

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

**FILED**

LARRY DON ROSE, )  
 )  
 Plaintiff, )  
 )  
 vs )  
 )  
 CHEMICAL EXPRESS CARRIERS, )  
 INC., )  
 )  
 Defendant, )  
 )  
 and )  
 )  
 TRANSPORTATION EMPLOYEES )  
 ASSOCIATION, affiliated )  
 with District 2, MEBA, )  
 AFL-CIO, )  
 )  
 Necessary )  
 Party. )

AUG 31 1979

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

Case No. 76-C-46-C

ORDER OF DISMISSAL

This matter came on for consideration on this 31st day of August, 1979, upon the Joint Application for Dismissal With Prejudice filed herein. The Court being duly advised in the premises, finds that said application for dismissal is in the best interest of justice and should be approved and the above styled and numbered cause of action dismissed with prejudice to a refiling.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the Joint Application for Dismissal With Prejudice by the parties be and the same is hereby approved and the above styled and numbered cause of action and Complaint is dismissed with prejudice to a refiling.

131 H. Dale Cook  
H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT JUDGE FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

APPROVED:

Darrell L. Bolton  
Darrell L. Bolton  
Attorney for Plaintiff

Donald Church  
Donald Church  
Attorney for Chemical Express  
Carriers, Inc.

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

FILED

AUG 31 1979

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

LIBERTY MUTUAL INSURANCE COMPANY, )  
a Corporation )  
 )  
Plaintiff )  
 )  
vs. )  
 )  
WILLIAM W. McCLURE, JR., and THOMAS )  
BURTON )  
 )  
Defendants )

No. 77-C-97-B

ORDER

Now on this 31st day of August, 1979, the court having considered the application of the plaintiff, Liberty Mutual Insurance Company, for permission to dismiss the declaratory judgment suit filed herein, and the court being fully advised in the premises, finds that the same should be sustained and the said declaratory judgment action is hereby dismissed.

*W. S. Lebock*

\_\_\_\_\_  
Judge

APPROVED AS TO FORM:

*[Signature]*  
Attorney for Plaintiff Liberty Mutual Insurance Company

*John S. Atherton*  
Attorney for Defendant William W. McClure, Jr.

*[Signature]*  
Attorney for Defendant Thomas Burton

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 FIRST NATIONAL BANK OF CHELSEA, )  
 OKLAHOMA, a Corporation, GEORGE A. )  
 HORMEL AND COMPANY, a Corporation, )  
 and W. A. MAXSON, )  
 )  
 Defendants. )

CIVIL ACTION NO. 79-C-170-C

**FILED**

AUG 31 1979

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

O R D E R

NOW, on this 31st day of August, 1979, there  
came on for consideration the Stipulation of Dismissal entered  
into by and between the United States of America, Plaintiff,  
and George A. Hormel and Company, a Corporation, Defendant.  
Based on such Stipulation,

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that  
this action as to George A. Hormel and Company, a Corporation,  
only, be and the same is hereby dismissed, with prejudice.

J. S. H. Davis Cook  
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 LOUIS TARVER and VERNITA TARVER, )  
 husband and wife; COUNTY TREASURER, )  
 Tulsa County, Oklahoma; BOARD OF )  
 COUNTY COMMISSIONERS, Tulsa County, )  
 Oklahoma; and FIRST CROWN FINANCIAL )  
 CORPORATION, a Missouri Corpora- )  
 tion, )  
 )  
 Defendants. )

CIVIL ACTION NO. 79-C-197-C

**FILED**

AUG 31 1979

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

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 31<sup>st</sup>  
day of August 1979, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney; and the Defendant,  
County Treasurer, Tulsa County, Oklahoma appearing by its  
attorney, Deryl L. Gotcher, Jr.; Defendant, Board of County  
Commissioners, Tulsa County, Oklahoma appearing by its attorney,  
Derl L. Gotcher, Jr.; Defendant, First Crown Financial Corpora-  
tion appearing by its attorneys, Paul F. McTighe, Jr. and  
Eric E. Anderson, and Louis Tarver and Vernita Tarver appearing  
not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Louis Tarver and Vernita  
Tarver, both, were served with Summons and Complaint on April  
20, 1979, and Amendment to Complaint on April 25, 1979; that  
Defendants; County Treasurer, Tulsa County, Oklahoma and  
Board of County Commissioners, Tulsa County, Oklahoma, both,  
were served with Summons and Complaint on April 10, 1979 and  
Amendment to Complaint on April 26, 1979; and that Defendant,  
First Crown Financial Corporation was served with Summons  
and Complaint on April 25, 1979 and Amendment to Complaint on  
April 25, 1979.

It appearing that the Defendants, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma have duly filed their answers herein on April 30, 1979; that the Defendant, First Crown Financial Corporation has duly filed its answer on May 14, 1979; and that the Defendants, Louis Tarver and Vernita Tarver have failed to answer herein and that default has been entered by the Clerk of this Court.

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

Lot Thirty-nine (39), Block Three (3)  
SUBURBAN ACRES ADDITION in the City of  
Tulsa, Tulsa County, State of Oklahoma,  
according to the recorded plat thereof.

THAT the Defendants, Louis Tarver and Vernita Tarver, did, on the 26th day of September, 1975, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$10,000.00, with 8 1/2 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Louis Tarver and Vernita Tarver, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$9,950.18, as unpaid principal with interest thereon at the rate of 8 1/2 percent per annum from June 1, 1978, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Defendants, Louis Tarver and Vernita Tarver, the sum of \$                      plus interest according to law for personal property taxes for the year(s)                      and that Tulsa County should have judgment, in rem, for said amount, but that such judgment



IT IS FURTHER ORDERED ADJUDGED AND DECREED that the County of Tulsa have and recover judgment, in rem, against Defendants, Louis Tarver and Vernita Tarver, for the sum of \$ \_\_\_\_\_ as of the date of this judgment plus interest thereafter according to law for real estate taxes, and that such judgment is superior to the first mortgage lien of the Plaintiff herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendants, County Treasurer, Tulsa County, Oklahoma, Board of County Commissioners, Tulsa County, Oklahoma, and First Crown Financial Corporation.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants to satisfy Plaintiff's money judgment herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell with appraisement the real property and apply the proceeds thereof in satisfaction of Plaintiff's judgment which sale shall be subject to the tax judgment of Tulsa County, supra. 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

  
By: ROBERT P. SANTEE  
Assistant United States Attorney

  
DERYL L. GOTCHER, JR.  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and Board  
of County Commissioners,  
Tulsa County, Oklahoma

  
PAUL F. MCTIGHE, JR. & ERIC E. ANDERSON  
Attorneys for First Crown Financial  
Corp., a Missouri Corporation

**FILED**

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

AUG 31 1979

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

JERROLD KING,

Plaintiff,

vs.

STATE OF OKLAHOMA and  
LARRY STUART, DISTRICT ATTORNEY,  
OSAGE COUNTY, OKLAHOMA, and  
JAMES TOLE, DIRECTOR, OKLAHOMA  
TAX COMMISSION DIVISION OF  
ALCOHOL AND TOBACCO,

Defendants.

No. 79-C-532-D

O R D E R

Plaintiff in this case is a Samish Indian from the State of Washington, presently residing in New Mexico. On July 18, 1979, he leased certain land in Osage County, State of Oklahoma. The particular tract in question is a restricted nontaxable homestead allotment held by an Osage Indian not possessing a certificate of competency. Plaintiff, on this leased land, operated a business for the retail sale of cigarettes. These cigarettes were stamped with the applicable federal tax but were not stamped with the stamps required by the State of Oklahoma. On August 6, 1979, agents of the State of Oklahoma arrested Plaintiff and confiscated the non-stamped cigarettes, allegedly pursuant to Okla. Stat. tit. 68, § 418, dealing with the possession of unstamped tobacco products.

Plaintiff essentially seeks an order of this Court enjoining state personnel from enforcing the state laws concerning the licensing, taxation and regulation of the sale of cigarettes, and for a declaration that the State of Oklahoma does not have authority to license, tax or regulate the sale of tobacco products by Plaintiff at the location in question.

The threshold question presented by this case is whether the Court is divested of jurisdiction by the Tax Injunction Act of 1937, 28 U.S.C. § 1341, which provides:

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

This is obviously not an action brought by the United States or its instrumentalities, which are outside the bar of 28 U.S.C. § 1341, nor is this case within the exception of Moe v. Salish and Kootenai Tribes, 425 U.S. 463 (1976) so that jurisdiction could be obtained under 28 U.S.C. § 1362, which applies to Indian tribes or bands. See also Pueblo of Isleta ex rel. Lucero v. Universal Constructors, 570 F.2d 300 (10th Cir. 1978); Quinault Tribe of Indians v. Gallagher, 368 F.2d 648 (9th Cir. 1966), cert. denied, 387 U.S. 907 (1967); Donahue v. Butz, 363 F.Supp. 1316 (N.D.Calif. 1973); Solomon v. LaRose, 335 F.Supp. 715 (D.Neb. 1971); 1 Moore's Federal Practice ¶ 0.62[18.-3].

Although Plaintiff has asserted jurisdiction under the civil rights statutes, 42 U.S.C. § 1983, 28 U.S.C. § 1343(3), the bar of the Tax Injunction Act is not thereby avoided, unlike those cases where the injunction prohibition of 28 U.S.C. § 2283 is applicable. In 17 Wright & Miller § 4237, it is said:

It has been held that the Anti-Injunction Act, 28 U.S.C.A. § 2283, does not apply when a suit is brought under 42 U.S.C.A. § 1983, the civil rights statute. But a different result is required with regard to the Tax Injunction Act. Unlike the Anti-Injunction Act, it is a specific restriction on federal courts adopted long after the Civil Rights Act, and it does not have an exception for suits "expressly authorized by Act of Congress," as the Anti-Injunction Act does. On this reasoning it has been held repeatedly that the bar of the Tax Injunction Act is not avoided because plaintiff is claiming a violation of his civil rights. (Footnotes omitted.)

See, e.g., Hickmann v. Wujick, 488 F.2d 875 (2d Cir. 1973); Bland v. McHann, 463 F.2d 21, 24 (5th Cir. 1972), cert. denied 410 U.S. 966 (1973); Advertiser Co. v. Wallace, 446 F.Supp. 677 (M.D.Ala.

1978); Kistner v. Milliken, 432 F.Supp. 1001 (E.D.Mich. 1977); Kimmev v. Berkheimer, Inc., 376 F.Supp. 49 (E.D.Pa. 1974), aff'd, 511 F.2d 1394 (3d Cir. 1975).

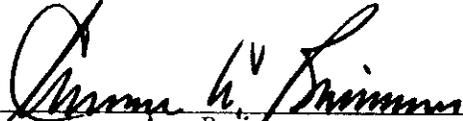
Plaintiff's request for injunctive relief is clearly barred by 28 U.S.C. § 1341. The fact that he seeks a declaratory judgment as well will not allow the Court to circumvent by that route the intent of 28 U.S.C. § 1341. Northern Natural Gas Co. v. Wilson, 340 F.Supp. 1126 (D.Kan. 1971) (three-judge court), aff'd, 405 U.S. 949 (1972); 17 Wright & Miller § 4237. The burden is upon the taxpayer to show that the state remedy is inadequate; only then is the bar of § 1341 lifted. Tully v. Griffin, Inc., supra; Sacks Brothers Loan Co. v. Cunningham, 578 F.2d 172 (7th Cir. 1978).

Title 68 Okla. Stat. §§ 201, et seq., known as the "Uniform Tax Procedure Code," provide ample remedies in this case. Direct appeal is afforded from the Oklahoma Tax Commission to the Oklahoma Supreme Court, from there, of course, the Plaintiff may seek review by the United States Supreme Court. Plaintiff has not shown that this remedy is inadequate to protect his claims.

For the foregoing reasons, this Court concludes that it is barred from exercising jurisdiction in this matter.

IT IS THEREFORE ORDERED that the Temporary Restraining Ordered entered by the Court on August 23, 1979, be and hereby is dissolved, the request for preliminary injunction and declaratory judgment denied, and this cause be and is hereby dismissed.

Dated this 31<sup>st</sup> day of August, 1979.

  
Clarence A. Brimmer  
U. S. District Judge, Presiding

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

FILED

DOROTHY DAVIS, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 JOSEPH A. CALIFANO, JR., )  
 Secretary of Health, )  
 Education, and Welfare, )  
 )  
 Defendant. )

No. 78-C-401-C

AUG 31 1979

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

JUDGMENT

The Court has for consideration the Findings and Recommendations of the Magistrate and has reviewed the file, the briefs and the 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 denying her the disability benefits provided for in Sections 216 and 223 of the Social Security Act as amended (Act). 42 U.S.C. §§ 416, 423. She asks that the Court reverse this decision and award her the benefits she seeks.

This matter 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 April 26, 1978. The Administrative Law Judge found that Plaintiff was not entitled to disability benefits under the Act because she retained the residual functional capacity to perform the light and sedentary jobs discussed by the vocational expert. Thereafter, that decision was appealed to the Appeals Council of the Bureau of Hearings and Appeals, which Council on June 21, 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 from which Plaintiff has brought this action for judicial review.

Plaintiff contends that the Secretary's decision that she was not totally disabled is incorrect; that she proved she became unable to work in July, 1975; and that her disability is attributable to problems with her back, her left leg, and her heart.

In her answer brief the Plaintiff complains about the Administrative Law Judge's conclusions that the claimant "has convinced several physicians that she has conditions which would affect her ability to engage in work," and the comment of the Administrative Law Judge that it was "apparent from the reports of the physicians that claimant misled [the Doctors] in regard to her daily activities." These conclusions of the Administrative Law Judge were based to a large extent upon the claimant's testimony at the hearing.

The Plaintiff also contends that the evidence that she presented proved that she could not be employed and that therefore the burden of proof shifted to the Secretary.

The medical evidence supporting the Secretary's decision consists of the reports from Drs. Burgtorf and Heine. Although Dr. Burgtorf found a growth or tumor on Plaintiff's left femur in February, 1977, the doctor felt Plaintiff's prognosis was good. His physical examination of Plaintiff was normal. She was described as in no acute distress, well nourished, and well developed. There was no evidence of any heart problem, and the doctor found only that Plaintiff had a lumbosacral strain. He advised her to do exercises and lose weight. See Pages 126-130 of the transcript.

Dr. Heine's orthopedic examination of Plaintiff in May, 1977, likewise failed to reveal any abnormalities of disabling severity. The doctor could find no cardiac abnormalities. The reflexes in Plaintiff's left leg were equal, and

there was no weakness in her leg. Similarly, Plaintiff's back had no muscle spasm and had a fairly good range of motion. The doctor concluded that Plaintiff "should be able to sit, stand, walk with no restrictions but is limited in her ability to bend, lift, and bear more than moderate weight within her subjective symptoms." See Pages 150-157 of the transcript.

Plaintiff's treating osteopaths, Drs. Young and Slater, offered their opinions that Plaintiff was totally disabled. These osteopaths failed, however, to submit the results of any laboratory or diagnostic tests that would support their conclusions. See Pages 166-171 of the transcript.

Vivian Evans, a vocational expert testified at the administrative hearing concerning the numerous light and sedentary jobs existing in the national economy for which Plaintiff's educational level and vocational background would qualify her. These jobs would permit Plaintiff to alternately sit and stand, and they include work as a motel/hotel clerk, cashier for a restaurant, self-service gas station attendant, self-service laundry attendant, or sales of Avon, Amway or Shockley products from the home by telephone. See Pages 60-82 of the transcript.

The administrative record indicates that Plaintiff was only 54 years old when she claimed she was disabled. She has a high school education, and has worked for twenty years as a licensed practical nurse. She also has had some work experience as a cashier. Plaintiff's testimony at the hearing indicates that her chief complaint is pain. She is able to do her housework and errands about town, and is active in church and social activities. She complained that employers would not hire her for light work because of her age.

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 Co. 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 Relas. Bd. v. Columbian Enameling & Stamping Co., 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 her engaging in substantial gainful activity; and

2. That she 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 of nondisability. Reyes Robles v. Finch, 409 F.2d 84 (10th Cir. 1969).

The medical reports indicate that Plaintiff may have a back problem, but it is not severe enough to prevent her doing light or sedentary work. Similarly, although Plaintiff apparently has a tumor or cyst in her left leg and some early morning swelling in her legs, those problems were not shown to be of disabling severity. Plaintiff has likewise failed to establish the existence of a severe, disabling heart condition.

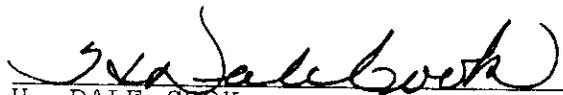
The Secretary's decision indicates that he gave careful consideration to Plaintiff's subjective complaints of pain, and resolved the issue against Plaintiff. Dvorak v. Celebrezze, 345 F.2d 894 (10th Cir. 1965). He also considered the opinions of Plaintiff's doctors that she was disabled, and accorded

greater weight to the medical opinions which were supported by clinical and laboratory test results. Janka v. Secretary of Health, Education, and Welfare, 589 F.2d 365 (8th Cir. 1978).

That Plaintiff's condition may prevent her performing the heavy lifting associated with her nursing work is not sufficient, 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). The Secretary's decision properly rejected Plaintiff's complaints about the alleged reluctance of employers to hire her because of her age, Weicht v. Weinberger, 403 F.Supp. 244 D. Md. 1975), or alleged physical problems. Sanborn v. Weinberger, 383 F.Supp. 859 (D. Del. 1974). An individual's unemployment because of employer hiring practices is not a proper basis for an award of disability benefits. 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. § 404.1502(b). The social security disability test is the inability to work at all, not the inability to find a job. Torske v. Richardson, 484 F.2d 59 (9th Cir. 1973), cert. denied, 417 U.S. 933 (1974).

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

It is so Ordered this 31<sup>st</sup> day of August, 1979.

  
H. DALE COOK  
CHIEF JUDGE

THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA

LAGLORIA OIL AND GAS COMPANY, )  
A Foreign Corporation, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
ROBERT THOMPSON and GLADYS )  
M. THOMPSON, )  
 )  
Defendants. )

**FILED**

AUG 31 1979

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

No. 79-C-56-C

J U D G M E N T

On August 1, 1979, this matter came on for pre-trial hearing before the undersigned Judge, LaGloria Oil and Gas Company appearing by its attorneys of record, Hall, Estill, Hardwick, Gable, Collingsworth & Nelson by Claire Eagan Barrett and Robert Thompson and Gladys M. Thompson appearing by their attorneys of record, Feldman, Hall, Franden, Reed & Woodard by Joseph R. Farris, and the Court, having reviewed the file and the pleadings and the matters therein, and in particular the defendants' answer to the complaint and response to requests for admissions, finds that there are no issues of triable fact and that judgment should be entered in favor of the plaintiff as a matter of law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff, LaGloria Oil and Gas Company, have and recover from the defendants, Robert Thompson and Gladys M. Thompson, the sum of One Hundred Fifty Three Thousand One Hundred Sixty Six Dollars and Fifty Eight Cents (\$153,166.58), together with interest thereon as provided by law, plus the costs of this action.

W.H. Dale Cook  
CHIEF UNITED STATES DISTRICT JUDGE

DATED: August 31, 1979

APPROVED:

Claire Eagan Barrett  
Attorney for Plaintiff

Joseph R. Farris  
Attorney for Defendants

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

AUG 30 1979

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

TULSA CITY PUBLIC HEALTH )  
 NURSING SERVICE, INC., an )  
 Oklahoma non-profit )  
 corporation, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 TULSA CITY-COUNTY HEALTH )  
 DEPARTMENT, THE COUNTY OF )  
 TULSA, )  
 )  
 Defendants. )

No. 79-C-530-C ✓

MEMORANDUM OPINION AND ORDER OF DISMISSAL

Plaintiff, Tulsa County Public Health Nursing Service, Inc., is a non-profit Oklahoma corporation which has brought suit against the Tulsa City-County Health Department, both the City and County of Tulsa, and the Tulsa County Treasurer, as defendants, claiming jurisdiction under 28 U.S.C. § 1331 relating to questions arising under the Constitution and laws of the United States. Plaintiff seeks the declaration of this Court that it is a "provider" of services under the Medicare Act, 42 U.S.C. § 1395(c)-1395(q)(q), entitled to \$225,000 which was paid by the U. S. Department of Health, Education and Welfare to the Plaintiff and turned over to the Defendant and now held by the Defendant Treasurer, and to possession of medical and fiscal records now held by the Defendant Health Department. Plaintiff sought a preliminary injunction. At the hearing upon Plaintiff's motion for a preliminary injunction, Defendants filed a Motion to Dismiss on grounds of lack of jurisdiction, but informed the Court that except for their desire to be heard on the jurisdictional question, Defendants had no objection to consolidation of the hearing on the preliminary injunction with a hearing on the merits of this case. At the end of the first day's hearing on Plaintiff's Amended Complaint the Court

granted Plaintiff's Motion to Consolidate under Rule 65, F.R.C.P., required Defendants to file their Answer which they have done, but the Court reserved ruling on the Motion to Dismiss. The Defendants have re-asserted their Motion to Dismiss at the close of the Plaintiff's evidence in this case, and the Court then heard arguments of the parties on the jurisdictional issue.

Plaintiff has sought declaratory relief, based on federal question jurisdiction, but also has claimed that Defendants have violated Sections 1 and 2 of the Sherman Act, Title 15, U.S.C.

Plaintiff was incorporated in 1960 and in 1964 contracted with the Defendant Health Department to provide home nursing services in Tulsa County jointly with it. Their written agreement provided for a joint or cooperative enterprise under the direction of the Medical Director of the Defendant Health Department. The services provided are home-care nursing and therapy to patients of Tulsa County, Oklahoma and a few fringe areas of its adjoining counties. The service has grown and in the last year Plaintiff provided more than 26,000 home nursing visits compared to 225 visits made by its only competitor in Tulsa County. The Plaintiff has interstate contacts, receiving supplies and payments from out-of-state, and using interstate facilities like highways and telephones, but essentially its activities are local in character and limited to provision of its services in the immediate area of Tulsa County.

Initially, the parties agreed each to pay a half of the personnel salaries, but in 1969 the visiting nurses were placed on the payroll of Tulsa County so that they could have the benefit of the County payroll schedule and also its fringe benefits. By 1978 all of the salaries of Plaintiff's employees were being paid by Tulsa County.

From its inception the Plaintiff and its personnel have occupied, rent-free, space provided on premises owned by the Defendant city and county, and has received from the defendants without charge furniture, lights, heat, janitorial services, computer services, some office supplied and typewriters and some vehicles. The Plaintiff is a member of Tulsa's United Way and receives \$160,000 a year, paid in monthly increments, which it keeps in a separate account from its other funds, which come to it from a minor amount of payments from insurance companies, patients and from payments made by Oklahoma Blue Cross-Blue Shield as the contractual fiscal intermediary of H.E.W.

The Medicare Act provides for funds, and encourages nursing care services of the type rendered by the program of the parties. The Plaintiff has submitted to Blue Cross as such fiscal intermediary its monthly billings for direct costs, such as salaries and mileage expense, as well as indirect costs, such as the value of the space and services provided to Plaintiff without charge by the Defendants. Blue Cross has approved and paid such statements after being satisfied that the joint entity created by the parties was a "provider of services", as that term is defined by 42 U.S.C. § 1395x(u). To become a provider of services application was made to the Oklahoma State Department of Health, which was contractually designated as its certification agent by H.E.W. It received the application, checked for qualifications and made its recommendations to H.E.W. At first, according to H.E.W. records, the "parent" of the Tulsa County home nursing operations was the Oklahoma State Board of Health but in September 1966 it was split off from the State Board. Application was then made in 1966 by the Defendant Health Department, designated therein as the "parent" organization, and the State department thereafter found the joint entity composed of the Plaintiff and Defendant

Health Department to be qualified as a provider and issued number "37-7001" to that entity. Each year a renewal application had to be made and the provider certification renewed, without which Blue Cross would not make its payments on the billings. 42 U.S.C. § 1395(f). In those applications the entity providing the Tulsa County nursing services was referred to as a "Combination Government and Voluntary Agency." The Oklahoma State Department of Public Health and the Dallas Regional Office of H.E.W. each regarded Plaintiff and Defendant Health Department as a combination agency. Together they had the necessary qualifications for "provider" certification, such as the medical advisory board of Plaintiff, maintenance of clinical records by Defendant, a medical director or administrator provided by Defendant, registered nurses, and occupational, physical and speech therapists of Plaintiff. H.E.W. has recognized that it has been dealing with a combined agency as its "provider", and that it was one voluntary entity formed by this 1966 written agreement, which has never been amended or rescinded. Although the name of the provider was changed in 1971 (Plaintiff's Exhibit 42) from that of the Defendant Health Department to that of the Plaintiff, H.E.W. believed that it was still dealing with the same combined entity.

The fiscal intermediary, Blue CrossBlue Shield, has paid its billings for direct and indirect home nursing costs in Tulsa County to "Tulsa City-County HHA, # 37-7001." The letters "HHA" were meant to refer to "home health agency" as used in the Medicare Act. The Plaintiff has received these moneys over the years and because of the payment to it of the indirect costs for which it billed Medicare, in the last three years, there has accumulated the surplus sum of \$225,000. Defendant Treasurer holds that \$225,000 sum which was turned over to the Defendant Health Department by an attorney for Plaintiff. In recent months personnel of the Defendants

have asserted claims to this sum, claiming it under an Oklahoma statute and because the money was paid by H.E.W. for indirect costs which Defendants have furnished without charge.

The Plaintiff wants to use these surplus funds for a "hospice" program for the terminally ill, and fears that the Defendants want the funds to use to raise salaries, or to lower taxes, or to purchase vehicles or otherwise use to the exclusion of the Plaintiff. As a result the once-happy partnership of the parties has turned sour and now they are quarreling over which has the right to these Medicare funds paid for their indirect costs and the right to the records accumulated in the course of the providing of nursing services in Tulsa County. Their contract with each other expires August 31, 1979, and thereafter without new certification of either as a "provider" and without funds and the records, the home nursing services cannot continue to be provided.

Plaintiff contends that this Court has federal question jurisdiction because the Court is asked to determine which of the parties is the "provider" of services under the Medicare Act and the applicable H.E.W. regulations. Defendants contend that the parties' dispute is purely local, not involving interpretation of a federal law, and that no Sherman Act violation is involved.

The Court finds that the foregoing facts are true and established by Plaintiff's evidence. There is no doubt at all that the certified provider, # 37-7001, of Medicare has been the combined entity of Plaintiff and the Defendant Health Department. That is established by their written contract, annual applications, and by their actions. Neither one alone was entitled to certification, according to the Oklahoma State Board of Health and the Regional H.E.W. office.

The Court therefore views this dispute as analogous to one of a partnership dissolution in which two former partners are fighting over their accumulated funds and records after they have decided that they cannot work together any longer. Undoubtedly the public of Tulsa County will be hurt if their mutual obstinacy continues; but, this Court is helpless to provide either party a remedy, or to protect the public in this matter, which it would like to do, because it is a Court of limited jurisdiction and does not have authority to adjudicate quarrels between two local entities.

There is no federal question here. The Court is not asked to interpret a vague or puzzling section or phrase of the Medicare Act, or of any of the H.E.W. regulations. They are all clear, and have been applied by the proper agencies to determine that the "certified provider" here is the combined agency of both Plaintiff and Defendant Health Department. "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." Shulthis v. McDougal, 225 U.S. 561 (1912) at 569. Justice Cardozo, in Gully v. First National Bank, 299 U.S. 109 (1936) at 114, quoted this language with approval and said: "Today, even more clearly than in the past, 'the federal nature of the right to be established is decisive--not the source of the authority to establish it.'"

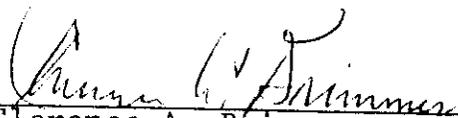
The Court concludes that there is no disputed question of interpretation, validity, construction or effect of a federal law here, but only a dispute over personal property, i.e., money and records. The right to either or both will undoubtedly turn on application of Oklahoma Statutes,

particularly 19 O.S. § 681 and 63 O.S. § 1-206.1, which Oklahoma's own courts are best able to do. The Court believes that entitlement to the funds and records of this joint enterprise should be litigated by the parties in their State courts.

Plaintiff also urges that this Court has jurisdiction under the Sherman Act, Sections 1 and 2, to restrain Defendants from claiming the sum of \$225,000 and the medical records, on the grounds that Defendants have conspired to monopolize the provision of Medicare certified home health care services in Tulsa County, and conspired to exclude Plaintiff from the home health care service market in Tulsa County. The Court believes that the Defendants, as agencies and arms of the State of Oklahoma, are vested with authority and, indeed have a public, legal duty to make decisions respecting the provision of home nursing services in Tulsa County. The evidence of the Plaintiff establishes no conspiracy or monopoly or scheme or artifice designed to monopolize the home health care services of Tulsa County or deprive Plaintiff of the right to provide competing services. The Defendants have discussed contingency plans in the event of final termination of the parties' 1964 agreement, but there is no Sherman Act violation in that because that is what the Defendants, as a governmental unit, are supposed to do. Finally, the Court doubts that the Defendants may be subjected to Sherman Act charges, Parker v. Brown, 317 U.S. 341 (1943).

For the foregoing reasons, it is  
ORDERED that the Plaintiff's First Amended Complaint,  
and the causes of action therein set forth, be, and they  
hereby are, dismissed.

Dated this 30<sup>th</sup> day of August, 1979.

  
\_\_\_\_\_  
Clarence A. Brimmer  
U. S. District Judge, Presiding

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

**FILED**

AUG 30 1979

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

UNITED STATES OF AMERICA, for the	)
use and benefit of Hemphill	)
Corporation,	)
	)
Plaintiff,	)
	)
vs.	)
	)
GUY H. JAMES CONSTRUCTION CO.	)
and FEDERAL INSURANCE COMPANY,	)
	)
Defendants.	)

No. 78-C-628-C

O R D E R

The use plaintiff brings the above-captioned case pursuant to the provisions of the Miller Act, 40 U.S.C. § 270b, to recover on a payment bond executed by the defendant Federal Insurance Company as surety and the defendant Guy H. James Construction Co. as principal, for sums owed to the use plaintiff under its subcontract with Guy H. James. Now before the Court is the use plaintiff's Motion for Summary Judgment.

The defendant Guy H. James has confessed the use plaintiff's Motion except for the use plaintiff's prayer for an award of an attorney's fee, and has actually paid to the use plaintiff the principal sum owed, plus interest and court costs to date. The Court is compelled to overrule the use plaintiff's Motion insofar as an attorney's fee is concerned under the authority of F. D. Rich Co., Inc. v. Industrial Lumber Co., Inc., 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974). The use plaintiff has abandoned its claim for an attorney's fee as against the defendant Federal Insurance Company.

In F. D. Rich Co., the Supreme Court applied the "American Rule" on the award of attorneys' fees, that "attorneys' fees 'are not ordinarily recoverable in the

absence of a statute or enforceable contract providing therefor.'" (Citations omitted) 417 U.S. at p.126. The Court noted that the Miller Act does not explicitly provide for an award of attorneys' fees, and that in that case there was no contractual provision concerning attorneys' fees. The circuit court, however, had construed the Miller Act to require an award of attorneys' fees "where the 'public policy' of the State in which suit was brought allows for the award of fees in similar contexts." Id. The Court rejected that construction. In the case at bar, there being no contractual provision regarding attorneys' fees, the Court must likewise reject the use plaintiff's prayer for an attorney's fee. This case does not fall into any of the exceptions to the American Rule noted in F. D. Rich Co.,

"that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class." (Footnotes omitted) 417 U.S. at pp. 129-30.

The use plaintiff argues that the holding in F. D. Rich Co. was limited to causes of action existing only by virtue of the Miller Act, and would not therefore be applicable to the cause of action against Guy H. James which also sounds in breach of contract at common law. The same could be said of most Miller Act cases. If the F. D. Rich Co. holding were subject to the limitations proposed by the plaintiff, it would be practically meaningless. In any event the Court did not limit its holding, but instead meant the rule to be uniform. See 417 U.S. at p.127.

Because the defendant Guy H. James has paid the use plaintiff's claim, the defendant Federal Insurance Company is relieved of any further liability to the use plaintiff on the bond. The claim against Federal Insurance Company will

therefore be dismissed by the Court sua sponte.

For the foregoing reasons it is therefore ordered that the use plaintiff's Motion for Summary Judgment is hereby sustained as to the defendant Guy H. James Construction Company except for the claim for an attorney's fee. The Motion for Summary Judgment is overruled as to the claim for an attorney's fee. It is further ordered that the Motion for Summary Judgment is overruled as to the defendant Federal Insurance Company, and that the use plaintiff's claim against Federal Insurance Company is hereby dismissed.

It is so Ordered this 29<sup>th</sup> day of August, 1979.

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

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

AUG 30 1979

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

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
DOLPHUS L. LILLEY, II, a/k/a, )  
DOLPHUS LILLEY, a/k/a, DOLPHUS )  
L. LILLEY, )  
 )  
Defendant. )

CIVIL ACTION NO. 79-C-478-C

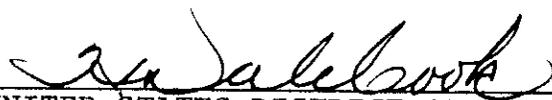
DEFAULT JUDGMENT

This matter comes on for consideration this 30<sup>th</sup>  
day of August, 1979, the Plaintiff appearing by  
Robert P. Santee, Assistant United States Attorney for the  
Northern District of Oklahoma, and the Defendant, Dolphus L.  
Lilley, II, a/k/a, Dolphus Lilley, a/k/a, Dolphus L. Lilley,  
appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendant, Dolphus L. Lilley, II,  
a/k/a, Dolphus Lilley, a/k/a, Dolphus L. Lilley, was personally  
served with Summons and Complaint on July 26, 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 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,  
Dolphus L. Lilley, II, a/k/a, Dolphus Lilley, a/k/a, Dolphus  
L. Lilley, for the sum of \$4,853.81 plus interest at the legal  
rate until such Judgment is paid, plus the costs of this action  
accrued and accruing.

  
UNITED STATES DISTRICT JUDGE

  
ROBERT P. SANTEE  
Assistant United States Attorney

FILED

AUG 30 1979

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

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 79-C-13-C
	)	
	)	
TERRY L. ANDERSON, PATRICIA ANN	)	
ANDERSON, COUNTY TREASURER, Tulsa	)	
County, Oklahoma, and BOARD OF	)	
COUNTY COMMISSIONERS, Tulsa	)	
County, Oklahoma,	)	
	)	
Defendants.	)	

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 30<sup>th</sup> day of August, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney; the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, appearing by their attorney, Deryl L. Gotcher, Jr., Assistant District Attorney; and, the Defendants, Terry L. Anderson and Patricia Ann Anderson, appearing not.

The Court being fully advised and having examined the file herein finds that Defendants, Terry L. Anderson and Patricia Ann Anderson, were served by publication as shown on the Proof of Publication filed herein; that Defendant, County Treasurer, Tulsa County, Oklahoma, was served with Summons, Complaint, and Amendment to Complaint on January 9, 1979, and April 3, 1979, respectively; that Defendant, Board of County Commissioners, Tulsa County, Oklahoma, was served with Summons, Complaint, and Amendment to Complaint on January 15, 1979, and April 3, 1979, respectively; both as appears on the United States Marshal's Service herein.

It appearing that the Defendants, County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma, have duly filed their Answers herein on February 2, 1979; and that Defendants, Terry L. Anderson and Patricia Ann

Anderson, have failed to answer herein and that default has been entered by the Clerk of this Court.

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

Lot Thirty-One (31), Block Ten (10), LAKE VIEW HEIGHTS AMENDED ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Terry L. Anderson and Patricia Ann Anderson, did, on the 29th day of May, 1976, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$9,400.00 with 9 percent interest per annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Terry L. Anderson and Patricia Ann Anderson, 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 \$497.14 as unpaid principal with interest thereon at the rate of 9 percent per annum from March 22, 1979, until paid, plus the cost of this action accrued and accruing.

The Court further finds that there is due and owing to the County of Tulsa, State of Oklahoma, from Defendant, Patricia Ann Anderson, the sum of \$ NONE plus interest according to law for personal property taxes for the year(s) \_\_\_\_\_ and that Tulsa County should have judgment, in rem, for said amount, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment against Defendants,

Terry L. Anderson and Patricia Ann Anderson, in rem, for the sum of \$497.14 with interest thereon at the rate of 9 percent per annum from March 22, 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 the County of Tulsa have and recover judgment, in rem, against Defendant, Patricia Ann Anderson, for the sum of \$ NONE — as of the date of this judgment plus interest thereafter according to law for personal property taxes, but that such judgment is subject to and inferior to the first mortgage lien of the Plaintiff herein.

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

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

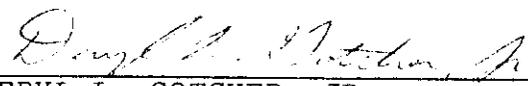
  
UNITED STATES DISTRICT JUDGE

APPROVED

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

  
BY: ROBERT P. SANTEE  
Assistant United States Attorney

  
DERYL L. GOTCHER, JR.  
Assistant District Attorney  
Attorney for Defendants,  
County Treasurer and  
Board of County Commissioners,  
Tulsa County

FILED

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

AUG 30 1979

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 LARRY D. ENGLE, )  
 )  
 Defendant. )

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

CIVIL ACTION NO. 79-C-476-C

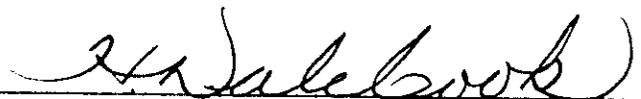
DEFAULT JUDGMENT

This matter comes on for consideration this 30<sup>th</sup>  
day of August, 1979, the Plaintiff appearing by  
Robert P. Santee, Assistant United States Attorney for the  
Northern District of Oklahoma, and the Defendant, Larry D.  
Engle, appearing not.

The Court being fully advised and having examined the  
file herein finds that Defendant, Larry D. Engle, was personally  
served with Summons and Complaint on July 26, 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,  
Larry D. Engle, for the sum of \$993.00 (less the sum of \$20.00  
which has been paid), plus the costs of this action accrued and  
accruing.

  
UNITED STATES DISTRICT JUDGE

  
ROBERT P. SANTEE  
Assistant United States Attorney

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

**FILED**

AUG 30 1979

RA

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

GARY M. KROLL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 79-C-372-C
	)	
J.T.S. AUTOMOTIVE, INC., a	)	
Suspended Oklahoma	)	
Corporation,	)	
	)	
Defendant.	)	

O R D E R

The plaintiff herein requests a declaration that Oklahoma's possessory lien law, Title 42 O.S. § 91, is unconstitutional under the Due Process Clause of the 14th Amendment and requests an injunction prohibiting the defendant from further detaining or selling plaintiff's automobile pursuant to that law. Plaintiff also prays for the return of his automobile, or in the alternative, a money judgment for the value of the same. Now before the Court is the defendant's motion to dismiss.

In March, 1978, the plaintiff delivered his automobile to the defendant for the purpose of having some mechanical work performed. The plaintiff alleges that the defendant promised to do the work diligently and for approximately \$1,500.00 to \$2,500.00. The defendant now demands approximately \$6,171.20 for repairs. Plaintiff alleges that he has paid the defendant \$1,500.00, and that he was never informed of or agreed to the extra charges. Under the provisions of Title 42 O.S. § 91, the defendant is maintaining possession of plaintiff's automobile until the repairs are paid for, and allegedly has threatened to dispose of the automobile pursuant to the sale provisions of Section 91.

Section 91 provides in pertinent part as follows:

"(a) Every person who, while lawfully in possession of an article of personal property, renders any service to the owner thereof by furnishing material, labor or skill for the protection, improvement, safekeeping, towing, storage or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service.

(A) Said lien may be foreclosed by a sale of such personal property upon the notice and in the manner following: The notice shall contain:

(1) The names of the owner and any other party or parties who may claim any interest in said property.

(2) A description of the property to be sold.

(3) The nature of the work, labor or service performed, material furnished, and the date thereof.

(4) The time and place of sale.

(5) The name of the party, agent or attorney foreclosing such lien.

(B) Such notice shall be posted in three (3) public places in the county where the property is to be sold at least ten (10) days before the time therein specified for such sale, and a copy of said notice shall be mailed to the owner and any other party or parties claiming any interest in said property if known, at their last known post office address, by registered mail on the day of posting. Party or parties who claim any interest in said property shall include owners of chattel mortgages and conditional sales contracts as shown by the records in the office of the county clerk in the county where the lien is foreclosed.

(C) The lienor or any other person may in good faith become a purchaser of the property sold.

(D) Proceedings for foreclosure under this act shall not be commenced until thirty (30) days after said lien has accrued."

It is the expressed opinion of this Court that neither the possessory lien nor the sale provisions of Section 91 involve such "state action" as would render them vulnerable to a 14th Amendment challenge. See Carter Rouse v. The Sports Car Shoppe, Inc., No. 78-C-333-C (N.D.Okla., Dec. 12, 1978).

In regard to the sale provisions of Section 91, the Court has found no state action under the authority of Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). Like the warehouseman's lien law in Flagg Brothers, Section 91 does not delegate a power "'traditionally exclusively reserved to the State.'" 436

U.S. at p.157. There are other means available for resolving the type of dispute which gave rise to this lawsuit. 436 U.S. at pp.159-60. A replevin action is provided by Oklahoma law. 12 O.S. §§ 1571, et seq. The Oklahoma possessory lien can be enforced in an equitable action in the state courts, as was apparently the practice prior to 1973, when Section 91 was amended to add the sale provisions. See Moral Ins. Co. v. Cooksey, 285 P.2d 223 (Okla. 1955). The Court is informed that the plaintiff has in fact instituted a replevin action against the defendant in the Tulsa County District Court. Furthermore, the sale provisions of Section 91 are permissive rather than mandatory. Another indication of a lack of state action is the "total absence of overt official involvement" in the practices outlined in Section 91. Flagg Brothers, supra, at p.157. Furthermore, the Court in Flagg Brothers held that action taken under the warehouseman's lien law was not attributable to the State because the State had not authorized and encouraged such action by passing the statute in question. 436 U.S. at pp. 164-5.

In Rouse, this Court also answered the present plaintiff's contention that the sale provisions of Section 91 involve state action because the Oklahoma Tax Commission issues a Certificate of Title to the new owner. The plaintiff relies on Caesar v. Kiser, 387 F.Supp. 645 (M.D.N.C. 1975), where the court found state action because of the participation of the North Carolina Department of Motor Vehicles in the sale of vehicles pursuant to the state's possessory lien law. Notice of sale had to be given to the Department before the sale was proper. N.C. Gen.Stats. § 44A-4(f). In Rouse, this Court found Caesar v. Kiser distinguishable because the Oklahoma Tax Commission has no connection with the sale. Its statutory duty is simply to issue a Certificate of Title to the purchaser. 47 O.S. § 23.3.

As in Rouse, the Court must also find an absence of

state action in the possessory lien provisions of Section 91. See Parks v. "Mr. Ford", 556 F.2d 132 (3rd Cir. 1977); Phillips v. Money, 503 F.2d 990 (7th Cir. 1974). Compare Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975); Hitchcock v. Allison, 572 P.2d 982 (Okla. 1977); Helfinstine v. Martin, 561 P.2d 951 (Okla. 1977).

Rouse was dismissed for failure to state a claim upon which relief could be granted. The present defendant challenges the Court's subject matter jurisdiction. The plaintiff alleges that this Court has subject matter jurisdiction under Title 28 U.S.C. §§ 1331(a), 1343(3). Where state action has not been demonstrated, Section 1343(3) does not confer subject matter jurisdiction. See Monks v. Hetherington, 573 F.2d 1164, 1167 (10th Cir. 1978). Section 1331(a) permits a federal court to assume jurisdiction of a case involving a "substantial" federal question. See Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.E. 939 (1946). But to dismiss a case for lack of a federal question, the claim stated must be

"'so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as to not involve a federal controversy within the jurisdiction of the District Court, whatever may be the ultimate resolution of the federal issues on the merits.'" (Citation Omitted) Hagans v. Lavine, 415 U.S. 528, 543, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974).

Following the admonitions of Bell v. Hood, supra, and its progeny, the Court is of the view that this action should be dismissed for failure to state a claim upon which relief can be granted, rather than for lack of subject matter jurisdiction. But because the defendant has raised the ground upon which the Court is basing the dismissal, the Court will assume that the designation of the motion as a Motion to Dismiss for Lack of Jurisdiction is simply a misnomer.

Plaintiff's additional claims are based upon state law and are pendent to his federal claims. But because the

plaintiff's federal claims will be dismissed, his state claims must be dismissed as well. United Mine Workers v. Gibbs, 383 U.S. 715, 725-6, 89 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

For the foregoing reasons, it is therefore ordered that the defendant's motion to dismiss is hereby sustained.

It is so Ordered this 29<sup>th</sup> day of August, 1979.

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



FILED

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

AUG 29 1979

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL ACTION NO. 79-C-495-C
	)	
MARETTA JOYCE HEATLEY, a single	)	
person, formerly Maretta J. Moses,	)	
et. al.,	)	
	)	
Defendants.	)	

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, without prejudice.

Dated this 29th day of August, 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 29th day of August, 1979.

  
Assistant United States Attorney

# United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 78-C-369 ✓

Sentry Insurance Company,  
a corporation, Plaintiff,  
vs.

Blanche Johnson, Floyd Curtis  
Johnson, Gloria Chase and  
Marie Lett, Administratrix of the  
Estate of Leo Joe Collins, Jr.,  
deceased, Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Clarence A. Brimmer, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Defendants.

It is Ordered and Adjudged that the Plaintiff take nothing and that Defendants recover of the Plaintiff their costs of action.

**FILED**

AUG 28 1979 *mm*

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

Dated at Tulsa, Oklahoma, this 28th day  
of August, 1979

*Jack C. Silver*  
JACK C. SILVER

Clerk of Court

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

JOHN D. WILLIAMS,

Plaintiff,

vs.

KAUFMAN & BROAD HOME  
SYSTEMS, INC., a foreign  
corporation; KAUFMAN AND  
BROAD, INC., a foreign  
corporation; WAYSIDE HOMES,  
INC., a foreign corporation;  
and KAUFMAN & BROAD INTERNATIONAL,  
INC., a foreign corporation,

Defendants.

No. 77-C-506-C

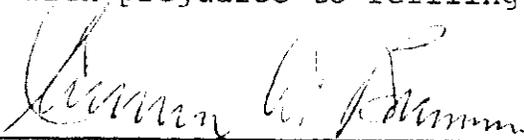
FILED

AUG 27 1979

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

ORDER

Now on this 27<sup>th</sup> day of August, 1979, I, the under-  
signed Judge of the United States District Court for the  
Northern District of Oklahoma, for good cause shown, upon  
the joint application of the parties hereto for an Order  
of Dismissal, find that said Order of Dismissal should be  
and the same is hereby entered, dismissing the causes of  
action pending herein with prejudice to refiling same.



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

FILED

AUG 27 1979

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

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

ROGER MILLS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	79-C-175-C
	)	
THE HONORABLE WILLIAM MEANS,	)	
JUDGE OF THE DISTRICT COURT	)	
IN AND FOR TULSA COUNTY, STATE	)	
OF OKLAHOMA, AND THE ATTORNEY	)	
GENERAL OF THE STATE OF OKLAHOMA,	)	
	)	
Respondents.	)	

ORDER

Petitioner, Roger Mills, was charged in Tulsa County, Oklahoma, with the crime of Possession of Heroin with Intent to Distribute in case number CRF-76-1736 and was further charged in the same county with Possession of Cocaine in case number CRF-76-1735, on the 24th day of November, 1976. Petitioner was duly tried to a jury in case number CRF-76-1736 [Possession of Heroin with Intent to Distribute] and found guilty, with his punishment fixed by the jury at 10 years in the custody of the Department of Corrections. On the 6th day of January, 1977, oral argument was had on a Motion for new trial in case number CRF-76-1736. At that time the defendant's request for a non-jury trial in case number CRF-76-1735 [Possession of Cocain] was granted. The Court approved a stipulation between the State and this petitioner that the evidence presented in the jury trial [CRF-76-1735] might be utilized by the Court in its determination of the charge and issues in the Possession of Cocaine case. The Court found the defendant guilty of Possession of Cocaine in CRF-76-1735; overruled the motions for new trial and sentenced the petitioner in accordance with the jury verdict in case number CRF-76-1736 (ten years), and further sentenced the petitioner in case number CRF-76-1735 to ten years concurrent with the sentence in case number CRF-76-1736.

The record reveals that the petitioner has exhausted his

State court remedies.

Petitioner has now instituted this action pursuant to 28 U.S.C. §2254, seeking habeas corpus relief from this Court. Petitioner demands his release from custody and as grounds therefor claims:

(i) His conviction was obtained by denial of the right of calling and cross-examining witnesses in the petitioner's defense;

(ii) That he was convicted by the use of evidence obtained as a result of his illegal arrest;

(iii) That his conviction was obtained by evidence seized pursuant to an unconstitutional search and seizure; and

(iv) That his conviction in State Court case number CRF-76-7135 [Possession of Cocaine] violated his right not to be twice placed in jeopardy.

In determining whether an evidentiary hearing is necessary prior to ruling upon the validity of petitioner's allegations, this Court must look to the requirements established by the United States Supreme Court in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of trial or in a collateral proceeding. 372 U.S. at 312.

In the instant case, it appears that the facts underlying petitioner's propositions were adequately developed during the trial process and that consideration of the propositions will require the Court merely to draw legal conclusions from these facts. For this reason, the Court deems it unnecessary to conduct an evidentiary hearing.

Petitioner's first proposition concerns the State's refusal to provide him with the identity of the person whose information was used as the basis for procuring the search warrant in question. In support of his position, petitioner cites *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

The Supreme Court first dealt with an unidentified informant situation in *Scher v. U.S.*, 305 U.S. 251, 59 S.Ct. 174, 83 L.Ed. 101

(1938). In that case Federal officials had received confidential information, thought reliable, that Scher was transporting liquor **without** required revenue stamps. After observing the suspect for a period of time, the officials stopped him without a warrant and proceeded to search his trunk, finding the unlicensed liquor. The motion to suppress was denied by the trial court on the basis that the observations gave probable cause for a stop independent of the informant's information. The Supreme Court affirmed, and in dicta the Court said "public policy forbids disclosure of an informer's identity unless essential to the defense, as, for example, where this turns upon an officer's good faith." *Id.* at 254.

In 1957 the Supreme Court expounded on the informant's privilege in *Roviaro v. U.S.*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). The Court held it was reversible error for the Government to refuse to disclose the identity of an undercover employee who had taken a material part in bringing about possession of certain drugs by the accused, had been present with the accused at the occurrence of the crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged. The informer's privilege was defined as "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.... The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crime to law-enforcement officials, and, by preserving their anonymity encourages them to perform that obligation." *Roviaro* at 59. The Court went on to say that the scope of the privilege is limited by its underlying purposes: (1) where disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged; (2) once identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable; (3) where the disclosure

of an informer's identity or contents of a communication is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.

The Court found that the Roviario situation fell within the third exception, but felt that no fixed rule requiring or preventing disclosure of the informant's identity was justifiable. Rather, the Court held that in each case there must be a balance of the public interest in protecting the flow of information against the individual's right to prepare his defense. In dicta, however, the Court said that in cases where the issue was the legality of a search without a warrant and communications of an informant were the sole basis for probable cause, the Government was required to disclose the identity of the informant, citing Scher.

The issue was again before the Court in *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967), reh'g. denied, 386 U.S. 1042. Petitioner was indicted and convicted in an Illinois State Court for unlawful possession of heroin. Prior to trial he filed a motion to suppress the heroin as evidence on the basis it was acquired during an unlawful search. The warrantless search was made by police officers acting on a tip from an unidentified informant who told them that McCray was selling narcotics, had narcotics in his possession and would be at a particular place at a particular time. The informant and police officers drove to the location where the informant pointed out McCray and then departed. The officers observed McCray for a brief period and then arrested and searched him. Both officers testified that they had dealt with the informant on many occasions over a year or more and had been supplied with the accurate information leading to arrest and conviction on many occasions. State Court held that under those circumstances the informant's information along with the officer's personal observations were sufficient for probable cause. Petitioner contended that even though the officers' sworn testimony would support a finding of probable cause for arrest and search, the Constitution required disclosure of the

informant.

The Supreme Court upheld the state decision. When the issue is not guilt or innocence, but rather the question of probable cause for arrest or search, police officers need not invariably be required to disclose an informant's identity. The test is whether the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did in fact rely in good faith upon credible information supplied by a reliable informant. The reasoning for the rule was set forth by the Supreme Court through an extensive quotation from Chief Justice Weintraub's opinion in *State v. Burnett*, 42 N.J. 377, 201 a.2d 39:

The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding. As we have said the magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he told. If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or either produced. It seems to us that the same approach is equally sufficient where the search was without a warrant, that is to say, that it should rest entirely with the judge who hears the motion to suppress, to decide whether he needs such disclosure as to the informant in order to decide whether the officer is a believable witness. *McCray*, at 307-308.

The Supreme Court found no support for *McCray's* contention that the Constitution prohibited the State from allowing their judges discretion to refuse to reveal an informant's identity in such situations.

The Supreme Court further stated:

....[w]e are now asked to hold that the Constitution somehow compels Illinois to abolish the informer's privilege from its law of evidence, and to require disclosure of the informer's identity in every such preliminary hearing where it appears that the officers made the arrest or search in reliance upon facts supplied by an informer they had reason to trust. The argument is based upon the Due Process Clause of the Fourteenth Amendment, and upon the Sixth Amendment right to confrontation applicable to the States through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065. We find no support for the petitioner's position in either constitutional provisions.

The affidavit for search warrant stated:

That ROGER MILLS has in his possession and concealed in the above described dwelling a large quantity of HEROIN. Said informant stated to your affiant that he was inside said dwelling during the past 24 hours and personally observed ROGER MILLS in possession of several plastic bags containing a brownish substance which the alleged violator ROGER MILLS, stated, 'was some mighty fine Heroin.' Informant also related to your affiant that he observed a young black female enter the residence and have conversation with the alleged violator, ROGER MILLS. Said informant stated to your affiant that he then observed ROGER MILLS placing the material which ROGER MILLS stated was Heroin into various colored balloons and giving approximately 10 of them to the black female.

Your affiant along with Inv. Jim Sherl, who had previously set up a surveillance on the residence before the informant entered it, observed the aforementioned black female enter the residence and exit the residence. Your affiant and Inv. Jim Sherl recognized this Negro female to be YVETT SEVERS, a known Heroin addict and prostitute.

Your affiant further states that ROGER MILLS has been charged in Tulsa County District Court on at least 5 occasions with drug offenses and is known by your affiant and Inv. Jim Sherl to be very active in trafficking in the distribution of Heroin in Tulsa County.

Your affiant further states that the said informant has been inside the alleged violator, ROGER MILL'S residence during the past 24 hours. That he personally observed ROGER MILLS in possession of a large quantity of HEROIN, that he had conversation with the alleged violator, ROGER MILLS, concerning the quality of the Heroin which the alleged violator ROGER MILLS had in his possession. The said informant is a Heroin addict and is able to recognize Heroin.

Your affiant further states that he has known said informant for a period of approximately three (3) years. During this time, said informant has provided your affiant with information concerning narcotic traffic in Tulsa County. On each and every occasion his information has proven to be reliable, correct and true. The information that he has provided to your affiant has resulted in the arrests of numerous people charged with drug offenses in Tulsa County District Court. His information has resulted in the confiscation of several thousand dollars worth of Heroin.

The record reveals that Yvett Severs testified at the preliminary hearing to the effect that none of the things or events related by the informant to the officer who submitted the affidavit occurred. Petitioner, based on the testimony of Yvett Severs, moved for discharge of the informant. At the trial, defendant testified that the contraband was not his and he had no knowledge of it. Two black females, Emily Grant and Patricia Armstrong, [Armstrong testified under immunity] testified that they were heroin addicts; that the contraband--Heroin--belonged to them; that they, with Yvett Severs had gone to Oklahoma City to

purchase the heroin; that they brought it back to petitioner's residence; that they left some of the heroin there because they did not want to carry it on their person.

Petitioner, therefore, contends that the testimony of the informant on the issue would have had a direct bearing not only on the threshold question of probable cause, but on the ultimate question of guilt or innocence.

The trial court, the Oklahoma Court of Criminal Appeals and this Court are not swayed by such argument. The Oklahoma Court of Criminal Appeals held that there was no evidence that the informant played a prominent role in the crime other than relating information upon which to predicate probable cause for issuance of a search warrant. The Court said that "[T]his does not go to the guilt or innocence of the accused."

The Court finds that the charge against the petitioner was not closely related to any individual; that the charge concerning the heroin was based on possession with the intent to distribute rather than the transaction revealed in the affidavit for search warrant. The Court, therefore, finds that the sole purpose of the informer was to serve as the basis for probable cause to issue a search warrant and not to prove guilt or innocence of the petitioner. The Court, therefore, finds no merit in the contentions of the petitioner as to his Proposition I.

The Court will consider Proposition II and Proposition III advanced by the petitioner conjointly. In Proposition II petitioner contends that he was convicted by the use of evidence obtained as result of his illegal arrest. In Proposition III he contends that his conviction was obtained by evidence seized pursuant to an unconstitutional search and seizure.

At the preliminary hearing, Officer Bell testified that he, along with Officer Jim Sherl, went to 136 West 50th Place North for the purpose of surveillance in order to serve a Search Warrant. They arrived at the residence at approximately 6:00 A.M. At 10:30

A.M. they observed the petitioner and a female exit the residence (TR 129) at which time he and Officer Jim Sherl exited the surveillance vehicle and ran toward the residence and the vehicle the petitioner and female companion were entering. He testified, commencing at page 33 of the transcript on the preliminary hearing:

- Q. Now, Officer, when you leveled your pistol at the driver, was the car stopped?
- A. Yes, it was.
- Q. Did it stop when you leveled the pistol or before?
- A. It was stopped before.
- Q. In terms of time, how long before you drew your pistol did the car stop?
- A. Three or four seconds. I really don't know.
- Q. Just a short instance? A few instances of time?
- A. Yes, I went to the passenger side of the vehicle and couldn't gain entry and we were afraid the vehicle was going to leave and we both went to the front of the vehicle.
- Q. Now, if the vehicle had not stopped at that time, would you have continued with your efforts to make the arrest or stop the vehicle?
- A. No, if it had took off there wouldn't have been much we could have done about it.

At page 37 of Officer Bell's testimony at the preliminary hearing he testified:

- Q. If he had refused to go into that home with you, you would have kept him in custody, wouldn't you?
- A. I would have taken his keys from him.
- Q. And done what?
- A. Entered the residence.
- Q. So, he was not free to go, was he?
- A. He was not under arrest at that particular time.
- Q. Now, the warrant -- and you understand your duty is to go and search and arrest those you find in possession of contraband or controlled dangerous substance in this case, isn't it?
- A. That's correct.
- Q. Isn't it true, Officer Bell, that you arrested the man before you searched anything?
- A. Technically I would say he was arrested first. He was detained.

Officer Sherl testified at the preliminary hearing as follows, commencing at page 70:

- Q. Now, did you at any time see a Dodge Cordoba(sic) in the street in front of 136 West 50th Place North on June 25th in the morning hours -- in the street -- all four wheels in the street?
- A. Yes, sir.
- Q. When did you see that?
- A. When it stopped backing out of the driveway.
- Q. So, it backed clear out of the driveway?
- A. Yes, sir, it did.
- Q. And then what happened?
- A. Well, I had already approached the vehicle myself and Investigator Bell kept advising Mr. Mills we were police officers.
- Q. You weren't dressed as police officer(sic) usually is (sic)?
- A. No, sir.
- Q. And neither was Officer Bell.
- A. No, sir.
- Q. And that's because of your duties?
- A. Yes, sir.
- Q. Okay, you kept advising him you were police officers and did you have your gun drawn at that time?
- A. I did after he kept backing out of the driveway, sir.
- Q. And did you point that gun at anybody in that car?
- A. Yes, sir, I did, Mr. Mills, when he put it back in forward gear and I was standing in front of the car.
- Q. And you weren't about to let that car go anywhere, were you?
- A. Not over the top of me, sir.
- Q. You were going to stop it, if you could, weren't you? You intended to stop that man, didn't you?
- A. Yes.
- Q. So that you could search the car; isn't that right?
- A. No, so I could search the house mainly.
- Q. The warrant says you thought there was something in the car, too. Is the warrant wrong?
- A. Do what, sir?
- Q. You didn't have any suspicion there was anything in the car?
- A. Not at that time. I didn't know of anything in the

- car.
- Q. And you didn't have information that there was anything in the car?
- A. No, I didn't know about nothing in the car.
- Q. But you stopped the car anyway. That's why you ran up was to stop him?
- A. Yes, sir.
- Q. And you did?
- A. Yes.
- Q. Now, at that time, did you, sir, as an experienced police officer have knowledge of any offense that Mr. Mills had committed in your presence that you had personal knowledge of?
- A. No, sir, when I approached the vehicle it was in the driveway backing out -- when he backed out.
- Q. Please answer my question.
- A. I was trying to, sir.
- Q. Please, that can be answered yes or no. Did you have knowledge of any crime or any offense committed in your presence visible to your eyes?
- A. When I first stopped him -- tried to stop him? No, sir.
- Q. Now, after you stopped him you ordered him out of the vehicle at gun point, didn't you?
- A. Yes, sir, I did.
- Q. And you kept him at gun point, which is proper in a certain information (sic)?
- A. When he stepped out of the car I put my gun back inside my waistband.
- Q. Officer Bell had his pistol, also?
- A. At the time he had it out, yes, sir.
- Q. And you put yours in to search the man?
- A. I padded him down.
- Q. Because you intended at the time time to take him into custody and you had to know if he had a weapon or not?
- A. Whether I took him in or not, I had to know if he had a weapon.
- Q. Whether you took him in or not?
- A. After we searched the house we would know whether we were going to take him in or not.
- Q. The warrant says you will go to a certain address. You

will go there and arrest them and then look for the substance, doesn't it?

A. No, sir, it does not say that.

Q. It doesn't say to seize, to go look first, and then arrest?

A. Yes, sir, but circumstances caused us to do what we did.

Q. Tell me.

A. When you go to search for dangerous substances in a house and apartment, when you go up you have reason to believe you can knock on the door and normally, if you are refused to be let in, you can enter the residence if you believe there are drugs there to be destroyed. In the matter of this house with the bars on the doors and windows, we did not believe we could get inside the residence, if there was narcotics in there, before it was destroyed. We figured the only way we could get in to stop anything from being destroyed was waiting for somebody to enter or exit the residence.

Q. So, you acted upon this conclusion based upon your belief as you have stated. You didn't even try to knock on the door and get in?

A. No, sir, not with the iron door, no, sir.

A. In fact, you didn't even try the iron door to see if it was locked before the man came out, did you?

A. No, sir.

Q. And you didn't wiggle around on any of the iron bars on the windows to see if you could gain an entry that way, did you?

A. No, sir.

Officer Sherl further testified, commencing at page 79:

Q. If Roger Mills had gotten out of the car and walked off down the street, what would you have done?

A. What would I --.

Q. Yes.

A. I don't know right now.

Q. Would you have stopped him?

A. I would have stopped him, yes, sir.

Q. That's a fair answer, isn't it?

A. Yes, sir.

Q. You had stopped him with your gun, so, you weren't going to let him walk away. You stopped him with your gun when he was in the car?

A. Yes.

Q. You intended at that time to take him into custody and search him and search the home and arrest him if

you found contraband there?

A. Yes.

Q. So, you took him off a public street, up to the door of his home armed with the warrant?

A. I initiated it while he was still in the driveway. He proceeded to the street, so, I took him from the street back to the house.

The Oklahoma Court of Criminal Appeals found in *Mills v. State*, 594 P.2d 374 (Okl. Cr. App. 1979), the Court stated, at page 380:

Defendant was restrained and submitted to the officers. We will assume for the sake of argument that an arrest was made by the officers at the time they stopped defendant's car at gunpoint. We must next determine whether such a warrantless arrest was valid as based upon probable cause. The applicable test was set forth in *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), as adopted by this state in *Duke v. State*, Okl. Cr., 548 P.2d 230 (1976):

....whether at [the moment the arrest was made] the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [arrestee] had committed or was committing an offense....

This court has also held that the use of the term "probable cause" imports that there may not be absolute irrefutable cause. See *Reynolds v. State*, Okl. Cr., 575 P.2d 628 (1978); *Satterlee v. State*, Okl. Cr., 549 P.2d 104 (1976).

In the case at bar, Officer Bell was the affiant for the search warrant. Based on facts related by the informant and what the informant had seen in defendant's possession the day before, there was reason to believe defendant was in possession of controlled dangerous substances. Defendant's behavior in attempting to drive away from the residence as the officers approached shouting they had a search warrant lends further support to the belief that a crime had been committed and that probable cause existed to arrest defendant under the test set forth in *Duke*, supra.

In *Gamble v. State of Okl.*, 583 F.2d 1161, 1165 (10th Cir. 1978 (a case totally ignored by the Oklahoma Criminal Court of Appeals in its decision in the instant case) the Tenth Circuit said:

"Opportunity for full and fair consideration" includes, but is not limited to, the procedural opportunity to raise or otherwise present a Fourth Amendment claim. It also includes the full and fair evidentiary hearing contemplated by *Townsend*. Furthermore, it contemplates recognition and at least colorable application of the correct Fourth Amendment constitutional standards. Thus, a federal court is not precluded from considering Fourth Amendment claims in habeas corpus proceedings where the state court willfully refused to apply the correct and controlling constitutional standards. Deference to state court consideration of Fourth Amendment claims does not require federal blindness to a state court's wilful refusal to apply the appropriate constitutional standard.

In the Gamble state court case, 546 P.2d 1336 (1976) the Oklahoma court admitted that the "[T]he legality of the arrest in the instant case is certainly questionable;...." In the Gamble case before the Tenth Circuit Court of Appeals, the Court said at page 1162: "[T]his case was born of an admittedly illegal arrest and was nurtured on evidence illegally seized in a context of abusive police conduct."

In the Mills case opinion by the State Court, the Court found that the arrest was made with probable cause and that the petitioner's statements were preceded by the Miranda warnings. It thus appears that the Oklahoma Court of Criminal Appeals, while not mentioning the case by name, has paid "Lip Service" to the principles of *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) which it failed to acknowledge at all in the original Gamble case.

In *Townsend v. Sain*, 372 U.S. 293, 313 (1963) the language, "opportunity for full and fair Litigation of a Fourth Amendment claim", was used and the Court said six factors to be considered were:

- (1) the merits of the factual dispute were not resolved in the state hearing;
- (2) the state factual determination is not fairly supported by the record as a whole;
- (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
- (4) there is a substantial allegation of newly discovered evidence;
- (5) the material facts were not adequately developed at the state-court hearing; or
- (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.

In *Brown v. Illinois*, supra, the Supreme Court, while urging that their holding was a limited one, found that "[t]he Illinois courts were in error in assuming that the Miranda warnings, by themselves under *Wong Sun* always purge the taint of an illegal arrest."

In *Stone v. Powell*, 428 U.S. 465, 493 (1976) the Court said:

We adhere to the view that these considerations import the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state-court convictions. But the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs. To be sure, each case in which such claim is considered may add marginally to an awareness of the values protected by the Fourth Amendment. There is no reason to believe,

however, that the overall educative effect of the exclusionary rule would be appreciably diminished if search-and-seizure claims could not be raised in federal habeas corpus review of state convictions. Nor is there reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant. The view that the deterrence of Fourth Amendment violations would be furthered rests on the dubious assumption that law enforcement authorities would fear that federal habeas review might reveal flaws in a search or seizure that went undetected at trial and on appeal. Even if one rationally could assume that some additional incremental deterrent effect would be present in isolated cases, the resulting advance of the legitimate goal of furthering Fourth Amendment rights would be outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.

In sum, we conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force.

As to Proposition II, i.e., that the defendant was convicted by the use of evidence obtained as a result of his illegal arrest, the Court finds that the petitioner has been provided with an opportunity for full and fair litigation of this Fourth Amendment claim and this Court is precluded from considering the claim again in this proceeding. *Stone v. Powell*, supra.

Under Proposition III, the petitioner contends that the affidavit for search warrant was insufficient in that the affidavit does not set out the underlying circumstances upon which the magistrate could independently judge the validity of the informant's conclusions as to possession of narcotics and that the affidavit fails to state facts upon which the magistrate could independently judge the informant's credibility and reliability of his or her information. Petitioner additionally attacks the manner in which the search warrant was executed.

The sufficiency of the affidavit for search warrant was raised at the trial level and on appeal. See *Mills v. State*, supra,

at 378, 379. In *Wolfe v. Rice*, 428 U.S. 465, 49 L.Ed.2d 1067, (6 S.Ct. 3037 (1976)), a case decided simultaneously with *Stone v. Powell*, the Court considered a search warrant alleged to be invalid because the supporting affidavit was defective. The preclusion theory was applied to the allegations concerning the search warrant as well.

The Court, therefore, finds that the petitioner has been provided with an opportunity for full and fair litigation of this Fourth Amendment claim and this Court is precluded from considering the claim again in this proceeding. *Stone v. Powell*, supra; *Wolfe v. Rice*, supra; *Breest v. Helgemore*, 579 F.2d 95 (1st Cir. 1978).

Petitioner contends that the officers, in executing the warrant, failed to comply with 22 O.S.1971 §1228 which provides:

The officer may break open an outer or inner door or window of a house, or any part of the house, or anything therein, to execute the warrant, if, after notice of his authority and purpose he be refused admittance.

The Oklahoma statute is similar to the federal statute, i.e. 18 U.S.C. §3109 which provides:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

But, effective consent to entry negates the requirements of both sections (state and federal). *United States v. Sheard*, 473 F.2d 139, 143 (D.Col. Cir. 1973); *United States v. Harris*, 435 F.2d 74, 81-82 (1970)

By analogy, Courts have found that the presence of evidence reasonably believed to be in imminent danger of removal or destruction is well recognized as a circumstance which may permit immediate police action. *United States v. Kulcsar*, 586 F.2d 1283, 1287 (8th Cir. 1978) and cases cited therein.

In the instant case there was no need at the time the search warrant was executed to comply with the knock and announce statute as the record reveals that the petitioner herein voluntarily opened the door to the residence with his own key.

Additionally, the Court notes that "[i]t is a well-esta

principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts." *Wainwright v. Sykes*, 433 U.S. 72, 81, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977).

The Court notes the petitioner's reliance on *Sabbath v. United States*, 391 U.S. 585 (1968) but finds it not applicable to the circumstances in the instant case.

The Court, therefore, finds that the petitioner is not entitled to a grant of habeas corpus relief on Proposition III of his petition.

The Fourth Proposition concerns the charge of cocaine, which petitioner contends is double jeopardy.

Possession of cocaine is not a lesser included offense of possession of heroin with intent to distribute. Either charge stands by itself. *Bogue v. State*, 556 P.2d 272 (Okla.Cr.1976); *White v. State*, 568 P.2d 329 (Okla.Crim. 1977).

The Court, therefore, finds that the petition for writ of habeas corpus sought by the petitioner herein must be denied.

IT IS SO ORDERED.

ENTERED this 27<sup>th</sup> day of August, 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

FARMERS ALLIANCE MUTUAL INSURANCE )  
COMPANY, a corporation, )  
 )  
Plaintiff, )

vs. )

NO. 79-C-164-D7 FILE

JAMES LEON BARLOW, JR., JAMES )  
LEON BARLOW, SR., JOE A WHITE, )  
WILLIAM NEAL BRUNSON and BILL )  
BRUNSON, )  
 )  
Defendants. )

AUG 1979  
Jack C. Silver, Clerk  
U. S. DISTRICT

J U D G M E N T

On the 28<sup>th</sup> day of August, 1979, 728  
this matter came before the Court upon the Application for  
Default Judgment of the plaintiff.

The Court finds that this action was commenced on March 16, 1978. Proper service was obtained upon each of the defendants on March 19, 1978, and no appearance has been made by defendants, Joe A. White, William Neal Brunson and Bill Brunson, to date. The Court finds that the plaintiff is a citizen of Kansas, and the defendants are citizens of Oklahoma and residents within this district. The Court, therefore, has jurisdiction and venue over the parties to this action. The Court further finds that said defendants are not currently members of the armed forces of the United States. The Court further finds that the amount in controversy exceeds \$10,000.00 exclusive of costs and interest and that there is complete diversity between the plaintiff and defendants, and therefore the Court has subject matter jurisdiction over this action.

This action is one for declaratory relief pursuant to 28 U.S.C. §2201 et seq. Plaintiff seeks an adjudication that the defendants are not covered by a policy of automobile liability insurance No. A82779 for injuries allegedly sustained by Joe A. White when he was struck by a vehicle driven by James Leon Barlow, Jr., and owned by Bill Brunson on April 22, 1978.

The Court finds that the allegations of the plaintiff, supported by the provisions of the policy attached as an exhibit

to the Complaint show that the policy in question was in force from December 12, 1977, to June 12, 1978. Bill Brunson is the named insured under said policy. William Neal Brunson, Bill Brunson's son, was a passenger in said vehicle at the time of said accident. The policy provides:

"PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

- (a) the named insured
- (b) \* \* \*
- (c) any other person while using an owned automobile ... with the permission of the named insured, provided his actual operation ... is within the scope of such permission ...
- (d) any other person ... but only with respect to his ... liability because of acts or omissions of an insured under (a) ... (c) above."

The Court finds that at the time of the accident, James Leon Barlow was the driver of the vehicle which was owned by Bill Brunson. The Court finds that the defendants, Joe A. White, William Neal Brunson and Bill Brunson, are currently in default in this action and that the allegations contained in plaintiff's Complaint must be taken as true as to those defendants and that they are not covered under the policy of insurance written by the plaintiff.

The Court further finds that Joe A. White has filed suit in the District Court of Washington County, Oklahoma, Case No. C-78-380 against William Neal Brunson, James Leon Barlow, Sr. and James Leon Barlow, Jr., for injuries allegedly received in the accident on April 22, 1978.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the policy of insurance written by plaintiff No. A82779 does not provide any coverage for injuries allegedly sustained by Joe A. White on April 22, 1978, in that the policy does not provide coverage as a result of those injuries or that accident to Bill Brunson and William Neal Brunson. Therefore, plaintiff has no obligation to defend Bill Brunson or

settle or pay any judgment against Bill Brunson or William Neal Brunson in favor of Joe A. White arising out of Case No. C-78-380 filed in the District Court of Washington County, Oklahoma, or any other action which involves the defendants, William Neal Brunson and Bill Brunson for the injuries allegedly sustained by Joe A. White on April 22, 1978, in said accident.

IT IS SO ORDERED this 22<sup>nd</sup> day of August,  
1979.

Lois Daugherty  
United States District Judge

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

FILED

AUG 23 1979

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

SPERRY CORPORATION, )  
individually and on behalf )  
of its SPERRY VICKERS, TULSA )  
DIVISION PLANT, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
MARSHALL, et al., )  
 )  
Defendants. )

No. 78-C-358-C

ORDER

This cause having come before this Court upon Motion by Defendants Brown and Bevins to dismiss this action as to them on the grounds that such Defendants have no present custody or control over the disputed documents which are the subject of this action, and it appearing to the Court that subsequent to the filing of this action the President of the United States did issue Executive Order 12086, which Executive Order did require the transfer of the disputed documents herein from the custody of Defendants Brown and Bevins to the custody of the remaining Defendants herein, and it further appearing to the Court that Defendants Brown and Bevins did thereafter transfer the disputed documents to the remaining Defendants herein and that Defendants Brown and Bevins have assured this Court through their representatives and counsel that Defendants Brown and Bevins, and their employees in the Department of Defense, have no custody or control, or any intention to disclose the disputed documents herein, this Court, therefore, concludes that the controversy between Plaintiff and Defendants Brown and Bevins has become moot.

It is, therefore, ORDERED, ADJUDGED and DECREED that Defendants Brown and Bevins be dismissed from this action, with

such dismissal to be without prejudice to a later refiling should the controversy become no longer moot as to Defendants Brown and Bevins. Each party shall bear its own costs.

So Ordered this 23<sup>rd</sup> day of August, 1979.

W. H. Dale Cook  
U. S. District Court Judge

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

WILLIAM B. ORCHARD, personal  
representative of the Estate  
of KENNETH E. ORCHARD,  
deceased,

Plaintiff,

vs.

AVCO CORPORATION, d/b/a AVCO  
LYCOMING WILLIAMSPORT DIVISION  
and MILLER AVIATION ENTERPRISES,  
FAY DAVIS d/b/a DAVIS AIRCRAFT  
and DAVIS AIRCRAFT, INC., and  
TULSA ACCESSORIES, INC. and  
WALTON BELL,

Defendants.

**FILED**

AUG 23 1979

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

NO. 78-C-473-D

ORDER OF DISMISSAL

Upon application and Stipulation For Dismissal  
With Prejudice of the parties, and for good cause shown,  
this cause of action and cross-claims against Tulsa Acces-  
sories, Inc., is dismissed with prejudice, all parties to  
bear their own costs and attorney's fees.

FRED DAUGHERTY

UNITED STATES DISTRICT JUDGE

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

JOHN ZINK COMPANY, a )  
Delaware corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
EMERSON ELECTRIC COMPANY, )  
a Missouri corporation, )  
 )  
Defendant.)

NO. 75-C-384

**FILED**

**AUG 23 1979**

ORDER OF DISMISSAL OF PLAINTIFF'S COMPLAINT AND DEFENDANT'S COUNTER-CLAIM Jack C. Silver, Clerk  
U. S. DISTRICT COURT

ON THIS 9th day of August, 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. The Court further finds that Plaintiff's claim against Mortex, Inc., d/b/a Terrell J. Small Company, heretofore dismissed without prejudice, 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.

51  
UNITED STATES DISTRICT JUDGE

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

WILLIAM D. CUNNINGHAM, )  
 )  
 Plaintiff, )  
 )  
 vs. ) No. 79-C-10-C  
 )  
 RICHARD MATHER and )  
 LORT A. MATHER, )  
 )  
 Defendants. )

FILED

AUG 29 1979

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

O R D E R

On February 27, 1979, the defendants filed their Motion to Dismiss the Complaint herein. By minute order, the plaintiff was directed to respond to the defendants' Motion on or before March 12, 1979. On April 12, 1979, the plaintiff filed a motion to strike defendants' Motion to Dismiss because he had not had sufficient time to complete the discovery necessary to respond to that Motion. By minute order, the plaintiff was granted until May 29, 1979 to respond to the Motion to Dismiss. Upon the plaintiff's motion, the Court again extended the time for responding to the Motion to Dismiss to July 2, 1979. To date, the plaintiff has not responded to the Motion to Dismiss. There is nothing in the file to indicate that the plaintiff has pursued the discovery indicated in his motion to strike.

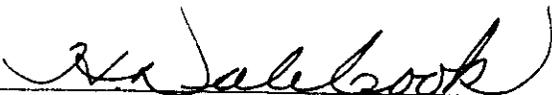
The defendants move to dismiss the Complaint for lack of in personam jurisdiction. In Oklahoma, jurisdiction over nonresident defendants cannot be inferred, but must affirmatively appear from the record. See Roberts v. Jack Richards Aircraft Co., 536 P.2d 353 (Okla. 1975); Crescent Corp. v. Martin, 443 P.2d 111 (Okla. 1968). When a jurisdictional question arises, the burden of proof is upon the party asserting that jurisdiction exists. See Roberts v. Jack Richards Aircraft Co., supra.

The Complaint alleges that the defendants are both

citizens of Missouri, and that the accident which is the basis for this lawsuit occurred in Missouri. The defendants have submitted an affidavit to the effect that they do not conduct or solicit any business in Oklahoma, nor derive any substantial revenue from goods used or consumed in this State. Furthermore, the defendants state therein that they do not have an interest in any real property in Oklahoma, nor do they maintain any other relation to this State or to persons or property therein. The plaintiff offers no contradictory evidence, and has failed to sustain his burden of establishing in personam jurisdiction over the defendants. The circumstances of this case do not even come close to any of the bases for jurisdiction over nonresident defendants provided by Oklahoma law. 12 O.S. §§ 187, 1701.03.

For the foregoing reasons, it is therefore ordered that plaintiff's motion to strike is hereby overruled. It is further ordered that the defendants' Motion to Dismiss is hereby sustained.

It is so Ordered this 22<sup>nd</sup> day of August, 1979.

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

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

JIMMY L. CLAUNCH, )

Plaintiff, )

-vs- )

JOSEPH CALIFANO, SECRETARY  
OF HEALTH, EDUCATION AND  
WELFARE, )

Defendant. )

No. 78-C-552-C

FILED

AUG 22 1979

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

ORDER DISMISSING

Now on the 22<sup>nd</sup> day of August, 1979, there came on for consideration the Motion of Plaintiff, JIMMY L. CLAUNCH, by and through his Attorney, Harold Charney, to dismiss the above captioned case. The Court finds that said Motion is well taken.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that the above captioned case is herein dismissed.

18/H. Dale Cook  
U. S. District Judge

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

BERT A. GRAHAM, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 EARL BENDER, et al., )

No. 78-C-343-C

**FILED**

AUG 22 1979

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

O R D E R

The Court has for consideration Defendants' Motions for Summary Judgment and has reviewed the file, the briefs and the recommendations concerning the motions, and being fully advised in the premises finds that Defendants' Motions for Summary Judgment should be sustained.

On August 9, 1979 the United States Magistrate filed Findings and Recommendations in which he recommended that Defendants' Motions for Summary Judgment be sustained. No exceptions or objections to the Findings and Recommendations of the Magistrate have been filed and the time for filing such objections has expired.

The plaintiff, Bert A. Graham (Graham) filed suit against the individual members of the Board of Education for Independent School District No. IV (Board) and several members of the administrative personnel of the Bixby public school system, claiming violations of his constitutional rights and seeking actual damages of \$17,049.87 and punitive damages of \$363,000.00 arising out of his dismissal by the Board.

Following a due process hearing on April 1, 1978 before the Board pursuant to the provisions of Title 70 O.S. 1971, § 6103.4, Graham's teaching contract was terminated. The Board concluded that based upon the evidence before it at the due process hearing, Graham was knowingly in possession of marijuana on the school grounds of the Bixby Public Schools; that school regulations prohibit students from

possessing marijuana on the school grounds; that Graham's conduct in possessing marijuana on the school grounds is contrary to school regulations as well as the laws of Oklahoma; and that such action on the part of Graham was detrimental to the interest and welfare of the school children within the school district.

Graham claims that since he was found "not guilty" of the criminal charge of unlawful marijuana possession by a Tulsa County District Court jury on May 17, 1978, the Board was not justified in terminating his contract.

In Wood v. Strickland, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed. 2d 214 (1975), the United States Supreme Court passed on the application of the official immunity doctrine in the context of school discipline of students.

In Wood, the Supreme Court determined that there must be a degree of immunity if the work of the schools is to go forward. The Court reasoned that for violations of school regulations, and appropriate sanctions, denying any measure of immunity "[w]ould contribute not to principled and fearless decision making but to intimidation." Wood established a two step test to be applied in determining the application of the official immunity doctrine: 1) the official's actions must be taken in good faith, i.e., he must be acting sincerely and with a belief that he is doing right; and, 2) the actions of the school official must not violate a student's clearly established (i.e., settled and undisputed) constitutional rights.

Bertot v. School District No. 1, Albany Co., Wyo., et al, 522 F.2d 1171 (10th Cir. 1975) (Bertot I), and Bertot v. School District No. 1, Albany Co., Wyo., et al, \_\_\_\_\_ F.2d \_\_\_\_\_ (10th Cir. 1978) (Bertot II) are relevant to the case now before the Court.

In Bertot I, the Tenth Circuit applied the Wood official immunity doctrine to school officials sued in their "individual capacities" in teacher dismissal cases.

In Bertot II, the Tenth Circuit applied the Wood official immunity doctrine to school officials sued in their "official capacities" in teacher dismissal cases.

Graham's claims for damages arise from either acts or omissions of the Defendants at the due process hearing on April 1, 1979.

It is clear from Wood that §1983 does not permit the right to relitigate in Federal Court the question of the proper construction of school regulations, and was not intended to be a vehicle for the Federal Court to correct alleged errors on the part of school officials which do not rise to the level of constitutional violations.

It appears from the record in this case that the procedures followed by the School Board were as prescribed by the Oklahoma Statutes and that under Wood, Bertot I and Bertot II, the Defendants' Motions for Summary Judgment should be sustained.

IT IS, THEREFORE, ORDERED that Defendants' Motions for Summary Judgment be and the same are hereby sustained.

Dated this 22<sup>nd</sup> day of August, 1979.

  
H. DALE COOK  
CHIEF JUDGE

FILED

AUG 22 1979

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

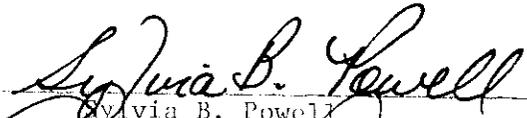
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SYLVIA B. POWELL, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SAFEWAY STORES, INC., )  
 a corporation, )  
 )  
 Defendant. )

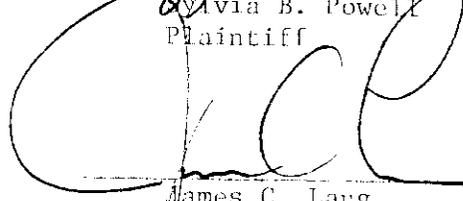
NO. 78 C 604 & D

- Stipulation OF  
DISMISSAL WITH PREJUDICE

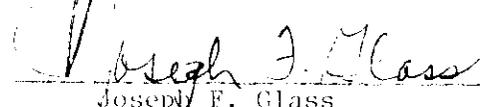
COMES now the plaintiff, Sylvia B. Powell, and dismisses this cause with prejudice to the right to the bringing of any other future action.



Sylvia B. Powell  
Plaintiff



James C. Larg  
Plaintiff's Attorney



Joseph F. Glass  
Defendant's Attorney

rdm

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

WALTER E. HALL, )  
 )  
 Plaintiff, )  
 )  
 -vs- )  
 )  
 CHARLES W. PAPEN, )  
 )  
 GARY HENRY, )  
 )  
 W. B. YORK, )  
 )  
 HARRY STEGE, and )  
 )  
 THE CITY OF TULSA, )  
 )  
 Defendants. )

Case No. 77-C-507-C

**FILED**

AUG 21 1979

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

ORDER OF VOLUNTARY DISMISSAL

On this 21st day of August, 1979, the above-styled matter coming on for hearing on Plaintiff's Application for Voluntary Dismissal of this action against the Defendants Papen and Henry, and the Court being fully advised of the premises therein, finds that pursuant to Federal Rules of Civil Procedure Rule 41(a) this action should be dismissed without prejudice against Defendants Papen and Henry and their Demurrer dismissed as moot.

*H. Dale Cook*  
-----  
JUDGE H. DALE COOK  
JUDGE OF THE DISTRICT COURT  
NORTHERN DISTRICT OKLAHOMA

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

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)			
	)			
Plaintiff,	)	CIVIL ACTIONS NOS.		
	)			
vs.	)	79-C-238-C	79-C-263-C	79-C-298-C
	)	79-C-240-C	79-C-264-C	79-C-301-C
OSAGE TRIBE OF INDIANS,	)	79-C-242-C	79-C-265-C	79-C-303-C
	)	79-C-244-C	79-C-266-C	79-C-305-C
Defendants..	)	79-C-246-C	79-C-267-C	79-C-307-C
	)	79-C-248-C	79-C-269-C	79-C-309-C
	)	79-C-250-C	79-C-273-C	79-C-311-C
	)	79-C-253-C	79-C-275-C	79-C-313-C
	)	79-C-255-C	79-C-277-C	79-C-315-C
	)	79-C-256-C	79-C-279-C	79-C-318-C
	)	79-C-257-C	79-C-282-C	79-C-321-C
	)	79-C-258-C	79-C-285-C	79-C-324-C
	)	79-C-259-C	79-C-288-C	79-C-326-C
	)	79-C-260-C	79-C-291-C	79-C-328-C
	)	79-C-261-C	79-C-293-C	79-C-330-C
	)	79-C-262-C	79-C-295-C	79-C-332-C
	)			
	)		79-C-334-C	
	)		79-C-336-C	
	)		79-C-338-C	
	)		79-C-340-C	
	)		79-C-343-C	

**FILED**

AUG 20 1979

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

ORDER

NOW, on this 20<sup>th</sup> day of August, 1979, the Court considers the Application for Dismissal Without Prejudice filed in this action by the Defendant, OSAGE TRIBE OF INDIANS. The Court finds that the Plaintiff, UNITED STATES OF AMERICA, does not object to this Order.

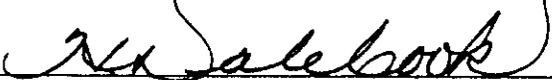
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action be dismissed without prejudice to the filing of a new case to condemn the subject property in the event that Congress should see fit to pass an Act authorizing such action.

IT IS FURTHER ORDERED AND DECREED that the Declaration of Taking on which this action was based is hereby void and held for naught insofar as the Declaration of Taking includes any interest of the Defendant to this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for immediate possession which has been filed in this

action be, and is hereby, overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant shall recover its costs of these actions, including Attorney fees, in the total amount of \$3,500.00.

  
UNITED STATES DISTRICT JUDGE

40  
**FILED**

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

AUG 17 1979

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

ROY F. MILLER and Wife, )  
ANNA LOU MILLER, )  
 )  
Plaintiffs, )  
 )  
-vs- )  
 )  
FRANKIE B. JARRETT, )  
 )  
Defendant. )

No. 78-C-90-~~B~~ C ✓

APPLICATION FOR DISMISSAL

COME NOW the Plaintiffs and Defendant and move the Court to dismiss the above-entitled cause of action for the reason that said parties have compromised and settled the entire issues that are included in said cause of action, and would ask the Court to enter its Order dismissing said cause of action with prejudice to any future action.

Richard B. Muller  
Attorney for Plaintiffs

Richard T. Gibson  
Attorney for Defendant

**FILED**

AUG 20 1979

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

ORDER

This matter comes on by the joint application of the parties hereto; the Court being fully advised in the premises finds that said cause of action should be dismissed with prejudice to any future action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above and foregoing cause of action be dismissed with prejudice.

Richard T. Gibson  
JUDGE OF THE DISTRICT COURT

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

ESTHER CASTRO SKELLY,  
a/k/a ESTHER CASTRO PRESLEY,  
a/k/a ESTHER CASTRO,

Plaintiff,

vs.

GRIFFIN B. BELL,  
Attorney General of the  
United States of America,

Defendant.

CIVIL ACTION NO. 78-C-497-C

**FILED**

AUG 17 1979

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

ORDER

It appearing to Court that the above-named plaintiff and defendant have entered into a stipulation for voluntary dismissal of cause which was duly filed in this action on August 16, 1979; therefore,

IT IS ORDERED AND ADJUDGED that the above-entitled action be, and it is hereby, dismissed, without cost to either party and without prejudice to the plaintiff.

Dated Aug 17, 1979.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

United States of America, )  
 )  
Plaintiff, ) CIVIL ACTION NO.78-C-109-B  
 )  
vs. ) Tract No. 218  
 )  
15.67 Acres of Land, More or )  
Less, Situate in Washington )  
County, State of Oklahoma, and )  
Milton W. Phillips, et al., and )  
Unknown Owners, )  
 ) (Included in D.T. filed in  
 ) Master File #400-12)  
Defendants. )

**FILED**

**AUG 17 1979**

J U D G M E N T

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

1.  
NOW, on this 17<sup>th</sup> day of August, 1979, this matter comes on for disposition on application of Plaintiff, United States of America, for entry of judgment on a stipulation agreeing upon just compensation, and the Court, after having examined the files in this action and being advised by counsel for the Plaintiff, finds:

2.  
This judgment applies to the entire estate condemned in Tract No. 218, as such estate and tract are described in the Complaint filed in this action.

3.  
The Court has jurisdiction of the parties and subject matter of this action.

4.  
Service of Process in this case has been perfected personally, as provided by Rule 71A of the Federal Rules of Civil Procedure.

5.  
The Acts of Congress set out in paragraph 2 of the Complaint filed herein give the United States of America the right, power, and authority to condemn for public use the property described in said Complaint. Pursuant thereto, on March 13, 1978,

the United States of America filed its Declaration of Taking of a certain estate in such described property, and title to the described estate in such property should be vested in the United States of America as of the date of filing said Declaration of Taking.

6.

Simultaneously with filing the Declaration of Taking, there was deposited in the Registry of the Court as estimated compensation for the taking of a certain estate in subject property a certain sum of money, and all of this deposit has been disbursed, as set out below in paragraph 11.

7.

On the date of taking in this case the land records of Washington County, State of Oklahoma, reflected that title to the subject property was vested in Milton W. Phillips and Velma Phillips, husband and wife, as joint tenants, with the right of survivorship. Velma Phillips died on May 26, 1976 and was survived by Milton W. Phillips who therefore succeeded to her interest.

Also a certain General Warranty Deed is recorded in the land records of Washington County, State of Oklahoma, in Book 616, page 477, showing that Milton W. Phillips and Velma Phillips, on November 27, 1973, apparently conveyed to the United States of America all interests in Tract 218 except "oil and gas minerals outstanding in third parties." However, the language contained in the exception in such deed, was a scrivener's error in that it was the intention of the parties to have the exception read as follows, to-wit: "less and except oil and gas minerals, and subject to oil and gas mineral interests outstanding in third parties." Furthermore, no consideration was paid by the United States of America to the Phillipses for any interest in the oil, gas or other minerals under Tract 218. Thus, the said deed was invalid as to the purported conveyance of the lessor interest in the oil, gas and other minerals under said Tract 218.

Therefore, on the date of taking in this action, the owner of the estate taken in subject tract was Milton W. Phillips,

as shown below in paragraph 11. Such named defendant is the only person asserting any interest in the estate taken in such property. All other persons having either disclaimed or defaulted, such named defendant is entitled to receive the just compensation awarded by this judgment.

8.

The owner of the estate taken in subject tract and the United States of America have executed and filed herein a Stipulation As To Just Compensation wherein they have agreed that just compensation for the estate condemned in subject tract is in the amount shown as compensation in paragraph 11 below, and such Stipulation should be approved.

9.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power, and authority to condemn for public use the property particularly described in the Complaint filed herein; and such property, to the extent of the estate described in such Complaint, is condemned, and title to such described estate is vested in the United States of America as of March 13, 1978, and all defendants herein and all other persons interested in such estate are forever barred from asserting any claim to such property.

10.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking the owner of the estate condemned herein in subject tract was the defendant whose name appears below in paragraph 11 and the right to receive the just compensation for the estate taken herein in such tract is vested in the party so named.

11.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation, described in paragraph 8 above, hereby is confirmed; and the sum therein fixed is adopted as the award of just compensation for the estate condemned in subject tract, as follows:

TRACT NO. 218

OWNER:

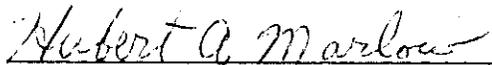
Milton W. Phillips

<u>Award</u> of just compensation pursuant to Stipulation -----	\$7,965.00	\$7,965.00
<u>Deposited</u> as estimated compensation --	<u>7,965.00</u>	
<u>Disbursed</u> to owner -----		<u>7,965.00</u>
<u>Balance due</u> to owner -----		None

---

  
UNITED STATES DISTRICT JUDGE

APPROVED:

  
HUBERT A. MARLOW  
Assistant United States Attorney

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 ERNEST R. COBB a/k/a ERNEST )  
 RAYMOND COBB, LOIS JANE COBB, )  
 and DONNA MAE COBB, )  
 )  
 Defendants. )

CIVIL ACTION NO. 79-C-211-C

**FILED**

AUG 16 1979

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

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 16<sup>th</sup>  
day of August, 1979, the Plaintiff appearing by Robert P. Santee,  
Assistant United States Attorney; and the Defendants, Ernest R.  
Cobb, a/k/a Ernest Raymond Cobb, Lois Jane Cobb, and Donna Mae  
Cobb, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendants, Ernest R. Cobb, a/k/a  
Ernest Raymond Cobb, and Lois Jane Cobb, were served with Summons  
and Complaint on April 13, 1979, as appears on the United States  
Marshal's Service herein; that Defendant, Donna Mae Cobb, was  
served by publication as shown on the Proof of Publication filed  
herein.

It appearing that the Defendants, Ernest R. Cobb, a/k/a  
Ernest Raymond Cobb, Lois Jane Cobb, and Donna Mae Cobb, have  
failed to answer herein and that default has been entered by  
the Clerk of this Court.

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

Lot Fourteen (14), Block One (1), NORTHGATE  
ADDITION to the City of Tulsa, Tulsa County,  
Oklahoma, according to the recorded plat thereof.

THAT the Defendants, Ernest R. Cobb and Lois Jane Cobb, did, on the 24th day of February, 1977, execute and deliver to the Administrator of Veterans Affairs, their mortgage and mortgage note in the sum of \$11,300.00 with 3 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, Ernest R. Cobb and Lois Jane Cobb, made default under the terms of the aforesaid mortgage note by reason of their failure to make monthly installments due thereon, which default has continued and that by reason thereof the above-named Defendants are now indebted to the Plaintiff in the sum of \$11,184.22 as unpaid principal with interest thereon at the rate of 8 1/2 percent per annum from July 1, 1978, 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, Ernest R. Cobb and Lois Jane Cobb, in personam, for the sum of \$11,184.22 with interest thereon at the rate of 8 1/2 percent per annum from July 1, 1978, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover judgment, in rem, against Defendant, Donna Mae Cobb.

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

judgment. The residue, if any, shall be deposited with the Clerk of the Court to await further order of the Court.

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

  
UNITED STATES DISTRICT JUDGE

APPROVED

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

  
BY: ROBERT P. SANTEE  
Assistant United States Attorney

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

BETTY J. HARWICK, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 INDUSTRIAL FABRICATING COMPANY, )  
 an Oklahoma corporation, )  
 )  
 Defendant. )

No. 79-C-119-C

**FILED**

AUG 16 1979

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

ORDER OF DISMISSAL WITH PREJUDICE

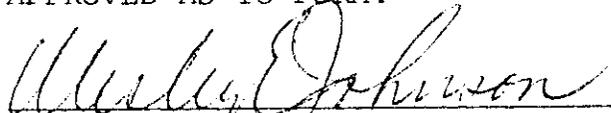
Now on this 16<sup>th</sup> day of August, 1979, there comes before this Court for its consideration the Joint Stipulation for Dismissal with Prejudice filed on behalf of Plaintiff and Defendant.

Whereupon, such Stipulation being prepared pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, and the Court finding that the within named parties, by their attorneys, urge that this Court enter an Order of Dismissal with Prejudice herein;

IT IS HEREBY ORDERED that this action is dismissed with prejudice, with the parties to bear their respective costs and attorney's fees.

  
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

  
WESLEY E. JOHNSON  
Attorney for Plaintiff

  
STEPHANIE K. SEYMOUR of  
Doerner, Stuart, Saunders, Daniel  
& Anderson  
Attorney for Defendant

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

NEW ULM STATE BANK OF  
NEW ULM, TEXAS,

Plaintiff,

vs.

FIRST NATIONAL BANK OF  
PRYOR, OKLAHOMA,

Defendant.

)  
)  
) 78-C-452-C  
)  
)  
)

**FILED**

)  
)  
) AUG 16 1979  
)

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

ORDER

Defendant has moved to dismiss this action with prejudice, asserting that the applicable statute of limitations bars the plaintiff from pursuing any alleged claim against the defendant.

Plaintiff has attached to its original complaint and amended complaint 9 checks, imprinted "Customers Draft". The drafts are designated "Security Bank & Trust Company of Warton, Warton, Texas". The drafts are all payable to R & R Farms, Inc., and signed as follows: (i) 8 drafts are signed "Buck Yoakum by Nan Beck"; (ii) one draft is signed "Buck Yoakum Nan Beck"--the "by" being omitted. The drawee on each draft appears as follows:

TO: First National Bank  
Pryor, Oklahoma  
Buck Yoakum

Four of the checks reflect the endorsement "R & R Farms, Inc. by Nan Beck". Five checks are endorsed "R & R Farms, Inc".

The plaintiff contends that the defendant placed its endorsement on the reverse side of 7 of the 9 drafts and thereafter placed a stamp over the "endorsement" as follows:

"First National Bank  
CANCELLED  
Pryor, Oklahoma"

Plaintiff contends that the defendant endorsed two of the drafts and did not cancel the endorsement. The endorsement states:

"Pay any Bank P.E.G.  
First National Bank  
Pryor, Oklahoma"

All of the drafts contained the following notation on the face of the draft: "Refer to Maker".

It is the contention of the plaintiff that the defendant held said drafts "past its 'midnight deadline' contrary to Okla. UCC Sec. 4-302" (see plaintiff's brief filed October 13, 1978, page 5).

The arguments of the plaintiff in connection with its assertion that the five year statute of limitations [Title 12 O.S.1971 §95(1)] is applicable may be summarized as follows:

(i) That this is an action to recover on a negotiable instrument. In this connection, Title 12 O.S. §296 provides:

If the action, counterclaim or setoff be founded on account or on a note, bill, or other written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading. If not so attached and filed, the reason thereof must be stated in the pleading. But if the action, counterclaim or setoff be founded on a series of written instruments executed by the same person, it shall be sufficient to attach and file a copy of one only, and in succeeding causes of action or defenses, to set forth in general terms descriptions of the several instruments respectively.

Plaintiff contends that it has sued for the face amount of the drafts.

(ii) Ancillary to this contention, the plaintiff asserts that by placing its "endorsement" on the back of the 9 drafts, the defendant in fact "accepted" the drafts for payment.

(iii) That the defendant is liable to the plaintiff on non-statutory grounds based on a contract between the defendant and the Federal Reserve Bank, which incorporates Regulation J (12 CFR 210) in connection with the collection of checks and other items by Federal Reserve Banks. Plaintiff argues that even though it is not a member of the "Fed", it is entitled to the contractual benefits rendered by the regulations [thus again making the 5 year statute of limitations applicable. (The rational of this argument is that the liability provided in Regulation J exists without reference to the liability imposed by Oklahoma UCC Sec. 4-302, thus the liability is not one arising by virtue of statute.)

To the contrary, the defendant argues that the applicable statute of limitations is 3 years (12 O.S.1971 §95(2)---"[a]n action upon a liability created by statute". Defendant bank further contends that it is not a "drawee" but is a "collecting bank" or "sub-agent for the collection of the drafts". Defendant also contends that it did not have a demand account with a "Buck Yoakum" as signatory and would not be a drawee of the drafts when no such account existed. Defendant further argues:

Clearly, since Buck Yoakum did not sign the drafts, said drafts could not be an order to pay nor could they be payable as drawn due to the non-existence of a demand account by Buck Yoakum at the Defendant bank.

In summary, then it is the position of the defendant that it could not have been a drawee of the drafts and therefore could not have accepted the drafts when it placed its bank stamp on said drafts.

Turning to the Regulation J controversy, the defendant argues that even if the Court found that an agreement was created between plaintiff and defendant by virtue of the defendant entering the contract with the Federal Reserve Bank, then such contract would be a contract express or implied, not in writing, and the three year statute of limitations would be applicable.

The Oklahoma Courts have on two occasions dealt with the dishonor question, but not in the context as presented here. In *Security Bank & Trust Co. v. Fed. Nat'l Bank*, 554 P.2d 119, 125 (Okla. App. 1976) the Court said:

Appellant's third proposition of error urges appellee's cause of action is based on liability created by statute for failure to give legal notice of dishonor of a demand item and is not a suit "to recover on a negotiable instrument" falling under §936. Appellee, however, argues its suit "is clearly an action to recover on a negotiable instrument, to-wit: check number 655," and is therefore under §936. [§936, Title 12 O.S.1971 provides that "[I]n any civil action to recover on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase of goods, wares, merchandise, or for labor or services, unless provided by law or the contract which is the subject [of] the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs."]

The cases cited in the briefs involve suits to recover on negotiable instruments and open accounts. As we view this lawsuit, it is a suit to recover for a failure to validly

dishonor a check, and as such, is not a suit to recover on the instrument itself. We note appellee did not attach copies of the checks to its petition as required by 12 O.S.1971 §296, a procedure which is usually done in action to recover on such an instrument. Also, the essence of appellee's petition is that it presented the check for payment to appellant and the appellant "retained the said items beyond midnight of the banking date of receipt without settling for them, or returning said items or sending notice of dishonor until after its midnight deadline." It is true the amount of damages sought is the amount of the check, which is the amount a payor bank is accountable for under 12A O.S.1971 §4-302; however, it still is not a suit to recover on the check, but is to recover damages for the wrongful manner in which the check was allegedly handled by appellant....

In *Goodman v. Norman Bank of Commerce*, 565 P.2d 372 (Okla. 1977), [citing the *Security Bank* case with approval] the Oklahoma Supreme Court said:

....Like the Court of Appeals, we hold that an action based upon a Bank's failure to meet its midnight deadline is not an action on an instrument itself. In so holding, we note that a payor bank is liable for its failure to meet the deadline, regardless of whether the instrument was properly payable to begin with, and regardless of whether there are any actual damages shown. Thus, a bank's liability for delaying beyond its midnight deadline is quite different from its liability on an instrument itself--the Bank's liability is different and the theory giving rise to its liability is different. Therefore, we view an action brought because of a bank's failure to meet its midnight deadline as separate and distinct from an action on an instrument itself....

In the instant case, the Court finds that although the checks are attached to the original complaint, the tenor of the complaint can only be construed to be a complaint as to the method employed by the defendant bank in dishonoring the checks, and not an action to recover on the checks per se. Such finding, however, is not dispositive of the Motion to Dismiss, in view of the other arguments propounded by the plaintiff and defendant.

The plaintiff asks this Court to find that the endorsement [note this is the term used by the plaintiff] by the defendant bank on the reverse side of the questioned drafts constituted an "acceptance".

Title 12A O.S.1971 §3-205 defines "pay any bank" as a restrictive "indorsement" [endorsement].

Title 12A O.S.1971 §3-410(a) defines acceptance:

(1) Acceptance is the drawee's signed engagement to honor the draft as presented. It must be written on the draft, and may consist of his signature alone....

In the Uniform Commercial Code Comment it is stated:

Subsection (1) states the generally recognized rule that the mere signature of the drawee on the instrument is a sufficient acceptance. Customarily the signature is written vertically across the face of the instrument; but since the drawee has no reason to sign for any other purpose his signature in any other place, even on the back of the instrument is sufficient. It need not be accompanied by such words as "Accepted," "Certified," or "Good". It must not, however, bear any words indicating an intent to refuse to honor the bill; ....

The only notation by the defendant bank on the face of the instrument is the notation "Refer to Maker". Also, the drafts themselves raise the question of whether the defendant was actually the drawee or a collecting bank. In *Wilhelm Foods, Inc. v. National Bank of North America*, 382 F.Supp. 605, 608, 609 (USDC SD NY, 1974) held:

Section 4-105(b) defines a payor bank as follows: "'Payor bank' means a bank by which an item is payable as drawn or accepted." Since the drafts were not accepted by either the Bank or DaFran, the defendant could be a payor bank only if it was a bank by which the drafts were "payable as drawn." The parties agree that under the facts of this case for the defendant to be a payor bank it must be the drawee of the drafts. Plaintiff argues that it is clear from the face of the drafts that the Bank was the drawee since the order to pay was directed to it. Contrawise, the Bank urges that it is clear from the face of the draft that the draft was directed to DaFran and not to it, but that in any event an obvious ambiguity exists since both the Bank and DaFran are designated and that extrinsic evidence establishes that DaFran was the drawee. The plaintiff's position disregards what appears on each draft already referred to, to wit:

"To: National Bank of North America  
\*\*\*\*

Account of: DaFran Meat Company  
\*\*\*\*"

The inclusion of both names in the space used for the name of the drawee does create an ambiguity and surrounding facts and circumstances may be considered in resolving it. ....

Another question that is raised by viewing the checks is the capacity of Nan Beck when she signed the checks. Title 12A O.S.1971 §3-104(1)(a) provides:

(1) Any writing to be a negotiable instrument within this Article must  
(a) be signed by the maker or drawer;....

Title 12A O.S.1971 §3-403(1) provides:

(1) A signature may be made by an agent or other representative, and his authority to make it may be

established as in other cases of representation. No particular form of appointment is necessary to establish such authority.

There is no evidence before this Court as to the capacity of Nan Beck when she signed the drafts here involved. Thus, the Court cannot determine the argument of the defendant that the items herein sued on were not in fact negotiable instruments.

Turning to the argument concerning Regulation J, Title 12A O.S.1971 §4-103(2) provides:

(2) Federal Reserve Regulations and operating letters, clearing house rules, and the like have the effect of agreements under subsection (1) whether or not specifically assented to by all parties interested in items handled.

The parties, by stipulation entered February 8, 1979, stipulated into the record for the purposes of consideration with regard to the pending motions, the letter agreement entered into by defendant and the Oklahoma City Branch, Federal Reserve Bank of Kansas City, and Regulation J, Collection of Checks and Other Items by Federal Reserve Banks. The Court has carefully examined the documents thus submitted in connection with the motion.

Plaintiff has espoused a two-pronged argument, i.e., that 12 C.F.R. 210.12 creates a separate and distinct liability from Oklahoma law and as a result the liability, if any, arises solely from the Federal Regulations and not from statutory Oklahoma law; and that it is a beneficiary of the "contract" between the Federal Reserve Bank and defendant, and thus the 5 year limitation period is applicable. This Court, in examining the contract submitted by the stipulation finds that the Federal Regulations do not usurp the argument as to statutory limitations. The authority to vary the statutory requirements by the Federal Reserve is vested in the statute and its genesis is an outgrowth of the statute and is to be read in conjunction with the statutes involving banks and negotiable items. Additionally, if this Court found that the regulations usurped the statutes, nevertheless the only contract the plaintiff in this case could avail itself of would be that statute relating to contracts, implied or express, not in writing.

This Court, in reviewing the entire file and the applicable law [even considering that some questions raised by the parties are not supported by evidence) finds that under no set of circumstances would the applicable statute of limitations be 5 years.

The Court, thus, finds that the cause of action and complaint asserted by the plaintiff is barred by the statute of limitations and the defendant's Motion to Dismiss with Prejudice should be sustained.

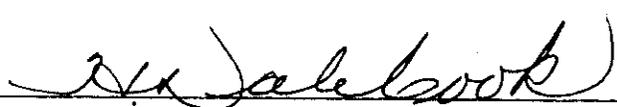
The Court thus finding, the defendant's Motion for More Definite Statement and Motion to Dismiss or Quash Summons and Complaint are overruled as being moot.

IT IS, THEREFORE, ORDERED that the defendant's Motion to Dismiss with Prejudice be and the same is hereby sustained and this cause of action and complaint are hereby dismissed with prejudice.

IT IS FURTHER ORDERED that the defendant's Motion for More Definite Statement and Motion to Dismiss or Quash Summons and Complaint are overruled as being moot.

IT IS FURTHER ORDERED that the plaintiff's Objections to Findings and Recommendations of Magistrate are overruled.

ENTERED this 16<sup>th</sup> day of August, 1979.

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



such dismissal order final and a final judgment pursuant to Rule 54(b), F.R.Civ.P.

IT IS, THEREFORE, ORDERED that the Motion for Entry of Judgment Pursuant to Rule 54(b) filed by the defendant, Fred W. Rausch, Jr. be and the same is hereby sustained.

IT IS FURTHER ORDERED that the Court finds no just reason for delay in making the Dismissal Order heretofore entered on July 19, 1979, a final order, and, therefore, IT IS ORDERED that Final Judgment, pursuant to Rule 54(b) F.R.Civ.P. be and it is hereby entered in favor of the defendant, Fred W. Rausch, Jr. and against the plaintiff, Bradford Securities Processing Services, Inc.

ENTERED this 16<sup>th</sup> day of August, 1979.

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



FILED

AUG 15 1979

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

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION No. 79-C-249-C ✓
	)	
v.	)	TRACT NO. 305ME
	)	
2.25 Acres of Land, More	)	Oil and Gas Leasehold Interest
or Less, Situate in Osage	)	
County, State of Oklahoma,	)	Included in D. T. Filed
and Rougeot Oil and Gas,	)	in Master File No. 405-8
Corporation, et al., and	)	
Unknown Owners,	)	Defendants' File No. 7642
	)	
Defendants.	)	

ORDER

Now on this 15<sup>th</sup> day of August, 1979, the Court considers the Application for Dismissal Without Prejudice filed in this Action by the Defendants, Rougeot Oil and Gas Corporation, Robert W. Langholz, Vector Properties, Inc., Elmer W. Anderson and Russel D. Anderson. The Court finds that Plaintiff, the United States of America does not object to this Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that this Action be dismissed without prejudice to the filing of a new case to condemn the subject property in the event that Congress should see fit to pass an act authorizing such action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Declaration of Taking on which this action was based is hereby void and held for naught insofar as the Declaration of Taking includes any interests of the Defendants to this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Plaintiff's Motion for Immediate Possession which has been filed in this Action be and it hereby is overruled.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the Defendants shall recover their costs of this Action, including an attorney's fee in the amount of FIVE HUNDRED DOLLARS and 00/00 (\$500.00).

  
UNITED STATES DISTRICT JUDGE

AUG 15 1979

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

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION No. 79-C-251-C
	)	
v.	)	TRACT NO. 306ME
	)	
121.00 Acres of Land, More	)	Oil and Gas Leasehold Interest
or Less, Situate in Osage	)	
County, State of Oklahoma,	)	Included in D. T. Filed
and Rougeot Oil and Gas	)	in Master File No. 405-8
Corporation, et al., and	)	
Unknown Owners,	)	Defendants' File No. 7643
	)	
Defendants.	)	

ORDER

Now on this 15<sup>th</sup> day of August, 1979, the Court considers the Application for Dismissal Without Prejudice filed in this Action by the Defendants, Rougeot Oil and Gas Corporation, Robert W. Langholz, Vector Properties, Inc., Elmer W. Anderson and Russel D. Anderson. The Court finds that Plaintiff, the United States of America does not object to this Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that this Action be dismissed without prejudice to the filing of a new case to condemn the subject property in the event that Congress should see fit to pass an act authorizing such action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Declaration of Taking on which this action was based is hereby void and held for naught insofar as the Declaration of Taking includes any interests of the Defendants to this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Plaintiff's Motion for Immediate Possession which has been filed in this Action be and it hereby is overruled.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the Defendants shall recover their costs of this Action, including an attorney's fee in the amount of FIVE HUNDRED DOLLARS and 00/00 (\$500.00).

W.H. Dale Cook  
UNITED STATES DISTRICT JUDGE

FILED

AUG 15 1979

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

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION No. 79-C-268-C
	)	
v.	)	TRACT NO. 310ME
	)	
50.35 Acres of Land, More	)	Oil and Gas Leasehold Interest
or Less, Situate in Osage	)	
County, State of Oklahoma,	)	Included in D. T. Filed
and Rougeot Oil and Gas,	)	in Master File No. 405-8
Corporation, et al., and	)	
Unknown Owners,	)	Defendants' File No. 7644
	)	
Defendants.	)	

ORDER

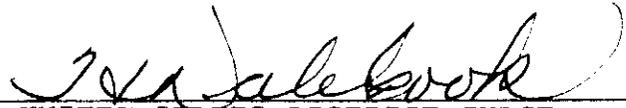
Now on this 15<sup>th</sup> day of August, 1979, the Court considers the Application for Dismissal Without Prejudice filed in this Action by the Defendants, Rougeot Oil and Gas Corporation, Robert W. Langholz, Vector Properties, Inc., Elmer W. Anderson and Russel D. Anderson. The Court finds that Plaintiff, the United States of America does not object to this Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that this Action be dismissed without prejudice to the filing of a new case to condemn the subject property in the event that Congress should see fit to pass an act authorizing such action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Declaration of Taking on which this action was based is hereby void and held for naught insofar as the Declaration of Taking includes any interests of the Defendants to this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Plaintiff's Motion for Immediate Possession which has been filed in this Action be and it hereby is overruled.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the Defendants shall recover their costs of this Action, including an attorney's fee in the amount of FIVE HUNDRED DOLLARS and 00/00 (\$500.00).

  
UNITED STATES DISTRICT JUDGE

FILED

AUG 15 1979

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

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION No. 79-C-247-C
	)	
v.	)	TRACT NO. 304ME
	)	
50.35 Acres of Land, More	)	Oil and Gas Leasehold Interest
or Less, Situate in Osage	)	
County, State of Oklahoma,	)	Included in D. T. Filed
and Rougeot Oil and Gas	)	in Master File No. 405-8
Corporation, et al., and	)	
Unknown Owners,	)	Defendants' File No. 7641
	)	
Defendants.	)	

ORDER

Now on this 15<sup>th</sup> day of August, 1979, the Court considers the Application for Dismissal Without Prejudice filed in this Action by the Defendants, Rougeot Oil and Gas Corporation, Robert W. Langholz, Vector Properties, Inc., Elmer W. Anderson and Russel D. Anderson. The Court finds that Plaintiff, the United States of America does not object to this Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that this Action be dismissed without prejudice to the filing of a new case to condemn the subject property in the event that Congress should see fit to pass an act authorizing such action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Declaration of Taking on which this action was based is hereby void and held for naught insofar as the Declaration of Taking includes any interests of the Defendants to this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Plaintiff's Motion for Immediate Possession which has been filed in this Action be and it hereby is overruled.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the Defendants shall recover their costs of this Action, including an attorney's fee in the amount of FIVE HUNDRED DOLLARS and 00/00 (\$500.00).

  
UNITED STATES DISTRICT JUDGE

FILED

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

AUG 16 1979

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION No. 79-C-245-C
	)	
v.	)	TRACT NO. 303ME
	)	
159.55 Acres of Land, More	)	Oil and Gas Leasehold Interest
or Less, Situate in Osage	)	
County, State of Oklahoma,	)	Included in D. T. Filed
and Rougeot Oil and Gas,	)	in Master File No. 405-8
Corporation, et al., and	)	
Unknown Owners,	)	Defendants' File No. 7640
	)	
Defendants.	)	

ORDER

Now on this 15<sup>th</sup> day of August, 1979, the Court considers the Application for Dismissal Without Prejudice filed in this Action by the Defendants, Rougeot Oil and Gas Corporation, Robert W. Langholz, Vector Properties, Inc., Elmer W. Anderson and Russel D. Anderson. The Court finds that Plaintiff, the United States of America does not object to this Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that this Action be dismissed without prejudice to the filing of a new case to condemn the subject property in the event that Congress should see fit to pass an act authorizing such action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Declaration of Taking on which this action was based is hereby void and held for naught insofar as the Declaration of Taking includes any interests of the Defendants to this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Plaintiff's Motion for Immediate Possession which has been filed in this Action be and it hereby is overruled.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the Defendants shall recover their costs of this Action, including an attorney's fee in the amount of FIVE HUNDRED DOLLARS and 00/00 (\$500.00).

Dale Cook  
UNITED STATES DISTRICT JUDGE

FILED

AUG 15 1979

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

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CIVIL ACTION No. 79-C-243-C
	)	
v.	)	TRACT NO. 302ME
	)	
80.25 Acres of Land, More	)	Oil and Gas Leashold Interest
or Less, Situate in Osage	)	
County, State of Oklahoma,	)	Included in D. T. Filed
and Rougeot Oil and Gas,	)	in Master File No. 405-8
Corporation, et al., and	)	
Unknown Owners,	)	Defendants' File No. 7639
	)	
Defendants.	)	

ORDER

Now on this 15<sup>th</sup> day of August, 1979, the Court considers the Application for Dismissal Without Prejudice filed in this Action by the Defendants, Rougeot Oil and Gas Corporation, Robert W. Langholz, Vector Properties, Inc., Elmer W. Anderson and Russel D. Anderson. The Court finds that Plaintiff, the United States of America does not object to this Order.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that this Action be dismissed without prejudice to the filing of a new case to condemn the subject property in the event that Congress should see fit to pass an act authorizing such action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Declaration of Taking on which this action was based is hereby void and held for naught insofar as the Declaration of Taking includes any interests of the Defendants to this action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Plaintiff's Motion for Immediate Possession which has been filed in this Action be and it hereby is overruled.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the Defendants shall recover their costs of this Action, including an attorney's fee in the amount of FIVE HUNDRED DOLLARS and 00/100 (\$500.00).

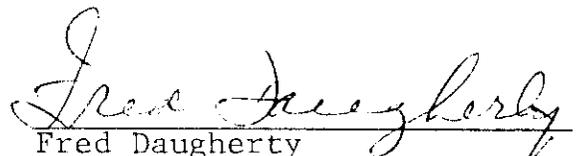
  
UNITED STATES DISTRICT JUDGE



favor of Farmers Alliance Mutual Insurance Company and against Defendants insofar as it pertains to Farmers' liability under the policy issued by it to Defendant Robert Kehler. Farmers' Motion, insofar as it pertains to the issue of whether Farmers may withdraw from its defense of Defendant Robert Kehler is hereby denied, and judgment granted thereon in favor of Defendants and against Farmers.

IT IS FURTHER ORDERED that this action be dismissed as against Defendants Southwest Wheel and Manufacturing Company, Bendix Corporation, and Jobbers Auto Parts Company.

It is so Ordered this 14<sup>th</sup> day of August, 1979.

  
Fred Daugherty  
United States District Judge



The defendants, David E. Wheat and Hillcres Medical Center, Inc. have filed their responses, stating that they have no objection to such dismissal.

The other defendants have not filed a response, nor have they requested or been granted an extension of time within which to respond.

Upon a review of the entire file, the Court finds that said application should be granted.

IT IS, THEREFORE, ORDERED that the above styled and numbered case be dismissed without prejudice as to its future filing and the parties to this action be dismissed each to pay their own costs and plaintiff's application is hereby granted.

ENTERED this 14<sup>th</sup> day of August, 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

NICHOLAS J. PUHLICK, JR., )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 MASSACHUSETTS MUTUAL LIFE )  
 INSURANCE COMPANY, )  
 )  
 Defendant. )

Case No. 78-C-340-C

**FILED**

AUG 14 1979

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

STIPULATION AND ORDER OF DISMISSAL WITH PREJUDICE

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

DATED this 14<sup>th</sup> day of August, 1979.

J.S./H. Dale Cook  
United States District Judge

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

KATHY LEE, individually and as  
Administratrix on behalf of the  
Estate of Anthony Paul Lee, de-  
ceased, and DELAINNA LEE, BRANDI  
LEE AND KAMIRON LEE, minors, by and  
through their mother and next of friend, KATHY LEE, )

Plaintiffs, )

vs. )

HAROLD LEE HARRINGTON, )

Defendant. )

79-C-57-C

**FILED**

AUG 14 1979

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

ORDER

The Court has for consideration a "unique" minimal contact question for determination on a Motion to Dismiss pursuant to Rule 12(b)(2) F.R.Civ.P.

The instant litigation seeks damages as a result of a vehicular accident which occurred in the State of Arkansas.

In the Complaint it is alleged that the "plaintiff" herein is a "resident" of the State of Oklahoma, and that the defendant is a "resident of the State of Arkansas". At the time of his death, Anthony Paul Lee, the decedent of plaintiffs, was living in Siloam Springs, Arkansas.

The contact alleged to vest jurisdiction with this Court is that plaintiffs' decedent and the defendant met across the broder of Arkansas, in the State of Oklahoma. Evidently they proceeded to consum beer and/or alcoholic beverages within the State of Oklahoma; and after a period of some 7 to 7-1/2 hours, decided to "continue their drinking and hunting in Oklahoma until shortly before the fatal accident occurred". It is the contention of the plaintiffs that all the activities of the deceased and the defendant in the State of Oklahoma gave rise to the accident that occurred in Arkansas, thus meeting the minimal contact necessary under 12 O.S. §187 to vest this Court

with jurisdiction.

Heretofore, the Court stayed the Motion to Dismiss and ordered the parties to submit any discovery deemed necessary to support their respective positions within 30 days and to file thereafter any supplemental simultaneous briefs.

The depositions of Kathy Lynn Lee and Danny Dixon have now been filed in this case and the parties have advised that the case is now in a proper posture for dispositive ruling.

In his original Motion to Dismiss, the defendant contends that "[I]t is the alleged negligent operation of the motor vehicle at the time of the accident which gives rise to Plaintiff's alleged claims against Defendant."

A federal district court must look to the law of the state where it sits to determine whether it has in personam jurisdiction over the defendant. *Doyn Aircraft, Inc. v. Wylie*, 443 F.2d 579 (10th Cir. 1971); *Jem Engineering & Manufacturing, Inc. v. Toomer Electrical Co.*, 413 F.Supp. 481 (ND Okl. 1976); *Standard Life & Acc. Ins. Co. v. Western Finance, INC.*, 436 F.Supp. 843 (WD Okl. 1977).

If in personam jurisdiction over the nonresident defendant exists in this Court, it must be found in the authority of the pertinent Oklahoma Statutes. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952); *Burchett v. Bardahl Oil Co.*, 470 F.2d 793 (10th Cir. 1972); *Timberlake v. Summers*, 413 F.Supp. 708 (WD Okl. 1976); *Federal National Bank & Trust Co. of Shawnee v. Moon*, 412 F.Supp. 644 (WD Okl. 1976); *Standard Life & Acc. Ins. Co. v. Western Finance, Inc.*, supra.

As was stated in *Standard Life & Acc. Ins. Co. v. Western Finance, Inc.*, supra:

For purposes of a Rule 12(b)(2) Motion to Dismiss for lack of personal jurisdiction, the burden of proof rests upon the party asserting the existence of jurisdiction. *Wilshire Oil Company of Texas v. Riffe*, 409 F.2d 1277 (Tenth Cir. 1969); *Radiation Researchers, Inc. v. Fischer Industries, Inc.*, 70 F.R.D. 561 (W.D.Okl.1976). This burden, however, is met by a prima facie showing that jurisdiction is conferred by the long-arm statute. *Block Industries v. DHJ Industries, Inc.*, 495 F.2d 256 (Eight Cir. 1974); *O'Hare International Bank v. Hampton*, 437 F.2d 1173 (Seventh Cir. 1971); *United States v. Montreal Trust Co.*, 358 F.2d 239 (Second Cir. 1966), cert. denied, 384 U.S. 919, 86 S.Ct. 1366, 16 L.Ed.2d 440 (1966).

The Courts of Oklahoma have made it clear that the Oklahoma long-arm statutes were intended to extend the jurisdiction of Oklahoma courts over non-residents to the outer limits permitted by the due process requirements of the Fourteenth Amendment of the United States Constitution. *Vacu-Maid, Inc. v. Covington*, 530 P.2d 137 (Okl.Ct.App. 1974); *Carmack v. Chemical Bank of New York Trust Co.*, 536 P.2d 897 (Okl. 1975); *Yankee Metal Products Co. v. District Court of Oklahoma*, 528 P.2d 311 (Okl. 1974); *Architectural Building Components Corporation v. Comfort*, 528 P.2d 307 (Okl. 1974); *Vemco Plating, Inc. v. Denver Fire Clay Co.*, 496 P.2d 117 (Okl. 1972); *Crescent Corp. v. Martin*, 443 P.2d 111 (Okl. 1968); *Simms v. Hobbs*, 411 P.2d 503 (Okl. 1966); *Marathon Battery Co. v. Kilpatrick*, 418 P.2d 900 (Okl. 1965); *Gregory v. Grove*, 547 P.2d 400 (Ct.App. Okl. 1976).

In *Gregory v. Grove*, supra, the Court said:

Summarizing, as far as the State of Oklahoma is concerned, we must apply the "minimum contacts" test and we must also consider whether or not the maintenance of a suit based thereon does not offend "traditional notions of fair play and established justice."

In *Curtis v. CIA Machinery, Inc.*, 571 P.2d 862, 865 (Okl.App. 1977) it was stated:

....The United States Supreme Court has concluded that a state may constitutionally exercise in personam jurisdiction over nonresidents so long as the prospective defendant has made certain "minimum contacts" within the territory of the forum. Although the phrase "minimum contacts" is not definable with precision the intercourse contemplated must be of such a nature that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Under the authority of these cases the Oklahoma Supreme Court has demonstrated a willingness to enforce the legislative policy we mentioned earlier. *Gregory v. Grove*, 547 P.2d 381 (1976)--a case in which it was held that a nonresident making "a telephone call and writing some five letters to" a state resident were sufficient contacts to satisfy the requirements of both due process and the long arm statute.

Turning to the complaint filed by the plaintiffs, it is alleged that "[T]he plaintiff states that the accident was caused by the loss of control of the vehicle due to intoxication of narcotics consumed by the defendant which contributed to or was the principle cause of the accident along with excessive speeding along with which

the decedent and the plaintiff had no control.

In *Newby v. Williams Transfer Co.*, 415 F.Supp. 987 (WD Okl. 1975), companion cases were brought in Oklahoma District Court for injuries arising out of a collision between two motor vehicles in Arkansas, and the cases were removed to Federal Court. On the motion to dismiss or transfer of the defendant motor vehicle owner, the Court held that where the causes of action arose from the allegedly negligent operation of a motor vehicle by owner's agent in the State of Arkansas and none of the allegedly negligent conduct complained of occurred while the motor vehicle was being driven through the State of Oklahoma, the fact that the motor vehicle had been driven through the State of Oklahoma before reaching the State of Arkansas was not relevant to the accident for jurisdictional purposes and could not be the basis for in personam jurisdiction over the nonresident owner under the Oklahoma long-arm statutes. At page 990 the Court said:

The simple question for consideration by this Court is whether the causes of action in the instant cases arose from the same acts Plaintiffs allege subjects Defendant to the jurisdiction of the Oklahoma Courts. The causes of action arise from alleged negligent conduct in the operation of a motor vehicle by Defendant's agent near North Little Rock, Arkansas. The acts of Defendant upon which they assert it is subject to the jurisdiction of this Court is that said motor vehicle had been driven through Oklahoma prior to the time of the accident. Again, assuming such allegation is true, none of the alleged negligent conduct complained of occurred while said motor vehicle was being driven through Oklahoma. The fact that a motor vehicle had been driven through Oklahoma before reaching the state in which an accident occurs is not relevant to the accident for jurisdictional purposes. Conduct prior to the time of the accident wholly unrelated to the negligent acts complained of cannot be the basis for in personam jurisdiction under the Oklahoma long arm statutes....

In *Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), after noting the trend of expanding personal jurisdiction over nonresidents, stated that the state's expanding power did not herald "the eventual demise of all restrictions on the personal jurisdiction of state courts." In *Hanson* the Court announced the principle that in considering the "minimum contacts" test of *International Shoe Co. v. Washington*, supra, the "rule will vary with the

quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. See also *Smith Lighting Sales, Inc. v. Blahut*, 562 F.Supp. 434 (USDC WD Okl. 1978).

Turning to the depositions filed, the deposition of Danny Dixon, who was "moonlighting" at the Phillips 66 Service Station owned by Mike Smith, he saw both the decedent and the defendant on February 5, 1978, at said service station, and that Mr. Lee left his pickup at the station. This station was located in Oklahoma. He further testified that he did not know whether the defendant and decedent left the service station together.

The deposition of Kathy Lee, the widow and plaintiff in this action, reveals no information relevant to the jurisdictional problem.

This Court finds, under the law, and the evidence submitted by the parties, that the plaintiffs have not sustained their burden of proving jurisdiction. The act and conduct complained of, i.e., the automobile accident, took place within the confines of the State of **Arkansas**. The "minimum contacts" necessary to establish jurisdiction are not present in this case.

The Court, therefore, finds that the defendant's Motion to Dismiss for lack of jurisdiction should be sustained.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss for lack of jurisdiction filed by the defendant be and the same is hereby sustained and the cause of action and complaint are dismissed for lack of jurisdiction.

ENTERED this 14<sup>th</sup> day of August, 1979.



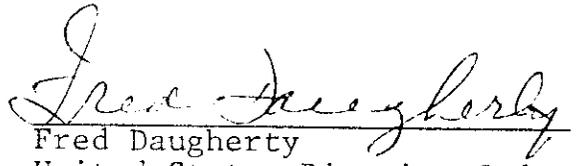
H. DALE COOK, CHIEF JUDGE  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA



favor of Farmers Alliance Mutual Insurance Company and against Defendants insofar as it pertains to Farmers' liability under the policy issued by it to Defendant Robert Kehler. Farmers' Motion, insofar as it pertains to the issue of whether Farmers may withdraw from its defense of Defendant Robert Kehler is hereby denied, and judgment granted thereon in favor of Defendants and against Farmers.

IT IS FURTHER ORDERED that this action be dismissed as against Defendants Southwest Wheel and Manufacturing Company, Bendix Corporation, and Jobbers Auto Parts Company.

It is so Ordered this 14<sup>th</sup> day of August, 1979.

  
Fred Daugherty  
United States District Judge

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

ERNEST E. CLULOW, Jr.,  
Plaintiff,  
vs.  
STATE OF OKLAHOMA, et al.,  
Defendants.

No. 78-C-387-C

FILED

AUG 13 1978

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

ORDER

The Motion of Plaintiff Ernest E. Clulow, Jr., for the Court to approve the withdrawal of Esther M. Belz as co-plaintiff herein, and for Dismissal of the above entitled action, without prejudice, as against certain Defendants, came on regularly for Hearing, and it appearing that the named Defendants have not filed Answers or Counter Claims in the action and will not be prejudiced by a Dismissal,

IT IS HEREBY ORDERED that the above entitled action be, and it is hereby Dismissed, without prejudice, against the following Defendants:

Governor David L. Boren	Elaine G. Allman
State Board of Mental Health	V. Burns Hargis
Ruth Sutherland	Wilson Wallace
Charles E. Smith	Jayne M. Montgomery
Harry Currie	John L. Belt
Durward Tucker	Richard L. McNight
Dr. Lucien Mascucci	John Boyd
Katherine Sappington	Charles C. Chestnut
Marie White Rhodes	Leslie L. Conner
Dr. Hayden Donahue	Ben T. Owens
Board of County Commissioners of Tulsa County	James C. Bass
District Judge H. H. McDougal	Jack A. Hattengly
S. H. Hallis, Jr	Rick Rodgers
State Election Board	Doyle Watson
Lee Slater	Douglas W. Sanders

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

Ross H. Lillard, Jr

District Judge Harold Theus, and

Chief Justice of Supreme Court  
Ralph B. Hodges.

IT IS FURTHER ORDERED that Esther M. Belz be allowed  
to withdraw as co-plaintiff herein.

(Signed) H. Dale Cook

---

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



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

SHARON VAN, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 MISSOURI-PACIFIC RAILROAD )  
 COMPANY and B. W. PARKER, )  
 )  
 Defendants. )

No. 78-cv-342-01

*filed*  
*August 13, 1979*

ORDER

NOW, on this 13<sup>th</sup> day of August, 1979, this matter coming on before me, the undersigned Judge of the United States District Court for the Northern District of Oklahoma, upon the parties' stipulation and agreement that the Court enter an Order of Dismissal With Prejudice, the Court finds that the Order of Dismissal With Prejudice should be granted.

The Court further finds that plaintiff, Sharon Van, is the surviving wife of Emmett Leon Van, Deceased, and that the said Sharon Van and April Dawn Van, age 3; Freddie Leon Van, age 4; Karen Sue Van, age 18; and Donald Leon Van, age 20, are all the heirs at law and next of kin of Emmett Leon Van, Deceased, and that plaintiff, Sharon Van, has brought this action for and in behalf of herself and all the heirs at law and next of kin of Emmett Leon Van, Deceased.

The Court further finds that the parties hereto have settled their differences and that the defendants have, without the admission of any fault, and in a spirit of compromise, agreed to pay to plaintiff the sum of Thirty Thousand Dollars (\$30,000.00), to be divided as follows, after deducting \$10,000.00 attorney fees, and expenses advanced by plaintiff's attorneys of \$2,150.50:

- Karen Sue Van will receive \$1,750.00.
- Donald Leon Van will receive \$150.00.

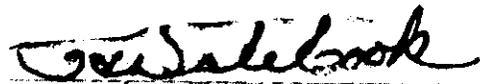
April Dawn Van will receive \$1,000.00, to be paid to Sharon Van as the mother and next friend of April Dawn Van.

Freddie Leon Van will receive \$1,000.00, to be paid to Sharon Van as the mother and next friend of Freddie Leon Van.

Plaintiff, Sharon Van, will receive individually the sum of \$1,000.00.

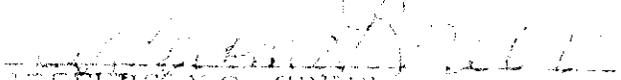
The Court further finds that the parties have reached a just and fair settlement and that the distribution of the proceeds and the items mentioned distribution of the proceeds as hereby approved and plaintiff is ordered and directed to proceed to distribute said recovery to the respective heirs above-mentioned, each to receive their agreed share as shown above.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court that this action be, and the same is hereby dismissed with prejudice to the bringing of any further cause of action against these defendants by this plaintiff or by any of the heirs at law or next of kin of Emmett Leon Van, Deceased.

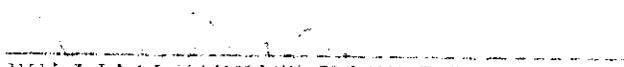
  
U. S. DISTRICT JUDGE.

AT PROVE D.

ATTORNEY FOR PLAINTIFF:

  
JEFFERSON G. GREER

ATTORNEY FOR DEFENDANTS:

  
WILLIAM KNIGHT POWERS



property of the Defendant for the full amount of the indebtedness then due and owing.

Entered this 13<sup>th</sup> day of August, 1979.

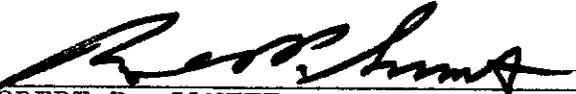
  
UNITED STATES DISTRICT JUDGE

CONSENTED TO:

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

By

  
ROBERT P. SANTEE  
Assistant United States Attorney

I hereby waive formal service of process in this action and acknowledge receipt of a copy of the Complaint filed herein and consent to the entry of this judgment.

Dated this 24 day of July, 1979.

  
WILLIE E. GRIMES a/k/a  
WILLIE GRIMES, JR.

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

UNITED STATES OF AMERICA,  
and GARY BENUZZI, Special  
Agent, Internal Revenue  
Service,

Petitioners,

vs.

SUNMARK INDUSTRIES and  
E. GERALD McALLISTER,

Respondents.

No. 79-C-362-C

**FILED**

AUG 13 1979

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

ORDER DISCHARGING RESPONDENTS  
AND DISMISSAL

On this 13<sup>th</sup> day of August, 1979,  
Petitioners' Motion to Discharge Respondents and for Dismissal  
came for hearing and the Court finds that Respondents have now  
complied with the Internal Revenue Service Summons served upon  
them; that further proceedings herein are unnecessary, and that  
the Respondents, Sunmark Industries and E. Gerald McAllister,  
be and they are hereby discharged from any further proceedings  
herein and this action is hereby dismissed.

*Over Salebook*

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

MILLARD HAMPTON,  
Plaintiff,

vs.

BANK OF OKLAHOMA, N.A.,  
a corporation,  
Defendant.

Civil Action File No. 78-C-616-C

**FILED**

AUG 1 1979

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

ORDER

NOW on this 13<sup>th</sup> day of August, 1979, the Plaintiff's Application to Dismiss came on for hearing and the Court finds that both of the parties hereto have entered into an agreement wherein they have settled any and all claims, each against the other, and the above styled and numbered cause should be dismissed with prejudice.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED by this Court that the Plaintiff's Application to Dismiss is hereby sustained and this cause is hereby ordered dismissed.

(Signed) H. Dale Cook

United States District Judge



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

ERNEST E. CLULOW, JR.,  
Plaintiff,  
vs.  
UNITED STATES OF AMERICA, ex rel  
VETERANS ADMINISTRATION,  
Defendants.

Case No. 78-C-234-C

FILED

AUG 13 1979

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

ORDER

The Motion of Plaintiff for Dismissal of the above entitled action, without prejudice, as against certain Defendants, came on regularly for Hearing and it appearing that the named Defendants have not filed Answers or Counter Claims in the action and will not be prejudiced by a Dismissal,

IT IS HEREBY ORDERED that the above entitled action, be and it is hereby Dismissed, without prejudice, against the following Defendants:

- |  |                                       |
|--|---------------------------------------|
| Dr. Charles C. Ault                                    | Dr. Franklin James                    |
| Dr. Henry M. Hawkins,                                  | The State Board of Mental Health      |
| Dr. John A. Stathakis                                  | The State Election Board and Members, |
| Pat Williams   | Lee Slater                            |
| The State of Oklahoma                                  | V. Burns Hargis                       |
| Governor David L. Boren<br>and his Successor           | Elaine Allmon                         |
| Attorney General Larry Derryberry<br>and his Successor | Dr. Joe E. Tyler, and his Successor   |
| Dr. Hayden Donahue,<br>and his Successor               | Dr. Karl E. Humiston                  |
|  | The Tulsa County Election Board       |

(Signed) H. Dale Cook

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

RECEIVED  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA  
TULSA, OKLAHOMA  
AUG 13 1979  
PRO SECUTIO IMMEDIATELY  
UPON RECEIPT.

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

FILED

AUG 10 1979

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

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 DONALD W. MOODY, a/k/a, )  
 DON MOODY, )  
 )  
 Defendant. )

CIVIL ACTION NO. 79-C-201-D

DEFAULT JUDGMENT

This matter comes on for consideration this 10<sup>th</sup>  
day of August, 1979, the Plaintiff appearing by Robert P.  
Santee, Assistant United States Attorney for the Northern  
District of Oklahoma, and the Defendant, Donald W. Moody,  
a/k/a, Don Moody, appearing not.

The Court being fully advised and having examined  
the file herein finds that Defendant, Donald W. Moody, a/k/a,  
Don Moody, was personally served with Summons and Complaint  
on April 10, 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,  
Donald W. Moody, a/k/a, Don Moody, for the sum of \$987.00,  
plus the costs of this action accrued and accruing.

*Lena J. ...*  
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney

*Robert P. Santee*  
ROBERT P. SANTEE  
Assistant U. S. Attorney

FILED

AUG 9 1979

Jack C. Silver, Clerk  
U. S. 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-428-C
	)	
DELBERT J. BAILEY,	)	
	)	
Defendant.	)	

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, without prejudice.

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 August, 1979.

  
Assistant United States Attorney

**FILED**

**AUG 8 1979**

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

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

HOME INSURANCE COMPANY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 78-C-131-C
	)	
NORTHEASTERN OKLAHOMA	)	
ELECTRIC COOPERATIVE, INC.,	)	
a corporation,	)	
	)	
Defendant.	)	
	)	

STIPULATION OF DISMISSAL

COME NOW the Plaintiff, Home Insurance Company, and the Defendant, Northeastern Oklahoma Electric Cooperative, Inc., and pursuant to Rule 41 (a), Federal Rules of Civil Procedure hereby stipulate that this action against the Defendant, Northeastern Oklahoma Electric Cooperative, Inc., can be and is dismissed with prejudice.

KNIGHT, WAGNER, STUART & WILKERSON

By: Stephen C. Wilkerson  
Attorney for the Plaintiff

Stephen C. Wilkerson  
310 Beacon Building  
Tulsa, Oklahoma 74103

Richard D. Gibbon  
Richard Gibbon, attorney for the Defendant, Northeastern Oklahoma Electric Cooperative, Inc.

DOCKET NO. 378

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

**FILED**

IN RE THE DEPARTMENT OF ENERGY STRIPPER WELL EXEMPTION LITIGATION

Wood Oil Co., et al. v. Department of Energy, N. D. Oklahoma,  
C. A. No. 79-0114-C

JUL 12 1979

CLERK OF THE PANEL

ARTHUR G. JOHNSON, Clerk

CONDITIONAL TRANSFER ORDER

By Patricia D. Howard Deputy

On June 29, 1979, after notice and hearing, the Panel transferred four related civil actions to the United States District Court for the District of Kansas for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. With the consent of that court, all such actions have been assigned to the Honorable Frank G. Theis.

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 Kansas and assigned to Judge Theis.

Pursuant to Rule 9 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 78 F.R.D. 561, 567-68, the above-captioned tag-along action is hereby transferred under 28 U.S.C. §1407 to the District of Kansas on the basis of the hearing held on March 23, 1979, and for the reasons stated in the opinion and order of June 29, 1979, and with the consent of that court, assigned to the Honorable Frank G. Theis.

This order does not become effective until it is filed in the office of the Clerk of the United States District Court for the District of Kansas. 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 the Panel.

APPROVED: Arthur G. Johnson, Clerk

FOR THE PANEL:

*Brown*  
Deputy

*Patricia D. Howard*

Patricia D. Howard  
Clerk of the Panel

**FILED**

As much as no objection is pending at this time, the stay is lifted and this order becomes effective

AUG 6 1979

JUL 30 1979

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

Patricia D. Howard  
Clerk of the Panel

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

JUL 12 1979

IN RE THE DEPARTMENT OF ENERGY STRIPPER WELL EXEMPTION LITIGATION

**FILED**

Oklahoma Association of Energy Consumers and Producers v.  
Department of Energy, N.D. Oklahoma, C. A. No. 77-C-108-C

AUG 1 1979

**ARTHUR G. JOHNSON, Clerk** **CONDITIONAL TRANSFER ORDER**

v. ~~s/Carolyn J. Brown~~ Deputy

On June 29, 1979, after notice and hearing, the Panel transferred four related civil actions to the United States District Court for the District of Kansas for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. §1407. With the consent of that court, all such actions have been assigned to the Honorable Frank G. Theis.

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 Kansas and assigned to Judge Theis.

Pursuant to Rule 9 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 78 F.R.D. 561, 567-68, the above-captioned tag-along action is hereby transferred under 28 U.S.C. §1407 to the District of Kansas on the basis of the hearing held on March 23, 1979, and for the reasons stated in the opinion and order of June 29, 1979, and with the consent of that court, assigned to the Honorable Frank G. Theis.

This order does not become effective until it is filed in the office of the Clerk of the United States District Court for the District of Kansas. 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 the Panel.

ATTEST: A true copy  
ARTHUR G. JOHNSON, Clerk

FOR THE PANEL:

By Carolyn J. Brown  
Deputy

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

**FILED** Inasmuch as no objection is being filed at this time, the stay is lifted and this order becomes effective

AUG 6 1979 JUL 30 1979

Jack C. Silver, Clerk  
U. S. DISTRICT COURT  
Patricia D. Howard  
Clerk of the Panel

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

AUTO CRANE COMPANY, an )  
Oklahoma corporation, )  
 )  
Plaintiff, )  
 )  
vs. ) No. 79-C-222-D ✓  
 )  
TOTAL FLEET SYSTEMS, a )  
Texas corporation, )  
 )  
Defendant. )

FILED

10 AUG 6 1979

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

O R D E R

The Court has before it for consideration Defendant's motion to dismiss made pursuant to Rules 12(b)(2) and 12(b)(3), Fed.R.Civ.P. Defendant contends that it does not have contacts with the State of Oklahoma sufficient to vest this Court with in personam jurisdiction. Defendant additionally contends that venue is improper in this District, and should properly lie in that district where the contract was made.

This action arises from an alleged balance due on an account. Plaintiff is an Oklahoma corporation doing business in Tulsa, Oklahoma. Defendant is a Texas corporation with its principal place of business located in Houston, Texas. The amount due on the account is alleged to be \$25,685.31. Jurisdiction is therefore founded upon diversity of citizenship, 28 U.S.C. § 1332(a).

Plaintiff alleges that on or about November 10, 1978, and November 20, 1978, Defendant ordered equipment and machinery from Plaintiff, which equipment and machinery was shipped f.o.b. Plaintiff's plant on November 28, 1978, and December 7, 1978. Plaintiff further alleges that although it has demanded payment for these goods, Defendant has refused to pay and has made no payments.

In support of its motion to dismiss for lack of in personam jurisdiction, Defendant has produced the affidavit of William H. Hill, President of Defendant Total Fleet Systems. The affiant states that he acquired, in October or November of 1978, an advertising brochure regarding Plaintiff's products. This brochure, he states, was acquired by him in Houston, Texas. Affiant states that he called Plaintiff in Tulsa, Oklahoma to make inquiry with regard to certain information contained in the brochure, and that he did request that Plaintiff send him a catalog. He denies, however, making any order for goods during this conversation. After receiving this catalog and considering its contents, affiant admits having sent a purchase order from Houston to the Plaintiff in Tulsa. Affiant further states that except for this one instance, Defendant Total Fleet Systems has never transacted any business in the State of Oklahoma; that Total Fleet Systems has no agent in the State of Oklahoma, and that Total Fleet Systems has not availed itself of the protection of the laws of Oklahoma. It is finally stated that Defendant does not presently have, and, with the exception of the events admitted, has never had, any contact with the State of Oklahoma.

In response, Plaintiff presents the affidavit of Steve Oden, Export Manager of Plaintiff Auto Crane Company. Oden states that prior to November 17, 1978, he received a telephone call from William Hill, requesting price quotations on Plaintiff's machinery and equipment. On the following day, he states, he received another telephone call from William Hill, during which Mr. Hill verbally ordered equipment and machinery for Defendant Total Fleet Systems, Inc. Oden asserts that he explained that Plaintiff's stock on hand was insufficient to meet the verbal order, but that Defendant requested a rush delivery and, in order to comply with this rush delivery request, Plaintiff accelerated the manufacture

of such equipment at its Tulsa plant. Oden further states that on or about November 17, 1978, a written purchase order was received from Defendant, pursuant to its verbal order, and that another such written purchase order was received on or about November 20, 1978. It is asserted that three releases on the purchase orders were also received from Defendant, requesting that some of the merchandise in question be shipped directly to two customers of Defendant, and that some be shipped to Defendant itself. It is also stated that on December 14, 1978, and December 15, 1978, Defendant, through William Hill, telephoned Plaintiff in Tulsa to inquire as to the status of the shipment of the equipment and machinery. Oden states that payment was made by Defendant for the equipment and machinery shipped to it by a money transfer order to a Tulsa bank dated March 2, 1979, but that no payment has been made on the balance of the equipment and machinery .

Inquiry into the propriety of in personam jurisdiction requires the analysis of two distinct questions: (1) does a statute or rule exist by which the exercise of jurisdiction is authorized, and (2) is the exercise of such jurisdiction consistent with the standards of constitutional due process. J.E.M. Corp. v. McCellan, 462 F.Supp. 1246 (D.Kan. 1978); World-Wide Volkswagen Corp. v. Woodson, 585 P.2d 351 (Okla. 1978). See Stillings Transp. Corp. v. Robert Johnson Grain & Molasses Co., 413 F.Supp. 410 (N.D.Okla. 1975).

Oklahoma's "Long Arm" statutes are found at 12 Okla. Stat. §§ 187 and 1701.03.

Section 187 provides, in pertinent part:

(a) Any person, . . . who does, or who has done, any of the acts hereinafter enumerated, whether in person or through another submits himself, or shall have submitted himself, and if an individual his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising or which shall have arisen, from the doing of any said acts:

(1) the transaction of any business within this STATE:

Section 1701.03 provides as follows:

(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's:

(1) transacting any business in this state;

A federal court, of course, must look to state law to determine whether in personam jurisdiction over nonresident defendants exists. Doyn-Aircraft, Inc. v. Wylie, 443 F.2d 579 (Tenth Cir. 1971); Standard Life & Acc. Ins. Co. v. Western Finance, Inc., 436 F.Supp. 843 (W.D.Okla. 1977); Jem Engineering & Mfg., Inc. v. Toomer Electrical Co., 413 F.Supp. 481 (N.D.Okla. 1976). The authorization for this Court's exercise of in personam jurisdiction is found in 12 Okla. Stat. §§ 187 and 1701.03. See Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437 (1952); Burchett v. Bardahl Oil Co., 470 F.2d 793 (Tenth Cir. 1972); Timberlake v. Summers, 413 F.Supp. 708 (W.D.Okla. 1976); Federal National Bank & Trust Co. of Shawnee v. Moon, 412 F.Supp. 644 (W.D.Okla. 1976).

The statutes quoted supra clearly indicate that the transaction of any business within the State of Oklahoma, will give rise to the authorization for the exercise of in personam jurisdiction. The question remaining is whether the exercise of jurisdiction is permitted under the standards of due process. See Jem Engineering & Mfg. Inc., v. Toomer Electrical Co., supra, World-Wide Volkswagen Corp. v. Woodson, supra; Vacu-Maid, Inc. v. Covington, 530 P.2d 137 (Okla.Ct.App. 1974).

The burden of proof here rests upon the Plaintiff as the party asserting the existence of jurisdiction, Wilshire Oil Company v. Riffe, 409 F.2d 1277 (Tenth Cir. 1969); Standard Life & Acc. Ins. Co. v. Western Finance, Inc.,

supra; Radiation Researchers, Inc. v. Fischer Industries, Inc. 70 F.R.D. 561 (W.D.Okla. 1976), but this burden is met by a prima facie showing. See Block Industries v. DHJ Industries, Inc., 495 F.2d 256 (Eighth Cir. 1974); O'Hare International Bank v. Hampton, 437 F.2d 1173 (Seventh Cir. 1971); United States v. Montreal Trust Co., 358 F.2d 239 (Second Cir.), cert. denied, 384 U.S. 919 (1966).

The test to be applied in this case is well known. The defendant must have minimum contacts with the forum such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Kulko v. California Superior Court, 436 U.S. 84 (1978); Shaffer v. Heitner, 433 U.S. 186 (1977); International Shoe Co. v. Washington, 326 U.S. 310 (1945). This test offers only general guidelines, to be applied to the facts of each case. It is not a "formula automatically determinative of every case." Barnes v. Wilson, 580 P.2d 991, 994 (Okla. 1978). In Kulko v. California Superior Court, supra, the Supreme Court said:

Like any standard that requires a determination of "reasonableness," the "minimum contacts" test of International Shoe is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. . . . We recognize that this determination is one in which few answers will be written "in black and white." The greys are dominant and even among them the shades are innumerable."

436 U.S. at 92 (citations omitted).

It is clear that the Oklahoma long-arm statutes were intended to extend the jurisdiction of Oklahoma courts over nonresidents to the outer limits permitted by the due process requirements of the United States Constitution. Burchett v. Bardahl Oil Co., supra; CMI Corp. v. Costello Constr. Corp., 454 F.Supp. 497 (W.D.Okla. 1977); Timberlake v. Summers, supra; Jem Engineering & Mfg., Inc. v. Toomer Electrical Co., supra; Barnes v. Wilson, supra; Fields

v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976); Carmack v. Chemical Bank New York Trust Co., 536 P.2d 897 (Okla. 1975); Yankee Metal Products Co. v. District Court, 528 P.2d 311 (Okla. 1974); Fidelity Bank, N.A. v. Standard Industries, Inc., 515 P.2d 219 (Okla. 1973); Vemco Plating, Inc. v. Denver Fire Clay Co., 496 P.2d 117 (Okla. 1972); Hines v. Clendenning, 465 P.2d 460 (Okla. 1970); Crescent Corp. v. Martin, 443 P.2d 111 (Okla. 1968); Simms v. Hobbs, 411 P.2d 503 (Okla. 1966); Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965); Gregory v. Grove, 547 P.2d 400 (Okla.App. 1975), modified 547 P.2d 381 (Okla. 1976); Vacu-Maid, Inc. v. Covington, supra.

In weighing the facts of the case to determine whether the requirements of due process are met, the Court must consider the totality of contacts between the nonresident defendant and the State of Oklahoma. Standard Life & Acc. Ins. Co. v. Western Finance, Inc., supra; Federal National Bank & Trust Co. of Shawnee v. Moon, supra; Carmack v. Chemical Bank New York Trust Co., supra; Crescent Corp. v. Martin, supra; Gregory v. Grove, supra.

The Oklahoma courts have drawn a distinction between "active purchasers" and "passive purchasers" when faced with the question of whether the exercise of jurisdiction over a nonresident buyer comports with the requirements of due process. CMI Corporation v. Costello Constr. Corp., supra; Yankee Metal Products Co. v. District Court, supra, Vacu-Maid, Inc. v. Covington, supra. The basis for such a distinction is that in the case of the average "passive" buyer, his contact with the seller's state is severely limited, and only comes about because by happenstance that is where the seller is located. As the court in Geneva Industries, Inc. v. Copeland Construction Corp., 312 F.Supp. 186, 188 (N.D. Ill. 1970) stated:

The notion that any customer of an Illinois based mail order house such as Sears Roebuck or Montgomery Ward would be subject to the jurisdiction of Illinois courts is obviously violative of the most minimal standard of minimum contacts and the fundamental structure of the federal system.

When the purchaser assumes a role greater than that of a mere consumer, however, his contacts with the seller's state may be sufficient to support the exercise of in personam jurisdiction. In Yankee Metal Products Co. v. District Court, supra, Yankee Metal, a New York corporation with its principal place of business in Connecticut, contacted the Del Wire Company in Oklahoma. An employee of Yankee Metal, in response to some direct mail advertising of Del Wire, discussed the purchase of wire harnesses, ultimately ordering a large number, to be custom built according to samples to be furnished by Yankee Metal. These wire harnesses were not stock items regularly produced by Del Wire, but were completely custom made. When the harnesses were received by Yankee Metal in Connecticut, they were rejected as being not in conformance with the samples and specifications.

In holding that Yankee Metal's contacts with Oklahoma were sufficient to support the district court's exercise of in personam jurisdiction, the Oklahoma Supreme Court noted:

The "active-purchaser, passive-purchaser" classification has the effect of protecting the ordinary "mail order catalogue" consumer who merely orders a stock item of merchandise from a distant state, from the jurisdiction of the courts of the distant state. At the same time it affords ample protection to a resident manufacturer who, at the special solicitation of a nonresident buyer, manufactures custom built materials or products according to specifications or samples furnished by the buyer.

As we have seen, the nonresident buyer in the case now before us did more than merely place an order for merchandise. It "actively participated in negotiations and plans for production" by furnishing specifications or samples for the manufacture of the harnesses.

528 P.2d at 313. The activities of Defendant in this case, in connection with its order to Plaintiff, while greater than those of a mere "mail order catalog consumer," are short of those of a nonresident buyer who specifically solicits the manufacture of custom built materials according to its own specifications. The affidavit of Plaintiff's export manager states that "the equipment and machinery verbally ordered by TOTAL FLEET were standard production items." From the affidavit, it appears that Defendant's involvement in the "negotiations and plans for production" was limited to the request of a rush delivery of this equipment and machinery, and the supplying of instructions as to where shipment was to be made. Supplying shipping instructions under these circumstances, cannot be the element which separates "active" from "passive" purchasers. The remaining element, then, whereby the exercise of in personam jurisdiction could be supported, is Defendant's demand of a rush delivery schedule.

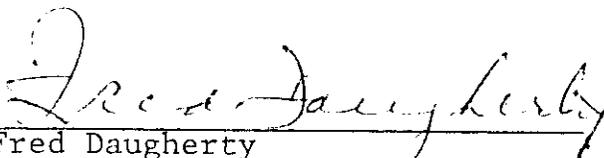
Applying the cases dealing with the "active-passive" purchaser distinction, it does not appear that this is a sufficient involvement with the seller's state to support the exercise of in personam jurisdiction. The mere fact, standing alone, that Defendant was informed that Plaintiff would have to adjust its manufacturing schedule to meet Defendant's "rush order" does not raise Defendant's involvement in the manufacturing process to the level where sufficient minimum contacts could be found.

Accordingly, the Court is of the opinion that Defendant's contacts with the State of Oklahoma are insufficient

to support the exercise of in personam jurisdiction over the Defendant.

IT IS THEREFORE ORDERED that Defendant's motion to dismiss be, and the same is hereby granted.

It is so Ordered this 6<sup>th</sup> day of August, 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.

DAVID ALLEN REAVES,

Defendant.

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) 76-CR-77 ✓  
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FILED

AUG 2 1979

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

ORDER

SUA SPONTE, IT IS ORDERED that the Special Conditions of  
Probation imposed on September 2, 1976, be modified to read as follows:

Defendant is to make restitution to the following  
named Banks, i.e.,

SOUTHEASTERN STATE BANK

PEOPLES STATE BANK

CITY BANK & TRUST COMPANY

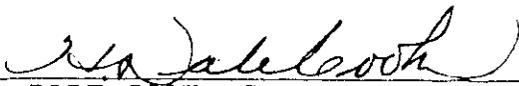
GUARANTY NATIONAL BANK

FIRST BANK & TRUST COMPANY

in the sum of \$300.00 per month, in proportionate  
amounts (to be disbursed by the Clerk of this Court  
quarterly to said banks) until the expiration of the  
term of probation originally imposed (5 years) on  
September 2, 1976.

IT IS FURTHER ORDERED that no further payments of restitution  
be made to Toyota of Tulsa, Inc. or Aetna Life & Casualty Company.

ENTERED this 1<sup>st</sup> day of August, 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

SHAWNEE SOUTHWEST, INC., )  
a Texas corporation, )  
 )  
Plaintiff, )  
 )  
vs )  
 )  
JACK L. MOORE, )  
 )  
Defendant. )

CASE NO. 78-C-575-**FILED**

AUG 2 1979

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

J U D G M E N T

This action came on for hearing on Plaintiff's Motion for Summary Judgment before the Court, Honorable Fred Daugherty, District Judge, presiding, on the 26th day of July, 1979, plaintiff appearing by its attorney, B. J. Brockett, and the defendant being adjudged in default upon his failure to appear. The Court, having duly heard and considered the said Motion, and a decision having been duly rendered,

It is ORDERED and ADJUDGED that plaintiff, Shawnee Southwest, Inc., recover of the defendant, Jack L. Moore, the sum of \$17,441.80, with interest thereon at 12% per annum from December 6, 1978, until paid, and its costs of action, including an attorney fee of \$2,600.00.

Dated this 2 day of <sup>Aug</sup> ~~July~~, 1979.

FRED DAUGHERTY

---

FRED DAUGHERTY  
UNITED STATES DISTRICT JUDGE

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

BOBBIE E. MORSE, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 JOSEPH E. CALIFANO, JR., )  
 Secretary of Health, )  
 Education and Welfare, )  
 )  
 Defendant. )

No. 79-C-3-C

**FILED**

APR 4 1979

U.S. DISTRICT COURT

O R D E R

The Court has for consideration plaintiff's Motion to Remand and has reviewed the file, the briefs and all of the recommendations concerning the motion, and being fully advised in the premises, finds:

That the Plaintiff's Motion to Remand Should be sustained for the following reasons:

This is an appeal from a decision of the Appeals Council rendered on November 6, 1978, which affirmed a decision of the Administrative Law Judge on October 10, 1978, denying period of disability and disability insurance benefits to plaintiff.

In support of plaintiff's Motion to Remand this matter to the Department of Health, Education and Welfare, Social Security Administration, for a new hearing by the Administrative Law Judge, plaintiff asserts that at the time of the original hearing before the Administrative Law Judge on September 7, 1978, it was agreed and promised by the Court and/or it was understood by the Claimant that additional medical information would be submitted to the Court prior to its rendering its decision. Specifically, additional medical consisting of an EMG, both cervical and lumbar, as well as a myelogram, both cervical and lumbar, would be considered by the Court prior to its decision. An EMG of the lumbar area only was thereafter submitted to the Court, but not an EMG

of the cervical area, nor a myelogram of both of the cervical and lumbar areas. Plaintiff asserts that the submission of such evidence is necessary to enable the Administrative Law Judge to properly evaluate the true condition of Mr. Morse, and that plaintiff has made the requisite showing of "good cause" for remand under 42 U.S.C. § 405 (g).

Defendant urges that plaintiff has failed to make the requisite showing of "good cause" for remand and seeks nothing more than the opportunity to produce additional and cumulative medical evidence, which amounts only to a re-litigation of the medical issues. Defendant further asserts that the government is not required to furnish a consultative examination at government expense if there is no showing that such exam is necessary and that such requested consultative exam would merely be a repeat test.

From the record it appears that there was a discussion between the Administrative Law Judge and the claimant concerning scheduling of an EMG, both cervical and lumbar, of plaintiff, as well as a neurological exam, including both a cervical and lumbar myelogram, if such tests had not previously been performed upon Mr. Morse by any of his previous attending physicians. Tr. 24-25; 63-64. It further appears that an EMG of the lumbar only was previously performed, but that an EMG of the cervical area, as well as a myelogram of both the cervical and lumbar, was not performed. Tr. 125.

IT IS, THEREFORE, ORDERED that this matter be remanded to the Administrative Law Judge so that he may consider additional diagnostic studies (EMG of the cervical area) and cervical and lumbar myelogram as are or may be performed upon plaintiff.

Dated this 1<sup>st</sup> day of aug. 1979.

  
H. DALE COOK  
CHIEF JUDGE





FILED

AUG 1 1979

Jack C. Silver, Clerk  
U. S. 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-330-
	)	
THELMA LOUISE WILLIAMS, a	)	
single person, et. al.,	)	
	)	
Defendants.	)	

NOTICE OF DISMISSAL

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 hereby gives notice of its dismissal of this action.

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 1st day of August, 1979.

  
Assistant United States Attorney

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

UNITED STATES OF AMERICA,  
Plaintiff,  
vs.  
ROBERT J. COFFER,  
Defendant.

)  
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)  
)

CIVIL ACTION NO. 79-C-205-C

**FILED**

AUG 1 1979

DEFAULT JUDGMENT

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

This matter comes on for consideration this August day of August, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Robert J. Coffe, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Robert J. Coffe, was personally served with Summons and Complaint on April 12, 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, Robert J. Coffe, for the sum of \$639.00, plus the costs of this action accrued and accruing.

*Jack C. Silver*  
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

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
RICHARD H. DAY, a/k/a, )  
RICHARD HAUSER DAY, )  
 )  
Defendant. )

CIVIL ACTION NO. 79-C-429-C

**FILED**

AUG 1 1979

DEFAULT JUDGMENT

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

This matter comes on for consideration this 1st

day of August, 1979, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Richard H. Day, a/k/a, Richard Hauser Day, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Richard H. Day, a/k/a, Richard Hauser Day, 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.

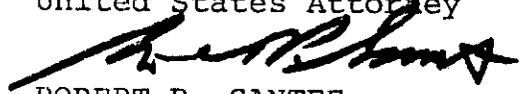
IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover Judgment against Defendant, Richard H. Day, a/k/a, Richard Hauser Day, for the sum of \$806.42, plus the costs of this action accrued and accruing.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT  
United States Attorney



ROBERT P. SANTEE  
Assistant U. S. Attorney

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

INSULATION SERVICES, INC., )  
a corporation, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
THE LITWIN CORPORATION, )  
a corporation, )  
 )  
Defendant. )

No. 77-C-479-D

**FILED**

AUG 1 1979

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

J U D G M E N T

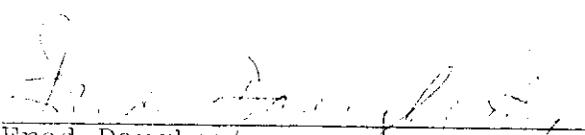
Based on the Order filed simultaneously this date, it is ordered that judgment be entered as follows:

1. That judgment be entered in favor of the plaintiff, Insulation Services, Inc. and against the defendant, The Litwin Corporation in the sum of \$73,000.00.

2. That judgment be entered in favor of plaintiff, Insulation Services, Inc. against the defendant, The Litwin Corporation on The Litwin Corporation's counterclaim.

3. That plaintiff, Insulation Services, Inc. recover its costs.

Dated this 31<sup>st</sup> day of July, 1979.

  
Fred Daugherty  
United States District Judge

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

PAUL G. PAULSON and SUSAN )  
K. PAULSON, ET AL., )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
INDEPENDENT SCHOOL DISTRICT )  
NUMBER ONE OF TULSA COUNTY, )  
OKLAHOMA, ET AL., )  
 )  
Defendants. )

No. 78-C-243-D

✓ FILED

AUG 1 1978

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

O R D E R

The Court has for consideration the Motions for Summary Judgment of the Plaintiffs, Defendant Independent School District No. 1 of Tulsa ("School District") and Defendant State of Oklahoma ("State"), and the School District's Motion to Dismiss and has reviewed the file, the briefs and all of the recommendations concerning the motions, and being fully advised in the premises, finds:

That the Motion for Summary Judgment of Plaintiffs should be overruled and that the State's Motion for Summary Judgment and the School District's Motion to Dismiss should be granted.

This is an action for a judicial review of a due process hearing pursuant to 20 U.S.C. § 1415(e). Prior to this date, the issues of this litigation have been substantially narrowed by agreement of the parties. During the pendency of this litigation, the Plaintiffs' child was transferred from School District to a cooperative special education program operated by Leonard Dependent School District No. 18 of Tulsa County ("Leonard") at Carnegie Elementary School where she has received and continues to receive educational services adequate to satisfy the demands of the Plaintiffs in this case.

The only issue which has survived to this date is that involving the alleged entitlement of the Plaintiffs to year-

round educational services for their daughter. School District, prior to this date, filed a Motion to Dismiss. One of the issues raised therein being that the daughter of the Plaintiffs, Julie Paulson, is now receiving educational services at a level commensurate with that requested by the Plaintiffs in their original complaint and that Julie Paulson will receive educational services on a year-round basis for the school year 1978-1979, that period covered by the current individualized educational program, thus rendering moot the sole surviving issue in this litigation.

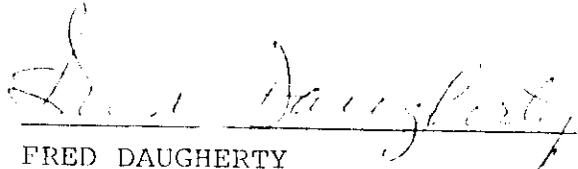
The Court finds that on July 2, 1979 the Legislature of the State of Oklahoma passed separate resolutions, House Resolution Number 1037 and Senate Resolution Number 60, directing the State Department of Education to allocate from funds previously appropriated to the said State Department of Education for New Special Education and Gifted and Talented Programs, Fifty Thousand Dollars (\$50,000) for the support and maintenance of programs through the summer months at the Development centers housed at Childrens' Medical Center and Carnegie Elementary School in Tulsa. The Magistrate further finds that the Assistant Superintendent for Finance of the State Department of Education, Mr. Stephen H. McDonald, has provided this Court with his assurance that the funds which the Legislature has by the aforementioned Resolutions directed the State Department of Education to provide to Childrens' Medical Center and Carnegie Elementary School, will be provided so that summer programs might commence at the earliest possible time.

The Court finds that by reason of the appropriation of funds for summer programs at Carnegie Elementary School and by reasons of the provision of year-round educational services to Julie Paulson at Carnegie Elementary School, the

issue of year-round educational services for Julie Paulson has been rendered moot. Since all the other issues in this litigation have previously been disposed of to the satisfaction of Plaintiffs, the case as a whole has been rendered moot by actions of parties, both Plaintiffs and Defendants, which satisfy all of the issues raised in the original complaint.

IT IS, THEREFORE, ORDERED that the Motion for Summary Judgment of Plaintiffs be and is hereby overruled and the State's Motion for Summary Judgment and the School District's Motion to Dismiss be and are hereby sustained for the reason that the issues are now moot and the Plaintiff's Complaint be and hereby is dismissed.

Dated this 31<sup>st</sup> day of July, 1979.

  
FRED DAUGHERTY  
U. S. DISTRICT JUDGE