  
 public corporation, )

Plaintiffs, )

vs. )

GRIFFIN B. BELL, Attorney )  
 General of the United States, )  
 and COUNTY ELECTION BOARD OF )  
 TULSA COUNTY, OKLAHOMA, )

Defendants. )

FILED

DEC 7 1977

J. L. Sizer, Clerk  
DISTRICT COURT

CIVIL ACTION  
No. 76-C-573-B

ORDER

The Court has for consideration Plaintiffs' Motion for Summary Judgment in its entirety 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 Plaintiffs' Motion for Summary Judgment should be sustained for the reasons stated herein.

The Voting Rights Act of 1965 was amended by Congress in 1975 for the purpose of enabling members of language minority groups to participate more effectively in the electoral process.

Subsection (b) of §1973aa-1a essentially provides that no political subdivision shall provide registration or voting notices, forms, instruction assistance, or other materials or information relating to the electoral process including ballots only in English if the Director of Census determines that more than 5% of the citizens of voting age of such political subdivision are members of a language minority group and the illiteracy rate of such persons as a group is higher than

the national illiteracy rate. The Director of the Bureau of the Census made a determination that Rogers County, Oklahoma (Federal Register, October 23, 1975) and Osage County, Oklahoma (Federal Register, September 18, 1975) are subject to the provisions of the Act.

Plaintiffs are subject to the following requirements under Subsection (c) of the Act:

Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language: Provided, that where the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

The interpretive guidelines issued by the Attorney General state in part:

Many of the languages used by language minority groups, for example, by some American Indians and Alaskan Natives, are unwritten. With respect to any such language, only oral assistance and publicity are required. Even though a written form for a language may exist, a language may be considered unwritten if it is not commonly used in a written form. It is the responsibility of the covered jurisdiction to determine whether a language should be considered written or unwritten. 28 C.F.R. 55.12(c).

Plaintiffs' Complaint alleges that there is no language in either Rogers or Osage County, Oklahoma, which is commonly used in a written form or which is a historically written language within the meaning of that term in the Permanent Guidelines; that the Indian population of Osage County is heterogeneous with the Osage Tribe forming the core; that, other than a small number of Cherokees who have married into the Osage Tribe, the Indian population of Osage County has no written language; that a written form of the Osage language has never been generally used; that Osage and Cherokee are mutually unintelligible Indian languages; that with the exception of the Cherokee Tribe, the American

Indian population of Rogers County are members of tribes having no written languages; that although a written form of Cherokee does exist, it is not commonly used by the Indian population of Osage and Rogers Counties; that there are no Cherokees in Osage County and only a very small number in Rogers County who can read Cherokee; that there are no traditional Cherokee speaking communities in either County; that those members of the Cherokee Tribe in either county who are literate in Cherokee are also literate in English; that despite the fact that no written form of an Indian language is commonly used by the Indian population in Osage and Rogers County, Oklahoma, and that Cherokee does not qualify as a historical written language, the defendant (Bell) may require plaintiffs to provide election materials printed in the Cherokee language or invoke the sanctions of the Act if plaintiffs fail to do so; that such requirements would be in violation of the clear intent of the Act and specific provision of Section 203(c) of the Act and Section 55.12(c) of the Permanent Guidelines of the Department of Justice; that it is the clear intent of the Act to assist the American Indian population whose language excludes their full participation in the electoral process; that as applied to the American Indian populations of Osage and Rogers Counties, Oklahoma, this purpose can be achieved by providing oral assistance; and, that providing election materials in the Cherokee language causes a substantial expense burden on the public funds of plaintiffs.

On January 28, 1977, the plaintiffs filed an application to strike from their complaint in the prayer for relief, appearing at page 5, paragraph 3.2, which recites: "Enjoin and restrain the defendant Levi, and his successors, from instituting any action against plaintiffs pursuant to the Act by reason of plaintiffs failing to provide election materials written in Cherokee." The Court, on January 28, 1977, entered an order sustaining such application.

In the remaining prayer plaintiffs state:

Plaintiffs request the Court to:

3.1 Find any requirement of Defendants that the Plaintiffs provide election materials printed in the Cherokee language to be contrary to law, unreasonable and void.

3.3 Declare that with respect to the American Indian population of Osage and Rogers County, Oklahoma, that there is no Indian language which is commonly used in a written form.

3.4 Declare that the Cherokee language is a historically unwritten language and that Plaintiffs, pursuant to Section 203(c) of the Act, are relieved of any responsibility to provide election materials printed in the Cherokee language.

3.5 Declare that as to the American Indian population of Osage and Rogers County, Oklahoma, Plaintiffs are required to furnish only oral instructions, assistance or other information relating to registration and voting.

The defendant, Attorney General of United States, filed a Motion to Dismiss premised on Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The Attorney General maintained that plaintiffs failed to state a claim on which relief can be granted and on the ground that the Court lacks subject matter jurisdiction since plaintiffs have not demonstrated that a case of actual controversy exists between the plaintiffs and this defendant, and since 42 U.S.C. 1973 1(b) vests exclusive jurisdiction over injunctive actions relating to the Attorney General's enforcement of the Voting Rights Act in the District Court for the District of Columbia. The Attorney General's Motion to Dismiss was overruled, this Court finding that a justiciable controversy does exist.

In its Order overruling the Motion to Dismiss this Court referred to paragraph 2.9, appearing at page 4 of the Complaint, where the following language appears:

Despite the fact that no written form of an Indian language is commonly used by the American Indian population in Osage and Rogers County, Oklahoma, and that Cherokee does not qualify as a historical written language [note, this is plaintiffs' contention that it does not], the Defendant Levi may require Plaintiffs to provide election materials printed in the Cherokee

language or may invoke the sanctions of the Act if Plaintiffs fail to do so. This requirement would be in violation of the clear intent of the Act and specific provisions of Section 203(c) of the Act and Section 55-12(c) of the Permanent Guidelines of the Department of Justice to implement the Act. It is the clear intent of the Act to assist the American Indian population whose language excludes their full participation in the electoral process. As applied to the American Indian population of Osage and Rogers Counties, Oklahoma, this purpose can be achieved through providing oral assistance. In addition, providing election materials in the Cherokee language causes a substantial expense burden on the public funds of Plaintiffs. (Emphasis supplied)

In *Eccles v. Peoples Bank*, 333 U.S. 426 (1947), Justice Frankfurter said, at 431:

A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest. *Brillhart v. Excess Insurance Co.*, 316 U.S. 491; *Great Lakes Dredge & Dock Co. vs. Huggman*, 319 U.S. 293; H. R. Rep. No. 1264, 73rd Cong., 2d Sess., p. 2; *Borchard, Declaratory Judgments* (2d ed. 1941) pp. 312-14. It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need is clear, not remote or speculative.

The actuality of the plaintiff's need for a declaration of his rights is therefore of decisive importance. \*\*\*.

In *International Tape Manufacturers Ass'n v. Gerstein*, 494 F.2d 25 (5th Cir. 1974), the Court said:

The general rule for determining whether ripeness exists is easy to state and hard to apply.

The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

*Aetna Life Insurance Co. v. Haworth*, 1937, 300 U.S. 227. The controversy cannot be hypothetical abstract, academic or moot. *Id.*

The Supreme Court itself recognizes that its test cannot be applied with mathematical certainty.

The difference between an abstract question and a "controversy" . . . is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy.

Maryland Casualty Co. v. Pacific Coal & Oil Co., 1941, 312 U.S. 270, quoted in Golden v. Zwickler, 1969, 394 U.S. 103.

Justiciability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought.

Poe vs. Ullman, 1961, 367 U.S. 497. In fact at times the ripeness concept has proven so slippery that its application has produced contradictory results. Compare Poe v. Ullman, supra, with Epperson v. Arkansas, 1968, 393 U.S. 97. See K. Davis, Administrative Law Text §21.03 (3d ed. 1972).

The Supreme Court of the United States said in Maryland

Casualty v. Pacific Coal and Oil Company, 312 U.S. 270 (1941):

The difference between an abstract question and a "controversy" contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be impossible to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

In their brief plaintiffs state:

\*\*\*There are no concrete guidelines for pre-enforcement advisory procedures in the Act. This legislative failure in itself, creates a direct and immediate hardship on the Plaintiffs. In the first place there is a financial burden imposed on the Plaintiffs by the Act. All three plaintiffs are public institutions which rely solely on millage and bond elections to raise revenue to perform their public responsibilities. In order to obtain the bond underwriting, Plaintiffs are required to meet certain requirements. Because of the lack of effective guidelines in the Act, bond underwriters insist that all election materials which are used by Plaintiffs in bond elections should be printed in both English and Cherokee languages. Bond underwriters retain this requirement in spite of the insertion of §55-12(c) in the Act. It is presumed that the hardship imposed by bond underwriters will continue until such times as Plaintiffs are no longer required to print two sets of election materials. It is estimated that the cost of printing election materials in the Cherokee language is \$10,000 per Plaintiff for each election. (Emphasis supplied)

The Attorney General also sought Dismissal on the grounds that exclusive jurisdiction is vested with the District Court for the District of Columbia. This is true where an injunction is sought, but the plaintiffs do not seek an injunction and have withdrawn any request that could be interpreted as a prayer for injunctive relief.

The defendant, in his brief, admits that the law is unclear as to whether exclusive jurisdiction is vested in the District of Columbia in actions where the relief sought is a declaratory judgment.

At page 10 of the brief it is stated:

Notwithstanding the indications in this legislative history that the District Court for the District of Columbia does not have exclusive jurisdiction to issue a declaratory judgment pursuant to Section 14(b) against federal officials charged with the responsibility for administering sections other than 4 and 5 of the Act, there are compelling reasons why this Court should dismiss the action for declaratory relief as well as that for injunctive relief. (Emphasis supplied)

Following the overruling of the Attorney General's Motion to Dismiss, the plaintiffs filed, on May 12, 1977, a Motion For Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Attached to Plaintiff's Motion For Summary Judgment and the two Supplements thereto are nine affidavits supporting plaintiffs' allegations.

The Attorney General's Response to Plaintiffs' Motion For Summary Judgment states:

Examination of the Amended Complaint and the Answer reveals that there is no genuine issue as to any material fact. The Attorney General agrees that the Cherokee and Osage languages are not commonly used in a written form in Osage and Rogers counties, Oklahoma, and therefore are "unwritten" within the meaning of Section 203(c) of the Voting Rights Act of 1965, 42 U.S.C. 1973 aa-1a(c), and 28 C.F.R. 55.12(c). This fact has been confirmed by the Osage and Cherokee tribal leaders, as plaintiffs' affidavits demonstrate. (Emphasis added).

As the defendant, Attorney General, admits in his Response to Plaintiffs' Motion For Summary Judgment, the affidavits attached to the Plaintiffs' Motion substantiate the allegations contained in plaintiffs' Petition.

The affidavit of Ross Swimmer, Principal Chief of Cherokee Tribe, states:

The written form of the Cherokee language is not in wide-spread use. As a matter of fact, it is in use only by a few scholars and older members of the Tribe. I believe that anyone who can read the written Cherokee language can most certainly read and understand the English language. It is my opinion that in Osage and Rogers Counties, Oklahoma there are very few Cherokees who can read the Cherokee language.

A Resolution of the Osage Tribal Council signed by Sylvester Tuilser, Principal Chief, states in part:

1. There is not now and never has been a written form of Osage language, and
3. The Cherokee and Osage languages are unrelated and the fact that any individual that could speak and understand one language would not be an indication that he could speak the language of the other tribe, and

The affidavit of Professor Leroy Logan states:

1. The Osage and Cherokee languages are totally different languages. An Osage speaker cannot understand or read the Cherokee language.

2. The Osage have never used a written form of the language except in the case of personal names.

The affidavit of Professor Garrick A. Bailey states:

4. Presently there are no monolingual Osage language speakers. All Osages speak English. Few individuals can speak the Osage language fluently and those who can are 50 years of age or older. The Osage language is rarely spoken in the home. Some older Osage speak the language on occasion with members of their age group, but speak English to their children and grandchildren. Presently the principal use of the Osage language is in Peyote meetings (religious services), and at time during the In-lon-schka dances (ceremonial dances) in June. The number of fluent Osage language speakers and the use of the language has declined to such a point that it can no longer be considered a viable language. Although there are Osage Indian communities, there is no longer an Osage language community, and has not been one for about 20 years. The Osage language is rapidly approaching total extinction.

5. The Osage and Cherokee languages are mutually unintelligible languages. Osage is classified as a Siouan language while Cherokee is classified as an Iroquoian language. An Osage speaker cannot read Cherokee.

6. There are some Cherokees living in Osage county. They are not native to the county and have moved there during the past thirty to forty years. The vast majority of these Cherokee are highly acculturated mixed-bloods who cannot be separated from the white community. There is not now, nor has there ever been a Cherokee community in Osage county. There are no monolingual Cherokee language speakers living in the county. There are less than half a dozen (6) fluent Cherokee language speakers in the county. Of these individuals few if any are literate in Cherokee.

Having admitted "that there is no genuine issue as to any material fact", the defendant, Attorney General, "reasserts its contention that this Court is without jurisdiction under Article III of the Constitution of the United States and 28 U.S.C. 2201, because no 'case or controversy' is before this Court".

The defendant, Attorney General, goes on to argue:

Indeed, the very fact that the United States admits all material factual and legal allegations of plaintiffs with respect to the application of the Voting Rights Act's bilingual election requirements to Osage and Rogers counties, while denying any intent to bring an action requiring plaintiffs to provide election materials in the Osage and Cherokee languages, underscores the total lack of any justiciable case or controversy. Plaintiffs have merely sought an advisory opinion from this Court.

Despite the defendant's stated position with regard to the lack of any intent to take immediate action against plaintiffs under the Act, the plaintiffs face a dilemma of either publishing in Cherokee, at great expense, or taking the risk of having the defendant or his predecessors bring an action to invalidate an election. This is a risk that none of the plaintiffs cannot take, especially in cases involving very large bond issues.

The affidavit of Manly W. Mumford, a partner in the law firm of Chapman and Cutler, states:

I have been advised that Osage and Rogers counties, Oklahoma, are covered by said amendment: that of the American Indian languages spoken in Osage and Rogers counties, only Cherokee has ever had a written form; that said written language was developed by the Cherokee tribe after colonization by Europeans of lands adjacent to the ancestral Cherokee lands; that no one is known to be able to read and write Cherokee language who is not also able to read and write English; and that the records of the Cherokee tribe are presently kept in English.

Nevertheless, there is sufficient uncertainty as to whether the Cherokee language is historically unwritten with the meaning of the Voting Rights Amendment of 1975 that I felt compelled to advise the City of Tulsa (which includes portions of those counties) that it should undergo the expense of providing ~ written (as well as oral) assistance in Cherokee in those parts of said city lying within Osage and Rogers Counties in connection with the election held throughout said city on March 1, 1977 to determine the issuance of \$14,463,000 General Obligation Limited Access Facilities Bonds of July 1, 1977 and \$7,480,000 General Obligation Storm Sewer Channel Improvement Bonds of July 1, 1977.

The option of publishing the materials in Cherokee as required by the Act is expensive and of no assistance to those the Act was intended to assist. The Secretary of the defendant, County Election Board of Tulsa County, Oklahoma, states, in his affidavit in support of plaintiffs' Motion for Summary Judgment:

Because it is a part of my responsibilities to examine the ballots case and participate in the counting of votes in each election, I can state of my own personal knowledge that in all three elections in which Vo-City No. 1 printed election materials in Cherokee, not one Cherokee language ballot was used. All votes cast were cast on English language ballots. (Emphasis added).

Defendant, Attorney General, insists that the plaintiffs should be satisfied the Attorney General's assurances that no action will be taken against them pursuant to the Act. Defendant points out that it has offered plaintiff a letter stating that he has no intention to uptake any action against the plaintiffs. Such a letter has no force in law and would be of no value in the future as administrations and personnel change.

In plaintiffs' Brief in Response to Defendant, Attorney General's Motion to Dismiss, the plaintiffs state:

\*\*\*There are no concrete guidelines for preenforcement advisory procedures in the Act. This legislative failure, in itself, creates a direct and immediate hardship on the Plaintiffs. In the first place there is a financial burden imposed on the Plaintiffs by the Act. All three plaintiffs are public institutions which rely solely on millage and bond elections to raise revenue to perform their public responsibilities. In order to obtain the bond underwriting, Plaintiffs are required to meet certain requirements. Because of the lack of effective guidelines in the Act, bond underwriters insist that all election materials which are used by Plaintiffs in bond elections should be printed in both English and Cherokee languages. Bond underwriters retain this requirement in spite of the insertion of §55-12(c) in the Act. It is presumed that the hardship imposed by bond underwriters will continue until such times as Plaintiffs are no longer required to print two sets of election materials. It is estimated that the cost of printing election materials in the Cherokee language is \$10,000 per Plaintiff for each election. (Emphasis supplied).

The defendant, Attorney General's suggestion, in his Response to the Second Supplement to plaintiffs' Motion, that a letter from an Attorney General should suffice as a preenforcement advisory procedure is erroneous. The Act does not provide for any preenforcements advisory procedures. No where in the Act is the Attorney General given authority to establish such procedures or grant assurances that actions will not be brought by future Attorney Generals.

Written assurances, such as those offered by the defendant, Attorney General, even though offered in good faith are insufficient when they are not authorized by the Act. The plaintiffs' position would not be improved at all by a receipt of a letter of assurances such as suggested by defendant, the plaintiffs would still face the same dilemma and hardships.

IT IS, THEREFORE, ORDERED that the Plaintiffs' Motion for Summary Judgment be and is hereby sustained.

DATED this 7<sup>th</sup> day of December, 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

C. J. SHIPLEY and  
AGNES SHIPLEY,

)  
)  
)  
Plaintiffs,)

-vs-

A. H. ROBBINS COMPANY, INC.,  
et al.,

)  
)  
)  
Defendants,)

No. 72-C-283

FILED

DEC 7 1977

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

ORDER DISMISSING CAUSE WITH PREJUDICE

THIS CAUSE coming on before me, the undersigned Judge, this 7<sup>th</sup> day of December, 1977, on the joint stipulation and agreement of the plaintiffs, C. J. SHIPLEY and AGNES SHIPLEY, and the defendant, DICK J. WOLLMAR, that the action of the plaintiffs as against such defendant may be dismissed with prejudice to the bringing of another action for the same, court costs to be borne by the plaintiffs herein; and the court being satisfied for good cause shown that such order should issue forthwith;

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED and DECREED that the above entitled <sup>cause of and complaint</sup> action of the plaintiffs herein as against the defendant, DICK J. WOLLMAR, be and the same is hereby dismissed with prejudice to the bringing of another action for the same, court costs to be borne by the plaintiffs herein.

Allen E. Barnes  
UNITED STATES DISTRICT JUDGE

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

FILED

EDMUND D. ZAYAT, d/b/a E. D. ZAYAT )  
& ASSOCIATES, and INTERVIEWERS )  
INCLUSIVE, AN AFFILIATE OF E. D. )  
ZAYAT & ASSOCIATES, )

DEC 7 1977

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

Plaintiff, )

vs. )

No. 76-C-569-B

SOUTHWESTERN BELL TELEPHONE )  
COMPANY, A Missouri Corporation, )

Defendant. )

O R D E R

The Court has for consideration defendant's Motion for Partial 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 defendant's Motion for Partial Summary Judgment should be sustained for the reasons stated herein.

This is an action for damages claimed to have arisen when defendant Southwestern Bell Telephone Company allegedly omitted certain of plaintiff's advertising and listings from the Yellow Pages of the 1975 issue of its Greater Tulsa Telephone Directory. Plaintiff's First Cause of Action seeks damages for breach of contract. Plaintiff claims defendant omitted certain advertising and listings, which were the subject of a written contract, from the Yellow Pages of such directory. Plaintiff's Second Cause of Action, which is the subject of defendant's Motion for Partial Summary Judgment, seeks damages for defendant's allegedly tortious omissions of certain other listings from said Yellow Pages, which plaintiff claims defendant was obliged to publish by virtue of custom and practice.

Defendant denies liability, claiming that if any obligation to publish listings of its business telephone subscribers in the Yellow Pages without an express contract

exists, such obligation is limited to publication of only the listing which defendant considers the subscriber's main listing; that in 1975 the defendant's subscriber was an individual named Edmund D. Zayat, who did business as an individual under the names, "Interviewers, Inclusive" and "Edmund D. Zayat & Associates;" that both listings were under the single telephone and directory advertising account of Mr. Zayat; that when a single subscriber has more than one listing, the defendant will publish only the main listing of the subscriber in its Yellow Pages without an express contract therefor; that in 1975, plaintiff's main listing was "Interviewers, Inclusive;" that defendant did publish the listing "Interviewers, Inclusive" in the Yellow Pages of said directory, under the heading "Public Opinion Analysts;" that the same listing had been published by defendant under the same heading, without an express contract, in the 1974, 1973 and 1972 Yellow Pages of its directory, without objection from plaintiff.

The defendant argues that there is no genuine issue as to any material fact regarding the publication of plaintiff's business listing in the Yellow Pages under plaintiff's Second Cause of Action, in that the pleadings, affidavits, answers to interrogatories and other instruments of record show that any obligation to publish plaintiff's listing by virtue of custom and practice was met by defendant in 1975, and that plaintiff has no basis for his Second Cause of Action as a matter of law.

In his brief in opposition to defendant's Motion for Partial Summary Judgment, plaintiff admits that defendant published the listing "Interviewers, Inclusive" under the heading "Public Opinion Analysts" in the 1975 issue of the directory. Plaintiff argues, however, that the defendant had an obligation to publish both of plaintiff's listings in

the Yellow Pages of the directory and further, that the heading under which the listing was published, "Public Opinion Analysts," was an obscure heading, one under which plaintiff had never before been listed, thus tantamount to an omission.

Defendant attached affidavits from Mr. Thomas Van Fleet, its Directory Sales Supervisor in Tulsa, Oklahoma, to its briefs in support of its motion. These affidavits show that when defendant has a business telephone subscriber with more than one listing, the only listing defendant publishes in its Yellow Pages without an express contract therefor is that which defendant considers the subscriber's main listing; that in 1975 the plaintiff herein was a single subscriber with more than one listing; that "Interviewers, Inclusive" was plaintiff's main listing according to Southwestern Bell's records in 1975; that Southwestern Bell published the listing "Interviewers, Inclusive" under the heading "Public Opinion Analysts" in the Yellow Pages of its 1975 directory.

Neither the affidavit of Mr. Edmund D. Zayat attached to plaintiff's brief in opposition to defendant's motion, nor any of the other instruments of record in this cause, controverts the facts contained in Mr. Van Fleet's affidavits regarding the issue of an obligation to publish plaintiff's listing as a matter of custom and practice. The plaintiff's allegations that defendant had an obligation to publish both plaintiff's business listings is squarely contradicted by the affidavits submitted by defendant; it was therefore incumbent upon plaintiff to come forth with facts sufficient to show that a genuine dispute exists with respect to such issue.

The mere contention that a factual issue exists is insufficient; the party opposing the motion must show that evidence is available which would justify a trial of the

issue. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L.Ed. 569 (1968). The very purpose of a motion for summary judgment is to pierce the pleadings in order to discern whether disputed issues of fact remain for trial. Wagoner v. Mountain Savings and Loan Assn., 311 F.2d 403, 406 (10th Cir., 1962).

Plaintiff argues that names "Interviewers, Inclusive" and "Edmund D. Zayat & Associates" were listed separately by defendant in the White Pages of the directory in 1960, 1961 and 1962, and Mr. Zayat's affidavit so states. In his brief, plaintiff implies that such facts lead to an inference that defendant is obliged to also publish each such listing in its Yellow Pages.

Not only is such an inference unsound, the defendant's affidavit attaches copies of the tariffs, filed with the Oklahoma Corporation Commission, which govern the defendant's obligations regarding publication of listings in the White Pages of defendant's directories. The tariffs show that when defendant has one subscriber with multiple listings, the only listing which defendant publishes in the White Pages without an extra charge is that which it determines is the subscriber's "primary listing."

Mr. Van Fleet's affidavit then shows that in 1975, for the purposes of the White Pages, the plaintiff's primary listing for the White Pages was "Interviewers, Inclusive;" that the listing "Edmund D. Zayate & Associates" was an extra listing, which under the tariffs would not be published without an additional charge therefor. The plaintiff has not controverted such facts.

Mr. Van Fleet's affidavit shows that the defendant's obligation to publish more than the subscriber's "main listing" in the Yellow Pages is similarly dependent upon the existence of an express contract therefor. The plaintiff does not place such fact in genuine dispute.

Plaintiff also argues that in 1960, 1961 and 1962, the name "Edmund D. Zayat & Associates" appeared in the Yellow Pages, under the heading "Market Research and Analysis" without an express contract therefor. Here again plaintiff seeks to infer that defendant had a similar obligation in 1975, but again such a contention is not well taken. The very matter that such facts meet their chronological end in the year 1962, some thirteen years before the dispute in question, creates an inference that thereafter no such obligation on defendant's part existed with respect to plaintiff's other listing. No contrary inference may logically be drawn with respect to 1975, from such facts.

The fact that such listing may have subsequently been published by defendant under the heading "Market Research & Analysis" is met by Mr. Van Fleet's affidavits, which state that any such publication by defendant was the subject of an express contract therefor. The plaintiff has not placed such facts in genuine dispute by merely stating that such listing was published by defendant under the heading in question.

Plaintiff has failed to show a genuine dispute exists regarding defendant's obligation to publish both plaintiff's listings. The undisputed facts of record show that any obligation which defendant may have had to publish plaintiff's listings without an express contract was limited to publication of the listing defendant considered plaintiff's main listing. The undisputed facts show that plaintiff's main listing in 1975 was "Interviewers, Inclusive," which listing defendant published in the Yellow Pages of its 1975 directory.

Plaintiff claims that defendant had never, prior to 1975, published the name "Interviewers, Inclusive" in the Yellow Pages under the heading "Public Opinion Analysts."

In response to this contention, Mr. Van Fleet's affidavit showed that defendant had, in fact, published the listing "Interviewers, Inclusive" under the heading "Public Opinion Analysts" in the Yellow Pages for the years 1972, 1973 and 1974, the years immediately preceeding the issuance of the directory in dispute, without an express contract for such publication. Further, the defendant attached copies of the Yellow Pages showing publication of such listing under such heading for the years in question, as part of Mr. Van Fleet's affidavit.

The plaintiff has not controverted such facts, nor has plaintiff shown that he complained or objected to the publication of the listing under such heading for those prior years. Thus, not only has plaintiff failed to show that defendant violated any obligation toward him by publishing such listing under the heading "Public Opinion Analysts," plaintiff's failure to object to such publication during the immediately preceeding years amounts to a waiver of and an estoppel to any claim by him at this time that such publication by defendant in 1975 was wrongful. Steiger v. Commerce Acceptance of Oklahoma City, Inc., 445 P.2d 81 (Okla. 1969).

The undisputed facts of record herein show that the plaintiff's claim that a tort was committed by defendant's failure to publish plaintiff's business listings as a matter of custom and practice is without merit as a matter of law.

There is no dispute whatsoever that defendant did publish the listing "Interviewers, Inclusive" in the 1975 issue of the directory concerned. No genuine dispute exists regarding the fact that defendant considered such listing to be plaintiff's main listing in 1975, and that defendant's obligation to publish more than a subscriber's main listing in its Yellow Pages rests upon an express contract for such

publication. Further, no dispute exists regarding the fact that defendant published plaintiff's listing "Interviewers, Inclusive" under the heading "Public Opinion Analysts" for the three immediate preceeding years, without an express contract and without objection from plaintiff.

In his Second Cause of Action, plaintiff also alleges that defendant's omissions of the listings in question, as a tort, were undertaken by defendant maliciously, thus entitling plaintiff to punitive or exemplary damages. Plaintiff's claim for punitive damages rests entirely upon his Second Cause of Action.

Since plaintiff has no basis for his Second Cause of Action, and plaintiff's First Cause of Action is admittedly for a claimed breach of contract, plaintiff has no basis for punitive damages in the action.

The recovery of punitive damages in an action based upon contract is not allowed in Oklahoma. 23 O. S. §9; Wheeler-Stuckey, Inc. v. Southwestern Bell Telephone Company, 297 F.Supp. 712 (W.D. Okl. 1967).

Although the foregoing resolves the issue of punitive damages, it should be noted that plaintiff has responded with no "specific facts" (see Rule 56(e)) of malice, nor has he excused himself of this requirement as allowed by Rule 56(f). When defendant supports its Motion for Summary Judgment with documents, the party opposing the motion may not rest upon the mere allegation of his pleading and must respond with specific facts showing a genuine issue for trial. Gates v. Ford Motor Company, 494 F.2d 458 (10th Cir. 1974); Brown v. Ford Motor Company, 494 F.2d 418 (10th Cir. 1974); General Beverages, Inc. v. Rogers, 216 F.2d 413 (10th Cir. 1954). The mere allegation of malice in the pleadings does not create a genuine issue of fact. Lester v. Hanover

Insurance Company, 488 F.2d 976 (5th Cir. 1974); Bon Air  
Hotel, Inc. v. Time, Inc., 426 F.2d 858 (5th Cir. 1970);  
Hurley v. Northwest Publications, Inc., 273 F.Supp 967 (D.  
Minn. 1967).

IT IS, THEREFORE, ORDERED that defendant's Motion for  
Partial Summary Judgment be and is hereby sustained.

*Entered December 7, 1977*

*Allen F. Dawson*  
CHIEF JUDGE, UNITED STATES  
DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

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

**FILED**

**DEC 7 1977**

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 EDWARD S. SCOTT, YVETTE SCOTT, )  
 ROBERT WILLIAMS, PATTON LOANS OF )  
 TULSA, INC., and BENEFICIAL )  
 FINANCE COMPANY OF TULSA, INC., )  
 )  
 Defendants. )

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

CIVIL ACTION NO. 77-C-259-B

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 6<sup>th</sup>  
day of December, 1977, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney; and the Defendant,  
Robert Williams, appearing by his attorney, David R. Scott;  
and the Defendants, Edward S. Scott, Yvette Scott, Patton Loans  
of Tulsa, Inc., and Beneficial Finance Company of Tulsa, Inc.,  
appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Edward S. Scott, Yvette  
Scott, and Patton Loans of Tulsa, Inc., were served by publication  
as shown on the Proof of Publication filed herein; and that  
Defendants, Robert Williams and Beneficial Finance Company of  
Tulsa, Inc., were served with Summons and Complaint on July 1,  
1977, as appears from the United States Marshal's Service herein.

It appearing that the Defendant, Robert Williams, has  
duly filed his Disclaimer on July 7, 1977; and that Defendants,  
Edward S. Scott, Yvette Scott, Patton Loans of Tulsa, Inc., and  
Beneficial Finance Company, Inc., 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 Twelve (12), Less the East Ten (10) Feet thereof, and the Easterly Fifteen (15) Feet of Lot Thirteen (13), Block Four (4), CHANDLER-FRATES FOURTH ADDITION, a Sub-Division of Tulsa County, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Edward S. Scott and Yvette Scott, did, on the 2nd day of January, 1976, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$10,400.00 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, Edward S. Scott and Yvette Scott, 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 \$10,549.90 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, Edward S. Scott and Yvette Scott, in rem, for the sum of \$10,549.90 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 the Plaintiff have and recover judgment, in rem, against Defendants, Patton Loans of Tulsa, Inc., and Beneficial Finance Company of Tulsa, Inc.

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 appraisal 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

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

FILED  
DEC 7 1977  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DONALD RAMSEY and )  
 CHARLESETTA FISHER RAMSEY, )  
 )  
 Defendants. )

CIVIL ACTION NO. 77-C-290-B ✓

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 6<sup>th</sup>  
day of December, 1977, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney; and the Defendants,  
Donald Ramsey and Charlesetta Fisher Ramsey, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Donald Ramsey and  
Charlesetta Fisher Ramsey, were served by publication as shown  
on the Proof of Publication filed herein.

It appearing that the Defendants, Donald Ramsey and  
Charlesetta Fisher Ramsey, 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 Six (6), Block Forty-Two (42), VALLEY VIEW  
ACRES SECOND ADDITION to the City of Tulsa,  
Tulsa County, State of Oklahoma, according to  
the recorded plat thereof.

THAT the Defendants, Donald Ramsey and Charlesetta  
Fisher Ramsey, did, on the 7th day of August, 1975, execute  
and deliver to the Administrator of Veterans Affairs, their  
mortgage and mortgage note in the sum of \$11,000.00 with 8 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, Donald Ramsey and Charlesetta Fisher Ramsey, 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 \$11,003.08 as unpaid principal with interest thereon at the rate of 8 1/2 percent per annum from September 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, Donald Ramsey and Charlesetta Fisher Ramsey, in rem, for the sum of \$11,003.08 with interest thereon at the rate of 8 1/2 percent per annum from September 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.

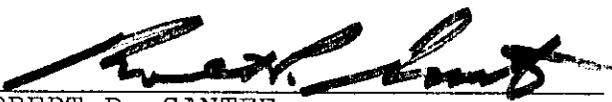
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property 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.

  
UNITED STATES DISTRICT JUDGE

APPROVED

  
ROBERT P. SANTEE  
Assistant United States Attorney

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

ROBERT B. PHILLIPS, )  
 )  
 Bankrupt. )  
 )  
 THE F&M BANK & TRUST COMPANY, )  
 an Oklahoma banking corporation, )  
 )  
 Plaintiff-Appellant, )  
 )  
 v. )  
 )  
 MARILYN M. PHILLIPS and )  
 ROBERT B. PHILLIPS, )  
 )  
 Defendant-Appellee. )

No. 76-561-B

**FILED**

**DEC 7 1977**

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

ORDER

The Court has for consideration the appeal from the decision of the Bankruptcy Court in its entirety and has carefully perused the entire file, the briefs and the recommendations concerning said appeal, and being fully advised in the premises, finds:

That Objections to the Findings and Recommendations of the Magistrate should be overruled and that the appeal from the decision of the Bankruptcy Court should be affirmed for the reasons stated herein.

On September 19, 1975, Appellant, The F&M Bank & Trust Company, an Oklahoma banking corporation, commenced adversary proceedings in the Bankruptcy Court by filing complaints against Robert B. Phillips (Phillips) (the Bankrupt in No. 75-B-852) and Marilyn Phillips, his wife (the Bankrupt in No. 75-B-851). Each of those complaints sought a determination that a certain judgment previously obtained by Appellant against Phillips and his wife in the Oklahoma state court was non-dischargeable under Section 17a(2) of the Bankruptcy Act.

Thereafter motions to dismiss the complaints and for summary judgments were filed on behalf of both Phillips and his wife. On May 14, 1976, the Combined Brief of Phillips and Marilyn M. Phillips was filed in support of those motions. On June 9, 1976, a hearing was held upon those motions before Judge Rutledge.

Appellant's Complaint was subsequently dismissed as to Marilyn M. Phillips upon Appellant's request. On September 2, 1976, the Court filed its Findings of Fact and Conclusions of Law, stating therein that Phillips was also "entitled to judgment as a matter of law . . ." Judgment was entered dismissing Appellant's Complaint as to Phillips on September 15, 1976. The record on appeal was filed November 4, 1976.

The Appellant asserts that the Findings of Fact and Conclusions of Law of the Bankruptcy Court are erroneous in two respects:

- (1) The Courts finding that "The record in the civil case upon which the motion of the defendant here is to be considered consists solely of the Petition, Answer and Journal Entry of Judgment, no other proceeding before the trial court having been tendered by either party here."
- (2) The Courts decision to limit its review to the "record" (Petition, Answer and Journal Entry of Judgment) in the State Court proceeding and precluding extrinsic evidence in considering Appellant's Complaint in the Bankruptcy Proceedings.

Under the provisions of Rule 810 of the Rules of Bankruptcy Procedure, upon an appeal from a judgment of the Bankruptcy Court, the District Court shall accept the Bankruptcy Judge's Findings of Fact unless they are clearly erroneous.

In the Findings of Fact and Conclusions of Law entered by the Bankruptcy Judge in this case he correctly found as controlling the case of In re Nicholas, 510 F.2d 160 (10th Cir., 1975), cert. denied, 421 U.S. 1012, 95 S.Ct. 2417. In Nicholas, the Court decided that where the basis of the plaintiff's claim in bankruptcy is a judgment obtained by the plaintiff in a prior proceeding, both the character of that claim and the question of that claim's dischargeability under Section 17a(2) of the Bankruptcy Act (11 U.S.C. §35a(2)) are controlled by the record and the judgment in the prior proceeding. Thus, Nicholas holds that unless the prior judgment was based on the same kind of fraud which, if shown in the bankruptcy proceedings, would be a sufficient basis for a determination of nondischargeability, the bankrupt (defendant) is entitled as a matter of law to a judgment

dismissing the Complaint in bankruptcy. Nicholas also quotes with approval from Collier on Bankruptcy as follows:

"Where, however, a liability has been prosecuted to judgment, the record is usually held decisive as to the character of the claim upon which the judgment is founded, and cannot be affected by the introduction of parol evidence except in the case of ambiguity. In order that a judgment based upon a fraudulent representation may be excepted from the operation of a discharge, the record in the action must show that fraud and deceit were the 'gist and gravamen' of the action." 510 F.2d at 163, citing 1 A Collier on Bankruptcy §117.16[4] PP. 1643-44 (1975) (emphasis by the court).

The Bankruptcy Judge concluded that "no ambiguity is reflected in the trial court record;" that the record as in Nicholas "does not contain a whisper of fraud;" and "that the judgment of the trial court conclusively determines the nature of the debt to be based upon contract of guaranty and not upon fraud." "Findings of Fact and Conclusions of Law," Record on Appeal, Page 133.

Therefore, under the rule of Nicholas, the Bankruptcy Court properly refused to consider extrinsic evidence as to the alleged fraud.

IT IS, THEREFORE, ORDERED that the judgment of the Bankruptcy Court be and is hereby affirmed.

Dated this 7th day of December, 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

CARL H. BARBEE and )  
RUTH F. BARBEE, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
IRBY SPROUSE, JR., and )  
CONCEPT 21, INC., )  
 )  
Defendants. )

No. 76-C-478-C ✓  
76-C-509-C  
(Consolidated)

**FILED**

DEC 7 1977 *fm*

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

ORDER & JUDGMENT

These consolidated actions involve a contract for the erection by Concept 21 of two fiberglass structures on property owned by the Barbees. The contract was never completed. Case number 76-C-478-C was brought by the purchasers to rescind the agreement and recover the deposit paid at the time the contract was executed. Case number 76-C-509-C was brought by the sellers for specific performance of the contract or, in the alternative, for damages from the purchasers for its breach. The cases were tried to the Court, sitting without a jury, on August 19, 1977. At the conclusion of the evidence, the Court ruled in favor of the Barbees, and against Concept 21, in both actions, reserving a ruling as to Irby Sprouse, Jr. in case 76-C-478-C pending the filing of briefs regarding his individual liability. A judgment to that effect was entered by the Court on December 5, 1977. The briefs have been filed, and the issue of the liability of Irby Sprouse, Jr. is now before the Court, as is the request by the Barbees for an award of attorneys' fees.

Sprouse executed the contract in issue in his capacity as president of Concept 21. The Barbees (hereinafter referred to as "plaintiffs") rely upon 42 O.S. §§ 152 and 153 to establish the individual liability of Sprouse. Section 152(1), the relevant subsection, provides as follows:

"The amount payable under any building or remodeling contract shall, upon receipt by any contractor or subcontractor, be held as trust funds for the payment of all lienable claims due and owing or to become due and owing by such contractors or subcontractors by reason of such building or remodeling contract."

Section 153 provides:

"(1) Such trust funds shall be applied to the payment of said valid lienable claims and no portion thereof shall be used for any other purpose until all lienable claims due and owing or to become due and owing shall have been paid.

(2) If the party receiving any money under Section 152 shall be a corporation, such corporation and its managing officers shall be liable for the proper application of such trust funds."

Plaintiffs concede that no lienable claims became due and owing under the contract. Nevertheless, they argue that "[s]ince no lienable claims arose by virtue of the contract having been terminated, the funds could never have been applied to any purpose other than to be returned to the plaintiff." The Court does not agree. There have been few cases construing these statutes, but it appears to the Court that they were enacted to protect persons in the position of the plaintiffs from the claims of third parties who might have valid materialmen's liens against the property if they were not paid by the contractor who employed them. See United States Fidelity & Guaranty Co. v. Sidwell, 525 F.2d 472 (10th Cir. 1975); Bohn v. Divine, 544 P.2d 916 (Okla. App. 1975). When the contract was terminated without the existence of any valid lienable claims, 42 O.S. §§ 152 and 153 became inapplicable, and Sprouse cannot be charged with personal liability under those statutes.

Plaintiffs' claim for attorneys' fees is based upon 12 O.S. § 936, which provides as follows:

"In any civil action to recover on an open account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided

by law or the contract which is the subject to the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs."

Plaintiffs contend that the contract in question related to the purchase or sale of goods and wares and also to labor and services. Because neither of the instant actions was brought for labor or services rendered, that portion of § 936 is inapplicable to the present situation. See Russell v. Flanagan, 544 P.2d 510 (Okla. 1975). However, case number 76-C-509-C was brought to enforce the contract, which does provide, at least in part, for the purchase and sale of goods. As the prevailing party in that action, the plaintiffs are entitled to a reasonable attorneys' fee. The two cases involved herein were consolidated because the factual and legal issues involved in each were, for all practical purposes, identical. The Court therefore feels that it would not be possible to allocate the work performed as to each case and, consequently, does not feel it necessary to determine whether an award of attorneys' fees would be proper in case number 76-C-478-C.

For the foregoing reasons,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Judgment be entered in favor of the defendant, Irby Sprouse, Jr., and against the plaintiffs, Carl H. Barbee and Ruth F. Barbee, in case number 76-C-478-C.

IT IS FURTHER ORDERED that the plaintiffs, Carl H. Barbee and Ruth F. Barbee, are entitled to an award of reasonable attorneys' fees. The parties are given ten (10) days from this date to present to the Court all information necessary for the Court to set such reasonable fee.

It is so Ordered this 6<sup>th</sup> day of December, 1977.

  
E. DALE COOK  
United States District Judge



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

UNITED STATES OF AMERICA, )  
 )  
 ) Plaintiff, )  
 )  
 vs. )  
 )  
 )  
 )  
 JERRY LEE KIDD and )  
 SANDY LEE KIDD, )  
 )  
 )  
 ) Defendants. )

CIVIL ACTION NO. 77-C-271-C

**FILED**

DEC 7 1977

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

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 6<sup>th</sup>  
day of December, 1977, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney; and the Defendants,  
Jerry Lee Kidd and Sandy Lee Kidd, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Jerry Lee Kidd and  
Sandy Lee Kidd, were served by publication as shown on the Proof  
of Publication filed herein.

It appearing that the Defendants, Jerry Lee Kidd and  
Sandy Lee Kidd, 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 Thirteen (13), Block One (1), YAHOLA  
HEIGHTS ADDITION to the City of Tulsa, Tulsa  
County, State of Oklahoma, according to the  
recorded plat thereof.

THAT the Defendants, Jerry Lee Kidd and Sandy Lee  
Kidd, did, on the 26th day of September, 1975, execute and deliver  
to the Administrator of Veterans Affairs, their mortgage and  
mortgage note in the sum of \$10,250.00 with 8 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, Jerry Lee Kidd and Sandy Lee Kidd, 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 \$10,165.53 as unpaid principal with interest thereon at the rate of 8 1/2 percent per annum from November 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, Jerry Lee Kidd and Sandy Lee Kidd, in rem, for the sum of \$10,165.53 with interest thereon at the rate of 8 1/2 percent per annum from November 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.

*W. Salebook*

UNITED STATES DISTRICT JUDGE

APPROVED

*Robert P. Santee*

ROBERT P. SANTEE  
Assistant United States Attorney



The Court further finds that Defendants, Terry W. Cormican and Vicki Lynn Cormican, 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 \$10,785.06 as unpaid principal with interest thereon at the rate of 9 percent per annum from October 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, Terry W. Cormican and Vicki Lynn Cormican, in rem, for the sum of \$10,785.06 with interest thereon at the rate of 9 percent per annum from October 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.

*W. Salebook*

UNITED STATES DISTRICT JUDGE

APPROVED

*Robert P. Santee*

ROBERT P. SANTEE  
Assistant United States Attorney

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

CONTINENTAL MASONRY COMPANY, )  
INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FRANK J. ROONEY, INC., and )  
REPUBLIC BANK AND TRUST )  
COMPANY, )  
 )  
Defendants. )

No. 77-C-269-B

FILED

DEC 6 1977

Jack C. ...  
U. S. DIST. COURT

ORDER OF TRANSFER

The defendant Frank J. Rooney, Inc., having moved for an order transferring the venue of this action to the United States District Court for the Eastern District of Arkansas, Western Division, and the said motion having duly come on to be heard, and the Court having heard the argument and statement of counsel and being fully advised, and the plaintiff having withdrawn its objection to defendant's motion, and it appearing to the Court that the defendant's motion should be granted for the convenience of parties and witnesses and in the interest of justice, IT IS ORDERED,

That this action be transferred from the United States District Court for the Northern District of Oklahoma, and

It is further ordered that the Clerk of this United States District Court for the Northern District of Oklahoma be, and hereby is directed to transfer all records and papers in this action, together with the cost deposit made by the defendant Frank J. Rooney, Inc., to the Clerk of the United States District Court for the Eastern District of Arkansas, Western Division, together with a certified copy of this Order, and

It is further ordered that the time for the defendant Frank J. Rooney, Inc. to answer the plaintiff's complaint be and the same hereby is extended to a date twenty (20) days after the service upon counsel for the defendant, personally or by registered mail, at the offices of Rose, Nash, Williamson, Carroll,

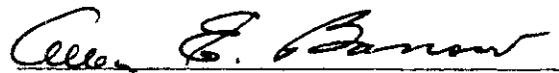
Clay & Giroir, Attention: Vincent Foster, Jr., 720 West Third Street, Little Rock, Arkansas, 72201, by the plaintiff of a notice that the transfer to the United States District Court for the Eastern District of Arkansas, Western Division, has been effected, and

It is further ordered that the Certificate of Deposit of the Republic Bank and Trust Company of Tulsa, Oklahoma, and the funds represented thereby shall also be transferred and shall remain with the Registry of the United States District Court for the Eastern District of Arkansas, Western Division until a determination of the controversy between plaintiff Continental Masonry Company, Inc. and Frank J. Rooney, Inc. shall be decided as to the validity of any claims which Frank J. Rooney, Inc. may have against Continental Masonry Company, Inc. under the agreements between the plaintiff Continental Masonry Company, Inc. and Frank J. Rooney, Inc., or until such time as the parties hereto may reach a settlement and compromise of their dispute, and

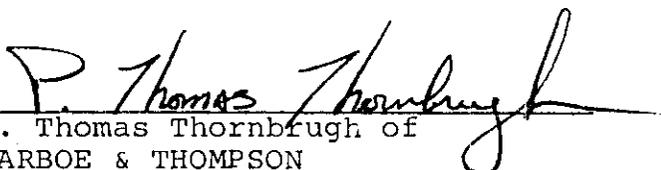
It is further ordered that upon the entering of judgment(s) against Continental Masonry Company, Inc. and in favor of Frank J. Rooney, Inc., in an amount in excess of any judgment(s) rendered on behalf of Continental Masonry Company, Inc. against Frank J. Rooney, Inc., in the cause transferred, or as may be consolidated therewith, or relating thereto, as evidenced by the agreements of parties of September 8, 1975, February 27, 1976, March 30, 1976 and a certain Letter of Credit No. 202, dated April 12, 1976, defendant Frank J. Rooney, Inc. may draw upon such funds as are available under the Certificate of Deposit to satisfy in whole or in part such judgment(s) and the Republic Bank and Trust Company shall honor such judgment or judgments but only to the extent and in the amount of Seventy-Five Thousand Dollars (\$75,000.00), plus accrued interest, unless proper undertaking be made by Continental Masonry Company, Inc. to stay the drawing upon such funds and execution upon the judgment(s) so entered, and

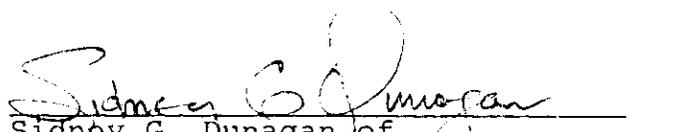
It is further ordered that should Continental Masonry Company, Inc. prevail against Frank J. Rooney, Inc., in the cause transferred, or as may be consolidated therewith, or relating thereto, as evidenced by the agreements of parties of September 8, 1975, February 27, 1976, March 30, 1976 and a certain Letter of Credit No. 202, dated April 12, 1976, and judgment(s) be entered in its favor, in an amount in excess of any judgment(s) rendered on behalf of Frank J. Rooney, Inc., the Certificate of Deposit shall be surrendered for cancellation to the Republic Bank and Trust Company, unless an appeal be taken from such judgment(s) whereon the Certificate of Deposit will remain subject to the Court's direction and control until the judgment(s) be resolved on appeal.

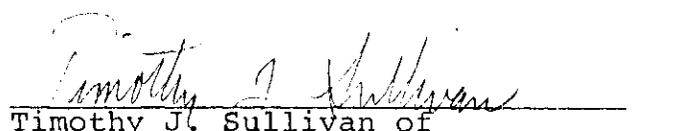
Dated this 16<sup>th</sup> day of December, 1977.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

  
P. Thomas Thornbrugh of  
JARBOE & THOMPSON  
Attorneys for Plaintiff

  
Sidney G. Dunagan of  
GABLE, GOTWALS, RUBIN, FOX,  
JOHNSON & BAKER  
Attorneys for Frank J. Rooney, Inc.

  
Timothy J. Sullivan of  
PRICHARD, NORMAN, REED & WOHLGEMUTH  
Attorneys for Republic Bank  
and Trust Company

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

DECEMBER MASONRY COMPANY,  
an Oklahoma Corporation,

Plaintiff,

vs.

BROYLES & BROYLES, INC.,  
a Texas Corporation, and  
THE TRAVELERS INDEMNITY  
COMPANY, a Connecticut  
Corporation,

Defendants.

BROYLES & BROYLES, INC.,  
a Texas Corporation,

Counterclaimant,

vs.

DECEMBER MASONRY COMPANY,  
an Oklahoma Corporation, and  
BALBOA INSURANCE COMPANY,  
a California Corporation,

Counterclaim Defendants.

No. 77-C-413-B

**FILED**

**DEC 6 1977**

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

ORDER OF DISMISSAL OF  
COUNTERCLAIM WITHOUT PREJUDICE

Broyles & Broyles, Inc., Counterclaim Plaintiff, and December Masonry Company and Balboa Insurance Company, Counterclaim Defendants, having stipulated in this Court to the dismissal without prejudice of the Counterclaim filed herein by Broyles & Broyles, Inc., on October 7, 1977, without any assessment of damages, costs, awards or other relief, and the Court finding that such dismissal without prejudice is proper and should be allowed,

IT IS, THEREFORE, ORDERED that the Counterclaim of Broyles & Broyles, Inc., against December Masonry Company and Balboa Insurance Company filed herein on October 7, 1977, be, and it hereby is, dismissed without prejudice and without assessment of damages, costs, awards or other relief against any party hereto.

(Signed) Allen E. Barrow

DEC 6 1977

CHIEF UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF OKLAHOMA

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

FILED

DEC 6 1977

NO

JOE ESPINOSA, d/b/a )  
C & J ELECTRIC COMPANY )  
 )  
Petitioner-Defendant )  
 )  
V. )  
 )  
RODNEY HARMON, )  
 )  
Respondent-Plaintiff )

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

CASE NO. 77-C-478-B ✓

NOTICE OF  
DISMISSAL

Comes now the plaintiff and hereby dismisses the above cause with prejudice.

Dated this 6th day of December, 1977.

*Herbert H. Zickel*  
Attorney for plaintiff

I hereby certify that I mailed a full, true and correct copy of the above document to Lynn S. Patton at 124 E. 4th St. with proper postage being prepaid on this 6th day of December, 1977

*Herbert H. Zickel*  
Attorney for Plaintiff

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

In the Matter of: )  
 )  
EASTLAND MALL SHOPPING ) No. 77-C-462-B  
CENTER, INC., )  
 )  
Debtor. )

FILED  
DEC 6 1977

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

ORDER DISMISSING APPEAL

NOW on this 4<sup>th</sup> day of December, 1977 the Court has for its consideration the Application of Republic Bank & Trust Company to dismiss its appeal of the order of the Bankruptcy Judge dismissing the Chapter X proceeding instituted by the above-named debtor. The Court is advised that subsequent to the filing of the Application to Dismiss, the Trustees of Guardian Mortgage Investors have paid into the registry of the Clerk of this Court the sum of \$500,000.00 as required by the Order of the Bankruptcy Judge filed October 11, 1977 in order to pay in full the Trustees' certificates of indebtedness presently being held by Republic Bank & Trust Company together with costs of administration. Therefore, the Court finds that good cause exists to grant the Application to Dismiss this appeal and does hereby

ORDER that the Application to Dismiss Appeal be and the same is hereby granted and that the appeal of Republic Bank & Trust Company from the order dismissing the Chapter X proceeding instituted by Eastland Mall Shopping Center, Inc. be and the same is hereby dismissed. This dismissal shall be without further cost to Republic Bank & Trust Company.

*Allen E. Barrow*

CHIEF UNITED STATES DISTRICT JUDGE

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

SOPHIE C. JORDAN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ENRICH AND ELSIE HENCKE, )  
 d/b/a TOWNSMAN MOTEL, )  
 )  
 Defendants. ) No. 76-C-406-B

FILED

DEC 6 1977

Jack C. Silver, Clerk  
U S DISTRICT COURT

O R D E R

The Court has for consideration defendant's Motion for Summary Judgment and Application for Order Allowing Expenses, and has carefully reviewed the entire file, the briefs, the cited authorities and the recommendations of the Magistrate concerning said Motion and Application, and being fully advised in the premises, finds:

That the Defendant's Motion for Summary Judgment should be sustained and Defendant's Application for Order Allowing Costs should be passed until the next motion docket without prejudice to Defendant's right to assert same.

Plaintiff brings her cause of action for damages sounding in tort. She alleges that on August 6, 1974, while a guest at defendants' motel, she slipped and fell on the ceramic tile entrance to her room. This fall happened when she was departing from the room.

In the Complaint filed by plaintiff, it is alleged that defendants' negligence arose from their failure to take remedial action in respect to an allegedly dangerous condition. The Pre-Trial Order approved by plaintiff changes plaintiff's theory of negligence in respect to these defendants and plaintiff now claims defendants were negligent in the selection of floor covering material.

There is no dispute between the parties as to the standard of care owed to a business invitee as explained in

Buck v. Del City Apartment, Inc., Okl., 431 P.2d 360 (1967)

at 365.

"The owner or person in charge of the premises has no obligation to warn an invitee, who knew or should have known the condition of a property, against patent and obvious dangers. The invitee assumes all normal or ordinary risks incident to the use of the premises, and the owner or occupant is under no legal duty to reconstruct or alter the premises so as to remove known and obvious hazards, nor is he liable to an invitee for an injury resulting from a danger which was obvious and should have been observed in the exercise of ordinary care.

"The duty to keep premises in a reasonably safe condition for the use of the invited public applies solely to defects or conditions which may be characterized as in the nature of hidden dangers, traps, snares, pitfalls, and the like - - things which are not readily observable. The law does not require the owner or occupant of land to warrant that the invitee shall suffer no injury upon the premises; his duty is discharged when reasonable care is taken to prevent the invitee's exposure to dangers which are more or less hidden, and not obvious. In the absence of a duty neglected or violated, there can be no actionable negligence."

See also Jackson v. Land, Okl., 391 P.2d 904 (1964) and Turner v. Rector, Okl., 544 P.2d 507 (1975).

A study of the deposition of the plaintiff herein reveals no hidden dangers or traps which would allow this case to come within the exceptions stated in Buck, supra. Defendants breached no duty in respect to the plaintiff.

Plaintiff's room had a tiled entrance. On the day of her departure, it was raining and the entrance became wet when plaintiff opened the door. It was on this area that plaintiff fell. The uncontroverted testimony of plaintiff shows that the wet tile was not a hidden danger, trap or snare but an apparent and obvious condition. A business proprietor is not liable for injuries sustained by an individual who falls

because of an obvious condition. See Sullins v. Mills, Okl., 395 P.2d 787 (1964); McClendon v. McCall, Okl. 489 P.2d 756 (1971); Stonsifer v. Courtney's Furniture Company, Inc., 474 F.2d 113 (10th Cir. 1973); Nicholson v. Tacker, Okl. 512 P.2d 156 (1973); and Turner v. Rector, *Supra*.

Additionally, the record is void of any testimony establishing that defendant knew or should have known of the condition. Such is necessary for liability to attach to a business owner. Owen v. Kitterman, 178 Okl. 483, 62 P.2d 1193; Safeway Stores, Inc., v. Feedback, Okl., 390 P.2d 519 (1964); Kassick v. Spicer, Okl., 490 P.2d 251 (1971); and Fuller v. Rahill, Okl., 496 P.2d 785 (1972).

During all relevant times herein the room was in the exclusive control of plaintiff. There was no water present when the plaintiff first checked into the room. It appeared when plaintiff's companions opened the door and allowed it to stand open in the rain.

Plaintiff's alternative theory that defendants were negligent in selection of the tile and that the tile when wet became dangerous is unfounded.

In support of defendant's Motion for Summary Judgment, an Affidavit of Van Carlile was submitted. Therein, Carlile stated that his company installed the tile in the entrance in the room involved; that said tile was manufactured by a well known and reputable company; that said tile is a widely accepted floor material and was installed pursuant to approved procedures and is so installed daily for the same use in many places. This affidavit was uncontroverted by the plaintiff.

IT IS THEREFORE ordered that the defendants' Motion for Summary Judgment be and the same is hereby sustained and that defendants' Application for Order Allowing Costs be passed until the next motion docket without prejudice to the defendant of asserting same.

Dated this 6<sup>th</sup> day of ~~November~~ <sup>December</sup>, 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

CARL H. BARBEE and )  
RUTH F. BARBEE, )  
 )  
Plaintiffs, )  
 )  
vs. ) No. 76-C-478-C  
 ) 76-C-509-C  
IRBY SPROUSE, JR., )  
et al., )  
 )  
Defendants. )

FILED

DEC 5 1977 *lm*

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

JOURNAL ENTRY OF JUDGMENT

On the 19th day of August, 1977, the above entitled cause came on for hearing on its merits. The above named plaintiffs, defendants in 76-C-509-C, appeared in person and with their attorney, C. Rabon Martin of Baker, Baker and Martin. The above named defendants, plaintiffs in 76-C-509-C, appeared not in person, but appeared by their attorney, Ted Gibson, of Farmer, Woolsey, Tips and Gibson. The plaintiffs above announced ready for trial and the defendants above, by their attorney, announced that they were not ready for trial, and moved for a continuance. Upon no good cause for a continuance being shown, the Court denied the request and the case was heard upon its merits. After hearing the sworn testimony of witnesses, in open Court, and upon receiving exhibits offered into evidence by the parties, and being fully advised in the premises, the Court finds that the material allegations of the plaintiffs' claim for relief are well taken, and should be sustained, and that in Case Number 76-C-478-C, the plaintiffs are entitled to judgment against the defendants, Concept 21 in Kansas, Arkansas and Oklahoma, Inc., an Oklahoma Corporation, in the sum of \$12,750.00, together with interest thereon from September 1, 1976, to the date of judgment, together with plaintiffs' costs expended herein, and in Case Number 76-C-509-C, the

defendants, Carl H. Barbee and Ruth F. Barbee, are entitled to judgment against the plaintiff, Concept 21 in Kansas, Arkansas and Oklahoma, Inc.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that in Case Number 76-C-478-C, the plaintiffs, Carl H. Barbee and Ruth F. Barbee are hereby granted judgment against the defendant, Concept 21 in Kansas, Arkansas and Oklahoma, Inc., in the sum of \$12,750.00, together with interest thereon at the rate of six percent (6%) per annum from September 1, 1976 to the date of judgment, and the costs of this action; and in Case Number 76-C-509-C, the defendants, Carl H. Barbee and Ruth F. Barbee are hereby granted judgment against the plaintiff, Concept 21 in Kansas, Arkansas and Oklahoma, Inc., and are awarded the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiffs' claim for relief against the individual defendant in Case Number 76-C-478-C, Irby Sprouse, Jr., as well as plaintiffs' request for attorney fees, are hereby taken under advisement for further consideration by the Court.

It is so Ordered this 5<sup>th</sup> day of December, 1977.

  
H. DALE COOK  
United States District Judge



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

BANK OF COMMERCE OF TULSA, an )  
Oklahoma banking corporation, )

Plaintiff )

vs. )

No. 77-C-64 (B)

WESTERN MUSIC & VENDING CO., INC., )  
a Kansas corporation, and )  
INSURANCE COMPANY OF NORTH AMERICA, )  
a Pennsylvania corporation, )

Defendants )

**FILED**

**DEC 1 1977**

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

STIPULATION OF ALL PARTIES OF  
DISMISSAL WITH PREJUDICE

Come now the parties herein and, pursuant to Rule 41(a)(1)(ii), advise the Court that all issues between the parties have been settled by payment of certain moneys from defendant Insurance Company of North America to plaintiff Bank of Commerce of Tulsa, and for and in consideration of same the parties herein stipulate and agree that plaintiff's cause is dismissed with prejudice as to all defendants, and that defendant Western Music & Vending Co., Inc. dismisses with prejudice its motion for summary judgment filed herein against plaintiff, and all parties stipulate and agree to bear their respective costs and attorneys fees and request this Honorable Court to make and enter its appropriate order of dismissal with prejudice of all parties' claims.

DONE AND DATED this 30 day of November, 1977.

BANK OF COMMERCE OF TULSA,  
Plaintiff

WESTERN MUSIC & VENDING CO., INC.  
Defendant

MOYERS, MARTIN, CONWAY,  
SANTEE & IMEL

PRAY, SCOTT, WILLIAMSON & MARLAR

By   s/    
Steven A. Stecher  
Attorneys for Plaintiff  
920 NBT Building, Tulsa, Okla.  
582-5281

By   s/    
Roger R. Scott  
Attorneys for Defendant Western Music  
2910 Fourth National Bank Building  
Tulsa, Oklahoma 74119  
918 583-1366

INSURANCE COMPANY OF NORTH AMERICA  
Defendant  
GREEN, FELDMAN, HALL & WOODARD

By *W. S. Hall*  
Wm. S. Hall  
Attorneys for Insurance Company of  
North America

816 Enterprise Building  
Tulsa, Oklahoma 74103  
918 583-7129

**FILED**

**DEC 1 1977**

ORDER OF DISMISSAL WITH PREJUDICE

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

The Court, being fully advised in the premises and on consideration of the above and foregoing Stipulation of Dismissal With Prejudice, finds that the appropriate order should issue.

BE IT, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff's cause against the defendants be, and the same is, hereby dismissed with prejudice.

BE IT FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Western Music & Vending Co., Inc's motion for summary judgment be, and the same is, hereby dismissed with prejudice.

BE IT FURTHER ORDERED that the respective parties bear their respective costs, including attorneys' fees.

DONE AND DATED this 1st day of ~~November~~ <sup>November</sup>, 1977.

*Allen E. Bonner*  
United States District Judge

FILED

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

DEC 1 1977

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

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

Plaintiff )

vs )

ARROWHEAD ASPHALT CO., and )  
CANAL INSURANCE COMPANY, )

Defendants )

No. 76-C-625-B

JUDGMENT

Upon application of the parties, judgment is hereby entered in this case in favor of the plaintiff, St. Louis-San Francisco Railway Company, and against the defendants, Arrowhead Asphalt Co. and Canal Insurance Company, for the sum of \$115,000, together with pre-paid interest on such amount at the rate of 6% per annum from August 19, 1976, to the date of this judgment. This judgment shall bear interest at the rate of 10% per annum, until paid.

DATED on this the 1<sup>st</sup> day of December, 1977.

*Allen E. Barrow*

Allen E. Barrow  
United States District Judge

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

**FILED**

DEC 1 1977

OLVE TORVANGER, and )  
 AASE TORVANGER, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 THE AUGUST CORPORATION, an )  
 Oklahoma Corporation, d/b/a )  
 Detrick Realtors; SUZANNE COWEN, )  
 an individual; MARGARET MARY )  
 DOLLAHAN; an individual; and )  
 CRAIG DOLLAHAN, an individual, )  
 )  
 Defendants. )

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

No. 77-C-95-B

ORDER OF DISMISSAL

ON this 1<sup>st</sup> day of December, 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 Plaintiffs filed  
 herein against the Defendants be and the same hereby is dismissed with  
 prejudice to any future action.

*Allen E. Bonner*

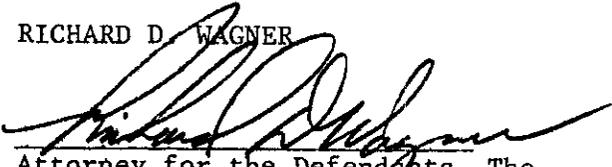
JUDGE, DISTRICT COURT OF THE UNITED  
STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

CHARLES W. SHIPLEY

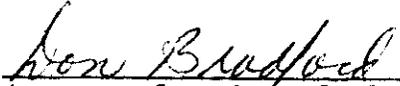
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DON BRADFORD



Attorney for the Defendants, Margaret  
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