

FILED

U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

RD

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION
	)	No. 79-C-278-C
110.85 ACRES OF LAND, MORE OR	)	
LESS, SITUATE IN OSAGE COUNTY,	)	Tract No. 315 ME
OKLAHOMA, and	)	
THE LINK OIL COMPANY, et. al.,	)	Oil leasehold interest only
and Unknown Owners,	)	
	)	Included in D.T. filed
Defendants.	)	in Master File #405-8

JUDGMENT

Now on this 31<sup>st</sup> day of July, 1979, the Court considers the Motion to Dismiss of The Link Oil Company of the condemnation action filed by the United States of America. The Court examines the file and finds that the United States does not oppose the Motion to Dismiss.

The Court finds that the United States cannot acquire by condemnation the interest sought to be condemned from The Link Oil Company.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that this action be and it is hereby dismissed, and that The Link Oil Company shall recover its reasonable costs, disbursements and expenses, including an attorney's fee of \$ 1,185.<sup>00</sup>.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Declaration of Taking on which this action was based be and it hereby is held for naught insofar as said Declaration of Taking includes any interests of The Link Oil Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Motion of the United States for Immediate Possession which has been filed in this action be and it hereby is overruled.

  
 \_\_\_\_\_  
 JUDGE

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

IN RE: )  
 )  
MIDWEST AUTOPILOTS and AVIONICS, INC., )  
 )  
Bankrupt, )  
 )  
RALPH GRABEL, )  
 )  
Plaintiff-Appellant, )  
 )  
vs. )  
 )  
HAROLD Z. NICHOLS, )  
 )  
Defendant-Appellee. )

79-C-62-C

In Bankruptcy  
No. 77-B-821

**FILED**

JUL 30 1979

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

ORDER

This case is presently before the Court for disposition on an appeal from the Bankruptcy Court and the decision of the Bankruptcy Judge.

The Court has carefully reviewed the entire file, including the depositions of Jerry Harrell, Don Richard Moon, Howard O. Holloway, Robert W. Ingle, Per Bjune, Harold Nichols and Roger Kelley. The matter was presented to the Bankruptcy Judge on the Defendant-Appellee's Motion for Summary Judgment. The Bankruptcy Judge duly entered his Findings of Fact and Conclusions of Law, and sustained the Motion for Summary Judgment.

This dispute involves a policy of life insurance, bearing the date of February 25, 1974, being Policy No. L 4426316, issued by the Business Men's Life Assurance Company of America, in the face amount of \$100,000.00.

The policy of insurance reflects that Linda L. Bennett was the owner; that Charles R. Bennett, was the insured; that the first beneficiary was Linda L. Bennett; that the contingent beneficiaries were Kelly D. Bennett and Stacy L. Bennett, the minor children of Charles R. Bennett and Linda L. Bennett.

Charles L. Bennett, Linda L. Bennett, Kelly D. Bennett and Stacy L. Bennett all departed this life on April 13, 1976, as a result of a vehicular accident. Harold Z. Nichols [the father of Linda L. Bennett] was duly appointed Administrator of the Estates of the deceased individuals.

The policy of insurance was paid on June 16, 1976, by the issuance of a check to Harold Z. Nichols as Administrator in P-76-45 pending in the District Court of Rogers County, Oklahoma. The check was in the amount of \$99,412.21 and said funds are held by Harold Z. Nichols subject to the administration of the estates.

Sometime after the death of the Bennett family, Midwest Autopilots and Avionics, Inc. was placed in bankruptcy, being bankruptcy number 77-B-821, and Ralph Grable, plaintiff-appellant herein, was appointed Trustee of said bankrupt estate.

The file reveals that Charles R. Bennett was the President of Midwest Autopilots and Avionics, Inc., from the time of its formation in April, 1973, until his death in April, 1976. The file also reflects that 12,193 shares of stock of said corporation were issued to Charles R. Bennett; 12,192 shares were issued to Linda Lou Bennett, his wife and 200 shares were issued to Per Bjune. [Page 2 of Trustee's Trial Brief--Document #4 on Appeal Designation].

On November 30, 1973, Charles R. Bennett made application for the insurance policy which is the subject of this litigation and the policy was issued on February 25, 1974.

It is undisputed that the premiums for said insurance policy were paid by the corporation, Midwest Autopilots and Avionics, Inc.

The Bankruptcy Judge found [page 2]:

The depositions show considerable questioning and possible controversy as to the extent of Linda Bennett's services to the firm but a finding that her status was one of employment with the firm is not necessary to the determination of the issues in this case. Suffice it to say, there is no indication whatsoever of any wrongdoing on the part of the bankrupt or any of the other parties involved. Nor does the plaintiff claim any fraud, embezzlement, or wrongdoing but rests his case solely on ownership in the corporation of the insurance proceeds, based upon the admitted fact that the premiums were paid on the policy by the bankrupt.

The only question of law on appeal for determination by this Court is stated in the Designation of Record and Statement of Issues filed by the Trustee, i.e.:

Can a corporation claim the death benefit under a policy insuring the life of a corporate officer, and purportedly owned by the officer's wife, but upon which all premiums were paid from corporate funds?

The trustee in bankruptcy relies primarily upon the case of G & M Motor Company v. Thompson, 567 P.2d 81 (Okla. 1977). This case, a case of first impression for the Oklahoma Supreme Court, dealt with the question of whether a trial court could impress a constructive trust upon proceeds of life insurance policies where a portion of the premiums were paid with wrongfully obtained funds, and impressed a constructive trust on the proportion of the insurance proceeds consistent with the extent of premiums paid by wrongfully acquired funds.

There is no showing, indeed no contention, that the funds used to pay the premiums on the insurance here involved, were wrongfully obtained.

The Supreme Court of Oklahoma has not had occasion to pass on a situation such as the one presented here.

In 44 Am.Jur.2d, Insurance, §1771, it is stated:

It is well settled that a third person who voluntarily pays the premiums or assessments upon a life insurance policy without any contract with the one entitled to the benefit of the policy, or without any agreement with the insured, is a mere volunteer, cannot recover such payments from the beneficiary, and has no title to or lien upon the policy or its proceeds. Thus, a corporation which pays the premiums on a policy on the life of its president and majority stockholder, of which his wife is beneficiary, is a volunteer and has no valid claim for reimbursement, and no lien on the policy.

In 44 Am.Jur.2d, Insurance, §1772 it is stated:

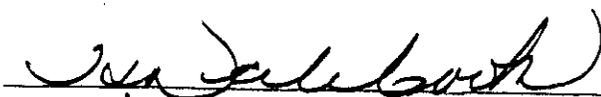
Where funds of another have been misappropriated and used to purchase, or pay premiums on, life insurance, the courts will generally allow some form of recovery from the proceeds by the one whose funds were so misused.

The Bankruptcy Judge found, and this Court agrees, that there is no reason shown to indicate that the Supreme Court of the State of Oklahoma would depart from the authority hereinabove cited.

The Court, therefore, finds that the Findings of Fact and Conclusions of Law and Judgment of the Bankruptcy Judge should be affirmed.

AFFIRMED.

ENTERED this 30<sup>th</sup> day of July, 1979.



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H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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

SMOKEY'S OF TULSA, INC.,  
an Oklahoma Corporation,

Plaintiff

vs.

AMERICAN HONDA MOTOR CO., INC.;  
SCHOLFIELD, SCHOLFIELD and NELMS,  
INC., dba HOUSE OF HONDA, an Arkansas  
corporation; HARRISON MOTOR-SPORTS,  
Inc., dba HARRISON HONDA, an Arkansas  
corporation; BLUFF MOTORCYCLE SERVICE,  
INC., a Missouri corporation dba BLUFF  
HONDA; ABERNATHY MOTORCYCLE SALES, INC.,  
a Tennessee corporation; BILL BENNETT  
dba BILL'S CYCLES,

Defendants

No. 76-C-623-B

**FILED**

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

ORDER OF DISMISSAL WITH PREJUDICE

On this 26th day of July 1979, on motion of plaintiff,  
the above-styled cause is hereby dismissed with prejudice  
as to the separate defendant, Scholfield, Scholfield, and  
Nelms, Inc., dba House of Honda, an Arkansas corporation,  
pursuant to Rule 41 (a) of the Federal Rules of Civil Procedure.

FRED DAUGHERTY

United States District Judge

APPROVED:

13/  
Lawrence A. Johnson  
Attorney for Plaintiff

13/  
William A. Storey  
Attorney for Separate Defendant

FILED

JUL 30 1979

DOCKET NO. 330

JUDICIAL PANEL ON  
MULTIDISTRICT LITIGATION

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

JUL -9 1979

IN RE SWINE FLU IMMUNIZATION PRODUCTS LIABILITY LITIGATION

PATRICIA D. HOWARD  
CLERK OF THE PANEL

Robert B. Scruggs v. United States of America,  
Oklahoma, C.A. No. 79-C-443-D

FILED

JUL 26 1979

CONDITIONAL TRANSFER ORDER

79-1956

On February 28, 1978, the Panel transferred 26 related civil actions to the United States District Court for the District of the District of Columbia for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. Since that time, more than 400 additional actions have been transferred to the District of the District of Columbia. With the consent of that court, all such actions have been assigned to the Honorable Gerhard A. Gesell.

It appears from the pleadings filed in the above-captioned action that it involves questions of fact which are common to the actions previously transferred to the District of the District of Columbia and assigned to Judge Gesell.

Pursuant to Rule 9 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 78 F.R.D. 561, 567-68 (1978) the above-captioned tag-along action is hereby transferred to the District of the District of Columbia on the basis of the hearings held on January 27, 1978, May 26, 1978, September 29, 1978, November 1, 1978, March 23, 1979 and April 27, 1979. and for the reasons stated in the opinions and orders of February 28, 1978, 446 F. Supp. 244, July 5, 1978, 458 F. Supp. 648, January 16, 1979, 464 F. Supp. 949, and with the consent of that court assigned to the Honorable Gerhard A. Gesell.

This order does not become effective until it is filed in the office of the Clerk for the United States District Court for the District of the District of Columbia. The transmittal of this order to said Clerk for filing shall be stayed fifteen days from the entry thereof and if any party files a Notice of Opposition with the Clerk of the Panel within this fifteen day period, the stay will be continued until further order of

Inasmuch as no objection has been filed at this time, the stay is lifted and this order becomes effective.

JAMES F. DAVEY, CLERK  
*James F. Davey*  
Deputy Clerk

JUL 25 1979

Patricia D. Howard  
Clerk of the Panel

FOR THE PANEL

*Patricia D. Howard*  
Patricia D. Howard  
Clerk of the Panel

THIS IS A TRUE COPY

CLERK'S OFFICE  
UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA  
WASHINGTON, D. C. , 20001

JUL 26 1979

Clerk  
United States District Court  
for the District of OKLAHOMA (NORTHERN)  
ROOM 411, U. S. COURTHOUSE  
TULSA, OKLAHOMA 74103

IN RE: SWINE FLU IMMUNIZATION PRODUCTS  
LIABILITY LITIGATION

Dear Clerk:

Enclosed is a certified copy of Conditional Transfer Order entered by the Judicial Panel on Multidistrict Litigation. The order became effective on 07-26-79 . We have assigned individual civil action number(s) to your case(s) to be transferred to us as listed below.

Please send us your file(s) along with a certified copy of your docket entries. When you send your file(s) please refer to our civil action number(s).

<u>Title of Case(s)</u>	<u>Your Number(s)</u>	<u>Our Number(s)</u>
ROBERT B. SCRUGGS v. UNITED STATES OF AMERICA	79-C-443-D	79-1956

Sincerely,

JAMES F. DAVEY, Clerk

by:  Deputy Clerk

Enclosure

cc: Patricia D. Howard, Clerk of the Panel  
Miscellaneous File 78-0040  
Civil Action File(s) 79-1956  
Judge Gerhard Gesell

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

PAUL DENTON and ELLIS J.  
EASTERLING,  
  
Plaintiffs,  
  
vs.  
  
CONSOLIDATED PIPE AND SUPPLY  
COMPANY, a foreign corporation,  
  
Defendant.

FILED

JUN 11 1978

JAMES C. HARRIS, Clerk  
U. S. DISTRICT COURT

78-C-553-C

FILED

JUN 11 1978

JAMES C. HARRIS, Clerk  
U. S. DISTRICT COURT

ORDER

On June 8, 1978, the Court entered an Order overruling the Motion for Dismissal of the Action With Prejudice and Default Judgment against Plaintiffs for Failure to Appear for Depositions and Produce Documents and Motion to Strike Response. In the same Order the Court indicated that the Court would consider, by way of sanction, an application containing an itemization of expenses incurred in the aborted deposition which was the subject matter of the Motion.

Defendant has duly filed its Application for Costs and Expenses Incurred by Defendant Consolidated Pipe & Supply Company in Aborted Depositions and the plaintiffs have responded thereto.

The application of the plaintiff, itemizing costs and expenses, reveals that the defendant seeks a total of \$2,511.13 [Out of pocket expenses of \$281.13 and attorneys' fees of \$2,230.00].

The Court has duly noted the response of the plaintiffs and in particular their contention that the Court not consider expenses of Laurence D. Vinson, Jr. (attorney who was present at the scheduled deposition from Birmingham, Alabama) because he was not shown as attorney of record. Plaintiffs do admit that they did have contact with the attorneys in Birmingham, Alabama, in late August or early September, 1977 (but contend that it was not in connection with this litigation but only concerning interpretation of the lease and sublease), but

assert that they had no idea that said attorneys from Alabama were actively participating in this litigation.

The Court, however, in reviewing the file, finds that the defendant should be entitled to the actual out of pocket expenses in the sum of \$281.13, plus an attorney fee of \$500.00, to be imposed as a sanction against plaintiffs.

IT IS, THEREFORE, ORDERED that the Application for Costs and Expenses filed by the defendant be and the same is hereby granted and the defendant is granted \$781.13 as costs and expenses, to be assessed as costs against plaintiffs and their counsel.

ENTERED this 30<sup>th</sup> day of July, 1979.

  
\_\_\_\_\_  
H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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

FILED

JUL 19 1979

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

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CLIFFORD W. ALLISON, )  
 )  
Defendant. )

CIVIL ACTION NO. 79-C-425-D

DEFAULT JUDGMENT

This matter comes on for consideration this 26  
day of July, 1979, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney for the Northern District of  
Oklahoma, and the Defendant, Clifford W. Allison, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendant, Clifford W. Allison, was  
personally served with Summons and Complaint on June 22, 1979,  
and that Defendant has failed to answer herein and that default  
has been entered by the Clerk of this Court.

The Court further finds that the time within which  
the Defendant could have answered or otherwise moved as to the  
Complaint has expired, that the Defendant has not answered or  
otherwise moved and that the time for the Defendant to answer  
or otherwise move has not been extended, and that Plaintiff  
is entitled to Judgment as a matter of law.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that  
the Plaintiff have and recover Judgment against Defendant,  
Clifford W. Allison, for the sum of \$663.30, plus the costs  
of this action accrued and accruing.

*Jack C. Sims*  
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

*Robert P. Santee*

ROBERT P. SANTEE  
Assistant U. S. Attorney

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

TRESCO, INC.,

Plaintiff,

vs.

VENUS PRODUCTS, INC.,

Defendant.

No. 76-C-115-D ✓

FILED

NO JUL 2 1979

ORDER OF DISMISSAL OF PLAINTIFF'S  
COMPLAINT AND DEFENDANT'S COUNTER-CLAIM

UNITED STATES CLERK  
OF DISTRICT COURT

On this 26 day of July, 1979, upon the written stipulation of the parties for a dismissal with prejudice of the plaintiff's complaint and the defendant's counter-claim, the Court having examined said stipulation, finds the parties have entered into a compromise settlement of all of the claims involved herein, and the Court being fully advised in the premises finds that the plaintiff's complaint against the defendant and the defendant's counter-claim against the plaintiff should be dismissed with prejudice.

IT IS THEREFORE ORDERED BY THE COURT that the complaint of the plaintiff against the defendant and the counter-claim of the defendant against the plaintiff be and the same are hereby dismissed with prejudice to any future action.

Ina Augherly  
UNITED STATES DISTRICT JUDGE

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

FARMERS INSURANCE COMPANY,  
INC.,  
  
Plaintiff,  
  
vs.  
  
DAVID ARMSTRONG, et al.,  
  
Defendants.

No. 75-C-92-C

FILED

July 26, 1979

JUDGMENT

ON THIS 26<sup>d</sup> day of July, 1979, pursuant to the joint application of the parties, this matter comes on for consideration by the Court. The Court, after reviewing the file and hearing statements of counsel advising the Court that certain agreements have been reached by the parties, finds as follows:

1. There remains a total of \$17,860.00 in the interpleader fund.
2. That the Defendant, Saint Francis Hospital, Inc., has agreed to accept an award of one-half (1/2) of the remaining amount of its total claim unpaid (\$3,832.46), or One Thousand Nine Hundred Sixteen and 23/100 Dollars (\$1,916.23) as full, final and complete settlement of the matters in controversy between the Defendant, Saint Francis Hospital, Inc., and their right to the interpleader fund. The Defendant, Saint Francis Hospital, Inc., has also agreed to refund to the United States Government \$60.69 which it has retained as payment from the United States Government to date.
3. That the Defendants, Betty Wagnon, Nellie Ann Wagnon, now Blossom, and Peggy Wagnon, individually; Betty Wagnon, as next friend of the following minors: Annie Wagnon (also known as Terry Lynn Wagnon), Sherry Wagnon, and Scott Wagnon; and Betty Wagnon, as next of kin of Wanda Wagnon (also known as Juanita Wagnon), a minor, deceased, have agreed to accept the following sums as full, final and complete settlement of the matters in controversy between these defendants and their right to the interpleader fund:

The above named Defendants have further agreed that their attorneys, Ross Hutchins and Ed Munson, should be awarded the sum of \$5,039.72 as a reasonable attorney fee previously agreed upon in representing them in this matter.

4. That the Defendant, the State of Oklahoma, Department of Institutions, Social and Rehabilitative Services (hereinafter referred to as DISRS) has agreed to accept the total sum of \$1,799.55 as full, final and complete settlement of its claim to the interpleader fund for payments previously made by it pursuant to Title XIX (Title 42, U.S.C.) on behalf of the qualifying indigent defendants. DISRS specifically preserves its right to appeal the question of whether or not the hospital, having submitted a claim for payment under Title XIX and the contracts entered into between the hospital and the State pursuant to Title XIX and the hospital having accepted payment, can make claims in addition to the sums received from the State for the same services rendered to the same parties. It is the position of DISRS that the hospital is foreclosed from making claim for a patient account balance due from a third party source when the hospital has applied for, been approved, and accepted Title XIX funds.

5. The Defendant, The United States of America, has agreed to accept the total sum of \$1,544.91 as total, complete and final settlement of its claim against the interpleader fund.

The Court, after considering the above findings and reviewing the file, including the Court's order of December 12, 1978, enters judgment and further finds as follows:

The \$3,832.46 is broken down as follows: \$2,105.24 which is not in contention by DISRS because it involves patient billing not approved or paid by DISRS under Title XIX. The balance of \$1,727.22 is disputed by DISRS as a payment to Saint Francis under the disputed issue. One-half of the \$1,727.22 in dispute is \$863.61. Therefore, the hospital is entitled to a judgment in the amount of \$1,916.23, \$1,052.62 of which is to be paid the hospital forthwith from the interpleaded fund. The balance in

dispute of \$863.61 is to remain in the court interpleaded fund until the dispute is terminated voluntarily or by appeal. If the trial court's order and judgment is affirmed on appeal the amount in dispute is to be paid over to Saint Francis Hospital; if the trial court's order or judgment is reversed on appeal said sum is to be paid to the individual claimants named in this order and their attorneys.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, Saint Francis Hospital, Inc., shall refund to the United States Government the total sum of \$60.69 which it has retained as payment from the United States Government. DISRS excepts to the amount of the judgment paid the Saint Francis Hospital, Inc., which represents the balance due on a patient account for which Title XIX funds were applied for and paid by DISRS.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Defendants, Betty Wagnon, Nellie Ann Wagnon, now Blossom, and Peggy Wagnon, individually; Betty Wagnon, as next friend of the following minors: Annie Wagnon (also known as Terry Lynn Wagnon), Sherry Wagnon, and Scott Wagnon; and Betty Wagnon, as next of kin of Wanda Wagnon (also known as Juanita Wagnon), a minor, deceased, should be and are hereby awarded judgment as and against the interpleader fund in the following sums:

To Betty Wagnon	\$1,746.93
To Peggy Wagnon, now Proctor	\$2,471.85
To Nellie Ann Wagnon, now Blossom	\$1,040.60
To Sherry Wagnon	\$ 626.99
To Annie Wagnon, also known as Terry Lynn Wagnon	\$1,046.23
To Scott Wagnon	\$ 626.99

Judgment in the above amount shall operate as a full, final and complete settlement of the matters in controversy between these Defendants and the interpleader fund. The Court further finds and holds that the sums payable to the minors in this action are reason-

able and a fair distribution in relation to the total fund available. Said sums payable to a minor child in excess of \$1,000.00 are to be deposited as required by Title 12, O.S. §83 in a separate order of this Court.

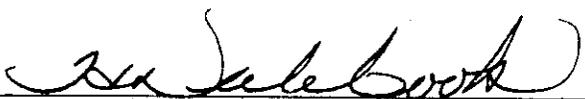
IT IS ORDERED, ADJUDGED AND DECREED by the Court that Ross Hutchins and Ed Munson, attorneys for the defendants, Betty Wagnon, Nellie Ann Wagnon, now Blossom, and Peggy Wagnon, individually; Betty Wagnon, as next friend of the following minors: Annie Wagnon (also known as Terry Lynn Wagnon), Sherry Wagnon, and Scott Wagnon; and Betty Wagnon, as next of kin of Wanda Wagnon (also known as Juanita Wagnon), a minor, deceased, should be and is hereby awarded the sum of \$5,039.72 as a reasonable attorney fee in this matter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that DISRS should be, and is hereby awarded the total sum of \$1,799.55 from the interpleader fund. This judgment shall operate as a full, final and complete settlement of DISRS claim to the interpleader fund.

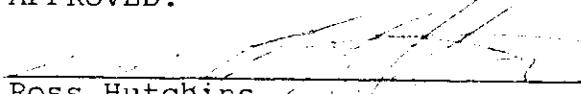
IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the defendant, the United States of America, is and should be awarded judgment against the interpleader fund in the total sum of One Thousand Five Hundred Forty-Four and 91/100 Dollars (\$1,544.91). This judgment in favor of the United States of America shall operate as a full, final and complete settlement of the United States Government's claim against the interpleader fund.

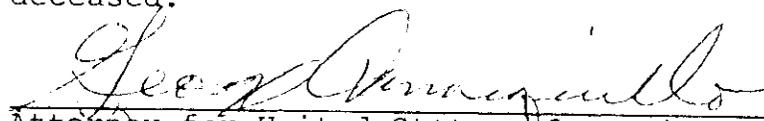
IT IS FURTHER ORDERED by the Court that all parties have waived their right to appeal from this Court's Judgment save and except DISRS, which has preserved the following issue for appeal: DISRS specifically preserves its right to appeal the question of whether or not the hospital, having submitted a claim for payment under Title XIX and the contracts entered into between the hospital and the State pursuant to Title XIX and the hospital having accepted

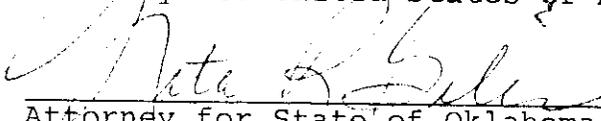
payment, can make claims in addition to the sums received from the State for the same services rendered to the same parties. It is the position of DISRS that the hospital is foreclosed from making claim for a patient account balance due from a third party source when the hospital has applied for, been approved, and accepted Title XIX funds.

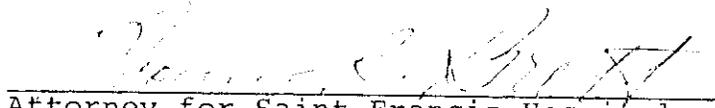
  
United States District Judge

APPROVED:

  
\_\_\_\_\_  
Ross Hutchins  
Attorney for Defendants, Betty Wagnon,  
Nellie Ann Wagnon, now Blossom, and  
Peggy Wagnon, individually; Betty  
Wagnon, as next friend of the follow-  
ing minors: Annie Wagnon (also known  
as Terry Lynn Wagnon), Sherry Wagnon,  
and Scott Wagnon; and Betty Wagnon,  
as next of kin of Wanda Wagnon (also  
known as Juanita Wagnon), a minor,  
deceased.

  
\_\_\_\_\_  
George Annunzio  
Attorney for United States of America

  
\_\_\_\_\_  
Rita L. Miller  
Attorney for State of Oklahoma, Depart-  
ment of Institutions, Social and  
Rehabilitative Services

  
\_\_\_\_\_  
Thomas E. Wright  
Attorney for Saint Francis Hospital, Inc.



FILED  
JUL 2 1979  
NORTHERN DISTRICT OF OKLAHOMA  
DISTRICT COURT

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 79-C-112-C
	)	
SECURITY BANK AND TRUST COMPANY,	)	
Miami, Oklahoma,	)	
	)	
Defendant.	)	

STIPULATION OF DISMISSAL

COME NOW the United States of America by and through its attorney, Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and Security Bank and Trust Company, Miami, Oklahoma, Defendant, by and through its attorney, Coy Morrow, and herewith stipulate and agree that this action be and the same is hereby dismissed, with prejudice.

Dated this 26 day of July, 1979.

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

  
ROBERT P. SANTEE  
Assistant United States Attorney

  
COY MORROW  
Attorney for Defendant,  
Security Bank and Trust Company,  
Miami, Oklahoma



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

GLADYS McDONALD,  
  
Plaintiff,  
  
vs.  
  
DONNA HOLT and MID-CONTINENT  
CASUALTY COMPANY, an  
Oklahoma Corporation,  
  
Defendant.

CIVIL ACTION  
No: 77-C-453-C

**FILED**

JUL 25 1979

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

ORDER

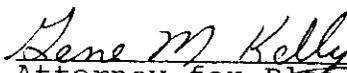
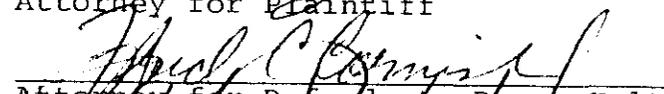
On this 16th day of July, 1979, this matter comes on for trial before the undersigned District Judge. Plaintiff, appearing through her attorney, Michael Kelly, orally made application to the Court to dismiss her cause of action against the defendants herein with prejudice. The defendant, Donna Holt, appearing by and through her attorneys, Hall, Estill, Hardwick, Gable, Collingsworth & Nelson by Fred C. Cornish and defendant Mid-Continent Casualty Company appearing by its attorney, Harlan S. Pinkerton, Jr., announced that they had no objection to plaintiff's proffered dismissal with prejudice.

Therefore, the Court, having examined the files and records in this case and having heard the statements of counsel in open Court, having fully considered the evidence, and being fully advised in the premises, finds that plaintiff's cause of action against both defendants should be dismissed with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff's cause against the defendants, Donna Holt and Mid-Continent Casualty Company are hereby dismissed with prejudice.

  
CHIEF UNITED STATES DISTRICT JUDGE

APPROVED:

  
Attorney for Plaintiff  
  
Attorney for Defendant, Donna Holt  
  
Attorney for Defendant,  
Mid-Continent Casualty Company

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OKLAHOMA

ALLEN WEST

PLAINTIFF

VS.

DOUGLAS M. COSTLE et al

DEFENDANTS

NO. C 79 C 33

FILED

JUL 25 1979

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

ORDER DISMISSING WITHOUT PREJUDICE

On this 25<sup>th</sup> day of July 1979 Plaintiff's Motion to Dismiss Without Prejudice comes on for hearing, and there being no objections,

IT IS HEREBY ORDERED that the abovestyled and numbered action be dismissed without prejudice.

  
UNITED STATES DISTRICT JUDGE

# United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

Jack A. Aird, d/b/a Aird Insurance Agency, and Aird Insurance Agency, a Utah Corporation,

CIVIL ACTION FILE NO. 78-C-1

vs.

JUDGMENT

Iliff Aircraft and Repair Service Co., Inc., an Oklahoma Corporation.

This action came on for trial before the Court and a jury, Honorable ALDON J. ANDERSON, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Plaintiff,

It is Ordered and Adjudged that having found in favor of the Plaintiff and against the Defendant, assesses damages in the sum of \$20,000.00, plus interest.

FILED

JUL 25 1979

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

Dated at Tulsa, Oklahoma, this 25th day of July, 1979.

  
Clerk of Court

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

BRIAN DENNIS HUNT, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 NUCLEAR REGULATORY COMMISSION, )  
 )  
 Defendant. )

No. 79-C-122-C

**FILED**

JUL 25 1979 *mw*

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

O R D E R

Now before the Court are the plaintiff's Motion for Reconsideration of Court's June 15 Order, and Motion for Injunction Pending Appeal.

With respect to the motion for reconsideration, the plaintiff has not raised any matter that was not considered by the Court prior to the entry of its Order of June 15, 1979. Plaintiff's motion for reconsideration of that Order will therefore be overruled.

In support of his Motion for Injunction Pending Appeal, the plaintiff has correctly pointed out that the purpose of such an injunction is to preserve the status quo pending appeal from an order granting, dissolving, or denying injunctive relief. See Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (2nd Cir. 1962); Shinholt v. Angle, 90 F.2d 297 (5th Cir. 1937). "Status quo" refers to the status of the case as it sits before the court of appeals. See Ideal Toy Corp., supra, at p.625. Plaintiff here moves the Court to enjoin the issuance by the defendant Nuclear Regulatory Commission of the construction permit for the Black Fox nuclear power station. If the Court were to issue such an injunction, it would not preserve the status of this case before the Court of Appeals. Whether or not a construction permit should issue for the Black Fox station is not and has never been an issue in this lawsuit. It therefore goes

without saying that the question could never be before the Court of Appeals on an appeal from any decision by this Court in this case.

For the foregoing reasons it is therefore ordered that the plaintiff's Motion for Reconsideration of Court's June 15 Order, and Motion for Injunction Pending Appeal are hereby overruled.

It is so Ordered this 25<sup>th</sup> day of July, 1979.

  
H. DALE COOK  
Chief Judge, U. S. District Court

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

ANGELA RENEE BROOKS and )  
MARCUS JOSEPH BROOKS, minor )  
children, by and through JANET )  
A. PICKLESIMER, their next )  
friend, )

Plaintiffs, )

vs. )

ASPHALT AND PETROLEUM INDUSTRIES, )  
INC., an Oklahoma corporation, and )  
LARRY P. MCGUIRE, )

Defendants. )

FILED

JUL 25 1979

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

No. 77-C-470-RC

J U D G M E N T

Pursuant to the stipulations of the parties heretofore filed herein, it is ordered that Judgment in the sum of ELEVEN THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS (\$11,750.00) plus the costs of this action be entered in favor of the plaintiffs, Angela Renee Brooks and Marcus Joseph Brooks, minor children, by and through Janet A. Picklesimer, their next friend, individually and as surviving children and on behalf of the heirs, executors and administrators of the estate of Garrett B. Brooks, deceased, against the defendants, Asphalt and Petroleum Industries, Inc., an Oklahoma corporation and Larry P. McGuire.

Further the Court finds and makes part of its Judgment that the settlement entered into by the plaintiffs with the defendants are in the best interest of the minor children.

ENTERED this 25<sup>th</sup> day of July, 1979.

  
JUDGE OF THE UNITED STATES  
DISTRICT COURT

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

ROY M. TEEL, SR., HAZEL G. TEEL,  
ROY M. TEEL, JR., MARGARET TEEL  
HERBST, DECO DEVELOPMENT COMPANY,  
A. M. BUXTON, L. L. McCULLOUGH,  
THE FIRST NATIONAL BANK OF SAN  
ANGELO, TEXAS, Testamentary Trustee  
Under the Will of William R. Crisp,  
Deceased, for the benefit of Cleo  
Crisp; GERALDINE CRISP; RICHARD  
ALLEN CRISP; and ALBERT DEWEY  
CRISP, II

Plaintiffs,

vs.

DILLINGHAM CORPORATION and  
CALIFORNIA LIQUID GAS CORPORATION,

Defendants.

No. 77-C-72 (C)

FILED

JUL 30

Jack C. Cook, Jr.  
U. S. District Court

ORDER OF DISMISSAL WITH PREJUDICE

Pursuant to the Stipulation of Dismissal with Prejudice  
submitted by the parties in the above captioned action, the Court  
does hereby enter its order of dismissal with prejudice.

SO ORDERED this 24<sup>th</sup> day of July, 1979.

s/ H. Dale Cook  
United States District Judge

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

FILE

FRANK AUSTIN ZEIGLER, )  
 )  
 Plaintiff, )  
-vs- )  
 )  
 D. R. COMSTOCK, et al., )  
 )  
 Defendants. )

NO. 76-C-637-B

✓  
JAMES S. MALONE, Clerk  
U.S. DISTRICT COURT

STIPULATED <sup>in p</sup> DISMISSAL WITH PREJUDICE

COMES NOW Frank Austin Zeigler, plaintiff herein, D. R. Comstock, Sam McCullough, S. N. Malone, Lee Walker, and Harry Stege, defendants herein, and herewith stipulate to the dismissal with prejudice upon all claims presented in the above-captioned matter pursuant to Rule 41(a)(1)(ii), with parties agreeing to bear their individual costs incurred herein.

Gordon D. McAllister, Jr.  
Gordon D. McAllister, Jr.  
Attorney for plaintiff

David L. Pauling  
David L. Pauling  
Assistant City Attorney  
Attorney for defendants

Frank Austin Zeigler  
Frank Austin Zeigler

D. R. Comstock  
D. R. Comstock

Sam McCullough  
Sam McCullough

S. N. Malone  
S. N. Malone

Lee Walker  
Lee Walker

Harry Stege  
Harry Stege

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

FILE

FRANK AUSTIN ZEIGLER, )  
 )  
 Plaintiff, )  
 -vs- )  
 )  
 D. R. COMSTOCK, et al., )  
 )  
 Defendants. )

NO. 76-C-637-B

✓  
Jack G. Miller, Clerk  
U.S. DISTRICT COURT

STIPULATED <sup>in P</sup> DISMISSAL WITH PREJUDICE

COMES NOW Frank Austin Zeigler, plaintiff herein, D. R. Comstock, Sam McCullough, S. N. Malone, Lee Walker, and Harry Stege, defendants herein, and herewith stipulate to the dismissal with prejudice upon all claims presented in the above-captioned matter pursuant to Rule 41(a)(1)(ii), with parties agreeing to bear their individual costs incurred herein.

Gordon D. McAllister, Jr.  
Gordon D. McAllister, Jr.  
Attorney for plaintiff

David L. Pauling  
David L. Pauling  
Assistant City Attorney  
Attorney for defendants

Frank Austin Zeigler  
Frank Austin Zeigler

D. R. Comstock  
D. R. Comstock

Sam McCullough  
Sam McCullough

S. N. Malone  
S. N. Malone

Lee Walker  
Lee Walker

Harry Stege  
Harry Stege

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

DANIEL DENNY and PATTIE  
JEAN DENNY, d/b/a DANIEL  
DENNY CONSTRUCTION,

Plaintiffs;

-vs-

MFA MUTUAL INSURANCE CO.,

Defendant.

No. CIV-79-C-459-D

No. C-79-99  
(State Court)

NOTICE OF DISMISSAL

TO: D. C. Johnston, Jr.  
320 Liberty Tower  
Oklahoma City, OK 73102

Attorney for MFA Insurance Company

Please take notice that the above-entitled action  
is hereby dismissed without prejudice under Rule 41a.

COPY (Original Signed) BRUCE W. GAMBILL

BRUCE W. GAMBILL of  
Kelly & Gambill  
Attorney for Plaintiff  
P. O. Box 329  
Pawhuska, OK 74056

CERTIFICATE OF MAILING

I, Bruce W. Gambill, hereby certify that on the 20th  
day of July, 1979, I mailed a true and correct copy of the  
above and foregoing instrument to D. C. Johnston, Jr., 320  
Liberty Tower, Oklahoma City, OK 73102 and to the Federal  
District Court Clerk, U.S. Court House, Tulsa, Oklahoma 74103.

COPY (Original Signed) BRUCE W. GAMBILL

BRUCE W. GAMBILL

*P/S return  
Stamped filed*

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

FLOYD HARRIS, #92213, )  
 )  
 ) Petitioner, )  
 )  
 v. )  
 )  
 NORMAN B. HESS, Warden, )  
 Oklahoma State Penitentiary, )  
 et al., )  
 )  
 ) Respondents. )

No. 78-C-573-C

FILED  
JUL 25 1979  
J. S. DISTRICT COURT

O R D E R

The Court has for consideration the Findings and Recommendations of the Magistrate, in which it is recommended that the Petition for Writ of Habeas Corpus be denied.

After careful consideration of all the matters presented to it, the Court has concluded that the Findings and Recommendations of the Magistrate should be and hereby are affirmed.

It is hereby Ordered that the Petition for Writ of Habeas Corpus be denied.

It is so Ordered this 23<sup>rd</sup> day of July, 1979.

  
H. DALE COOK  
CHIEF JUDGE

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

SARAH HIGEONS, )  
 )  
 ) Plaintiff, )  
 )  
 vs. )  
 )  
 ) BILL PARESE, WARREN McNIEL, )  
 ) LESTER SCARBROUGH, WAYNE )  
 ) ROBERTS, RAY GRIMES and THE )  
 ) CITY OF OWASSO, OKLAHOMA, )  
 )  
 ) Defendants. )

No. 77-C-398-~~B~~D

**FILED**

JUL 26 1979

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

ORDER

For good cause shown and pursuant to Rule 41(a)(2),  
Federal Rules of Civil Procedure, the Court finds that  
Plaintiff's Motion to Dismiss should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that  
Defendant Ray Grimes is hereby dismissed without prejudice  
from this action.

FRED DAUGHERTY

UNITED STATES DISTRICT JUDGE

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

In the Matter of an Application )  
to Enforce Administrative )  
Subpoena Duces Tecum of the )  
SECURITIES AND EXCHANGE COMMISSION, )  
Applicant, )  
v. ) No. 78-C-380-C  
FOURTH NATIONAL BANK OF TULSA, )  
Respondent, )  
OKC CORPORATION, )  
Intervenor. )

O R D E R

The Court has for consideration an Order to Show Cause for Failure to Comply with Administrative Subpoena Duces Tecum, Motion of OKC Corporation to Intervene as a Defendant, Motion of OKC Corporation to Quash and Request for Discovery by OKC Corporation and has reviewed the file, the briefs and all of the recommendations concerning the motions, and being fully advised in the premises, finds:

That OKC Corporation's Motion to Intervene be denied, that OKC Corporation's Request for Discovery be denied, that OKC Corporation's Motion to Quash be overruled, and that the Securities and Exchange Commission's Application to enforce compliance with the Subpoena Duces Tecum be sustained.

On March 27, 1978, the COMMISSION issued an Order Directing Private Investigation and Designating Officers To Take Testimony "In the Matter of OKC Corporation" (FW-1701) pursuant to Section 21(a) of the Securities Exchange Act of 1934, as amended [15 U.S.C. 78u(a)]. On July 5, 1978, pursuant to that Order, the COMMISSION issued a subpoena to the BANK for certain records and testimony, including a loan memorandum. The BANK refused to produce the loan memorandum on July 14, 1978, as required by the subpoena. The loan

memorandum undisputedly is a record of, and belongs, to the BANK. The loan memorandum related to a loan to J. R. Adams, a customer of OKC, to purchase gasoline from OKC.

OKC has moved to intervene under Rule 24(a) and (b) FRCP. Rule 24(a)(2) provides that an Applicant has the right to intervene when he "claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the Applicant's interest is adequately represented by existing parties."

OKC seeks to intervene in this enforcement action in order to protect an attorney-client privilege, prevent investigations intended solely for criminal purposes from being conducted, and determine if the SEC is pursuing its investigation in good faith, and to protect Fourth Amendment rights.

In Donaldson v. United States, 400 U.S. 517 (1971), the taxpayer sought to intervene in a subpoena enforcement action in which the Internal Revenue Service issued summonses to the taxpayer's former employer and its accountant for the production of the employer's records of Donaldson's employment and compensation. Donaldson's asserted interest was not that he actually owned the documents subpoenaed, but was only that the documents contained details about him that were significant for federal income tax purposes. The Supreme Court held that an applicant for intervention must demonstrate a proprietary interest in the property sought. The interest asserted by Donaldson was not the kind of interest contemplated by Rule 24(a)(2) and thus intervention of right was improper.

OKC, however, contends that its interest is greater than that of the taxpayer in Donaldson although it has not

disputed that the loan memorandum is the property of the BANK. It seeks to intervene to "protect its constitutional right against unreasonable search and seizure and abuse of its privileged documents." Specifically, it claims that the COMMISSION's investigation is based on the Locke-Purnell Report which it claims is subject to the attorney-client privilege. OKC contends that the COMMISSION, in obtaining and using the Locke-Purnell Report, has violated OKC's Fourth Amendment rights and is interfering with the attorney-client privilege. OKC submits that these interests are sufficient to justify intervention as of right and relies for support on Reisman v. Caplin, 375 U.S. 440 (1964) and Atlantic Richfield Co. v. F.T.C., 546 F.2d 646 (C.A. 5, 1977). In Reisman, the Supreme Court stated that "both parties summoned and those affected by a disclosure may appear or intervene before the district court and challenge a summons by asserting their constitutional and other claims." However, the language in Reisman, which is also cited in Atlantic Richfield, does not guarantee intervention for a taxpayer who asserts such claims; rather the court in Donaldson stated that a taxpayer meeting the requirements of Reisman is "only entitled to permissive intervention." 400 U.S. at 529.

All issues that OKC here raises, do not justify permissive intervention because they have been fully raised and argued by OKC in other actions and have been adjudicated against OKC. In OKC Corp. v. Williams, CA3-78-1021-G (N.D. Tex.), Judge Higginbotham determined that the COMMISSION is lawfully in possession of the Locke-Purnell Report and has not violated OKC's Fourth Amendment rights. In Securities and Exchange Commission v. OKC Corp., CA3-79-0412-G, (N.D. Tex.), Judge Higginbotham, in enforcing the COMMISSION's subpoena issued

pursuant to this investigation against OKC, found that the COMMISSION has not violated OKC's Fourth Amendment rights and that whatever privilege, if any, in the Locke-Purnell Report that OKC has enjoyed does not justify quashing the COMMISSION's subpoena. Similarly, the Temporary Emergency Court of Appeals in U.S. v. First City National Bank of El Paso, Texas, et al., No. S-33 (C.A. Emp. App. 1979) considered OKC's alleged privilege where the issuance of a subpoena by the DOE was based upon the Locke-Purnell Report and found that:

"At the hearing in the District Court, a question arose as to the DOE's use in the Adams investigation of an allegedly illegally obtained 'Report to Special Committee to OKC Corp. by Special Counsel.' Appellant's contention in this regard affords no ground to deny enforcement of the subpoena issued to the Bank." at 11.

The allegedly privileged character of the Locke-Purnell Report has been determined adversely to OKC. Therefore, OKC's alleged interest is not sufficient to warrant intervention.

OKC contends that since a criminal reference by the DOE has been made to the Department of Justice ("DOJ"), the continued investigation of substantially similar facts by the SEC mandates intervention and discovery in order to prevent the SEC from obtaining information for use in a criminal prosecution. In support of the contention OKC relies on U. S. v. LaSalle National Bank, 437 U.S. 298 (1978) which addressed the issue of "whether the District Court correctly refused to enforce IRS summonses when it specifically found that the special agent who issued them was conducting his investigation solely for the purpose of unearthing evidence of criminal conduct." 437 U.S. at 299. The use of an administrative summons for criminal purposes is undisputably evidence of bad faith. As the Supreme Court noted in Donaldson v. U. S., 400 U.S. 517, 530 (1971),

intervention may be appropriate "where the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution." A review of the SEC's responsibilities is necessary in order to determine whether OKC's interest in protecting any abuse of delegated authority is sufficient to warrant intervention.

Congress, in enacting the Securities Act of 1934, 15 U.S.C. 77a et. seq., invested the SEC with administrative enforcement of the securities laws. 15 U.S.C. § 78 u (a) provides that:

"The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member . . ."

The Commission's subpoena powers are conferred for the purpose of investigation of matters "which the Commission deems relevant or material to the inquiry." 15 U.S.C. 78 u (b). This includes the potentiality of civil and criminal liability.

To enforce the subpoena, the SEC must demonstrate that its investigation is in good faith by showing that the information sought is relevant to a legitimate purpose, that it does not already possess the information it seeks and that it has followed the appropriate administrative steps. United States v. Powell 379 U.S. 48, 57-58, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964). There has been no suggestion that the SEC has failed to follow the proper procedure in issuing its subpoena or that the information is already known to the SEC. Thus, the Court need only consider whether the investigation proposed is relevant to a legitimate purpose.

The Order issued by the SEC on March 27, 1978 directed an investigation be conducted to determine whether violations of Sections 10(b) and 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78(j) and 78m(a) and certain regulations had been or was about to be violated by OKC in connection with the offer and sale of certain securities; namely, common stock of OKC traded on the New York Stock Exchange and 5-3/4% Convertible Subordinated Debentures, due 1988, traded on the American Stock Exchange. The subpoena duces tecum issued on July 5, 1978 by SEC officer Steven K. McGinnis was in furtherance of this investigation and specifically required the production of documents relating to a loan to J. R. Adams and a \$2,000,000 certificate of deposit acquired by OKC.

The standard to be applied in determining whether the subpoenaed document is relevant is whether it is "plainly incompetent or irrelevant to any lawful purpose," Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943). This Court finds that the loan memorandum sought by the SEC is relevant to its congressionally authorized investigation and that the SEC is conducting its investigation in good faith. The SEC has demonstrated through affidavits that no exchange of information is occurring with respect to the criminal inquiry by the DOJ nor has the SEC made a criminal reference to the DOJ. Independent investigations by different agencies are permissible. U.S. v. Kordel, 397 U.S. 1 (1970).

Fed. R. Civ. P. 24(b)(2) provides for intervention "when an applicant's claim or defense and the main action have a question of law or fact in common." Permissive intervention is discretionary with the trial court which, in exercising that discretion, "shall consider whether the intervenor will unduly delay or prejudice the adjudication of the rights of the original parties." Degge v. City of

Boulder, Colorado, 336 F.2d 220 (10th Cir. 1964). In this enforcement action, the Bank has asserted no claims or defenses against the SEC. To allow OKC to intervene will unduly hamper and impede the investigatory process. As the United States Court of Appeals for the Tenth Circuit noted:

"Investigative powers given by statute to an administrative agency are not derived from the judicial function and are more 'analogous to the Grand Jury.' U. S. v. Morton Salt Co., 338 U.S. 632, 642-643, 70 S.Ct. 357, 364, 94 L.Ed. 401. Questions concerning agency subpoenas should be promptly determined so that the subpoenas, if valid, may be speedily enforced. See U. S. v. Davey, 2 Cir., 426 F.2d 842, 845." Securities and Exchange Commission v. First Security Bank of Utah, 447 F.2d 166 (10th Cir. 1971).

Therefore, OKC's Motion for Permissive Intervention should be denied.

The Court has discretion to limit the application of the Federal Rules of Civil Procedure in a summons proceeding. Rule 81(a)(3) FRCP. The Supreme Court in Donaldson recognized that a subpoena enforcement proceeding, such as this, is to be expeditiously handled and summary in nature. 400 U.S. 517, 528-529 (1971). Since an adversary hearing was held by the Magistrate on May 7, 1979, at which all parties were allowed to present oral arguments, and in light of the discovery allowed to OKC in OKC Corp. v. Williams, supra, OKC Corp. v. First National Bank of Commerce, supra, and OKC Corp. v. Harold R. Clements II, et al., B-79-162-CA (E.D. Tex.), further discovery would be inappropriate in this proceedings.

IT IS, THEREFORE, ORDERED that SEC's Application for Order Compelling Compliance with Subpoena Duces Tecum be and is hereby sustained; that OKC's Motion to Intervene, Motion to Quash Subpoena Duces Tecum, and Request for Discovery be and are hereby denied.

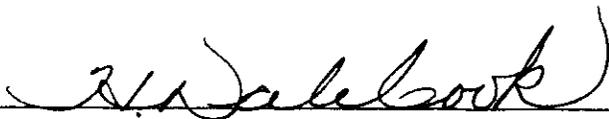
Dated this 19<sup>th</sup> day of July, 1979.

  
H. DALE COOK  
CHIEF JUDGE



IT IS FURTHER ORDERED that this cause of action is transferred to the United States District Court for the Middle District of Alabama, Northern Division.

ENTERED this 19<sup>th</sup> day of July, 1979.



---

H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA



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

OKLAHOMA INDEPENDENT PETROLEUM )  
ASSOCIATION, an Oklahoma corpor- )  
ation; SERVICE DRILLING COMPANY, )  
an Oklahoma corporation; HARRISON )  
L. TOWNES, INC., an Oklahoma cor- )  
poration; SOUTHLAND DRILLING AND )  
PRODUCTION COMPANY, an Oklahoma )  
corporation; and L. O. WARD, an )  
individual, )

Plaintiffs, )

v. )

HAMP BAKER, BILL DAWSON and )  
NORMA EAGLETON, Commissioners )  
of the Oklahoma Corporaton )  
Commission, )

Defendants. )

FILED

JUL 1 1979

Judge H. Dale Cook  
U. S. DISTRICT COURT

No. 79-C-174-C

O R D E R

Upon the Joint Motion of the parties hereto to transfer this action to the United States District Court for the Western District of Oklahoma, pursuant to 28 USC §1404(a), for the reason and on the grounds that there is now pending there a case involving substantially the same questions of law and fact and that the best interest of the parties and the ends of justice will be promoted by such transfer. The Court having reviewed said Motion and the pleadings on file, and it appearing that this action might have originally been brought before the District Court to which this transfer is sought, and being fully advised in the premises, finds that it would be in the best interests of justice and the parties hereto that this Motion be granted.

IT IS, THEREFORE, ORDERED that the Joint Motion of the parties hereto be, and the same is hereby, granted and that this action be, and it is hereby, transferred to the United States District Court for the Western District of Oklahoma.

DATED this 19<sup>th</sup> day of July, 1979.

(Signed) H. Dale Cook

\_\_\_\_\_  
JUDGE OF THE DISTRICT COURT

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

UNITED STATES OF AMERICA, )

Plaintiff, )

vs. )

CIVIL ACTION NO. 78-C-270-C )

JERRY LEE MAYO, SHIRLEY DELLENE )

MAYO, EDWARD MELVIN TAYLOR, )

BILLY TAYLOR, a/k/a, BILL E. )

TAYLOR, a/k/a, WILLIAM S. )

TAYLOR, if living, or if not, )

his unknown heirs, assigns, )

executors and administrators, )

HOUSING AUTHORITY OF THE CITY )

OF TULSA, CREDIT CONTROL SYSTEMS )

CORP., F. W. WOOLWORTH CO., a )

corporation, and PAYCO OF )

OKLAHOMA, INC., )

Defendants. )

FILED

JUL 19 1979

JUDGMENT OF FORECLOSURE

This matter comes on for consideration of the Findings and Recommendations of the Magistrate. For the reasons stated herein the Court finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

In this matter, Plaintiff appeared by Robert P. Santee and George Carrasquillo, Assistant United States Attorneys for the Northern District of Oklahoma, and the Defendant, Edward Melvin Taylor, appeared pro se, and the Defendant, Housing Authority of the City of Tulsa, appeared by Stephen A. Schuller, Attorney at Law, and the Defendants, Jerry Lee Mayo, Shirley Dellene Mayo, Payco of Oklahoma, Inc., Credit Control Systems Corp., F. W. Woolworth Co., a corporation, Billy Taylor, a/k/a, Bill E. Taylor, a/k/a, William S. Taylor, if living, or if not, his unknown heirs, assigns, executors and administrators, appearing not.

The Court being fully advised and having examined the file herein finds that the Defendant, Edward Melvin Taylor, was served with Summons and Complaint on June 20, 1978, and with Summons and Amendment to Complaint July 28, 1978; that

Housing Authority of the City of Tulsa was served with Summons and Complaint on June 23, 1978, and with Summons and Amendment to Complaint on July 25, 1978; and that Credit Control Systems Corp. was served with Summons and Complaint on June 19, 1978, and with Summons and Amendment to Complaint on July 26, 1978; and that F. W. Woolworth Co. was served with Summons and Complaint on June 19, 1978, and with Summons and Amendment to Complaint on July 26, 1978; and that Payco of Oklahoma, Inc. was served with Summons, Complaint and Amendment to Complaint on July 27, 1978; all as shown on the Marshal's Service herein; and that Defendants, Jerry Lee Mayo, Shirley Dellene Mayo, and Billy Taylor, a/k/a, Bill E. Taylor, a/k/a, William S. Taylor, if living, or if not, his unknown heirs, assigns, executors and administrators were served by Publication as shown by Proof of Publication filed herein.

It appearing that Edward Melvin Taylor filed his Answer herein on August 2, 1978; and that Housing Authority filed its Answer herein on July 6, 1978; and that Jerry Lee Mayo, Shirley Dellene Mayo, Billy Taylor, a/k/a, Bill E. Taylor, a/k/a, William S. Taylor, if living, or if not, his unknown heirs, assigns, executors and administrators, Credit Control Systems Corp., F. W. Woolworth and Payco of Oklahoma, Inc. have failed to answer herein; and that default has been entered by 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 note upon the following-described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Three (3), Block Twenty-three (23),  
VALLEY VIEW ACRES ADDITION to the City  
of Tulsa, County of Tulsa, State of  
Oklahoma, according to the recorded Plat  
thereof.

That the Defendants, Shirley Dellene Mayo and Jerry Lee Mayo, did, on the 25th day of August, 1973, execute and deliver to the Administrator of Veterans Affairs, their mortgage note in the sum of \$10,450.00, 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, Shirley Dellene Mayo and Jerry Lee Mayo, were the Grantors in a General Warranty Deed to Defendants, Edward Melvin Taylor and Billy Taylor, dated September 13, 1976, filed September 13, 1976, in Book 4231, Page 692, records of Tulsa County, wherein Defendants, Edward Melvin Taylor and Billy Taylor assumed and agreed to pay the mortgage indebtedness being sued upon herein.

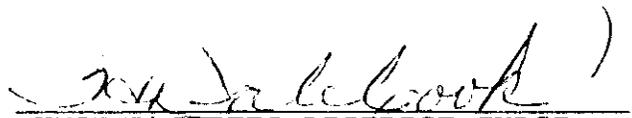
The Court further finds that Jerry Lee Mayo, Shirley Dellene Mayo, Edward Melvin Taylor and Billy Taylor made default under the terms of the mortgage note by reason of their failure to make monthly installments thereon, which default has continued, and that by reason thereof, the above-named Defendants are now indebted to the Plaintiff in the sum of \$9,934.57, as unpaid principal as of June 1, 1979, plus accrued interest of \$701.99 as of June 1, 1979, plus abstracting and appraisal costs of \$121.00, plus interest from June 1, 1979, at the rate of 4 1/2 percent per annum, plus the costs of this action accrued and accruing.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against the Defendant, Edward Melvin Taylor, in personam, and against the Defendants, Jerry Lee Mayo, Shirley Dellene Mayo and Billy Taylor, a/k/a, Bill E. Taylor, a/k/a, William S. Taylor, if living, or if not, his unknown heirs, assigns, executors and administrators in rem for the sum of \$9,934.57.

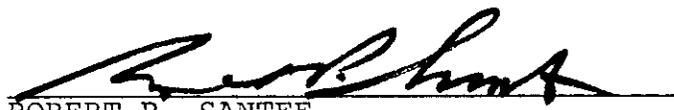
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that upon the failure of said Defendant to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment, with the residue, if any, thereafter to be deposited with the Clerk of the Court for the benefit of Edward Melvin Taylor and Billy Taylor, if living, or if not, his unknown heirs, assigns, executors and administrators, 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.

Dated this 19<sup>th</sup> day of July, 1979.

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
ROBERT P. SANTEE  
Assistant United States Attorney

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

BRADFORD SECURITIES  
PROCESSING SERVICES, INC.,

Plaintiff,

vs.

PLAZA BANK AND TRUST COMPANY,  
et al.,

Defendants.

)  
)  
) 76-C-107-C ✓  
)  
)  
)

FILED

JUN 10 1979 *hm*

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

ORDER

The Court has for consideration the Motion to Dismiss of the defendant, Fred W. Rausch, Jr. ("Rausch"), pursuant to Fed.R.Civ.P. 12(b)(1)(3) and (6); the briefs in support and opposition thereto; the Findings and Recommendations of the Magistrate; the Objections to Findings and Recommendations of the Magistrate filed by the plaintiff; the briefs of Rausch and the plaintiff as to the objections. The Court has carefully perused the entire file, and, being fully advised in the premises, finds:

The Seventh Claim of the plaintiff, appearing at pages 32 and 33 of the First Amended Complaint [the Seventh Claim remains the same in Second Amended Complaint filed June 22, 1979], alleges:

Defendant Rausch, in his capacity as a practicing attorney, issued a letter of opinion in which he represented, either expressly or by necessary implication from the language used that the entire consideration for the bond issue had been paid, that the said Bonds were legally issued, and that the interest upon the Osage Bonds would be excludable from gross income under Section 103 of the Internal Revenue Code of 1954. The defendant Rausch knew or by the exercise of reasonable diligence should have known that said letter of opinion would be used in the sale of the Osage Bonds and relied upon by purchasers of said Bonds. The defendant Rausch negligently failed to ascertain that the purchase price for said Bonds had not been paid and that

the uses contemplated for the proceeds of the Osage Bonds issue would remove the interest upon said Osage Bonds from the income exclusion of Section 103 of the Internal Revenue Code of 1954, which facts were each material facts to ultimate purchasers of said Bonds, or said defendant negligently failed in the issuance of said letter of opinion to advise the true facts relating thereto.

In accepting in the Osage Bonds on behalf of Tower and National, and in extending advances thereon and becoming pledgee thereof the plaintiff relied upon the opinion of the defendant Rausch which was printed upon said Bonds, and, as a proximate result and consequence of the aforesaid negligence of the defendant Rausch the plaintiff has been injured and damaged in that it became a forced purchaser of securities having little or no value and has been caused to lose the use and benefit of its funds, all to plaintiff's damage in the sum of \$1,760,000.

A copy of the opinion issued by Mr. Rausch, imprinted on the Bond, is attached as Exhibit "A" to Plaintiff's Brief in Opposition to Supplemental Motion to Dismiss filed October 18, 1978 [which brief was attached to the brief of plaintiff in support of objections to Findings and Recommendations of the Magistrate].

The claim asserted by the plaintiff against the defendant, Rausch, is one of negligence. Defendant, Rausch, on the other hand, argues that by virtue of the decision of the Supreme Court of the United States in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976), no liability can be imposed on him absent an allegation of an intent to deceive, manipulate or defraud in a §10(b) and Rule 10b-5 action. Additionally, Rausch contends that he cannot be held liable to a third party pledgee [forced purchaser] with whom he was not in privity.

Under the Supreme Court's decision in *Ernst & Ernst v. Hochfelder*, supra, more than negligent conduct is required to trigger a private cause of action under this section. *Cook v. Avien, Inc.*, 573 F.2d 685, 692 (1st Cir. 1978). In *Hochfelder*, supra, fn. 12, the Supreme Court said:

Although the verbal formulations of the standard to be applied have varied, several Courts of Appeals have held in substance that negligence alone is sufficient for civil liability under §10(b) and Rule 10b-5. See, e.g., *White v. Abrams*, 495 F.2d 724, 730 (CA9 1974) ("flexible duty" standard); *Myzel v. Fields*, 386 F.2d 718, 735 (CA8 1967), cert. denied, 390 U.S. 951 (1968) (negligence sufficient); *Kohler v. Kohler Co.*, 419 F.2d 634, 637 (CA7 1963) (Knowledge not required). Other Courts of Appeals have held that some type of scienter--i.e., intent to defraud, reckless

disregard for the truth, or knowing use of some practice to defraud---is necessary in such an action. See, e.g., *Clegg v. Conk*, 507 F.2d 1351, 1361-1362 (CA10 1974), cert. denied, 422 U.S. 1007 (1975) (an element of "scienter or conscious fault"); *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1306 (CA2 1973) ("willful or reckless disregard" of the truth). But few of the decisions announcing that some form of negligence suffices for civil liability under §10(b) and Rule 10b-5 actually have involved only negligent conduct. *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 606 (CA5), cert. denied, 419 U.S. 873 (1974); *Kohn v. American Metal Climax, Inc.*, 458 F.2d 255, 286 (CA3 1972) (Adams, J., concurring and dissenting); *Bucklo, Scienter and Rule 10b-5*, 67 Nw. U.L. Rev. 563, 568-570 (1972).

In this opinion the term "scienter" refers to a mental state embracing intent to deceive, manipulate, or defraud. In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act. We need not address here the question whether, in some circumstances, reckless behavior is sufficient for civil liability under §10(b) and Rule 10b-5.

....

In *Aldrich v. New York Stock Exchange, Inc.*, 446 F.Supp. 348, 354 (USDC SD NY 1977) it was said:

Moving now to plaintiff's claim against Touche under section 10(b) and Rule 10b-5, it appears that the complaint, which is based upon gross negligence and recklessness, fails to allege facts such as would amount to scienter under *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976); *Holdsworth v. Strong*, 545 F.2d 687 (10 Cir. 1976).

The plaintiffs allege that Touche Ross certified the May 26, 1972 financial statements of Weis without any knowledge or reasonable grounds to believe that they were prepared in accordance with generally accepted accounting principles and fairly presented the financial position of Weis, and that Touche Ross failed to conduct an audit of Weis which was in accordance with generally accepted auditing principles. Plaintiffs further allege that Touche Ross breached a duty to inquire into and disclose to the plaintiffs the true state of Weis' financial condition which it would have discovered had it conducted its audit in accordance with generally accepted auditing standards. There are no allegations of intent to deceive, manipulate or defraud as are required by the Supreme Court's decision in *Hochfelder*, that scienter must be alleged in an action based on section 10(b). See also *Sundstrant Corp. v. Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir. 1977); *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath*, 540 F.2d 27 (2d Cir. 1976); *Lanza v. Drexel & Co.* The simple statement that Touche Ross failed to comply with auditing standards or accounting principles in the absence of specification as to what standards and principles were violated

and in what manner such non-compliance occurred does not support an inference of fraud. *Poloron Products, Inc. v. Lybrand Ross Bros. & Montgomery*, 534 F.2d 1012 (2d Cir. 1976) (allegations only of "fraud" and "deceit" not adequate to allege scienter); *Levy v. First National City Bank*, No. 75 Civ. 1335 (S.D.N.Y. Aug. 26, 1975).

Although plaintiffs characterize Touche Ross' conduct through the use of the terms "gross negligence" and "reckless disregard," the Supreme Court has not yet determined whether and if so under what circumstances recklessness can suffice for liability under section 10(b) and rule 10b-5. *Hochfelder*, 425 U.S. at 193, n. 12, 96 S.Ct. 1375....

In *Utah State University, Etc. v. Bearn, Stearns & Co.*, 549 F.2d 164, 169, (10th Cir. 1977) the Court said:

The USU claims under §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) and SEC Rule 10b-5, 17 C.F.R. §240.10b-5, promulgated thereunder, are based on its allegations of violations of the NASD, NYSE, and AMEX rules. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 holds that for a private cause of action to lie under §10(b) or Rule 10b-5, there must be allegations of scienter-intent to deceive, manipulate or defraud. None of the complaints plead scienter. A claim of violation of the NASD, NYSE, and AMEX rules does not take the place of the scienter requirement. Willful or intentional misconduct, or the equivalent thereof, is essential to recovery by USU under either the statute or the regulation. *Ibid.* at 301, 96 S.Ct. 1375. In the absence of the needed allegations, *Hochfelder* applies and requires the dismissal of the §10(b) and Rule 10b-5 claims.

In *Continental Assur. Co. v. American Bankshares Corp.*, 439 F.Supp. 804 (USDC ED Wis. 1977) the Court said:

The Supreme Court in *Hochfelder* held that mere negligent conduct was insufficient to establish a §10(b) violation. The question of whether reckless conduct could provide the necessary scienter was left unanswered. The Seventh Circuit has since resolved this issue for this circuit and has stated that reckless conduct can form the basis of a violation. *Sanders v. John Nuveen & Co., Inc.*, 554 F.2d 790 (7th Cir. 1977); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir. 1977); *Bailey v. Meister Brau, Inc.*, 535 F.2d 982 (7th Cir. 1976); *Stern v. American Bankshares Corp.*, 429 F.Supp. 818 (E.D.Wis. 1977).

The Seventh Circuit in *Sundstrand*, supra, defined recklessness in the context of omissions. It quoted from *Franke v. Midwestern Oklahoma Development Authority*, 428 F.Supp. 719 (W.D.Okla.1976):

reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even in excusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it. 553 F.2d at 1045.

The Court went on to explain that:

[u]nder this definition, the danger of misleading buyers must be actually known or so obvious that any reasonable man would be legally bound as knowing, and the omission must derive from something more egregious than even "white heart/empty head" good faith. While this definition might not be the conceptual equivalent of intent as a matter of general philosophy, it does serve as a proper legally functional equivalent for intent, because it measures conduct against an external standard which, under the circumstances of a given case, results in the conclusion that the reckless man should bear the risk of his omissions. Id.

The Court characterized the requirement that the defendant be aware of the danger or legally bound as being aware of the danger as an objective test. Id. at 1045 n. 19. The later requirement of the omission deriving from something more than even "white heart/empty head" good faith was characterized as a subjective test which requires something more than the "inexcusable negligence" found in Hochfelder. Id. at 1045 n.20.

In *Franke v. Midwestern Okl. Development Authority*, 428 F.Supp. 719 (USDC WD Okl. 1976), Smith, Leaming were retained to serve solely as bond counsel. Judge Bohanon found that "[I]t was incumbent upon them to advise as to the bond sales legality and to verify the tax exempt status of interest payments accruing to the bondholders. As bond counsel they could not be expected to warrant the over-all economic soundness of the issue; such a fiducial role and responsibility was not attributable to them" Smith, Leaming served as one of the three "bond counsel" in connection with the bond issue and prepared a "legality opinion". At page 724 the Court said:

A plaintiff in a Section 10(b) case must plead and prove that the defendant was guilty of conscious fault, which would require that the defendant have actual knowledge of the matters complained of. *Clegg v. Conk*, 507 F.2d 1351 (10th Cir. 1974). The Tenth Circuit holding has recently been acknowledged as a correct view by the United States Supreme Court. *Ernst & Ernst v. Hochfelder*, supra. Under these cases, it is now settled that scienter is an element of a Section 10(b) case....

In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739, 740, 95 S.Ct. 1917, 1927, 44 L.Ed.2d 539 (1975), the Court said:

There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general....

....

The first of these concerns is that in the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity of the defendant which is totally unrelated to the lawsuit....

In *Franke v. Midwestern Okl. Development Authority*, supra, at 725 the Court said:

Plaintiff attempts to persuade that "recklessness" is a substitute for scienter. In the context of an omissions case, reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable, negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it. See *Beecher v. Able*, CCH Fed. Sec. L. Rep. para. 95,303 (S.D.N.Y. 1975); *Prosser, Law of Torts*, 185-186 (4th ed. 1971); *Ernst & Ernst v. Hochfelder*, supra, 425 U.S. 185, at 190, 96 S.Ct. 1375, at 1380, 47 L.Ed.2d 668 at 675, fn. 5. If indeed there is any validity to the proposition that obviousness of risk of harm can be a substitute for guilty knowledge, it is sufficient to note that there is no evidence here of such a state of facts....

See also *Wolfson v. Baker*, 444 F.Supp. 1124, 1135, fn. 15 (USDC MD Fla. 1978); *Lingenfelter v. Title Ins. Co. of Minnesota*, 442 F.Supp. 981, 994, 995 (USDC Neb. 1977).

The Court, therefore, finds that the plaintiff has not stated a cause of action against the defendant, Rausch, based on the *Hochfelder* case, supra, and its progeny.

Additionally, as to the question of privity, Judge Bohanon said in *Franke v. Midwestern Okl. Development authority*, supra, at 726:

Further, it is well established in Oklahoma and in most other jurisdictions that as a matter of law an attorney cannot be held liable to a third party with whom he was not in privity by reason of negligence while representing his client. *Waugh v. Dibbens*, 61 Okl. 221, 160 P. 589 (1916); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); *Stephens Industries, Inc. v. Haskins & Sells*, 438 F.2d 357 (10th Cir. 1971); *Koch Industries v. Vosko*, 494 F.2d 713 (10th Cir. 1974).

The Court, therefore, finds that Rausch cannot be held liable to plaintiff with whom he was not in privity.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss of the defendant, Fred W. Rausch, Jr., be and the same is hereby sustained and the cause of action and complaint are dismissed as to Fred W. Rausch, Jr.

IT IS FURTHER ORDERED that the Objections to the Findings and Recommendations of the Magistrate filed by the plaintiff be and the same are hereby overruled.

ENTERED this 19<sup>th</sup> day of July, 1979.

A handwritten signature in cursive script, appearing to read "H. Dale Cook", is written over a horizontal line.

H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

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

FILED

JUL 18 1979

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 JAMES H. SMITH, )  
 )  
 Defendant. )

CIVIL ACTION NO. 78-C-607-B

CONSENT JUDGMENT

Parties hereto having expressly indicated and consented to the terms of this Judgment, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

I.

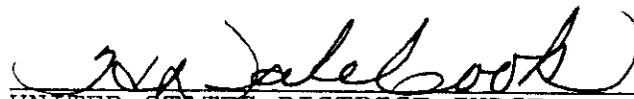
Judgment is entered for the Plaintiff in the amount of \$321.00 plus interest at the rate of 10 percent per annum from the date of this Judgment.

II.

Execution on this Judgment is stayed and no payment is required thereon until the Defendant abandons regular attendance in accredited college courses or is otherwise terminated by the college he is attending.

Notwithstanding the above, in no event will execution be stayed or payment delayed on such Judgment longer than September 1, 1980.

Dated this 18<sup>th</sup> day of July, 1979.

  
UNITED STATES DISTRICT JUDGE

CONSENTED TO:

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

  
ROBERT P. SANTEE  
Assistant U. S. Attorney

  
JAMES H. SMITH

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

RANGER INSURANCE COMPANY, )  
a foreign corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DALE D. WESTFALL; )  
DAVID W. CARPENTER; ) No. 78-C-145-B  
ERNEST GLASS; )  
PAMELA CAGLE RUFFIN; )  
LUCINDA VERNON; )  
PEGGY TRENT, wife and next of )  
kin of SAMUEL TRENT, deceased, )  
and LO ANN MOORE, wife and next )  
of kin of CHARLES MOORE, )  
deceased, )  
 )  
Defendants. )

**FILED**

JUL 10 1979

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

O R D E R

NOW on this 18<sup>th</sup> day of July, 1979, this cause came on for hearing on the Stipulation heretofore filed in this cause; that Defendants David W. Carpenter and Ernest Glass are the only parties making claim to the property damage liability insurance fund heretofore paid into Court; that the Court hereby approve the Stipulation for Settlement of Defendants Carpenter and Glass heretofore filed on the 18<sup>th</sup> day of July, 1979.

NOW IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT that Defendant David W. Carpenter be and is hereby granted the sum of three thousand three hundred dollars (\$3,300.00) from the property damage liability insurance fund heretofore paid into Court by Plaintiff;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that Defendant Ernest Glass, be and is hereby granted the sum of one thousand seven hundred dollars (\$1,700.00) from the property damage liability insurance fund heretofore paid into Court by Plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that the Court Clerk disburse the five thousand dollar (\$5,000.00) property damage liability insurance fund as set forth above to the respective parties and their attorneys.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT that

this action may now be, and is hereby dismissed with prejudice.

(Signed) H. Dale Cook

---

H. DALE COOK, Judge  
United States District Court for  
the Northern District of Oklahoma

UNITED STATES DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA for the use and  
benefit of L. B. SMITH, INC., SOUTHWEST,  
a corporation,

Plaintiff,

vs.

UTILITY CONTRACTORS, INC., a corporation;  
MID-STATES CONSTRUCTION OF DERBY, INC., a  
corporation; and FEDERAL INSURANCE COMPANY,  
a corporation,

Defendants.

**FILED**

JUL 17 1979

Jack C. Silver Clerk  
U. S. DISTRICT COURT

No. 78-C-565-C

ORDER OF DISMISSAL WITH PREJUDICE

On this 17th day of July, 1979, the Court has for con-  
sideration the Stipulation for Dismissal of L. B. Smith, Inc.,  
Southwest and Utility Contractors, Inc. and Federal Insurance  
Company, and the Court having reviewed the file and Stipulation  
for Dismissal finds that the above styled action should be dis-  
missed and that such dismissal should be with prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the  
Court that the above styled and numbered action be dismissed  
with prejudice.

Approved as to form:

J. C. Silver  
United States District Judge

Charles E. Malson  
Charles E. Malson  
Attorney for Plaintiff

Jay C. Baker  
Jay C. Baker  
Attorney for Utility Contractors,  
Inc. and Federal Insurance Co.

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

**FILED**

MARTHA A. HARRIS, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PAYCO OF OKLAHOMA, INC., )  
 )  
 Defendant. ) No. 78-C-619-B<sup>U</sup>

JUL 17 1979  
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ORDER OF DISMISSAL

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

Entered this 17th day of July, 1979.

1311 Dale Cook  
UNITED STATES DISTRICT JUDGE

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

WILLIAM B. TANNER COMPANY, INC., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 NEO BROADCASTING, a partnership )  
 composed of Robert R. Toone and )  
 Charles Ingram, formerly doing )  
 business as Radio Station KWLG )  
 and KJEM, )  
 )  
 Defendants. )

No. 79-C-396-D ✓

**FILED**

140 JUL 16 1979

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

O R D E R

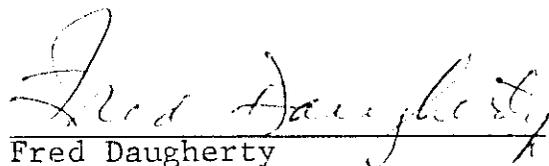
The Court has before it for consideration Defendants' Motion to Dismiss. This motion is evidently made under Rule 12(b)(3), Fed.R.Civ.P., based upon venue being improperly laid in the Northern District of Oklahoma. This action is brought pursuant to 28 U.S.C. § 1332. In its Complaint, Plaintiff alleges that it is a Tennessee corporation, and that Defendants were, at the times relevant to this action, residents of Wagoner, Oklahoma, doing business as a partnership in Wagoner, Oklahoma.

Under 28 U.S.C. § 1391(a), venue in an action wherein jurisdiction is founded upon diversity of citizenship is proper only in the district where all of the plaintiffs reside, where all of the defendants reside, or in which the claim arose.

Plaintiff, via letter, has informed the Court that it concedes that venue is improper in this district, and it does not intend to resist Defendant's motion.

It being apparent from the face of the Complaint that venue in this **district** is improper, Defendants' motion will be granted, and this action dismissed.

It is so Ordered this 16 day of July, 1979.

  
Fred Daugherty  
United States District Judge

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

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
LARRY DEAN TURNER, )  
 )  
Movant. )

77-C-49  
No. 73-CR-113-D ✓

**FILED**

10 JUL 16 1979

OPINION AND ORDER

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

On May 6, 1977, the court entered an Order disposing of two legal issues raised pursuant to movant's Motion to Vacate under Title 28, U.S.C. § 2255. As to the remaining three mixed fact and law issues, counsel was appointed to represent the movant, a complete evidentiary record has been developed through interrogatories, and counsel has submitted said three issues for final decision based on the record extant herein. The movant is presently in custody under the sentence attacked herein because of alleged violation of parole arising, in part, from a judgment of conviction in the Western District of Oklahoma of a new offense (United States v. Larry Dean Turner, Case No. CR-79-13, Tenth Circuit Court of Appeals No. 79-1468). The court upon review of this record finds and concludes as follows:

I.

As to the ground for relief No. 3, based upon the assertion the movant was not advised of his right to grand jury indictment, the supplemented record includes the testimony of John Street, court-appointed counsel for movant, which is summarized as follows:

Street states that he represented Turner at a hearing before the late Chief Judge Allen E. Barrow on September 18, 1973 where the government was granted the right to dismiss the indictment (Case No. 73-CR-97) and was granted leave to file and proceed upon a superseding Information (Case No. 73-CR-113); that he told Turner that he had an absolute

right to be proceeded against by grand jury indictment if he desired; that he believes Judge Barrow also informed him of this right; that Turner said that he understood this right and wished to waive it since a grand jury indictment would only delay the proceeding; that he believes that Turner also acknowledged this right and waived it in open court; that no written waiver of indictment was executed by Turner because no one ever asked him to sign one; and that he can state beyond a reasonable doubt to a moral certainty that he advised Turner of his constitutional rights.

It is apparent that the right of grand jury indictment accruing to the movant through the Fifth Amendment was knowingly, voluntarily, and understandingly waived in the interest of an expeditious jury trial. The court notes that the superseding information was virtually identical to the superseded indictment. The fact that movant did not formally sign or waive indictment in open court is not fatal under these circumstances, where he was competently informed of this constitutional right by his counsel and informally waived the same. The court has heretofore quoted from the case of Bartlett v. United States, 354 F.2d 745 (8th Cir. 1966) in its Order of May 6, 1977, which case recognizes a non-ritualized waiver of indictment and a review of this record reflects substantial compliance with the Bartlett test. Also see Beardslee v. United States, 541 F.2d 705, 706 (8th Cir. 1976); Williams v. United States, 410 F.2d 370 (3rd Cir. 1969). Collateral relief is not available where all that is shown is a failure to comply with the formal requirements of a rule of criminal procedure and absent any indication the movant was prejudiced thereby. United States v. Hamilton, 553 F.2d 63, 66 (10th Cir. 1977), cert. denied, 434 U.S. 834 (1977); United States v. White, 572 F.2d 1007, 1009 (4th Cir. 1978); Lepera v. United States, 587 F.2d 433, 435 (9th Cir. 1978). Movant has simply not sustained his burden of establishing this ground for relief by a

preponderance of the evidence. United States v. DeCarlo, 575 F.2d 952, 954-955 (5th Cir. 1978), cert. denied, \_\_\_ U.S. \_\_\_.

## II.

As to grounds for relief Nos. 4 and 5, the movant urges that the use of prior unaccepted and void state (Hughes County, Oklahoma) guilty pleas is violative of constitutional due process herein at two levels: (a) during jury trial for the purpose of impeachment, and (b) at sentencing since it may have enhanced the sentence imposed by four years. In its Order of May 6, 1977, the court also ordered an evidentiary record on movant's allegations of threats and coercion perpetrated on him to enter said state guilty pleas. The evidentiary record pertinent to these grounds includes the testimony of James C. Daugherty, movant's privately retained counsel on the Hughes County charges, Jim Baker, undersheriff of Hughes County and Elma Mae Medler, mother of the movant. Their testimony is summarized as follows:

(a) James C. Daugherty - Daugherty states that Turner was arraigned in each of the Hughes County criminal cases; that no preliminary hearings were held and explains why; the investigation he made of the charges; that he advised Turner of the alternatives involved in accepting or denying the Hughes County District Attorney's offer to recommend a deferred sentence if Turner pleaded guilty; the reasons for giving such advice to Turner; that he had no knowledge of any remarks the Hughes County District Attorney made to Turner regarding deferred sentences and their effects; that when he appeared with Turner for arraignment, he noted that Turner's right eye was black and that his nose appeared to be swollen, and that he dictated this observation into the record; that he did not recall specifically the explanation for Turner's appearance at that time but recalled that it involved some type of altercation in the jail between Turner and the Hughes County

sheriff and/or deputies; that he knew of no threats by the Hughes County sheriff upon Turner's life; that he could state with certainty that Turner's plea to the state charges was voluntarily made and was made because Turner was guilty and not because of promises made by the District Attorney's office; that during the time in which he represented Turner, he discussed with Turner his right to a jury trial, not to incriminate himself, to have the government carry the burden of proving his guilt beyond a reasonable doubt, and to require the government to prove every element of the offenses; and that Turner had told him that Turner and the Hughes County sheriff were having some problems involving a woman they were both supposedly interested in.

(b) Jim Baker - Baker states that Turner was subjected to physical force or violence while in the custody of the Hughes County sheriff's office when Turner, upon being arrested, refused to surrender keys he had in his pocket; that the injuries complained of by Turner possibly resulted when it was necessary for Baker and the sheriff to forcibly remove the keys from Turner; that Turner was never threatened by any member of the Hughes County sheriff's department; and that Turner was never threatened, coerced or encouraged by any member of the Hughes County sheriff's department to plead guilty to any crime.

(c) Elma Mae Medler - Mrs. Medler relates events surrounding the 1969 state criminal charges against Turner and the events up to Turner's guilty pleas in those cases, and states that the Hughes County sheriff communicated threats to her to induce Turner to plead guilty to the state charges; that these threats were that the sheriff would see to it that Turner never got out of jail if he didn't

cooperate and that he, the sheriff, would kill Turner if he didn't plead guilty to the charges; and that in 1973 Judge Bob Reeves called her and threatened to put Turner in the penitentiary for the rest of his life if Turner tried to have his records expunged.

The transcript of testimony in the Hughes County District Court and other evidentiary materials reflect that the Hughes County charges included the following:

CRF-69-52, Grand Larceny;  
CRF-69-53, Burglary;  
CRF-69-55, Grand Larceny;  
CRF-69-56, Burglary;  
CRF-69-57, Burglary;  
CRF-69-58, Burglary;  
CRF-69-59, Burglary;  
CRF-69-60, Grand Larceny;  
CRF-69-62, Grand Larceny;  
CRF-69-63, Grand Larceny.

On August 5, 1971 the movant entered pleas of guilty to said charges and upon the recommendation of the District Attorney, he was placed on probation for a period of two years with actual sentence being deferred. On August 21, 1975, subsequent to the trial and sentence attacked herein, the deferred sentences were expunged from the record and dismissed with prejudice.

In the appeal of the judgment under attack herein, the movant contended, as he has also urged herein, that the use of the Hughes County pleas of guilty for impeachment purposes was improper since there was no judgment of guilt. In reviewing the Oklahoma "Deferred Sentence Procedure", 22 O.S. § 991c, the Court of Appeals affirmed and stated that although a deferred sentence is not a "conviction" under Oklahoma law, the admissibility of evidence in a federal criminal trial is not controlled thereby. "Federal cases interpret the common law as allowing evidence of other convictions

for impeachment purposes . . . and hold that a guilty plea is a confession of guilt and amounts to a conviction". (citations omitted). United States v. Turner, 497 F.2d 406, 407 (10th Cir. 1974), cert. denied, 423 U.S. 848 (1975). Also see United States v. Place, 561 F.2d 213, 215 (10th Cir. 1977), cert. denied, 434 U.S. 1000 (1977); Braswell v. United States, 224 F.2d 706, 707-710 (10th Cir. 1955), cert. denied, 350 U.S. 845 (1955). Vacating this sentence because of the use of the Hughes County pleas at trial would violate the rule that normally, evidentiary rulings are not properly cognizable in § 2255 proceedings. Carrillo v. United States, 332 F.2d 202 (10th Cir. 1964); Nick v. United States, 406 F.Supp. 1 (E.D. Mo. 1975), affmd, 531 F.2d 936 (8th Cir. 1976).

In the sentencing of the movant, the transcript reflects that the court's only reference to the Hughes County pleas was as follows:

"In connection with this sentencing, the only consideration that is being made by the Court is the prior record of this defendant involving those State Court convictions brought out during the trial. I am giving no consideration to any other items on the defendant's prior record." (page 16.)

Thus, no tainted prior sentences were ever considered during the trial, or to enhance the sentence in violation of Gideon v. Wainwright, 372 U.S. 335 (1963) and Tucker v. United States, 404 U.S. 443 (1972), and the state pleas, even when dismissed in 1975, were never held to be invalid on constitutional grounds. Moreover, the law of this case was established in United States v. Turner, supra, and, both at the time of trial and sentencing, the prior state pleas of guilty were deemed convictions without evidence of constitutional infirmity. Bromley v. Crisp, 561 F.2d 1351, 1363 (10th Cir. 1977), cert. denied, 435 U.S. 908 (1978); Schwartz v. N.M.S. Industries, Inc., 575 F.2d 553 (5th Cir. 1978).

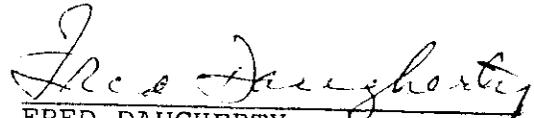
In an anomalous contention to the court's purported illegal use of valid Hughes County pleas, the movant asserts the pleas were

invalid because of threats and coercion by the Hughes County Sheriff's department. In this regard, the testimony of movant's privately retained counsel is particularly significant in view of his professional competence and the lengthy and deliberate consideration of the Hughes County charges (from October 1969 to August 1971) before the pleas were entered. Reiterating, movant's counsel stated that the pleas were voluntarily made with full awareness of constitutional rights to jury trial, to confrontation, not to incriminate himself, and of the state's burden of proof. Movant's counsel further stated he knew of no threats by the Hughes County Sheriff's department. The undersheriff unequivocally stated that the movant was never threatened nor coerced by himself or any member of the Hughes County Sheriff's department and that the only physical contact with the movant was when it was necessary to forcibly remove keys from him before he was incarcerated. The testimony of movant's mother is incredulous in view of her relationship to the movant, that the threats by the sheriff and district judge were communicated to her rather than directly to movant, and movant has not shown by competent evidence that the pleas were unconstitutionally entered by reason of the alleged threats. The evidentiary record in this case satisfies the court that the Hughes County pleas were not taken in violation of Boykin v. Alabama, 395 U.S. 238 (1969), and were intelligently and voluntarily entered. Stinson v. Turner, 473 F.2d 913 (10th Cir. 1973); Lansinger v. Crisps, 403 F.Supp. 928 (W.D. Okla. 1975). The full panoply of Rule 11, Federal Rules of Criminal Procedure, 18 U.S.C.A., does not apply to state court procedures. Beavers v. Anderson, 474 U.S. 1114, 1117 (10th Cir. 1973). Accordingly, it is the court's view that the movant has not shown by a preponderance of the evidence that there was any unconstitutional threats or coercion in connection with the Hughes County pleas.

Therefore, the movant's Motion to Vacate, Set Aside, or

Correct Sentence pursuant to 28 U.S.C. § 2255 is denied.

Dated this 16<sup>th</sup> day of July, 1979.

  
FRED DAUGHERTY  
UNITED STATES DISTRICT JUDGE

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

FILED

LOIS N. SOWLE, )  
 )  
Plaintiff, )  
 )  
-vs- )  
 )  
WALTER A. BUTLER, )  
 )  
Defendant. )

JUL 16 1979

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

NO. 78-C-479-C

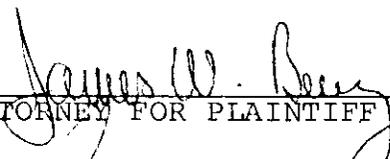
ORDER OF DISMISSAL

NOW on this 16<sup>th</sup> day of July, 1979, 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 compromised 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 of the causes of action of the plaintiff filed herein against the defendant be and the same hereby dismissed with prejudice to any future action.

  
JUDGE OF THE UNITED STATES DISTRICT COURT

APPROVED AS TO FORM:

  
ATTORNEY FOR PLAINTIFF  
  
ATTORNEY FOR DEFENDANT

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

WESTERN INDUSTRIAL )  
MAINTENANCE, INC., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
CUSTOM AIRMOTIVE, INC., )  
and NORMAN D. LICKTEIG, )  
 )  
Defendants. )

Civil Action No. 77-C-128

**FILED**

JUL 16 1979

JUDGMENT

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

This action came on for trial before the Court and a Jury, the Honorable H. Dale Cook, Chief District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED,

That the Plaintiff, Western Industrial Maintenance, Inc., recover of the Defendant, Custom Airmotive, Inc., the sum of \$10,210.00, on its First Claim for Relief, with interest thereon at the rate of ten percent (10%) per annum as provided by law, and for the costs and disbursements of this action, and it is further,

ORDERED AND ADJUDGED that the Plaintiff, Western Industrial Maintenance, Inc., recover of the Defendant, Custom Airmotive, Inc., the sum of One and 00/100 Dollars (\$1.00) in nominal damages and Thirty-five Thousand and 00/100 Dollars (\$35,000.00) punitive damages, for a total of Thirty-five Thousand One and 00/100 Dollars (\$35,001.00), on its Second Claim for Relief, with interest thereon at the rate of ten percent (10%) per annum as provided by law, and for the costs and disbursements of this action; and it is further

ORDERED AND ADJUDGED, that the Plaintiff take nothing against the individual Defendant, Norman D. Lickteig, neither on its first nor its second claim for relief, and that the action be dismissed as to him, and that he be discharged and send hence without hindrance or delay, with his costs of this action.

DONE this 16th day of July, 1979, in the City of Tulsa, State of Oklahoma.

SO ORDERED:

  
UNITED STATES DISTRICT JUDGE



FILED

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

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

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
KATHY SUE UNDERWOOD, et. al.,  
Defendants.

CIVIL ACTION NO. 78-C-590-C

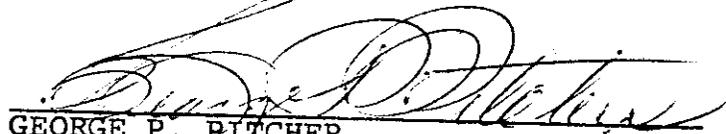
STIPULATION OF DISMISSAL

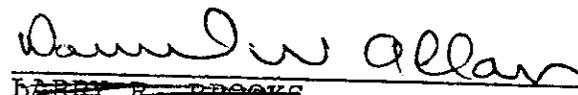
COME NOW the United States of America, Plaintiff, Vinita Finance Company, Inc., County Treasurer, Craig County, and Board of County Commissioners, Craig County, Defendants, by and through their respective attorneys and herewith stipulate and agree that this action be and the same is hereby dismissed, without prejudice, each party to bear his own costs.

Dated this 29th day of May, 1979.

HUBERT H. BRYANT  
United States Attorney

  
ROBERT P. SANTEE  
Assistant United States Attorney

  
GEORGE P. PITCHER  
Attorney for Defendant,  
Vinita Finance Company, Inc.

  
~~HARRY E. BROOKS~~  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and Board of  
County Commissioners, Craig County



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

FOR EYES OPTICAL COMPANY,

Plaintiff,

VS.

FOR EYES CORPORATION,

Defendant.

§  
§  
§  
§  
§  
§  
§  
§  
§

CIVIL ACTION NO.

79-C-<sup>347</sup>~~237~~-D

**FILED**

JUL 13 1979

FINAL JUDGMENT

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

Default having been entered against Defendant For  
Eyes Corporation, it is hereby ORDERED, ADJUDGED AND DECREED  
that:

1. This Court has jurisdiction of this cause of  
action, 15 U.S.C. § 1121, 28 U.S.C. § 1332, 28 U.S.C.  
§§ 1338(a) and 1338(b).
2. Plaintiff, For Eyes Optical Company, is the owner  
of the trademark and service mark FOR EYES, including the  
registration thereof in the United States Patent and  
Trademark Office, Registration No. 1,006,525 issued March 11,  
1975.
3. Said trademark and service mark FOR EYES, and  
said registration thereof No. 1,006,525, are good and valid  
in law.

4. Defendant, For Eyes Corporation, has infringed Plaintiff's rights in said trademark and service mark by using the mark and name FOR EYES in its operation of retail optical stores in Tulsa, Oklahoma, within the Northern District of Oklahoma, and in the advertising and promotion thereof.

5. Defendant, its agents, servants, employees, representatives and affiliates, and all those in active concert and participation with it or any of them, are hereby enjoined from further infringing, directly or indirectly, Plaintiff's trademark and service mark FOR EYES by rendering any optical store services or selling any optical product under the mark or name FOR EYES, or under any other mark or name confusingly similar thereto.

6. Plaintiff is awarded its costs in the amount of \$15.00.

Done at Tulsa, Oklahoma, this 13 day of July, 1979.

) s/ FRED DAUGHERTY  
UNITED STATES DISTRICT JUDGE

DATE: 7-13-79

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

LARRY GAIL LINEBARGER, )  
 )  
 ) Petitioner, )  
 )  
 v. )  
 )  
 ) THE STATE OF OKLAHOMA, )  
 )  
 ) Respondent. )

No. 79-C-397

FILED

JUL 13 1979

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

O R D E R

The Court now considers the petition of Larry Gail Linebarger, challenging the validity of his conviction in Tulsa County District Court pursuant to Title 28, U.S.C. § 2254 (Section 2254).

Petitioner alleges that he has exhausted his remedies within the state appellate structure, as is necessary under Section 2254. However, none of the documents filed by petitioner reflect the state's disposition of the issues raised in this action. Petitioner refers the Court to Linebarger v. State, 527 P.2d 178 (Okla.Ct.Cr.App. 1974) for the record of the state's handling of his appeal, but that case does not consider the issues raised in this action by petitioner.

Petitioner does enclose copies of briefs he filed with the state (see Plaintiff's Exhibits) that do raise the issues now before this Court, but the Court has no record other than petitioner's pleading that the State of Oklahoma has rendered its judgment. However, the Court has been advised by the Oklahoma Court of Criminal Appeals that the issues in the present case have been considered, and relief denied. That decision is reflected in Linebarger v. State, PC-79-146, Order Affirming Dismissal of Application of Post Conviction Relief. A copy of that decision has been received by this Court and placed in the file. The Court is therefore satisfied that petitioner has exhausted his state remedies.

Turning to consider the merits, petitioner argues that the trial court erred in failing to instruct the jury "that the prosecution must prove beyond a reasonable doubt that: ("the automobile was taken by Larry Linebarger with felonious intent to deprive the owner (Carl Jenson), (Not) (Gene Vire), thereof pemantly [sic], and to convert the automobile to Larry Linebarger's own use'). Petition, p. 3. (Emphasis original.)

Petitioner further contends that under recent Supreme Court cases, failure of the prosecution to prove every element beyond a reasonable doubt is a failure to carry the burden of proof. [See Hankerson v. North Carolina, 432 U.S. 233 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); In Re Winship, 397 U.S. 358 (1970).] Petitioner's law is correct, but the facts fail to sustain his case. Petitioner's Exhibit No. 1 purports to be the jury instructions given at petitioner's trial, and those instructions clearly advise the jury of every element of the crime petitioner was charged with, including the concept "that the burden of proof was on the State to establish by evidence beyond a reasonable doubt all the material allegations contained in the information." Petitioner's Exhibit No. 1, Instruction No. 1. The information referred to in the instruction above, contained in Petitioner's exhibits, and also listed as Exhibit No. 1, includes every element of the crime of larceny.

A second issue is implied in Petitioner's pleading (p. 3), that the actual owner of the automobile in question was Carl Jenson, not Gene Vire as named in the information and jury instructions. The implication from this is that the misstating of the actual owner was error. The record reflects that Carl Jenson had placed his car in the hands of Gene Vire, the owner of a used car lot, for the purpose of selling it. Gene Vire thus became Carl Jenson's agent, and it is

fundamental that where the principal's property is in the possession of the agent for the benefit of the principal, or for their mutual benefit, that theft from the agent is theft from the principal. It follows that the naming of either the agent or the principal as owner in the indictment or information is sufficient to inform the accused of the charges against him.

For the foregoing reasons, the Petition of Larry Gail Linebarger for a Writ of Habeas Corpus under Title 28, U.S.C. § 2254 will be denied.

It is so Ordered this 12<sup>th</sup> day of July, 1979.

  
E. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

FILED

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

JUL 13 1979

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

A. F. BUSH, a/k/a "Skip" Bush,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 79-C-375-C
	)	
FIRST WESTROADS BANK; CHUCK	)	
HALL, an individual; AIR-KAMAN	)	
OF OMAHA, INC., a Connecticut	)	
Corporation; DR. JAMES E.	)	
MONTGOMERY and JAMES L. ROLD,	)	
individuals,	)	
	)	
Defendants.	)	

Notice of DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff, A. F. Bush, a/k/a "Skip" Bush,  
and hereby dismisses the above-entitled matter without prejudice  
to a future cause of action.

JONES, GIVENS, BRETT, GOTCHER,  
DOYLE & BOGAN, INC.

By Mac D. Finlayson  
 Mac D. Finlayson  
 201 West 5th, Suite 400  
 Tulsa, Oklahoma 74103  
 918/583-1115

Attorneys for the Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on the 12th day of July, 1979,  
I mailed a full, true and correct copy of the above and foregoing  
Dismissal Without Prejudice with proper postage thereon fully  
prepaid addressed to each of the following: Mr. John H. Tucker,  
2900 Fourth National Building, Tulsa, Oklahoma, 74119; Mr. Donald G.  
Hopkins, Liberty Towers, 1502 South Boulder, Suite 108, Tulsa,  
Oklahoma, 74119; Mr. James L. Rold, 202 South 71st, Omaha, Nebraska,  
68132; Chuck Hall, c/o Air-Kaman of Omaha, Inc., A.T.O. Eppley Air  
Field, Omaha, Nebraska, 68119.

Mac D. Finlayson  
 Mac D. Finlayson

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

RX AMERICA, INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MEDICINE SHOPPE INTERNATIONAL )  
INC., a corporation, et al. )  
 )  
Defendants )

Civil Action No. 78-C-486-D

FILED

JUL 12 1979

FINAL JUDGMENT

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

This matter having come on for hearing on an agreed statement of stipulated facts, and upon the depositions of record,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. This Court has jurisdiction over the parties and the subject matter of this suit pursuant to 28 U.S.C. §1332.
2. Defendant Medicine Shoppe International, Inc., recover of Plaintiff the sum of \$20,000.00.
3. That Plaintiff, its agents, servants and employees, be and hereby are permanently enjoined from failing to:
  - (a) Cease to use by advertising or otherwise, the franchise, Defendant's program or any parts thereof, or any devices, marks, service marks, trademarks, trade names, systems, slogans or symbols used in connection with the program, including the name MEDICINE SHOPPE in any manner whatsoever;
  - (b) deliver to the Defendant or its designee all employment files, prescription lists and files, and all inventory records of the Medicine Shoppe pharmacies operated by Plaintiff.

JUDGMENT ENTERED this 12 day of July, 1979.

Irma Dougherty  
UNITED STATES DISTRICT JUDGE

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

PANHANDLE AIRCRAFT, INC., a )  
corporation; and LIBERAL )  
AIRCRAFT, INC., a corporation, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
AIRCRAFT ENTERPRISES, INC., a )  
corporation; and B & J FLYING )  
SERVICE, INC., a corporation, )  
 )  
Defendants. )

No. 76-C-255-B

FILED

JUL 11 1979

ORDER OF DISMISSAL WITH PREJUDICE

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

The Court being advised that all claims arising out of the airplane accident described in plaintiffs' Complaint have been fully, finally, and totally settled and discharged, it is hereby ORDERED that this action be dismissed with prejudice to the future filing thereof.

*H. Dale Cook*  
\_\_\_\_\_  
H. DALE COOK  
UNITED STATES DISTRICT JUDGE

6/27/79

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

EQUILEASE CORPORATION, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 HENRY OIL COMPANY, INC., )  
 a corporation; EARL E. HENRY )  
 JR.; and STATE FEDERAL SAVINGS )  
 AND LOAN ASSOCIATION, a federal )  
 savings and loan associatin, )  
 )  
 Defendants. )

No. 77-C-47-C

**FILED**

JUL 11 1979

Jack O. [unclear]  
U. S. DISTRICT COURT

STIPULATION OF DISMISSAL

It is hereby stipulated by Plaintiff, Equilease Corpora-  
tion, by and through its attorneys of record, Ungerman,  
Conner, Little, Ungerman & Goodman; Defenants, Earl E.  
Henry, Jr. and Henry Oil Company by and through their attorneys  
of record, Grigg, Richards & Paul; and Defendant, State  
Federal Savings & Loan Association, by and through its  
attorneys of record, Gable, Gotwals, Johnson, Fox, Rubin &  
Baker; that the above entitled action be dismissed without  
prejudice as to Defendants Earl E. Henry, Jr. and Henry Oil  
Company. This stipulation is entered into as the result of  
the Petitions of Voluntary Bankruptcy filed on behalf of  
Defendants, Earl E. Henry, Jr. and Henry Oil Company and the  
subsequent discharge in bankruptcy of the debts owing to  
Plaintiff from Earl E. Henry, Jr. and Henry Oil Company  
which were the basis of this action against Earl E. Henry,  
Jr. and Henry Oil Company.

This stipulation of dismissal in no way affects the  
status of this action as between Plaintiff Equilease Corporation  
and Defendant State Federal Savings and Loan Association.

UNGERMAN, CONNER, LITTLE, UNGERMAN & GOODMAN

BY   
John B. Wimbish

1710 Fourth National Bank Bldg.  
Tulsa, Oklahoma 74103  
Attorneys for Plaintiff Equilease Corporation

LAW OFFICES  
UNGERMAN,  
CONNER,  
LITTLE,  
UNGERMAN &  
GOODMAN  
1710 FOURTH NATL.  
BANK BUILDING  
TULSA, OKLAHOMA

GRIGG, RICHARDS & PAUL

By John R. Paul  
John R. Paul

200 Thurston National Building  
Tulsa, Oklahoma 74103

Attorneys for Earl E. Henry, Jr. and  
Henry Oil Company, Inc.

Gable, Gotwals, Johnson, Fox, Rubin & Baker

By John Henry Paul

2010 Fourth National Bank Building  
Tulsa, Oklahoma 74119

Attorneys for State Federal Savings & Loan Assn.

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

JOHN G. ARCHER and  
LINDA LOU ARCHER,

Plaintiffs,

vs.

WILMA COOK SAWYERS, LYNN  
B. FELLISON and PAULINE  
FELLISON, husband and wife,  
and THE FIRST NATIONAL BANK  
& TRUST COMPANY OF VINITA,

Defendants.

CIVIL ACTION NO. 78-C-184-C

**FILED**

JUL 11 1979

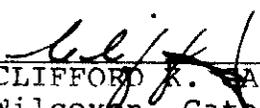
Jack C. Silver, Clerk  
U. S. DISTRICT COURT

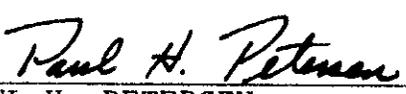
STIPULATED ORDER OF DISMISSAL

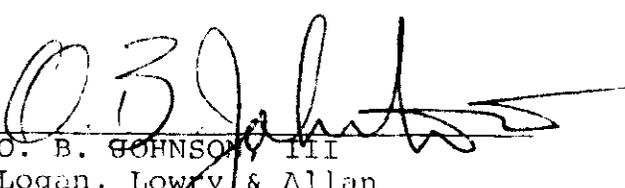
IT IS HEREBY STIPULATED, by and between counsel for  
all parties hereto, subject to the approval of the Court, as  
follows:

1. All claims presented by the Complaint (originally  
filed as a Petition in state court) and all the counterclaims  
filed herein shall be dismissed with prejudice as to all parties  
pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.
2. Each party shall bear his or her own costs and at-  
torneys' fees.

DATED: July 10<sup>th</sup>, 1979.

  
CLIFFORD K. CATE, JR.  
Wilcoxon, Cate & Scherer  
P. O. Box 357  
(918) 683-6696  
Attorney for Plaintiffs

  
PAUL H. PETERSEN  
P. O. Box 2971  
Tulsa, Oklahoma 74101  
(918) 747-0690  
Attorney for Defendant-Counterclaimants

  
O. B. JOHNSON, III  
Logan, Lowry & Allan  
101 South Wilson Street  
Vinita, Oklahoma 74401  
(918) 256-7511

SO ORDERED:

1A/H. Dale Cook  
DALE H. COOK, Chief Judge  
United States District Court  
Northern District of Oklahoma

DATE: July 11, 1979.

FILED

JUL 11 1979

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

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

FILED

JUL 11 1979

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 CHARLES R. KELLER, )  
 )  
 Defendant. )

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

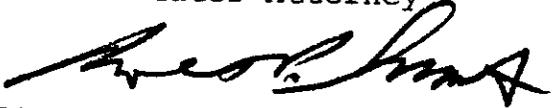
CIVIL ACTION NO. 79-C-439-C

D I S M I S S A L

COMES NOW the United States of America by and  
through its attorney, Robert P. Santee, Assistant United  
States Attorney for the Northern District of Oklahoma, and  
herewith dismisses its Complaint.

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

  
ROBERT P. SANTEE  
Assistant United States Attorney

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

PACIFIC MUTUAL LIFE INSURANCE )  
COMPANY, a Corporation, )  
 )  
Plaintiff, )

v. )

No. 76-C-528-B

JULIE BLOOMFIELD and )  
ANTHONY EDWARD BLOOMFIELD, )  
a Minor, et al., )  
 )  
Defendants. )

FILED

JUL 10 1979

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

O R D E R

This cause came on to be heard the 10<sup>th</sup> day of July, 1979, for voluntary dismissal of Defendant CHESTER BLOOMFIELD's claims, individually and as Trustee for ANTHONY EDWARD BLOOMFIELD, a minor, and after hearing counsel for the respective parties and due deliberation have been had thereon, it is,

ORDERED, that the claims of CHESTER BLOOMFIELD, individually and as Trustee of ANTHONY EDWARD BLOOMFIELD, are hereby dismissed without prejudice.

DATED this 10<sup>th</sup> day of July, 1979.

  
CHIEF JUDGE H. DALE COOK  
UNITED STATES DISTRICT COURT

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

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

COMMANDER AIRLINES, INC.,  
a New York corporation,

Plaintiff,

vs.

DON PARRISH, d/b/a AIRE-  
KARE CORPORATION, and

MID-STATES AIRCRAFT ENGINES, INC.,  
an Oklahoma corporation, and

AIRE-KARE CORPORATION, an  
Oklahoma corporation,

Defendants.

No. 77-C-399-C

**FILED**

JUL 10 1979

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

JUDGMENT FOR ATTORNEYS FEES

The Court, on July 3, 1979, after having heard arguments of counsel, James H. Chafin for the Defendant and Joseph LeDonne, Jr., for the Plaintiff, on Defendant's Motion for the Assessment of Attorneys Fees in the above cause of action, and being fully advised in the premises, finds:

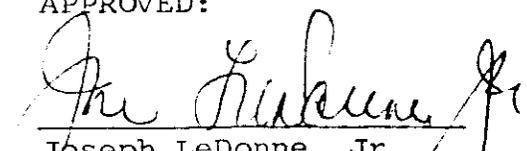
That judgment on the merits of the case was entered in favor of the Defendant by this Court on May 21, 1979;

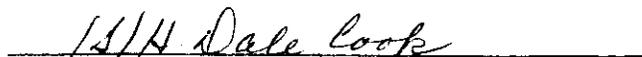
That the Defendant, Mid-States Aircraft Engines, Inc., is entitled to a judgment for attorneys fees in the amount of \$8,410.50, to be entered along with costs already taxed on the 30th day of May, 1979.

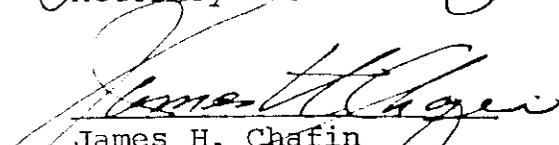
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment for attorneys fees be entered in the favor of the Defendant, Mid-States Aircraft Engines, Inc., in the amount of \$8,410.50.

It is so ordered on this 10<sup>th</sup> day of July, 1979.

APPROVED:

  
Joseph LeDonne, Jr.  
Attorney for Plaintiff

  
H. Dale Cook, Chief Judge District Court

  
James H. Chafin  
Attorney for Defendant

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

MUSTAFA SULEIMAN TARA'ANI, )

Plaintiff, )

v. )

DEGEN PIPE AND SUPPLY COMPANY, )  
a corporation, and WORLD TRADE )  
SERVICES, INC., a corporation, )

Defendants. )

No. 79-C-124-C

FILED

71 JUL 10 1979

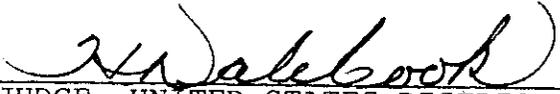
Jack P. Young, Clerk  
U. S. DISTRICT COURT

ORDER DISMISSING DEFENDANT  
WORLD TRADE SERVICES, INC.

Upon the Motion of plaintiff, Mustafa Suleiman Tara'ani,  
good cause having been shown:

IT IS ORDERED that the claims against defendant World Trade  
Services, Inc. are dismissed without prejudice.

Dated this 10<sup>th</sup> day of July, 1979.

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

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

DARRELL WAYNE CONDIT, )  
 )  
 Movant, )  
 )  
 vs. )  
 )  
 UNITED STATES OF AMERICA, )  
 )  
 Respondent. )

79-C-385-C

No. 74-CR-48

FILED

NOV 10 1979

ORDER

J. D. Clark, Clerk  
U. S. DISTRICT COURT

The movant herein is presently a prisoner in the Englewood Federal Correctional Institution, Englewood, Colorado. On November 18, 1974, the movant entered pleas of guilty to Counts One and Two of an Indictment charging him with violations of 18 U.S.C. § 1708, and 18 U.S.C. § 495, respectively. On November 26, 1974, Judge Allen E. Barrow suspended the imposition of sentence on both Counts, and placed the movant on probation for a period of four years as to each Count, the two periods of probation to run concurrently. The imposition of probation was made pursuant to the Youth Corrections Act, 18 U.S.C. § 5010(a). On January 9, 1976, movant's probation was revoked, and he was sentenced by Judge Barrow to eighteen months imprisonment on Count One. On Count Two, the imposition of sentence was suspended, and he was placed on two years probation. The movant served the eighteen-month sentence. On January 10, 1978, the United States District Court for the Eastern District of California assumed jurisdiction of movant's probation, as the movant intended to reside within that judicial district. On April 2, 1979, movant's probation was revoked and the California court sentenced him to two years imprisonment. The movant herein challenges the sentences imposed by Judge Barrow on January 9, 1976, and by the California court on April 2, 1979, pursuant to 28 U.S.C. § 2255.

Under the literal terms of Section 2255, this Court would lack jurisdiction to consider the movant's challenge to the sentence of the California court for that Section provides that the motion be made to the "court which imposed the sentence". However, movant has referred the Court to the case of Napoles v. United States, 536 F.2d 722 (7th Cir. 1976), and the Court finds the reasoning of that case to be persuasive.

In Napoles, the court held that a Section 2255 motion should be heard in the "'court whose proceedings are being attacked'". 536 F.2d at p.726. Jurisdiction over Napoles' probation had been transferred, and the transferee court had subsequently revoked probation and imposed an institutional sentence. Napoles filed a Section 2255 motion with the transferor court which was dismissed for lack of jurisdiction. The appellate court held that the transferor court did have jurisdiction because it was the proceedings there that were being attacked by Napoles.

In the case at bar, the movant is serving a sentence imposed by the California court. However, as in Napoles, the movant is only attacking proceedings in this Court. The movant alleges that the sentence of the California court is illegal because the sentence imposed on January 6, 1976 by Judge Barrow is illegal.

In support of its holding, the Napoles court noted that one of the purposes of Section 2255 "'was to effect a change in the law whereby the Judge whose proceedings were being attacked would in the first instance hear and determine the validity of the attack . . .'" 536 F.2d at p.725. See also Martin v. United States, 248 F.2d 554 (8th Cir. 1957); Woods v. Rodgers, 275 F.Supp. 559 (D.D.C. 1967). Because Judge Barrow is now deceased, this purpose could not be achieved in the instant case. On the other hand, the California court had absolutely no connection with the proceedings

presently being attacked. The Court therefore holds that it may properly hear the present motion in its entirety.

The movant contends that the January 9, 1976 sentence was illegal because it changed his original sentence under the Youth Corrections Act to an adult sentence, and because the sentences on the two counts were made to run consecutively, when they were originally to run concurrently. He further contends that the California court did not have jurisdiction to impose the two year sentence on him because that sentence stemmed from the allegedly illegal sentence imposed by Judge Barrow.

An examination of the court file herein demonstrates that the movant was approximately twenty-four years old on January 9, 1976. The movant was therefore eligible for treatment under the Youth Corrections Act, but as a "young adult offender", not as a "youth offender". 18 U.S.C. §§ 4216, 5006. If the movant had been a "youth offender", sentencing under the Youth Corrections Act would have been mandatory absent a finding that he would not derive any benefit therefrom. 18 U.S.C. § 5010(d). See Dorszynski v. United States, 418 U.S. 424, 94 S.Ct. 3042, 41 L.Ed.2d 855 (1974). But as a "young adult offender", the movant could not have been sentenced under the Youth Corrections Act unless there was a finding that there were reasonable grounds to believe that he would benefit from treatment thereunder. 18 U.S.C. § 4216. See Dorzynski v. United States, supra. No such finding was made.

Furthermore, the fact that the movant was originally sentenced under the Youth Corrections Act does not require his re-sentencing under the same upon the revocation of his probation. Nor was Judge Barrow required to impose concurrent sentences on both counts such as were originally imposed.

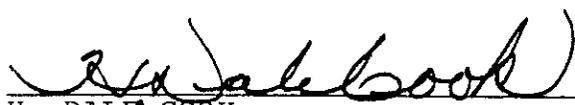
"When a court places a youth offender on probation under section 5010(a) of the Youth

Corrections Act, it is exercising an option in lieu of sentencing and not imposing a 'sentence' within the strict meaning of the word. . . . Thereafter, when the terms of probation are violated the court may impose any sentence that might originally have been adjudged. . . ." (Citations omitted) Dunn v. United States, 561 F.2d 259, 261 (D.C.Cir. 1977). See also United States v. Evers, 534 F.2d 1186 (5th Cir. 1976).

The January 9, 1976 sentence was certainly one that could have originally been adjudged and the movant's contention that such sentence was illegal is without merit. The movant proposes no further ground to support his claim that the California sentence is illegal. That claim must therefore fall as well.

For the foregoing reasons, it is therefore ordered that the present motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 is hereby overruled.

It is so Ordered this 10<sup>th</sup> day of July, 1979.

  
\_\_\_\_\_  
H. DALE COOK  
Chief Judge, U. S. District Court

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

**FILED**

**JUL 10 1979** *140*

GLYNN M. WELLS,  
Plaintiff,  
v.  
UNITED STATES OF AMERICA,  
Defendant and  
Plaintiff on  
Counterclaim,  
v.  
LETA P. WELLS and DON EARL EDWARDS,  
Additional  
Defendants on  
Counterclaim.

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

CIVIL ACTION  
NO. 78-C-231-B ✓

STIPULATION OF DISMISSAL

It is hereby stipulated by and between the plaintiff  
Glynn M. Wells, the defendant and plaintiff on counterclaim  
United States of America, and the additional defendant on  
counterclaim Leta P. Wells, that the claim of the plaintiff  
and the counterclaims of the United States of America be dis-  
missed with prejudice, each of the parties hereto to bear their  
own costs.

MORREL, HERROLD, WEST, HODGSON,  
SHELTON & STRIPLIN, P. A.

By: *[Signature]*  
BARRY G. WEST  
4111 So. Darlington, Suite 600,  
Tulsa, Oklahoma 74135

ATTORNEYS FOR PLAINTIFF AND COUNTER-  
CLAIM DEFENDANT, LETA P. WELLS

HUBERT H. BRYANT  
United States Attorney

By: *[Signature]*  
JOHN F. MURRAY  
Tax Division  
Department of Justice

ATTORNEY FOR DEFENDANT AND PLAINTIFF ON  
COUNTERCLAIM

FILED

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

BANK OF OKLAHOMA,  
WILLIAM H. BELL,  
CO-EXECUTORS OF THE ESTATE  
OF HORACE C. BARNARD,  
DECEASED,  
  
Plaintiffs  
  
v.  
  
UNITED STATES OF AMERICA,  
  
Defendant

Jack C. Silver Clerk  
U.S. DISTRICT COURT

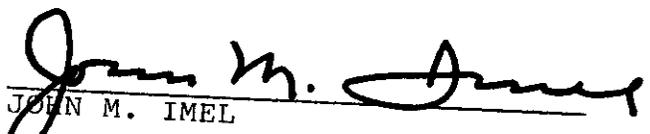
CIVIL NO. 77-C-215-B

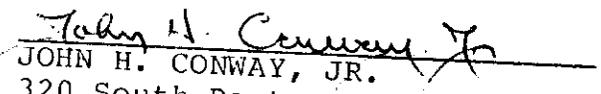
STIPULATION OF DISMISSAL

It is hereby stipulated by the parties that this action  
be dismissed, each party to bear its own costs.

MOYERS, MARTIN, CONWAY,  
SANTEE & IMEL

By:

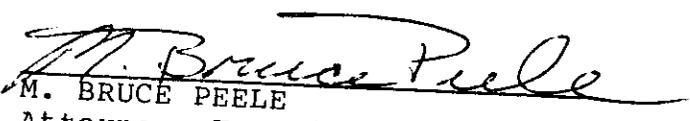
  
JOHN M. IMEL

  
JOHN H. CONWAY, JR.  
320 South Boston Building  
Suite 920  
Tulsa, Oklahoma 74103

ATTORNEYS FOR PLAINTIFFS

HUBERT H. BRYANT  
United States Attorney

By:

  
M. BRUCE PEELE  
Attorney, Tax Division  
Department of Justice  
Room 5B27, 1100 Commerce Street  
Dallas, Texas 75242  
(214) 749-1251

ATTORNEY FOR DEFENDANT

FILED

JUL 15 1979  
Jack C. Silver, Clerk  
U.S. DISTRICT COURT

IT IS SO ORDERED this 9<sup>th</sup> day of July, 1979.

(Signed) H. Dale Cook  
UNITED STATES DISTRICT JUDGE

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

LEE KEELING AND ASSOCIATES, INC., )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 THE PETROLIA CORPORATION, )  
 )  
 Defendant. )

No. 78-C-200-C

FILED

ORDER OF DISMISSAL  
WITH PREJUDICE

JUL 9 1979

Jack C. [unclear] Clerk  
U. S. DISTRICT COURT

NOW on this 9<sup>th</sup> day of July, 1979, there comes before the Court for its consideration the Joint Stipulation and Application for Dismissal With Prejudice filed herein by the plaintiff and defendant.

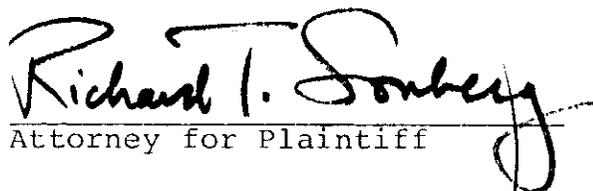
It appearing to the Court that the claims between the parties to this civil action have been fully settled and resolved and they seek to have this action dismissed pursuant to Rule 41 of the Federal Rules of Civil Procedure,

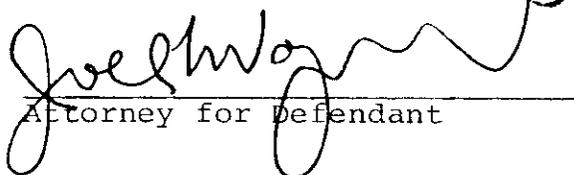
NOW, THEREFORE, it is Ordered that the above captioned civil action is hereby dismissed with prejudice, with each party to bear and pay its own costs herein incurred.

SO ORDERED.

  
UNITED STATES DISTRICT JUDGE

Approved as to form and  
content:

  
Attorney for Plaintiff

  
Attorney for Defendant

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ISIAH JEFFERSON, JR., )  
 )  
 Defendant. )

CIVIL ACTION NO. 79-C-207-C

FILED

JUL 12 1979

Jack C. Silver, Clerk  
S. DISTRICT COURT

NOTICE OF DISMISSAL

COMES NOW the United States of America, Plaintiff  
herein, by and through its attorney, Robert P. Santee, Assistant  
United States Attorney for the Northern District of Oklahoma,  
and hereby gives notice of its dismissal, pursuant to Rule 41,  
Federal Rules of Civil Procedure, of this action, with prejudice.

Dated this 9th day of July, 1979.

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney



ROBERT P. SANTEE  
Assistant United States Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy  
of the foregoing pleading was served on each  
of the parties hereto by mailing the same to  
them or to their attorneys of record on the

9th day of July, 1979.

  
Assistant United States Attorney



The terms and conditions of Plaintiff's parole included the prohibition that he not violate any law nor associate with persons engaged in criminal activity.

On July 25, 1977, a preliminary interview was conducted before Defendant Robert Boston, at which hearing Defendant Rod Baker appeared as a witness. A summary report of the investigation was forwarded to the United States Parole Commission at Dallas, Texas, whereupon Plaintiff was ordered to be committed to El Reno. At El Reno, a revocation hearing was conducted. Plaintiff was found to have violated the conditions of his parole and was recommitted to the institution pursuant to 18 U.S.C. §5010(b).

Plaintiff has previously challenged his parole revocation by means of a petition of habeas corpus. The United States District Court for the Western District of Oklahoma denied the petition. The Tenth Circuit Court of Appeals affirmed the District Court in Billy Boyd Thompson v. Warden Keohane, in an unpublished opinion of May 3, 1979. The Tenth Circuit noted that the essence of Plaintiff's Complaint was that the parole was revoked, in part, based on allegations of criminal behavior for which he had not been convicted. The court held:

The Parole Commission may take into account and make specific independent determinations with respect to conduct charged... Since appellant was provided an opportunity to refute the charges at his parole hearing, the fact that the state later drops the charges is not sufficient of itself to invalidate the revocation determination.

Id. at 2.

Plaintiff now challenges his parole revocation by asserting that the Defendants deliberately lied about charges against him. Specifically, he asserts that the only State charges for which he was convicted were four traffic violations. Plaintiff contends that because of the Defendants' knowingly false statements at the preliminary interview and in the summary report at the parole revocation hearing, he was found to have been

charged with auto theft, forgery, burglary and to have associated with persons engaged in criminal activity. He contends, however, that he was never charged with forgery or association and that the charges of auto theft and burglary were dismissed.

The Defendants gave the following sequence of criminal charges in their memorandum: On or about August 16, 1976, Plaintiff appeared in the State District Court and entered a plea of guilty to driving while under suspension and was fined and placed on probation for one year. Additionally, Plaintiff was fined and sentenced to one-year term of probation for reckless driving, said terms to run concurrently.

On or about February 19, 1977, Plaintiff was arrested by the Pryor, Oklahoma Police Department and investigated on charges of burglary and forgery for which the following explanation was given to said officers by the Plaintiff: That he observed several individuals take blank checks from a car dealership and offered to drive them to Tulsa for the purpose of cashing the same. In giving said explanation, Plaintiff admitted to having voluntarily associated himself with persons actively engaged in the commission of a crime, to-wit, burglary, and he admitted his participation in aiding and abetting them in the commission of the crime, to-wit, forgery.

In a subsequent interview with parole officer Rod Baker, Plaintiff repeated the above-mentioned activities, which were violations of condition 6 of his parole:

You shall not violate any law. Nor shall you associate with persons engaged in criminal activity. You shall get in touch immediately with your probation officer or his office if you are arrested or questioned by a law-enforcement officer.

On or about May 26, 1977, Plaintiff was arrested by the Pryor, Oklahoma Police Department on charges of auto theft for which he was released on bond pending trial. On or about June 28, 1977, Plaintiff was arrested by the Chouteau, Oklahoma

Police Department on charges of driving while under suspension, resisting arrest, speeding and failure to stop. The above charges were effectively dismissed when Plaintiff's parole was revoked.

In his affidavit in support of the motion for summary judgment, Defendant Rod Baker avers that during the period of his supervision, October 3, 1975, through July 25, 1977, Plaintiff sustained numerous arrests and was allowed to remain on parole pending disposition of outstanding misdemeanor and felony charges. He avers that it was not until Plaintiff displayed continued disrespect for the law that parole revocation procedures were instituted. He further avers that during the preliminary interview of July 25, 1977, Plaintiff himself admitted the validity of the several pending charges, some of which involved his participation in the commission of felonies, to-wit, burglary, forgery and uttering forged instruments. He finally avers that he did not receive or forward to the United States Parole Commission any false, manufactured or irrelevant information.

In his affidavit in support of the motion for summary judgment, the Defendant Robert E. Boston avers that he was involved in Plaintiff's revocation because an independent parole officer is required to conduct the preliminary interview and he filled that function. He further avers that at no time was he in receipt of any false, manufactured or irrelevant information concerning parole violations by Plaintiff; neither was such information forwarded to the U. S. Parole Commission and that Plaintiff was the sole source of information gathered and forwarded to the Commission.

As federal officers, the Defendants possess a qualified immunity. Butz v. Economau, 438 U.S. 478, 506 (1978). The immunity is that specified by the Supreme Court of the United States in Economau, wherein the Court stated:

In varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances coupled with good-faith belief, that affords a basis of qualified immunity of executive officers for acts performed in the course of official conduct.

Id. at 497-98 citing Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974). Further, federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law. Butz v. Economou, 438 U.S. at 507.

Moreover, as stated by the Court in Economou:

[D]amages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity.

438 U.S. at 508. See also: Scheuer v. Rhodes, 416 U.S. 232, 250 (1974).

As to a motion for summary judgment, it is clear that such a motion should not be lightly granted for summary judgment is not a substitute for trial. Jones v. Nelson, 484 F.2d 1165, 1167 (10th Cir. 1973). Moreover, the pleadings and other documentary evidence are to be construed liberally in favor of the party opposing a motion for summary judgment. Stevens v. Barnard, 512 F.2d 876, 878 (10th Cir. 1975). Further, it is incumbent upon the movant to establish that no genuine issue of material fact exists before a motion for summary judgment may be granted. Mustang Fuel Co. v. Youngstown Sheet & Tube Co., 561 F.2d 202, 204 (10th Cir. 1977).

Notwithstanding the burden placed upon the party moving for summary judgment, the Tenth Circuit Court of Appeals has held that:

[W]hen the motion is supported by depositions and affidavits, the party

opposing it may not rest upon the mere allegations of his pleadings, but must respond with specific facts showing the existence of a genuine issue for trial.

Stevens v. Barnard, 412 F.2d 876, 878 (10th Cir. 1975) (emphasis in original). Mere conclusory allegations will not suffice.

Id. at 878-79.

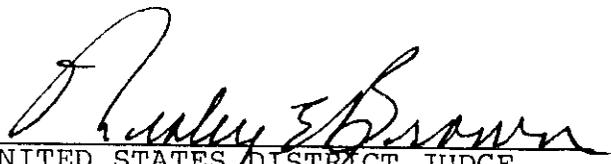
In the present case, the affidavits of the Defendants are sufficient to show their entitlement to the good faith immunity announced in Economau justifying a motion for summary judgment in their favor. At the time of their actions, the Defendants have averred and this Court finds that there were actual criminal charges pending against the Plaintiff. The Tenth Circuit also noted that the charges existed and held that it was irrelevant to the parole revocation that the charges were later dismissed. Billy Boyd Thompson v. Warden Keohane, unpublished opinion of May 3, 1979. This Court further finds that the information submitted by the Defendants to the Parole Commission came from the Plaintiff himself as well as from various local police authorities. Based upon the information received from these two sources, the Defendants had a reasonable basis for concluding that Plaintiff violated the terms of his parole and for forwarding that information to the Parole Commission. Having established their entitlement to this good faith immunity, the Defendants have shown that there exists no genuine issue of material fact in this action.

Plaintiff rests solely upon his bald allegations that the Defendants lied and knowingly sent false information concerning the forgery and association charge to the Parole Commission. These unsupported allegations, however, are not sufficient to show any material issue exists.

Based upon all the facts contained in this opinion, the records in the file and the testimony of the probation officers, it is the conclusion of the Court that the Motion for

Summary Judgment should be and is granted. The motion of Rod Baker and Robert E. Boston, each in his official and personal capacity, for summary judgment is sustained.

It is so Ordered this 2 day of June, 1979.

  
UNITED STATES DISTRICT JUDGE



accident resulted in plaintiff's complete loss of vision in his right eye. See pages 96-98 of the administrative transcript. Although plaintiff claimed that the vision in his left eye was also impaired, the results of an ophthalmological examination revealed that his vision in the left eye was correctable to 20/20. See page 111 of the transcript. Plaintiff testified that his blindness in one eye has impaired his depth perception, making it difficult for him to judge distances while driving. See pages 37-38 of the transcript.

The administrative transcript also includes medical records of treatment for plaintiff's low back pain starting in February 1972. The records from Dr. Norman L. Dunitz indicate that after treating plaintiff conservatively for the flare-up of his osteoarthritis in February 1972, Dr. Dunitz did not see plaintiff again until November 1976. Dr. Dunitz admitted plaintiff to St. John's Hospital for three days and again treated him conservatively with local physical therapy and traction. Plaintiff's condition was improved upon discharge, and Dr. Dunitz reported that plaintiff failed to return for his scheduled follow-up examination. See pages 107-109 of the transcript.

When plaintiff was seen at the Veterans Administration Hospital in January 1977, he complained of pain in his back, neck, and shoulders. X-rays revealed moderate osteoarthritic changes. See pages 114-119 of the transcript.

Plaintiff was hospitalized by Dr. James S. Seebass, an osteopath, for a few days in August 1977, because of a back strain. Dr. Seebass diagnosed acute lumbar strain, chronic lumbar myositis, degenerative joint disease of the lumbar spine, gout, and controlled essential hypertension. See page 129 of the transcript. Plaintiff was discharged in an improved condition. Dr. Seebass prescribed Valium, Empirin, and Myoflex cream. He told plaintiff to increase his activities, do exercises for his back, and lose forty pounds. See pages 133 to 134 of the transcript. Plaintiff submitted to the Appeals Council an updated report from Dr. Seebass dated April 4, 1978. Dr. Seebass noted that plaintiff had lost weight and continued to have back pain. He offered his opinion that plaintiff should be considered disabled. See page 147 of the transcript.

The record indicates that plaintiff was only 44 years old in January 1976, when he claimed he became disabled. Plaintiff has a high school education, and has worked for many years as an electrician and as a supervisor of electricians for the Public Service Company of Oklahoma. Plaintiff also worked for three years as a self-employed electrical contractor until his gunshot injury in January 1976. See pages 26 to 32 of the administrative transcript.

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. §405(g), and is not a trial de novo. Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C. §405(g); Atteberry v. Finch, supra.

Substantial evidence has been defined as:

"more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Company v. NLRB, 305 U.S. 197, 229 (1938)

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F. Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relations Board v. Columbian Enameling & Stamping Company, 306 U.S. 292, 300 (1939), the Court, interpreting what constitutes substantial evidence, stated:

"It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Cited in Atteberry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not reached pursuant to the correct legal standards. See Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F. Supp. 83 (D.S.C. 1973).

After carefully reviewing the entire administrative record, the pleadings, and the briefs and arguments of counsel, the Court finds that the administrative law judge applied the correct legal standards in making his findings on plaintiff's claim for disability insurance benefits. The Court further finds that the record contains substantial evidence to support his findings.

An individual claiming disability insurance benefits under the Act has the burden of proving the disability. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972). Plaintiff must meet two criteria under the Act:

1. That the physical impairment has lasted at least twelve months that prevents his engaging in substantial gainful activity; and
2. That he is unable to perform or engage in any substantial gainful activity. 42 U.S.C. §423; Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972); Timmerman v. Weinberger, 510 F.2d 439 (8th Cir. 1975). The burden is not on the Secretary to make an initial showing on nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969).

The medical reports establish that plaintiff only has vision in one eye as a result of his gunshot injury in January 1976. The record also establishes that the vision in plaintiff's left eye was 20/20 with the use of corrective lenses. Plaintiff's blindness in one eye does not rise to the level of a disabling impairment within the meaning of the Social Security Act. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972); Russell v. Secretary of Health, Education, and Welfare, 402 F. Supp. 613 (E.D. Mo. 1975), aff'd, 540 F.2d 353 (8th Cir. 1976).

The administrative record also establishes that plaintiff has received treatment for his back pain, the cause of which has been diagnosed as arthritis. Plaintiff failed to meet his burden of proving that his back problems were of such a severity as to prevent him from engaging in any substantial gainful activity. The Secretary's decision recognizes that plaintiff's back problem might prevent his performing heavy arduous work, but correctly notes that the evidence fails to demonstrate that plaintiff could not do his former supervisory work or other light and sedentary work. It is clear that a claimant is not disabled if he can do his former work.

Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970). In any event, because the record establishes that plaintiff can do light work, the Secretary could properly take administrative notice that light work exists in substantial numbers in the national economy. McLamore v. Weinberger, 538 F.2d 572 (4th Cir. 1976); Chavies v. Finch, 443 F.2d 356 (9th Cir. 1971). Plaintiff's controlled essential hypertension would not interfere with these capabilities. Laffoon v. Clifano, 558 F.2d 253 (5th Cir. 1977).

Plaintiff has argued that the Secretary "ignored" plaintiff's award of benefits by the Veterans Administration and a private insurance carrier, but the administrative law judge's decision on its face reflects that these awards were considered (Tr. 14). The administrative law judge properly noted that the awards were not consistent with the medical evidence. The Secretary's regulations specifically provide that the decisions of other agencies that an individual is or is not disabled shall not be determinative of the disability issue under the Social Security Act, because different program concepts, definitions and criteria are involved. 20 C.F.R. §404.1525; Mandrell v. Weinberger, 511 F.2d 1102 (10th Cir. 1975).

Because the findings of the administrative law judge are supported by substantial evidence and because said findings are based upon the correct legal standards, it is the determination of the Court that the plaintiff is in fact not entitled to continued disability benefits under the Social Security Act. Judgment is so entered on behalf of the defendant.

It is so Ordered this 5<sup>th</sup> day of July, 1979.

  
H. DALE COOK  
United States District Judge

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

LARRY R. WELLS,

Plaintiff

vs.

JOSEPH A. CALIFANO, JR.,  
Secretary of Health, Education,  
and Welfare

Defendant

CIVIL ACTION NO. 78-C-402-C

**FILED**

JUL 5 1979

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

JUDGMENT

This matter comes in for consideration for the Findings and Recommendations of the Magistrate. For the reasons stated herein, the Court finds that the Findings and Recommendations of the Magistrate should be accepted and affirmed.

Plaintiff in this action has petitioned the Court to review a final decision of the Secretary of the Department of Health, Education, and Welfare denying him continued disability benefits and supplemental security income after his disability ceased in November 1977, as provided for in Sections 216 and 223 of the Social Security Act, as amended, 42 U.S.C. §§416, 423. He asks that the Court reverse this decision and award him the additional benefits he seeks.

The termination of plaintiff's benefits was first heard by an administrative law judge of the Bureau of Hearings and Appeals of the Social Security Administration, whose written decision was issued May 26, 1978. The administrative law judge found that plaintiff was not entitled to continued disability benefits and supplemental security income because he was no longer disabled after November 1977, under Sections 216 and 223 of the Social Security Act, as amended. Thereafter, that decision was appealed to the Appeals Council of the Bureau of Hearings and Appeals, which Council on June 30, 1978, issued its findings that the decision of the administrative law judge was correct and that further action by the Council would not result in any change which would benefit the plaintiff. Thus, the decision of the administrative law judge became the final decision of the Secretary of the Department of Health, Education, and Welfare.

There appears to be no dispute about plaintiff's disability from January 1976, when he underwent knee surgery, to November 1977, when the Secretary determined plaintiff regained the capacity to work. The Secretary contends that there is substantial evidence of record to support his decision that by November 1977, plaintiff's condition had improved enough to permit his return to work. Plaintiff, on the other hand, argues in his complaint that he continued to be disabled after the cessation date found by the Secretary.

The administrative transcript includes medical records of treatment for plaintiff's right knee starting in January 1976. Apparently, plaintiff had noticed a loose knot in his knee a few months before, but did not see a doctor for the problem until January 5, 1976, when the knee became locked and he lost full use of it. See pages 107 and 115 of the transcript.

Surgery on the right knee for the removal of the loose body and patella tendon transfer was performed on January 10, 1976. See pages 108-113. On June 29, 1976, plaintiff had surgery on the left knee, and was discharged two days later in an improved condition and ambulatory on crutches. See page 114 of the transcript. The follow-up notes from plaintiff's treating physician, Dr. Mauerman, indicated that plaintiff was recuperating well from the surgical procedures. See pages 163-165. In fact, by January 3, 1977, one year after his surgery, Dr. Mauerman released plaintiff for light work with no prolonged standing, walking or climbing. The doctor advised plaintiff to lose 40-60 pounds, and described plaintiff's discomfort as only mild. See page 165 of the transcript.

Based on this information, the administrative law judge who first considered plaintiff's claim awarded him disability benefits and noted that plaintiff was engaging in a trial work period. The judge recommended that plaintiff's status be reevaluated in six months to determine whether he had regained the capacity for work. See pages 68 and 69 of the administrative transcript.

When plaintiff's status was reevaluated, it was determined that by November 1977, his disability had ceased and he was capable of performing sedentary work.

The medical evidence supporting the Secretary's termination of benefits includes the November 1977 reports from plaintiff's

treating physician, Dr. Mauerman. The doctor could find no effusion of patello-femoral crepitus, and plaintiff has pretty good quadriceps function. An arthrogram showed no definite pathology, and no surgery was felt necessary. Plaintiff was placed on a program of exercises, aspirin, and weight reduction. See pages 163-164 of the record.

The Secretary's decision is also supported by the results of the examinations performed by Dr. Rounsaville in October 1977, and by Dr. Joseph in February 1978. Dr. Rounsaville concluded that plaintiff was only precluded from performing duties that would require walking up and down stairs and squatting. See pages 172-173. Dr. Joseph agreed, finding that plaintiff's problems were minimal, and only interfered with his ability to do manual labor requiring heavy lifting, straining, climbing stairs, and being on his knees over a prolonged period of time. See pages 174-175.

The record also indicates that plaintiff felt his poor vision contributed to his alleged disability. An ophthalmological examination in October 1977, by Dr. Schoeffler failed to substantiate plaintiff's claim. In fact, plaintiff's corrected vision was 20/40 in the right eye and 20/25 in the left eye. See pages 167-171 of the transcript.

Dr. M. W. Gordon, a psychologist, testified at the administrative hearing about plaintiff's vocational potential. See pages 54-64. Dr. Gordon testified that there were many sedentary jobs that were within plaintiff's vocational capabilities and which did not require heavy lifting, bending, stooping, or standing for prolonged periods of time. These jobs included work as a telephone operator, telephone solicitor, motel clerk, self-service attendant; these jobs all existed in substantial numbers in the area of plaintiff's residence and in the national economy.

The record indicates that plaintiff was only 33 years old in November 1977, when the Secretary determined plaintiff's disability ceased and he regained the capacity to perform sedentary work. Plaintiff has an eighth grade education and has worked as a warehouseman, as a construction laborer, and in a feed mill. Plaintiff also testified that at the time of the hearing, he owned an answering service, where he employs three people, does the billing, and takes care of the messages in the evenings. See pages 36-38 and 49-50 of the hearing transcript.

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. §405(g), and is not a trial de novo. Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1970); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C. §405(g); Atteberry v. Finch, supra.

Substantial evidence has been defined as:

"more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Company v. NLRB, 305 U.S. 197, 229 (1938)

It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F. Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relations Board v. Columbian Enameling & Stamping Company, 306 U.S. 292, 300 (1939), the Court, interpreting what constitutes substantial evidence, stated:

"It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Cited in Atteberry v. Finch, supra; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Celebrezze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957). However, even though the findings of the Secretary are supported by substantial evidence, a reviewing court may set aside the decision if it was not reached pursuant to the correct legal standards. See Knox v. Finch, 427 F.2d 919 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Branham v. Gardner, 383 F.2d 614 (6th Cir. 1967); Garrett v. Richardson, 363 F. Supp. 83 (D.S.C. 1973).

After carefully reviewing the entire administrative record, the pleadings, and the briefs and arguments of counsel, the Court finds that the administrative law judge applied the correct legal standards in making his findings on plaintiff's claim for disability insurance benefits. The Court further finds that the record contains substantial evidence to support his findings.

An individual claiming disability insurance benefits under the Act has the burden of proving the disability. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972). Plaintiff must meet two criteria under the Act:

1. That the physical impairment has lasted at least twelve months that prevents his engaging in substantial gainful activity; and
2. That he is unable to perform or engage in any substantial gainful activity. 42 U.S.C. §423; Alexander v. Richardson, 451 F.2d 1185 (10th Cir. 1971), cert. denied, 407 U.S. 911 (1972); Timmerman v. Weinberger, 510 F.2d 439 (8th Cir. 1975). The burden is not on the Secretary to make an initial showing on nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969).

The medical reports reveal that plaintiff does have problems with his knees, but the record clearly demonstrates that after November 1977, his problems were no longer the requisite severity to entitle plaintiff to continued disability benefits. The doctors agree that plaintiff should not do heavy manual labor, but his low back problem does not prevent his performing lighter, sedentary activities. That plaintiff's problems prevent his performing heavy arduous work is of no moment, because the Social Security Act requires an inability to engage in any substantial gainful activity, Keller v. Mathews, 543 F.2d 624 (8th Cir. 1976); Waters v. Gardner, 452 F.2d 855 (9th Cir. 1971). As attested to by the vocational expert, many light and sedentary jobs exist that are within plaintiff's vocational capabilities. Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970). Plaintiff's slightly less than perfect corrected vision would not interfere with these capabilities. Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972).

The Court notes that both plaintiff's very young age and his demonstrated ability to own and operate an answering service also weigh against his claim that he continued to be disabled after November 1977. See McLamore v. Weinberger, 538 F.2d 572 (4th Cir. 1976); Hedge v. Richardson, 458 F.2d 1065 (10th Cir. 1972); Everitt v. Weinberger, 399 F. Supp. 35 (D. Kan. 1975).

Because the findings of the Administrative Law Judge are supported by substantial evidence and because said findings are based upon the correct legal standards, it is the determination of the Court that the plaintiff is in fact not entitled to continued disability benefits under the Social Security Act. Judgment is so entered on behalf of the defendant.

It is so Ordered this 5<sup>th</sup> day of July, 1979.

  
H. DALE COOK  
United States District Judge

FILED

JUL - 5 1979

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

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

DONALD L. LUNDY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 JOSEPH TUDOR ROBBINS; )  
 HERTZ RENT-A-CAR, a )  
 Foreign Corporation; and )  
 CROUSE-HINDS, INC., a )  
 Foreign Corporation, )  
 )  
 Defendants. )

No. 78-C-524-B

ORDER OF DISMISSAL

Now, on this 5 day of June, 1979, the above-  
 styled and numbered cause of action coming on for hearing  
 before the undersigned Judge, upon the Application For Order  
 of Dismissal of the Plaintiff and Defendants herein; and the  
 Court having examined the pleadings and said Application and  
 being well and fully advised in the premises, is of the  
 opinion that said cause should be dismissed with prejudice.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED  
 by the Court that the above-styled and numbered cause be,  
 and the same is hereby dismissed with prejudice.

*[Handwritten Signature]*  
 \_\_\_\_\_  
 UNITED STATES DISTRICT JUDGE

APPROVED:

*[Handwritten Signature]*  
 \_\_\_\_\_  
 BERT M. JONES, Attorney for Defendant

*[Handwritten Signature]*  
 \_\_\_\_\_  
 JOHN J. TANNER, Attorney for Plaintiff

14

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

NORTH AMERICAN BAIT FARMS, INC., )  
 )  
 ) Plaintiff, )  
 )  
 ) -vs- )  
 )  
 ) GAYLORD SHIPLEY, d/b/a CHEROKEE )  
 ) STRIP WORM RANCH, )  
 )  
 ) Defendant. )  
 )  
 ) -vs- )  
 )  
 ) RONALD E. GADDIE, JOHN F. BURKE, )  
 ) EDWARD HAGER and BARBARA HICKOX, )  
 )  
 ) Cross-Claim )  
 ) Defendants. )

**FILED**

JUL 5 1979

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

No. 78-C-215-*BC*

O R D E R.

The Court has for consideration the Motions to Dismiss on behalf of Cross-Claim Defendants Edward Hager and Barbara Hickox together with the Defendant's Motion for Default Judgment as to Cross-Claim Defendant John F. Burke and has carefully reviewed the entire file, the briefs, the cited authorities and all of the recommendations concerning said Motions, and being fully advised in the premises, finds:

That the Defendant-Cross-Claimant's Motion for Default Judgment with regard to Cross-Claim Defendant John F. Burke should be overruled and that the Motions to Dismiss filed on behalf of Cross-Claim Defendants Edward Hager and Barbara Hickox should be granted for the reasons stated below:

In Defendant's Motion for Default Judgment against Cross-Claim Defendant John F. Burke, Defendant refers to the Marshal's Return of Service which provides that service was had upon a "Shella Burke, wife" at the address of 5841

Huntley Avenue, Garden Grove, California. The Response filed herein on behalf of the Cross-Claim Defendant John F. Burke indicates that he has never been served and that he does not now and has not in the past ever resided at the address shown on the Marshal's Return, 5841 Huntley Avenue, Garden Grove, California. The Court notes specifically that no counter-affidavits have been filed on behalf of the Defendant, and accordingly, it would appear that although service was had upon a Shella Burke, it would not appear that such is the wife of the Cross-Claim Defendant John F. Burke and that, accordingly, Defendant's Motion for Default Judgment should be denied.

The Cross-Claim Defendants Edward Hager and Barbara Hickox allege in their Motions to Dismiss and Briefs that the allegations of the Defendant in his Counterclaim do not allege sufficient facts to bring Cross-Claim Defendants Hager and Hickox under the jurisdiction of this Court. These Cross-Claim Defendants allege that this suit was originally commenced by the Plaintiff to collect a certain indebtedness from the Defendant and that the Defendant has improperly attempted to include these Cross-Claim Defendants herein. The Cross-Claim Defendants urge that jurisdiction of this Court can be invoked only under Rule 4(f) of the Federal Rules of Civil Procedure or under the Oklahoma Long Arm Statute. The provisions of Rule 4(f) specifically provide that persons brought in as additional parties must be served within 100 miles from the place in which the action is commenced.

In American Carpet Mills, Inc. v. Bartow Industrial Development Corporation, 42 F.R.D. 1 (N.D. Ga., 1967), the Court specifically dealt with the question of whether Rule 4(f) deals with service upon cross-claim defendants

such as are involved in this cause of action. The Court concluded that inasmuch as the purported service of process on the cross-claim defendants in that action occurred at a distance of greater than 100 miles from the place where the action was commenced, the service was invalid and the cross-claim defendants' Motion to Dismiss was granted.

It is not clear to the Court whether Defendant intends in his Counterclaim to invoke the Oklahoma Long Arm Statute and to establish a jurisdiction of this Court by such means. A hearing was held before this Court on November 20, 1978, and counsel for Defendant indicated to the Court that such was his intention and that an Amended Counterclaim would be filed within thirty days to clarify this question for the Court. Accordingly, the Recommendation of the Magistrate was not filed pending the subsequent filing of the Amended Counterclaim so as to clarify the issue involving Oklahoma's Long Arm Statute. Inasmuch as the Amended Counterclaim has not been filed, the Court still feels that the allegations of the existing Counterclaim are insufficient to invoke the Oklahoma Long Arm Statute and that the Motions to Dismiss should be granted.

The Oklahoma Long Arm Statute, 12 O.S. § 187 (a), has been interpreted on numerous occasions in this jurisdiction. In order to invoke the so-called "Long Arm Statute," it must be shown that the defendant had certain "minimum contacts" with the forum state. Where the Long Arm Statute is relied upon to confer jurisdiction on the Court, as is apparently the allegation here, the Complaint (or Cross-Claim) must affirmatively allege that the defendant has committed some act or transacted business within the state which, in either case, would constitute a sufficient contact with the forum

state to subject the non-resident defendant to personal jurisdiction. See Garrett v. Levitz Furniture Corporation, 356 F.Supp. 283 (N.D. Okla. 1973); Keckler v. Brookwood Country Club, 248 F.Supp. 645 (N.D. Ill., 1965); Bartholomeo v. Parent, 71 F.R.D. 86 (E.D. N.Y., 1976); Nigro v. Eagle Star Insurance Company, 216 F.Supp. 205 (E.D. La., 1963).

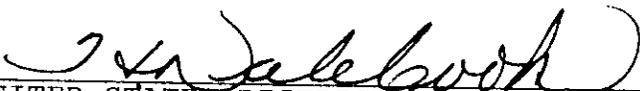
The Affidavits of Cross-Claim Defendants Edward Hager and Barbara Hickox filed in this matter indicate that such Cross-Claim Defendants do not reside within the state and that they do not transact business here. The Cross-Claim Defendant Edward Hager alleges that he has never been in the State of Oklahoma for any reason whatsoever, and the Cross-Claim Defendant Barbara Hickox alleges in her Affidavit that she has been here only on one occasion for a limited transaction. The Court notes that no counter-affidavits have been filed herein on behalf of the Defendant. Under the facts as set forth by virtue of the Affidavits of Cross-Claim Defendants Edward Hager and Barbara Hickox, the Court finds that there have not been sufficient business transactions to constitute "minimum contacts," in accordance with the Oklahoma Long Arm Statute. Two cases which are helpful to the Court with regard to the necessary activity and conduct to constitute "minimum contacts" under the Oklahoma Long Arm Statute are Vacu-Maid, Inc. v. Covington, 530 P.2d 137 (Okla., 1974) and Oklahoma Publishing Company v. National Sportsman's Club, Inc., 323 F.Supp. 929 (W.D. Okla. 1971). Both cases deal with factual situations wherein representatives of defendants against whom personal jurisdiction was sought had come within the State of Oklahoma for a limited purpose. In both instances the Courts determined that the mere fact that such persons traveled within the State of Oklahoma for the limited purpose was insufficient to constitute the necessary "minimum contacts" to invoke

in personam jurisdiction pursuant to the Oklahoma Long Arm Statute.

The Court further finds that the bases of the allegations of Defendants' Counterclaim appear to be violations of the Securities Act of 1933 and the Securities Exchange Act of 1934, 15 U.S.C. §77-v(a) and 15 U.S.C. §78-j. The provisions of such Acts (15 U.S.C. §77-v and 15 U.S.C. §78-aa) provide that the actions to enforce such provisions may be brought in the district wherein any act constituting the violation occurred as well as in the district wherein the defendant may be found, is an inhabitant, or transacts business. Under the allegations presently contained in Defendant's Counterclaim, it would appear that such service on the Cross-Claim Defendants could be properly had in the United States District Court, Central District of California, wherein the Plaintiff's offices are located in Ontario, California, and wherein the Cross-Claim Defendants live and work. Whether or not such Cross-Claim Defendants could properly be served in this district is not ascertainable from the allegations in the Defendant's Counterclaim for the reason that it is not clear that the actions complained of and alleged to be violations of the Securities Acts occurred within this district. In the absence of such allegations, the alleged violations of the Securities Acts would not invoke jurisdiction of the Counterclaim on this Court. Beckman v. Ernst & Ernst, CCH Fed. Sec. L. Rep. ¶91,462 (S.D. N.Y. 1964).

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Defendant-Cross-Claimant's Motion for Default Judgment with regard to Cross-Claim Defendant John F. Burke is overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that  
Motions to Dismiss filed on behalf of Cross-Claim Defen-  
dants Edward Hager and Barbara Hickox are granted.

  
UNITED STATES DISTRICT JUDGE

FILED

JUL - 5 1979

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

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

HAZEL IRENE LUNDY, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 JOSEPH TUDOR ROBBINS; )  
 HERTZ RENT-A-CAR, a )  
 Foreign Corporation; and )  
 CROUSE-HINDS, INC., a )  
 Foreign Corporation, )  
 )  
 Defendants. )

No. 78-C-525-B

ORDER OF DISMISSAL

Now, on this 5 day of June, 1979, the above-styled and numbered cause of action coming on for hearing before the undersigned Judge, upon the Application For Order of Dismissal of the Plaintiff and Defendants herein; and the Court having examined the pleadings and said Application and being well and fully advised in the premises, is of the opinion that said cause should be dismissed with prejudice.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the above-styled and numbered cause be, and the same is hereby dismissed with prejudice.

*Lawrence D. ...*

UNITED STATES DISTRICT JUDGE

APPROVED:

*Bert M. Jones*  
BERT M. JONES, Attorney for Defendant

*John J. Tanner*  
JOHN J. TANNER, Attorney for Plaintiff

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

FILED

DELORES C. WALTON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SEISMOGRAPH SERVICE CORPORATION, )  
 )  
 Defendant. )

JUL 5 1979

Jack C. Silver, Clerk  
S. DISTRICT COURT

No. 79-C-147-D

ORDER OF DISMISSAL

NOW, on this 5 day of ~~June~~ <sup>July</sup>, 1979, the Court has for <sup>710</sup>  
its consideration the Stipulation for Dismissal jointly filed  
in the above-styled and numbered cause by plaintiff and defen-  
dant. Based upon the representations and requests of the par-  
ties as set forth in the foregoing Stipulation, it is

ORDERED that plaintiff's Complaint and claims for relief  
against the defendant Seismograph Service Corporation be and  
the same are hereby dismissed with prejudice.

FRED DAUGHERTY

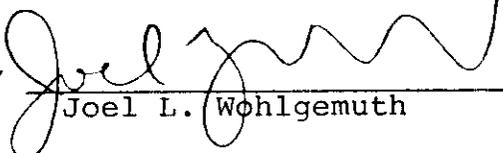
UNITED STATES DISTRICT JUDGE

APPROVED:

  
George B. Suppes, Jr.

Attorney for the Plaintiff,  
Delores C. Walton

PRICHARD, NORMAN & WOHLGEMUTH

By   
Joel L. Wohlgemuth

Attorneys for the Defendant,  
Seismograph Service Corporation





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

RURAL WATER DISTRICT #3,  
Washington County, Oklahoma,

Plaintiff,

v.

OWASSO UTILITIES AUTHORITY, ITS  
BOARD OF TRUSTEES, Consisting  
of JERRALD HOLT, Chairman,  
BILL WILLIAMS, Vice-Chairman,  
BOYD SPENCER, Secretary and  
V.D. DUNCAN, Treasurer,

Defendants,

and

FARMER'S HOME ADMINISTRATION,  
United States Department of  
Agriculture, United States of  
America,

Defendant.

No. 77-C-99-D

**FILED**

JUL 3 1979

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

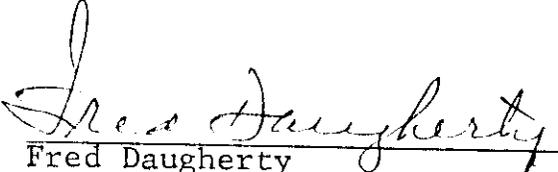
JUDGMENT

Based on the Order filed simultaneously this date,

IT IS ORDERED that Judgment be entered in favor of the Plaintiff, Rural Water District #3, Washington County, Oklahoma, and the Defendant, Farmer's Home Administration, and against the Defendants, Owasso Utilities Authority, its Board of Trustees, consisting of Jerrald Holt, Chariman; Bill Williams, Vice-Chairman; Boyd Spencer, Secretary, and V. D. Duncan, Treasurer, enjoining said Defendants, their agents, servants and employees, or anyone acting under their direction, from any additional or further expansion of its services within the geographical confines of the territory of Plaintiff, but

permitting the Owasso Utility Authority to continue to serve the 223 homes which it is presently serving within the territory of the Plaintiff.

ENTERED this 30 day of June, 1979.

  
Fred Daugherty  
United States District Judge

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

TEDDY LEO NOLAND, )  
 )  
 ) Petitioner, )  
 )  
 v. )  
 )  
 ) MACK H. ALFORD, Warden, et al., )  
 )  
 ) Respondents. )

No. 79-C-65-D

FILED

JUL 3 1979

O R D E R

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

This is a proceeding for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a State petitioner incarcerated at the Correctional Center, Stringtown, Oklahoma, by virtue of the judgment and sentence of the District Court of Nowata County, Oklahoma, in Case No. CRF-75-7. Therein, after a trial by a jury, the petitioner was found guilty of murder in the second degree and he was sentenced to an indeterminate period of from ten years to life imprisonment. The conviction was affirmed by the Oklahoma Court of Criminal Appeals. Noland v. State, Okl. Cr., 550 P.2d 958 (1976).

A prior petition for writ of habeas corpus in this Court, Case No. 76-C-575, was denied without prejudice for failure to exhaust State remedies. Thereafter, petitioner filed an application for post-conviction relief in the District Court of Nowata County, and after evidentiary hearing the application was denied. An appeal was filed, Case No. PC-78-390, to the Oklahoma Court of Criminal Appeals and the denial was affirmed. State remedies have now been exhausted on the issue presented herein.

Petitioner alleges that his detention is unlawful on the ground that his retained counsel was incompetent in that at trial said counsel failed to call alibi witnesses who were present in court under subpoena, counsel failed to make an opening statement or closing argument on petitioner's

behalf, counsel prevented the petitioner from taking the witness stand in his own behalf to deny his involvement in the alleged crime, and counsel was intoxicated during the trial.

From the Court's examination of the petition, response, traverse, transcripts and record of the state preliminary hearing, trial and post-conviction proceedings, and being fully advised in the premises, the Court finds:

Petitioner's dissatisfaction with counsel comes some considerable time after sentence was imposed. In fact, counsel had represented the petitioner four or five years prior to the present offense on a drunk-driving charge, and in the instant case counsel was retained by petitioner and his wife not only as trial counsel, but thereafter for appeal from the conviction. For the first time, after the appellate court affirmed the conviction, did petitioner contend that his counsel was intoxicated and ineffective during the trial.

As was said in Gillihan v. Rodriguez, 551 F.2d 1182, 1187, (Tenth Cir. 1977) cert. denied 434 U.S. 845 (1977):

"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.' Tapia v. Rodriguez, 446 F.2d 410, 416 (10th Cir. 1971), quoting from Ellis v. Oklahoma, 430 F.2d 1352, 1356 (10th Cir. 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1260, 28 L.Ed.2d 546 (1972). Accord, Lorraine v. United States, 444 F.2d 1 (10th Cir. 1971) (per curiam). This circuit adheres to the well established principle 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. Ellis v. Oklahoma, 430 F.2d 1352, 1356 (10th Cir. 1970), cert. denied, 401 U.S. 1010, 91 S.Ct. 1260, 28 L.Ed.2d 546 (1971). Accord, United States v. Coppola, 476 F.2d 882, 887 (10th Cir. 1973), cert. denied, 415 U.S. 948, 94 S.Ct. 1469, 39 L.Ed.2d 563 (1974); Johnson v. United States, 485 F.2d 240, 241-42 (10th Cir. 1973); Tapia v. Rodriguez, 446 F.2d 410,

416 (10th Cir. 1971); United States v. Davis, 436 F.2d 679, 681 (10th Cir. 1971); Linebarger v. Oklahoma, 404 F.2d 1091, 1095 (10th Cir. 1968), cert. denied 394 U.S. 938, 89 S.Ct. 1218, 22 L.Ed.2d 470 (1969); Goforth v. United States, 314 F.2d 868, 871 (10th Cir.), cert. denied 374 U.S. 812, 83 S.Ct. 1703, 10 L.Ed.2d 1035 (1963)."

Petitioner testified at the post-conviction evidentiary hearing in the District Court of Nowata County that he believed his defense counsel had been drinking during the trial because "I could smell it on his breath." (Tr. 8 and 17). Further, Petitioner testified that his counsel offered him (petitioner) a drink but never did get him one. (Tr. 8 and 17). Petitioner admitted that he did not see his counsel consume any alcohol (Tr. 18) and further stated "Well, he wasn't stumbling falling down drunk, but he was drinking." He further stated ". . . , he had a little bit of reddening in his eyes, and his words started -- a time or two after we would come back off a break his words would start slurring a little." (Tr. 17-18). Petitioner testified that his attorney's condition got progressively worse as the day wore on. (Tr. 24). In regard to the length of the trial, Petitioner testified, "I can't really remember. I think the actual trial, after we got into it. I believe it lasted just one day. After we got into the trial part of it." (Tr. 9) and further, "The length of the actual trial, they done all of it in one day. . . ." (Tr. 20).

The State called as a witness the man who at the time of the trial was Sheriff of Nowata County. He testified that he had been present in the courtroom during the trial and that he had talked with petitioner's counsel and in his opinion said counsel was not intoxicated. (Tr. 34). Further, the witness stated that from his observation he did not feel the defense attorney was under the influence of alcohol, but that the attorney could have been without the witness observing it. (Tr. 35). The witness testified that the man with

the defense counsel, an attorney or former attorney who did some research work, "appeared to be intoxicated." (Tr. 35). The witness testified that he had met the defense counsel on several occasions during the day of the trial in the district attorney's office and courtroom and did not see the defense counsel drinking or smell anything on his breath. (Tr. 36).

There were also six witnesses who testified at the evidentiary hearing on the post-conviction proceeding that they were present at trial standing ready to testify for the defense and that they were never called. Five testified that they were present at the trial under subpoena of the defense. One was present, but not under subpoena, and this witness testified he had never "met" the defense counsel. One other witness stated that he had not discussed his possible testimony with the defense counsel, but the other four testified they had discussed their testimony with defense counsel, and two of the witnesses had given testimony at the preliminary hearing. (Tr. 25-32). Counsel for petitioner at the State evidentiary hearing stated in part, "For the record, I know the trial transcript reflects no witnesses called on behalf of the defendant at the jury trial. None testified. What these witnesses would testify in the trial court is immaterial here. We simply want to show that they were available to testify on behalf of the defendant, but were not called." (Tr. 32).

As requested by petitioner in his traverse, this Court has before it the transcript of the preliminary hearing on these charges in the state court. The theory of an alibi is that the fact of presence elsewhere is essentially inconsistent with presence at the time and place alleged, and therefore inconsistent with personal participation in the act charged. There is no such convincing evidence found from the testimony of the defense witnesses at the preliminary hearing as to require this Court in habeas corpus to conclude

that defense counsel's representation was incompetent. Rather it appears clear that counsel's decision not to go forward with such evidence was based on his professional judgment that the state had failed to present evidence which would overcome a reasonable doubt of guilt by the jury.

The trial transcript has been carefully reviewed with the above testimony of petitioner in mind, and his contentions are belied by the record.

April 1, 1975, was the first day of trial and the morning was spent on defense counsel's motion to disqualify the entire jury panel with two witnesses called and interrogated at length on the motion. The motion was overruled and court recessed for lunch. Court reconvened at 1:30 p.m., the entire panel was sounded and jury selection commenced. Because of the seriousness of the offense of murder in the second degree charged against petitioner, counsel was permitted to conduct voir dire. Petitioner's attorney actively participated by objections to questions of the prosecutor and detailed interrogation of the prospective jurors. The jury was passed for cause and prior to the exercise of peremptory challenges a "short recess" was had (Tr. 65) after which voir dire continued and defense counsel actively participated in questioning the prospective jurors, waived his fourth and fifth peremptory challenges and the jury was sworn and excused until the next day. (Tr. 88).

Court reconvened at 9:50 a.m. Wednesday, April 2, 1975, and defense counsel moved for a mistrial on grounds that some two to seven of the thirteen jurors had not been sworn prior to voir dire, which motion was overruled. The State made its opening statement, the defense reserved opening statement, and the State presented two witnesses prior to noon recess. The Court reconvened at 1:15 p.m. (Tr. 151). Two witnesses testified and a "short recess" was had. (Tr. 199). One more witness was called by the State, and a prior

witness was recalled, the State rested, and the jury was excused until the next day. (Tr. 223). Thereupon, defense counsel demurred to the evidence and moved for a directed verdict and for dismissal of the charges, which motion and demurrer were denied. (Tr. 223). As clearly appears from the transcript, defense counsel closely followed the testimony during the State's case-in-chief, interposed objections and conducted extensive cross-examination.

Court reconvened at 9:00 a.m. Thursday, April 3, 1975, and defense counsel at that time waived opening statement and rested without presenting any evidence. A recess was had to permit the court to prepare instructions during which time in chambers counsel's requested instruction was refused by the court, and said counsel objected to instruction number four to be given by the Court. Open Court was reconvened at 10:55 a.m., the instructions were read to the jury, and the State made closing argument to which defense counsel interposed objection on five occasions, one of which required argument outside the hearing of the jury. Defense counsel then waived closing argument and court was recessed for the noon hour and reconvened at 2:00 p.m. The jury started deliberations at 2:05 p.m., and returned a verdict of guilty at 4:50 p.m. Defendant's bond as previously set at \$20,000 was continued. On April 28, 1975, sentence was imposed, defense counsel's motion for new trial was overruled, appeal bond was set at \$25,000, and defense counsel filed notice of appeal and designation of record.

Clearly, the jury's verdict was based on circumstantial evidence from the testimony of the five state witnesses, and inferences to be drawn therefrom. However, the record shows active, diligent and extensive participation by defense counsel. The trial was clearly not a farce, a mockery of justice, or shocking to the conscience of the court, and further the representation by defense counsel was not per-

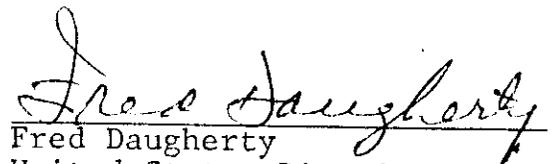
functory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation.

Trial techniques and the witnesses to be used or not used in a trial are a matter for trial counsel to determine by the exercise of professional judgment. Grant v. State of Oklahoma, 382 F.2d 270 (Tenth Cir. 1967); Bozel v. Hudspeth, 126 F.2d 585 (Tenth Cir. 1942). The alleged mistakes in trial tactics and somewhat careless preparation, even if proved, clearly did not reduce the trial to a mockery of justice. Linebarger v. State of Oklahoma, 404 F.2d 1092 (Tenth Cir. 1968) cert. denied 394 U.S. 938 (1969); 26 A.L.R.Fed. 218.

In reviewing the State transcripts, the specific grounds urged by the petitioner have been considered and they do not support under the circumstances before the Court a finding of ineffective assistance of counsel for any of the reasons asserted by petitioner. Where the transcript of the State trial refutes petitioner's claim that he was denied effective counsel, federal plenary hearing in habeas corpus proceeding is not required. Edwards v. Wainwright, 461 F.2d 238 (Fifth Cir. 1972).

The petition for writ of habeas corpus of Teddy Leo Noland is without merit and should be denied and the case dismissed.

IT IS SO ORDERED this 30 day of June, 1979.

  
Fred Daugherty  
United States District Judge

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AMOS C. PERKINS and BETTY LOU  
PERKINS, a/k/a, LOUISE B. PERKINS,  
a/k/a, BETTY L. PERKINS, a/k/a,  
LOUISE BETTY L. PERKINS, a/k/a,  
BETTY JOHNSON, husband and wife;  
and FIRST BANK OF OWASSO, a  
banking corporation,

Defendants.

CIVIL ACTION NO. 79-C-158-D

FILED

JUL 3 1979

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

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 3  
day of July, 1979, the Plaintiff appearing by Robert  
P. Santee, Assistant United States Attorney; and the Defendant,  
First Bank of Owasso, appearing by its attorney, W. W. VanDall;  
and the Defendants, Amos C. Perkins and Betty Lou Perkins, a/k/a,  
Louise B. Perkins, a/k/a, Betty L. Perkins, a/k/a, Louise Betty  
L. Perkins, a/k/a, Betty Johnson, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Amos C. Perkins and  
Betty Lou Perkins, a/k/a, Louise B. Perkins, a/k/a, Betty L.  
Perkins, a/k/a, Louise Betty L. Perkins, a/k/a, Betty Johnson,  
were served with Summons and Complaint and Amendment to Complaint  
on March 26, 1979, as appears on the United States Marshal's  
Service herein; and that First Bank of Owasso was served with  
Summons and Complaint and Amendment to Complaint on March 16,  
1979, as appears on the United States Marshal's Service herein.

It appearing that the Defendant, First Bank of Owasso,  
has duly filed its Disclaimer herein on April 30, 1979, and  
its Release and Satisfaction of Judgment herein on April 6,  
1979; and that Amos C. Perkins and Betty Lou Perkins, a/k/a,  
Louise B. Perkins, a/k/a, Betty L. Perkins, a/k/a, Louise Betty  
L. Perkins, a/k/a, Betty Johnson, 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 Mayes County, Oklahoma, within the Northern Judicial District of Oklahoma:

The West 100 Feet of Lot Numbered 1 of Kern Addition to the Town of Locust Grove, Mayes County, Oklahoma, according to the official Survey and Plat thereof, filed for record in the office of the County Clerk of said County and State.

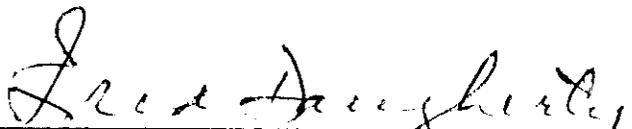
THAT the Defendants, Amos C. Perkins and Betty L. Perkins, did, on the 17th day of May, 1971, execute and deliver to the Farmers Home Administration, their mortgage and mortgage note in the sum of \$14,600.00 with 7 1/4 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Amos C. Perkins and Betty L. Perkins, 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 \$15,404.54, as unpaid principal with interest thereon at the rate of 7 1/4 percent per annum from May 25, 1979, 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, Amos C. Perkins and Betty Lou Perkins, a/k/a, Louise B. Perkins, a/k/a, Betty L. Perkins, a/k/a, Louise Betty L. Perkins, a/k/a, Betty Johnson, in personam, for the sum of \$15,404.54, with interest thereon at the rate of 7 1/2 percent per annum from May 25, 1979, 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:

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

  
ROBERT P. SANTEE  
Assistant United States Attorney



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

PROFESSIONAL DATA MANAGEMENT, )  
INC., A Corporation, )  
Plaintiff, )  
)  
vs. )  
)  
GREYHOUND COMPUTER CORPORATION, )  
A Corporation and SORBUS, INC., )  
A Corporation, )  
)  
Defendants. )

No. 76-C-615-C

**FILED**

**JUL 2 1979**

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

ORDER

THIS CAUSE coming on for consideration by the Court on the parties' written Stipulation of Dismissal with Prejudice of said cause, and the Court having reviewed the file and being fully advised in the premises, IT IS HEREBY ORDERED, that any and all claims that have been, or might have been, asserted herein by Plaintiff against the Defendant Greyhound Computer Corporation and any and all claims which have been or might have been asserted by Defendant Greyhound Computer Corporation against Plaintiff be, and they hereby are, dismissed with prejudice, each party to bear its own costs.

DATED this 2nd day of July, 1979.

H. Dale Cook  
H. DALE COOK,  
Chief Judge  
United States District Court  
Northern District of Oklahoma

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

ERNEST E. CLULOW, Jr., and  
ESTHER M. BELZ, for themselves  
and others,  
Plaintiffs,  
-v-  
STATE OF OKLAHOMA, et al,  
Defendants.

FILED

JUL 2 1979

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

No. 78-C-387-B

JUDGEMENT

The Defendant, Kenneth Spears, having failed to plead or otherwise defend in this action and his default having been entered,

NOW, upon Application of the Plaintiff and upon affidavit that the Defendant is indebted to the Plaintiff in the sum of \$100,000.00, that the Defendant has been defaulted for failure to appear, and that the Defendant is not an infant or incompetent person, it is hereby

ORDERED, ADJUDGED, AND DECREED that the Plaintiff recover of Defendant the sum of \$100,000.00 with interest at the rate of 10% per annum, from the 2nd day of July, 1979, and costs in the sum of .35¢.



Jack Silver  
Clerk, U.S. District Court  
Northern District of Oklahoma

NOTE: THIS ORDER IS TO BE MAILED  
BY ATTORNEY OR COUNSEL AND  
FILED WITHIN 10 DAYS IMMEDIATELY  
UPON RECEIPT.