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

RONALD LEON PEARSON,)	
)	
Plaintiff,)	CIVIL ACTION NO. 79-C-632-BT
)	
and)	
)	
TERRY WAYNE TABER,)	
)	
Plaintiff,)	CIVIL ACTION NO. 79-C-631-BT
)	
AND)	
)	
DONNA JOY TABER,)	CIVIL ACTION NO. 79-C-630-BT
)	
Plaintiff,)	
)	
vs.)	
)	
UNITED STATES OF AMERICA,)	
BUREAU OF INDIAN AFFAIRS, and)	
THOMAS E. HARDIN,)	
)	
Defendants.)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

These cases came on for non-jury trial on May 27, 1980, at 9 A.M. The Court having fully considered the evidence and the applicable law now finds as follows:

(1) This action arises under the Federal Tort Claims Act. The plaintiffs are residents of, and the causes of action arose, in the City of Tulsa, Tulsa County, State of Oklahoma.

(2) Plaintiffs have exhausted their administrative remedies; and this Court has personal and subject matter jurisdiction over this action.

(3) On May 6, 1978, Thomas E. Hardin was employed by the Bureau of Indian Affairs, an agency of the United States Government, as a teacher of Driver's Education at the Chilocco Indian School, Chilocco, Oklahoma. (Pl. Ex.20)

(4) On May 6, 1978, Agnes Jean White, age 17 years, was a student at the Chilocco Indian School, Chilocco, Oklahoma, and was enrolled in the Driver's Education Program at that school. Agnes Jean White was at no time employed by the Chilocco Indian School or by the Bureau of Indian Affairs.

(5) On May 6, 1978, Agnes Jean White was receiving behind-the-wheel instruction from Thomas E. Hardin as a part of the Driver's Education Program provided by the Chilocco Indian School. Thomas E. Hardin was seated beside Agnes Jean White while acting in his capacity as a driving instructor.

(6) Thomas E. Hardin was licensed by the Oklahoma State Department of Public Safety which allowed students enrolled in Driver's Education at the Chilocco Indian School to drive an automobile when he is in the seat beside them. Agnes Jean White derived her authority to drive an automobile therefrom (Pl. Ex. 17)

(7) The automobile which Agnes Jean White was driving was owned by a Newkirk, Oklahoma car dealer and was gratuitously leased or made available to the Chilocco Indian School for its Driver's Education Program. The automobile was equipped with Driver's Education license tags from the Oklahoma Department of Public Safety. The automobile was so equipped that Thomas E. Hardin, sitting in the seat beside the driver, could stop the automobile by means of a brake attached to the floorboard in front of him.

(8) Thomas E. Hardin as Driver's Education instructor was in complete authoritative control of each student-driver under his supervision concerning the manner and operation of the automobile. Thomas E. Hardin had actual partial mechanical control of the automobile by the use of the passenger foot brake. Thomas E. Hardin had supervising control over the automobile and driving of Agnes Jean White with authority to direct her in the details with regard to the operation of the automobile.

(9) Thomas E. Hardin as part of his behind-the-wheel instruction, took Agnes Jean White and two other students to Tulsa, Oklahoma, to get experience driving in city traffic. Agnes Jean White was at the time of the accident the driver of the automobile with no previous driving experience in a large metropolitan area such as Tulsa.

(10) On May 6, 1978 Agnes Jean White was driving north on Lewis Avenue under the direction and oversight of Thomas E. Hardin. Agnes Jean White was instructed by Thomas E. Hardin to change lanes and then make a left turn at the intersection of South Lewis Avenue and East Sixth Street.

(11) Agnes Jean White did change lanes as instructed, and as she approached the intersection she slowed the vehicle and paused to allow a southbound car to pass through the intersection. She then suddenly, unexpectedly, and in a careless manner turned left into the path of the plaintiffs' vehicle when it was so close it constituted an immediate hazard. (Testimony of Thomas E. Hardin)

(12) On May 6, 1978, at approximately 2:30 P.M., plaintiff, Ronald Leon Pearson, was approaching the intersection of South Lewis Avenue and Sixth Street from the north with three other passengers in the automobile, including the plaintiffs Taber.

(13) The Pearson automobile entered the intersection at a proper speed and in a proper manner in response to the green traffic signal. The two automobiles collided resulting in some injury to the plaintiffs.

CONCLUSIONS OF LAW

(1) Any Finding of Fact which may also be considered Conclusions of Law are incorporated herein.

(2) This Court has jurisdiction of this case under 28 U.S.C.A. §2671 et seq., and §1346(b).

(3) The test established by the Federal Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. Otteson v. United States, ___ F2d ___ (10 Cir. 1980); Sanchez v. United States, 506 F2d 702 (10th Cir. 1974); United States v. Gray, 199 F2d 239 (10th Cir. 1952); 28 U.S.C.A. §2674. Therefore, the laws of the State of Oklahoma apply to this cause of action.

(4) The United States under the Federal Tort Claims Act, Title 28 §2674, and the facts herein, stands in the relationship of a private school operated by the Bureau of Indian Affairs with respect to a cause of action based on negligence. Sanchez v. United States, supra.

The Chilocco Indian School as a private entity under the Federal Tort Claims Act is not protected by Oklahoma's sovereign immunity doctrine. Sanchez v. United States, supra.

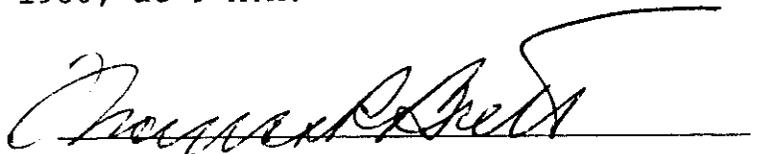
(5) The Chilocco Indian School operating under the Bureau of Indian Affairs has a duty to protect the public from the negligent acts or omissions of its employees. Thomas E. Hardin as a licensed driving instructor and employee of the Chilocco Indian School had a duty to protect the public from the negligent acts or omissions of student drivers directly under his control and authority. Sanchez v. United States, supra; Roberts v. Craig, 268 P2d 500 (D.C. Cal. 1954); Sardo v. Herlihy, 256 N.Y.S. 690 (S.Ct. N.Y. 1932).

(6) Thomas E. Hardin's control of the Driver's Education automobile was comparable to that of an owner and the negligence of Agnes Jean White is imputed to him as an employee of the United States of America. Wagnon v. Carter, 539 P2d 735 (Okla. 1975); Wagner v. McKernan, 177 P2d 511 (Okla. 1947); Knudson v. Boren, 261 F2d 15 (10th Cir. 1958); Watt v. United States, 123 F.Supp. 906 (E.D. Ark. 1954); Texaco v. Layton, 395 P2d 393 (Okla. 1964); Kelley v. Thibodeau, 115 A.2d 162 (Me. 1921); Merritt v. Darden, 176 A.2d 205 (C.A. M.D. 1962).

(7) Thomas E. Hardin and Agnes Jean White were engaged in a common purpose when the accident took place, and Thomas E. Hardin had control of the details and manner in which the vehicle was operated. Agnes Jean White had actual physical control of the automobile and the imputation of negligence to Thomas E. Hardin and the United States of America arises from this relationship. St. Louis & S.F. R. Co. v. Bell, 159 P2d 336 (Okla. 1916); Wagner v. McKernan, supra; Phillips v. Ward, 157 P2d 450 (Okla. 1945); Hasty v. Pittsburg County Ry. Co., 240 P. 1056 (Okla. 1925); Danner v. Chandler, 233 P2d 953 (Okla. 1951); Heiserman v. Aikman, 186 P2d 252 (Kan. 1947); Gilmore v. Grass, 68 F2d 150 (10 Cir. 1933); Knudson v. Boren, supra; Roberts v. Craig, 268 P2d 500 (D. C. Ca. 1954); Boker v. Luebbe, 252 N.W.2d 297 (Neb. 1977).

(8) The negligence of Agnes Jean White in failing to yield to oncoming traffic while executing a left turn and in failing to keep a proper lookout is imputed to the United States of America under the Federal Tort Claims Act, 28 U.S.C.A. §§2679, 1346; DiSalvatore v. United States, 456 F.Supp. 1079 (D.C. Pa. 1978); Holden v. Commonwealth Australia, 369 F.Supp. 1258 (D.C. Ca. 1974); Texaco v. Layton, supra; 28 U.S.C.A. §§ 1346(b) and 2674.

(9) The issue of liability herein is decided in favor of the plaintiffs, Ronald Leon Pearson, Terry Wayne Taber, and Donna Joy Taber, and against the United States of America. A hearing is set on the issue of damages relative to each plaintiff on the 27th day of October, 1980, at 9 A.M.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

8-29-80

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

YOKO NISHIYAMA,

Plaintiff,

vs

KEWANEE OIL COMPANY,
a Delaware corporation;
KEWANEE INDUSTRIES, INC.,
a Delaware corporation; and
GULF OIL CORPORATION, a
foreign corporation,

Defendants,

MICHAEL MODELL; and WAYNE
WOODY, CHARLES ROYE, RYAN
CORLEY, NEIL GINTHER and
MAC ALVIN PIERCE, successors
to Kan Okie Oil Corporation,

Additional Defendants
on Counterclaim.

NO. 78-C-290-C

ORDER OF DISMISSAL WITH PREJUDICE

The Court, being fully advised in the premises and on consideration of the parties' Joint Stipulation of Dismissal With Prejudice herein and request for Order of Dismissal With Prejudice, finds that such Order should issue.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's cause against Defendants be and the same is hereby dismissed with prejudice.

BE IT FURTHER ORDERED that the Defendants' counterclaims against Plaintiff and Additional Defendants on Counterclaim be and the same are hereby dismissed with prejudice.

BE IT FURTHER ORDERED that Additional Defendants' Motion for Leave to File Counterclaim against the Defendants be and the same is hereby dismissed with prejudice.

Done and dated this 29th day of aug., 1980.


H. Dale Cook, Chief United
States District Judge for the
Northern District of Oklahoma

W. S. Hall
att. for P
John D. Bryant
att. for Defendants

FILED

AUG 29 1980

Jack C. Smith
U.S. District Court

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

RICHARD E. CARLOCK, et al.,)	
)	
Plaintiffs,)	NOS. 79-C-664-BT ✓
)	
vs.)	79-C-700-BT
)	
JOHNNY CARSON SISK,)	79-C-701-BT
)	
Defendant,)	79-C-708-BT
)	
and)	(Consolidated)
)	
STATE FARM MUTUAL AUTOMOBILE)	
INSURANCE COMPANY,)	
)	
Garnishee.)	

J U D G M E N T

In accordance with the jury verdict entered on August 27, 1980, Judgment is hereby granted in favor of the plaintiffs and against the garnishee-defendant, State Farm Mutual Automobile Insurance Company, in the amount of \$101,000.00, together with pre-judgment interest in the amount of \$22,883.45, together with interest at the rate of 12% per annum from the date of judgment, together with costs of this action.

This Judgment is to be allocated as follows:

Richard L. Carlock	38%
Cindy Carlock	27%
Richard Jason Carlock	8%
Cathy Chandler	27%

Whenever the judgment is paid, the amounts allocated to the minor children, Richard Jason Carlock and Cathy Chandler, are to be distributed in accordance with the provisions of Title 12, O.S. §83 and the Journal Entry of Judgment of the Court in Cases Number C77-128, C77-129, C77-110, and C77-111, in the District Court of Creek County, State of Oklahoma. Upon payment and distribution, a copy of the Order of the District Court of Creek County is to be filed in these cases.

The application for attorneys' fees remains for decision at a later date.

Dated this 29th day of August, 1980.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

SOUTHWEST PORCELAIN, INC.,)
)
 Plaintiff,)
)
 vs.) No. 79-C-734-BT
)
 NORTH AMERICAN MANUFACTURING)
 CO., a foreign corporation,)
)
 Defendant.)

ORDER OF DISMISSAL

Pursuant to the joint Stipulation of Dismissal without prejudice filed herein by the parties, the Court finds that plaintiff's cause should be dismissed without prejudice.

BE IT THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that plaintiff's cause be, and the same is hereby dismissed without prejudice.

DONE AND DATED this 29 day of August, 1980.

S/ THOMAS R. BRETT
Thomas R. Brett
U. S. District Judge

APPROVED AS TO FORM AND CONTENT:

WHITTEN, McDANIEL, OSMOND,
GOREE AND DAVIES

by Jack Y. Goree
Jack Y. Goree
Attorneys for Plaintiff

FELDMAN, HALL, FRANDEN & WOODARD

by Wm. S. Hall
Wm. S. Hall
Attorneys for Defendant

FILED

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

AUG 29 1980

FRANK F. REINHARDT,

Plaintiff,

v.

HARLEY INDUSTRIES, INC., and
AMERICANA VENTURES, INC,

Defendants.

Civil Action
No 79-C-586-C BT

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes on for consideration pursuant to Stipulation of Dismissal filed herein on behalf of the Plaintiff and the Defendants and having reviewed the Stipulation the Court finds that the captioned case should be dismissed with prejudice to the rights of the Plaintiff to refile the same.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the captioned case be, and the same is hereby dismissed with prejudice to the rights of the Plaintiff to refile the same.

DATED this 29th day of Aug., 1980.


Thomas R. Brett, United States
District Judge

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

UNITED STATES OF AMERICA,)
)
Plaintiff)
)
v.) CIVIL No. 80-C-275-BT
)
IRENE T. DARILEK,)
)
Defendant)

ORDER OF DISMISSAL

The plaintiff, United States, having stipulated to the dismissal with prejudice of the complaint filed herein, is hereby,

ORDERED, ADJUDGED and DECREED that the above-entitled action be and hereby is dismissed with prejudice, each party to bear its own costs.

S/ Thomas R. Brett
UNITED STATES DISTRICT JUDGE

"[y]our interest in a \$50,000 loan being made to Louis McAlpine" it effectively constituted a guaranty of the note and makes applicable its provisions. A reasonable attorney fee is permitted by the terms of the note and without an express reference to attorney's fees, Title 12 O.S. §936 provides for attorney's fees. Nat.Educ.Life Ins. Co. v. Apache Lanes, Inc., 555 P.2d 600 (Okl. 1976); Barclay v. Waxahachie Bank & Trust Co., 568 S.W.2d 721 (Ct.Civ.Ap. Texas, 1978).

IT IS, THEREFORE, ORDERED plaintiff is allowed an Attorney fee of \$16,000.00, plus costs and expenses in the amount of \$1,010.76, or a total of \$17,010.76, and Judgment is entered thereon in favor of the plaintiff and against the defendant.

IT IS FURTHER ORDERED the defendant file with the Clerk of this Court a corporate Supersedeas Bond in the amount of \$95,000.00 on or before the 17th day of September, 1980 [the amount of Judgment, interest thereon, attorney fees and costs and expenses being approximately \$85,000.00 to this date].

ENTERED this 28th day of August, 1980.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA,)
)
 PLAINTIFF)
)
 v.) CIVIL NO. 80-C-275-BT ✓
)
 IRENE T. DARILEK,)
)
 Defendant)

STIPULATION OF DISMISSAL

The plaintiff, United States, hereby stipulates to the dismissal with prejudice of the above-entitled action, each party to bear its own costs.

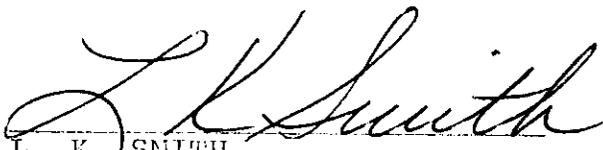
HUBERT H. BRYANT
United States Attorney

By:



ROBERT D. MARTINEZ
Attorney, Tax Division
Department of Justice
Room 5B31, 1100 Commerce Street
Dallas, Texas 75242
(214) 767-0293

ATTORNEYS FOR PLAINTIFF



L. K. SMITH
Attorney at Law
900 World Building
Tulsa, Oklahoma 74103

DATED this 27th day of Aug., 1980.

FILED

AUG 28 1980

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

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

FIRST NATIONAL BANK OF HOMINY,
OKLAHOMA, a banking corporation,

Plaintiff,

vs.

THE CITIZENS AND SOUTHERN BANK OF
COBB COUNTY, MARIETTA, GEORGIA,

Defendant.

)
)
) 78-C-522-BT
)
)
)

)
) FILED
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) AUG 8 1980
)

)
) Jack A. Simon, Clerk
) U. S. DISTRICT COURT

ORDER

This matter came on for hearing this 28th day of August, 1980, upon the Application of plaintiff for attorney fees and costs and the Motion of the defendant to set Supersedeas Bond.

The parties announced to the Court that an agreement had been reached as follows: If the Court determines attorney fees and costs are allowable, a reasonable attorney fee would be \$16,000.00, and the reasonable costs, including expenses and costs, would be \$1,010.76, or a total allowance of \$17,010.76.

The defendant urges if there were an enforceable guaranty, which is denied, it was a guaranty up to the sum of \$50,000.00 and not a guaranty of the note. Therefore, the reference to attorney fees in the note or Title 12 O.S. §936 referring to attorney fees payable where there is a suit on a note are neither applicable.

The agreement which was the basis of the Court's Judgment against C & S Bank in pertinent part states:

"....[t]he C & S Bank....agrees to repurchase your interest in a \$50,000 loan being made to Louis McAlpine."

The Court determined in Conclusions of Law 4, 13 and 14 that this "repurchase" agreement was in effect a guaranty to repurchase or pay the McAlpine note. This conclusion is implicit in the language "[y]our interest in a \$50,000 loan being made to Louis McAlpine".

It is the Court's view when C & S Bank chose to guarantee

"[y]our interest in a \$50,000 loan being made to Louis McAlpine" it effectively constituted a guaranty of the note and makes applicable its provisions. A reasonable attorney fee is permitted by the terms of the note and without an express reference to attorney's fees, Title 12 O.S. §936 provides for attorney's fees. Nat.Educ.Life Ins. Co. v. Apache Lanes, Inc., 555 P.2d 600 (Okla. 1976); Barclay v. Waxahachie Bank & Trust Co., 568 S.W.2d 721 (Ct.Civ.Ap. Texas, 1978).

IT IS, THEREFORE, ORDERED plaintiff is allowed an Attorney fee of \$16,000.00, plus costs and expenses in the amount of \$1,010.76, or a total of \$17,010.76, and Judgment is entered thereon in favor of the plaintiff and against the defendant.

IT IS FURTHER ORDERED the defendant file with the Clerk of this Court a corporate Supersedeas Bond in the amount of \$95,000.00 on or before the 17th day of September, 1980 [the amount of Judgment, interest thereon, attorney fees and costs and expenses being approximately \$85,000.00 to this date].

ENTERED this 28th day of August, 1980.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

WILLIAM MARK BLEDSOE,)
)
 Plaintiff,)
)
-vs-)
)
 FAIRFIELD ENGINEERING)
 AND MANUFACTURING COMPANY,)
 a foreign corporation,)
)
 Defendant.)

No. 77-C-380-E

FILED

AUG 28 1980

ORDER

This action comes before the Court on the stipulation of the parties to dismiss this action.

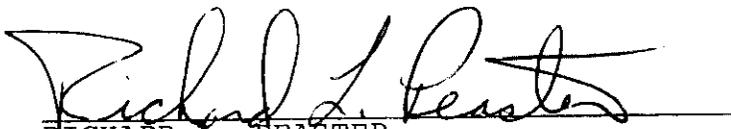
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action be dismissed.

DONE this 28th day of August, 1980.

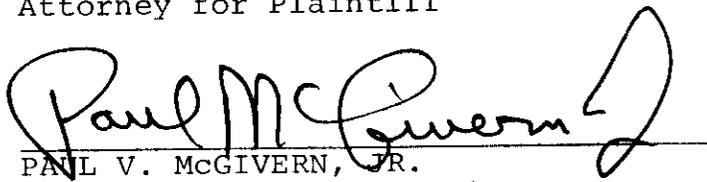
JAMES O. ELLISON

JAMES O. ELLISON
JUDGE OF THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

APPROVED AS TO FORM AND CONTENT:



RICHARD L. PEASTER
Attorney for Plaintiff



PAUL V. MCGIVERN, JR.
Attorney for St. Paul Fire
and Marine Insurance Company

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

By 

ALFRED K. MORLAN
Attorneys for Defendant

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

MYRTLE M. BRADY,)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF TULSA,)
)
 Defendant.)

No. 80-C-19-E

FILED

AUG 28 1980

Jack C. ...
U. S. DISTRICT ...

ORDER

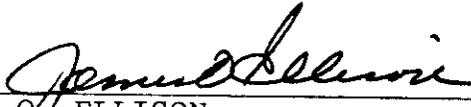
This action, brought under Title VII, 42 U.S.C. §§ 2000e, et seq., was filed on January 9, 1980. In paragraph II thereof, Plaintiff states: "a Notification of Right to Sue was received ... on November 15, 1978; this complaint has been filed within 90 days of receipt of the Notification of Right to Sue."

Now before the Court is Defendant's Motion to Dismiss, which was filed January 29, 1980. Plaintiff has failed to respond to said motion.

Filing of suit within the 90-day period is a jurisdictional prerequisite, see, e.g., Swails v. Service Container Corp., 404 F.Supp. 835 (W.D. Okla. 1975); Schlei & Grossman, Employment Discrimination Law, at 913-942 (1976). The Complaint herein discloses a fatal defect on its face, and must be dismissed. Even were this not so, the Court would be justified in dismissing this action under Rule 41(b), F.R.C.P., for Plaintiff's failure to respond to Defendant's motion as ordered.

IT IS, THEREFORE, ORDERED that Defendant's Motion to Dismiss be, and the same hereby is, granted, and this action is hereby dismissed.

It is so Ordered this 28 day of August, 1980.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

HERTZ CORPORATION, a New York corporation,
Plaintiff,
vs.
CANAL INSURANCE COMPANY, a South Carolina corporation,
Defendant.

No. 79-C-408-BT

FILED
AUG 28 1980

J U D G M E N T

Based on the Order filed simultaneously this date,
IT IS SO ORDERED that Judgment be entered in favor of the Plaintiff, Hertz Corporation, and against the Defendant, Canal Insurance Company, in the sum of \$16,610.00, with interest thereon at the rate of 6% per annum from the date of commencement of this action (June 8, 1979), and at the rate of 12% per annum from the date of judgment (August 28, 1980), together with Plaintiff's costs.

ENTERED this 28 day of August, 1980.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

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

HERTZ CORPORATION, a New York Corporation,)
)
)
) Plaintiff,)
)
)
) v.)
)
) CANAL INSURANCE COMPANY, a)
) South Carolina Corporation,)
)
) Defendant.)

No. 79-C-408-BT

FILED
AUG 23 1980

O R D E R

This is a diversity action brought pursuant to the provisions of 28 U.S.C.A. § 1332 and § 2201 et seq. seeking judgment declaring the rights of the parties with respect to liability coverage under insurance policies of Plaintiff (Hertz) on its rental tractor and Defendant (Canal) on a trailer being pulled by the Hertz tractor when the tractor-trailer collided with another tractor-trailer in the State of Indiana. The facts are undisputed and the matter has been submitted to the Court for decision based upon the pleadings, exhibits, Pretrial Order as amended, and briefs.

The parties have stipulated the following: (1) Thermal Distributors, Inc. (Thermal) leased from Hertz the rental tractor being driven by Thermal employee Neal F. Riley which was pulling a trailer owned by Thermal at the time it collided with a tractor-trailer owned by Raymond Gomez (Gomez) and being driven by Martin Chavez (Chavez); (2) the Hertz Rental Agreement covering the tractor required Hertz to provide liability coverage for Thermal's driver in accordance with the standard provisions of a Basic Automobile Liability Policy against liability arising from the use of the tractor with limits of \$100,000 each person, \$300,000 each accident for bodily injury, and \$25,000 each accident for property damage; (3) that suit was filed in Indiana and Oklahoma by Chavez and Gomez against Thermal and Riley; that a settlement was made by Hertz in the Oklahoma case

which resulted in the Indiana case being dismissed; and (4) the defendant Canal insured (\$100,000 each person - \$300,000 each accident - \$100,000 property damage) the Thermal trailer being pulled by the Hertz rental tractor driven by Riley at the time of the collision and that the Hertz rental tractor was a temporary substitute vehicle under the language of the Canal policy.

The sum of \$40,532.67 was paid by Hertz in the defense and settlement of the Chavez and Gomez lawsuits which included \$6,700 paid to Gomez for damages to his truck and trailer, \$22,500 paid to Chavez for personal injuries and \$10,033.37 paid by Hertz in attorneys fees, deposition costs and expenses. Hertz seeks the sum of \$22,318.93 which it claims is Canal's pro rata share of the sum expended by Hertz in settlement of the lawsuits. Hertz admits that it has primary coverage on its tractor but denies coverage on Thermal's trailer. Hertz contends that Canal has primary coverage on the trailer.

Canal claims that under Paragraph 6 of the Tractor Rental Agreement between Hertz and Thermal that Hertz agreed to provide primary insurance coverage for the accident giving rise to this litigation and is not entitled to any proration of payments between Hertz and Canal. Paragraph 6 of the Rental Agreement provides:

"6. Lessor provides liability coverage for a person using Vehicle with permission of Lessor * * * in accordance with the standard provisions of a Basic Automobile Liability Policy against liability arising from the use of the Vehicle with limits as follows: * * * IF A TRACTOR \$100,000 each person, \$300,000 each accident for bodily injury including death and \$25,000 each accident for primary damage; IF A TRAILER, NO COVERAGE. * * * Lessor warrants that to the extent permitted by law, the coverage for the rented truck or tractor is primary as respects any other insurance available to Customer or Authorized Drivers as defined herein."

Canal argues that under the language quoted above from the Rental Agreement Hertz agreed with Thermal that Hertz insurance coverage on the truck was primary regardless of whether Thermal had any other insurance available to it, primary or otherwise. The quoted language ignores there was a separate insured "owned automobile", the trailer, also involved herein. Paragraph 6 of the Rental Agreement incorporates by reference the standard provisions of a basic automobile liability policy. One of the exhibits submitted to the Court is the Royal Indemnity Company Automobile Combination Policy which contains such provisions (Hertz policy).

Hertz agreed under the provisions of the Basic Automobile Liability Policy with respect to coverage for bodily injury and property damage liability: "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages [because of bodily injury or property damage] caused by accident and arising out of the ownership, maintenance or use of the automobile." No issue is raised by Canal that Hertz settled the Gomez-Chavez claims before final judgment or unreasonably.

Among other provisions in the Hertz Policy applicable to this case is Paragraph 19 under "CONDITIONS." That provision states as follows:

"19. Other Insurance. * * * If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; * * *"

Canal argues that because Hertz admits primary coverage on the Hertz rental tractor that it makes no difference whether Canal had coverage on the trailer or whether such insurance on the trailer was primary. Canal contends that

the parties are free to incorporate in the insurance agreement any lawful terms they desire and that the courts should enforce those terms to which the parties have agreed. Canal also argues that the insurance contract should be interpreted so as to carry out the intent of the parties as deduced from the entire agreement. Canal then concludes that the court should find that Canal has no liability under its policy covering the trailer. However, using the guidelines suggested by Canal, it is the view of this Court that Canal's policy provides primary coverage on Thermal's trailer.

As to the trailer, which is described in the Canal policy as an "owned automobile," the following language appears:

"I. COVERAGE A - BODILY INJURY LIABILITY -
COVERAGE B - PROPERTY DAMAGE LIABILITY:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

bodily injury or property damage

to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use, * * * of an owned automobile or of a temporary substitute automobile,
* * *"

Under this provision the trailer is covered as an "owned automobile" and the Hertz rental tractor is covered as a "temporary substitute automobile" subject, however, to the exclusionary or other provisions of the policy.

Section A - III of the Canal policy provides:

"III. PERSONS INSURED: Each of the following is an insured under this insurance to the extent set forth below:

* * *

(c) any other person while using an owned automobile or a temporary substitute automobile with the permission of the named insured * * *

None of the following is an insured:

* * *

(iii) any person or organization, other than the named insured, with respect to:

(1) a motor vehicle while used with any trailer owned or hired by such person or organization and not covered by like insurance in the company * * *

or

(2) a trailer while used with any motor vehicle owned or hired by such person or organization and not covered by like insurance in the company; * * *"

Under "PERSONS INSURED" Thermal's employee Riley was using the Thermal Trailer which is described as an "owned automobile" together with the Hertz rental tractor which is described as a "temporary substitute automobile" with the permission of the "insured" Thermal. Riley was not excluded under those provisions "none of the following is an insured".

Canal claims that Riley was not covered because of the exclusions set forth under Section A - III. (iii) (1) and (2). Canal argues that Riley was pulling an owned trailer with a motor vehicle hired by Riley. Such statement is not in accord with the stipulated facts. Riley as a Thermal employee was pulling a trailer owned by Thermal with the motor vehicle (Hertz tractor) hired by Thermal. Therefore, the coverage exclusion upon which Canal relies is not applicable to Riley because Riley was not a "person" using the "motor vehicle" (Hertz tractor) "with any trailer owned or hired by such person" (Riley), nor was Riley using the "trailer" with any "motor vehicle" (Hertz tractor) "owned or hired by such person" (Riley). For the purposes of the Hertz and Canal coverages Riley and Thermal are one as the named insured because a corporation acts only through its agents or employees.

Canal cites Pa. Th. & F. Mut. Cas. Ins. Co. v. Hartford Acc. & I. Co., 310 F.2d 618 (4th Cir. 1962) to support its argument that Riley was not an insured under Canal's policy. The facts of that case are not the same as the facts in the case before this Court. In that case the owner of the

tractor (Drake) entered into an agreement with another company (Carolina) to furnish his tractor and a driver to pull Carolina's trailer from one location to another. The tractor-trailer was involved in a collision and the insurer of the tractor brought suit against the insurer of the trailer to determine the liability of the insurance companies for damages to the driver of the automobile involved in the collision with the tractor-trailer unit. The Court held that the insurer of the trailer (Hartford) was not liable because of the exclusion in the Hartford policy excluding coverage with respect to any person (Drake), other than the named insured (Carolina), while using Carolina's trailer with any automobile (Drake's tractor) hired by the insured (Carolina) and not covered by like insurance in the company (Hartford). There was no coverage as to Drake under the Hartford Policy because the Carolina trailer was being used with a tractor hired by Carolina which tractor was not covered by a Hartford policy. However, the Court, in considering whether Carolina, who did not fall under the exclusion clause might be liable under the provisions of the Hartford policy, stated:

"It remains to be considered whether Carolina, which was not within the exclusion clause, had any liability for the damages caused by the accident which would bring it within the coverage of the policy. This is a matter of importance since an affirmative answer to the inquiry would increase the protection of the operator of the tractor trailer outfit and would lead to an apportionment of the damages between the two insurance companies according to the relevant clauses of the two policies. The contention is that Drake was about the business of Carolina when he hauled its property from South Carolina to Georgia and made the return trip; and that Drake's driver was subject to Carolina's control from the time he reached the Carolina plant and connected the two vehicles together until he completed delivery of the goods and returned the trailer to its owner. Reliance is placed upon such decisions as *Brownlee v. Charleston Motor Express Co.*, 189 S.C.204,

200 S.E. 819, where it is held that a general servant of one person may be hired or loaned by his master to another for a special service so as to become the servant of the other person for this purpose, the test of liability being whether in the particular service he continues liable to the direction and control of his master or becomes subject to that of the person to whom he is loaned or hired. The decisive factor under this rule in the pending case is whether Carolina had the authority to control the driver during the trip or whether control remained in Tommie Drake, his employer, as an independent contractor. The uncontradicted evidence presents a clear answer to the inquiry. The only part played by Carolina in the carriage of the goods after it entered into the contract with Tommie Drake was to deliver the loaded trailer to the driver and to inform him where the cargo was to be taken and delivered. Carolina exercised no other control. The testimony affirmatively shows that Carolina gave no instructions as to the route to be followed, the time to be taken or the stops to be made. The driver was employed and paid and furnished with expense money by the owner of the tractor. In our view the only reasonable conclusion from the facts is that Drake undertook to transport the goods for a specified price, furnished the vehicle and the driver for the expedition and had complete control of the driver throughout. Under these circumstances Hartford has no liability under its policy in this case."

In the case before this Court, Thermal, the owner of the trailer, and its driver had complete control of the tractor-trailer for its own business purposes. Neither the Pennsylvania case nor Canal Ins. Co. v. State Automobile Ins. Ass'n., 433 F.2d 373 (5th Cir. 1970) also cited by Canal, is supportive of Canal's position in this case.

Canal also contends that Endorsement E-45 (a 1) - N to the Canal Policy excludes coverage on the trailer as to Riley and provides excess insurance only on the trailer as to the "named insured" Thermal. That provision reads as follows:

"In consideration of the premium charged for the policy to which this endorsement is attached, it is understood and agreed that no coverage is extended to any person [Riley], firm or organization using the described automobile [Thermal's trailer] pursuant to any lease, contract of hire, bailment, rental agreement, or any similar contract

or agreement either written or oral, expressed or implied, the terms and provisions of the Insuring Agreement III of Section A, entitled "Persons Insured" notwithstanding.

"In the event the automobile [Thermal's trailer] described in this policy is being used or maintained pursuant to any lease, contract of hire, bailment, rental agreement or any similar contract or agreement, either written or oral, expressed or implied, the insurance afforded the named insured [Thermal] shall be excess insurance over any other insurance."

The language of the endorsement is not applicable to the facts in this case. The first paragraph refers to "any person" (Riley) "using the described automobile" (trailer) "pursuant to any lease," or other agreement as described therein. Riley was using the trailer as an employee of Thermal and not pursuant to any agreement as described in the endorsement. Under the second paragraph of the endorsement "the automobile described" (trailer) was not being used "pursuant to any lease," or other agreement as described therein. It was the Hertz rental tractor that was being used pursuant to the rental agreement by Thermal not the Thermal owned trailer.

The endorsement set out above on which Canal relies was designed to cover the situation where the trailer was being used pursuant to the type of agreement set forth in the endorsement by some person other than the insured, Thermal.

Canal also suggests that the accident involved in this case did not arise out of the ownership, maintenance or use of the Thermal Trailer. Canal argues that if the accident did not arise out of the use of the trailer then Canal would be liable only as an excess insurer of the tractor under the second paragraph of the endorsement set out above. This argument is not persuasive. The same argument was made in the case of Ins. Co. of North America v. Royal Indemnity Co., 429 F.2d 1014 (6th Cir. 1970). In that case the facts involved the same kind of a situation as presented here.

Ins. Co. of North America (INA) was the insurer of a trailer owned by a company (Miller) who leased a tractor from Hertz for the purpose of pulling Miller's trailer in connection with Miller's business. Royal Indemnity Co. (Royal) was the insurer of the Hertz tractor. Miller's employee was driving the Hertz tractor pulling the Miller trailer when the tractor-trailer unit went out of control and collided with another vehicle. After INA settled the lawsuit that was brought against Miller as a result of the collision, INA brought suit against Royal to determine the liability of INA and Royal on their respective policies of insurance. The Court stated in that case:

"In our factual context, the trailer was being used for the purpose it was designed, i.e., it was being used in Miller's business and was attached to a tractor. The fact that the trailer did not come into physical contact with Williams' automobile is not determinative. The trailer was being used at the time of the accident. It cannot be said that the occurrence did not 'arise out of the use' of the trailer. The accident resulting in the death of Williams arose out of the use of both the tractor and the trailer. Royal is primary insurer on the tractor and INA is primary insurer on the trailer.

"Both insurance policies provided that in the event that two or more companies are liable on the same basis for a loss, the policies should prorate in accordance with their respective provisions, i.e., in the ratio which the applicable limit of policy bears to the total applicable limit of all valid and collectible insurance.

"The District Court properly found that both INA and Royal were primary insurers and prorated the liability. In our opinion this determination was correct."

The same reasoning applies to the case now before this Court. The Hertz rental tractor and Thermal's trailer were being used by Thermal's employee as a unit in Thermal's business. Under such circumstances the Hertz policy and the Canal policy both provided coverage with provisions for prorating losses as set forth in both policies. See Aetna

Casualty & Surety Co. v. The Hertz Corporation, 589 F.2d 921 (5th Cir. 1979); Industrial Indemnity Co. v. Continental Casualty Co., 375 F.2d 183 (10th Cir. 1967); Dairyland Ins., Co. v. Drum, 568 P.2d 459 (Colo. Sup.Ct. 1977).

The Hertz policy provided that Hertz "shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable liability of all valid and collectible insurance against such loss * * *" (emphasis added). The "limit of liability stated in the declarations" is for bodily injury, \$100,000 each person and \$300,000 each accident; for property damage \$25,000 each accident.

The provisions of the Canal policy with respect to prorating losses are set forth under "CONDITIONS" as follows:

"* * * When both this insurance and other insurance apply to the loss on the same basis, whether primary, excess or contingent, the company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

* * *

- (b) Contribution by Limits. If any of such other insurance does not provide for contribution by equal shares, the company shall not be liable for a greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss."

The Canal policy provides for limits of liability for bodily injury, \$100,000 each person and \$300,000 each occurrence; for property damage \$100,000 each occurrence.

Canal argues that even if Canal is found to have primary coverage on the Canal trailer, Hertz is not entitled to recover any sums paid for attorneys fees and other expenses in settlement of the Chavez and Gomez lawsuits. Additionally, Canal contends in its brief that in prorating the bodily injury and property damage payments made by Hertz to

Chavez and Gomez, the Court must include a \$1,000,000 umbrella policy which Canal claims Hertz had on the tractor. Neither the Pretrial Order, as amended nor any other portions of the record in this case contain any stipulation or other evidence as to the \$1,000,000 umbrella policy or any of its provisions. On the other hand, the Hertz policy provisions with respect to prorating losses specifically calls for proration based on the "stated" limits of liability in the Hertz policy of \$100,000 -- \$300,000 -- \$25,000.

Although the Canal policy on proration contains language for prorating on the basis that Canal's limits under its policy "bears to the total applicable limit of liability of all valid and collectible insurance against such loss", neither the Hertz Rental Agreement nor the provisions of the Basic Automobile Liability Policy incorporated by reference in the Rental Agreement contain language which would permit the inclusion of umbrella coverage in prorating the losses.

The Court finds that the losses paid by Hertz to Chavez in settlement of the bodily injury claims should be prorated on a 50 - 50 basis and that the losses paid by Hertz to Gomez in settlement of the property damage claims should be shared 20 percent by Hertz and 80 percent by Canal.

With respect to the attorneys fees and other expenses paid by Hertz in settlement of the Chavez and Gomez lawsuits, it is the finding of the Court that under the provisions of the Hertz Rental Agreement and the Basic Automobile Liability Policy incorporated by reference in the Rental Agreement, that Hertz is not entitled to recover from Canal any sums paid for such fees and expenses. Fidelity & Casualty Co. of N.Y. v. Ohio Cas. Ins. Co. 482 P.2d 924 (Okl.Sup.Ct. 1971); United States Fidelity & Guar. Co. v. Tri-State Ins. Co., 285 F.2d 579 (10th Cir. 1960).

In United States Fidelity & Guar. Co. v. Tri-State Ins. Co., supra, the Court held that the agreement to furnish

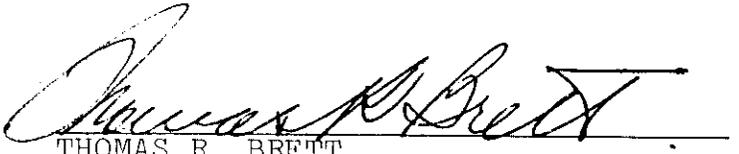
a defense for the insured is several with the two insurance companies and is distinct from and in addition to the provisions of the insuring agreement pertaining to liability.'

The Court stated:

"The question here thus narrows to whether contributions will lie between two insurance companies when each has a policy containing a defense agreement. The question has been answered in the negative, and we believe properly so, in a number of cases. The duty to defend is personal to each insurer. The obligation is several and the carrier is not entitled to divide the duty nor require contribution from another absent a specific contractual right." (Citations omitted)

Accordingly, judgment should be entered in favor of the Plaintiff, Hertz Corporation, and against the Defendant, Canal Insurance Company in the sum of \$16,610.00, together with Plaintiff's costs.

It is so Ordered this 28th day of August, 1980.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 27 1980

Jack A. Fisher, Clerk
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
MAE K. COOK,)
)
Defendant.)

CIVIL ACTION NO. 80-C-394-C

DEFAULT JUDGMENT

This matter comes on for consideration this 27th
day of August, 1980, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney for the Northern District of
Oklahoma, and the Defendant, Mae K. Cook, appearing not.

The Court being fully advised and having examined
the file herein finds that Defendant, Mae K. Cook, was personally served
with Summons and Complaint on July 15, 1980, 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, Mae K. Cook,
for the principal sum of \$1,366.24, plus the accrued interest of
\$310.94, as of May 8, 1980, plus interest at 7% from May 8, 1980
until the date of Judgment, plus interest at the legal rate on
the principal sum of \$1,366.24, from the date of Judgment until paid.


UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney


ROBERT P. SANTEE
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 27 1980
JACK D. SUTTER, CLERK
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 KAY J. CARTER,) CIVIL ACTION NO. 80-C-393-E
)
 Defendant.)

DEFAULT JUDGMENT

This matter comes on for consideration this 27TH
day of August, 1980, the Plaintiff appearing by Robert
P. Santee, Assistant United States Attorney for the Northern
District of Oklahoma, and the Defendant, Kay J. Carter, appearing
not.

The Court being fully advised and having examined
the file herein finds that Defendant, Kay J. Carter, was personally
served with Summons and Complaint on July 14, 1980, 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,
Kay J. Carter, for the principal sum of \$1,690.00, plus the
accrued interest of \$403.77, as of May 25, 1980, plus interest
at 7% from May 25, 1980, until the date of Judgment, plus interest
at the legal rate on the principal sum of \$1,690.00, from the
date of Judgment until paid.

James O'Brien
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

Robert P. Santee
ROBERT P. SANTEE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

RAY MARSHALL, Secretary of Labor,)
United States Department of Labor,)
)
Plaintiff,)
)
v.)
)
CHARLES H. NINDE CORPORATION, a)
Corporation d/b/a TULSA WHISENHUNT)
FUNERAL HOME, MARK A. OLIVER and)
RICHARD A. PATTERSON, Individuals,)
)
Defendants.)

Civil Action File
No. 80-C-268-E ✓

FILED

APR 27 1980 ✓

JACKSONVILLE, FLA.
U.S. DISTRICT COURT

JUDGMENT

Plaintiff has filed his complaint and defendants have waived their defenses and have agreed to the entry of judgment without contest, it is, therefore, upon motion of the plaintiff and for cause shown,

.....

ORDERED, ADJUDGED and DECREED that defendants, their officers, agents, servants, employees and all persons in active concert or participation with them be and they hereby are permanently enjoined and restrained from violating the provisions of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Section 201, et seq., hereinafter referred to as the Act, in any of the following manners:

1. Defendants shall not, contrary to sections 6 and 15(a)(2) of the Act, 29 U.S.C. §§ 206 and 215(a)(2), pay any employee who is engaged in commerce or in the production of goods for commerce, or who is employed in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, wages at a rate less the minimum hourly rates required by section 6 of the Act.

2. Defendants shall not, contrary to sections 7 and 15(a)(2) of the Act, 29 U.S.C. §§207 and 215(a)(2) employ any employee in commerce or in the production of goods for commerce, or in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for workweeks longer than forty (40) hours, unless the employee receives compensation for his employment in excess of forty (40) hours at a rate not less than one and one-half times the regular rate at which he is employed.

3. Defendants shall not, contrary to sections 11(c) and 15(a)(5) of the Act, 29 U.S.C. §§211(c) and 215(a)(5), fail to make, keep and preserve adequate and accurate records of the persons employed by them, and the wages, hours and other conditions and practices of employment maintained by them as prescribed by regulations issued by the Administrator of the Employment Standards Administration, United States Department of Labor (29 C.F.R. Part 516).

Defendants have paid minimum wage and overtime compensation in the total amount of \$3,500.00 which the parties agree, and the court finds, is due under the Act to defendants' employees named in Exhibit A attached hereto in the amounts indicated for the period May 1, 1977 to the present.

It is further ORDERED, that plaintiff shall promptly proceed to make distribution of such unpaid compensation, less income tax and social security deductions, to defendants' employees named herein in the amounts indicated, or to their estate if necessary. In the event that any of said money cannot be distributed within the period of one (1) year hereof because of inability to locate the proper person, or because of their refusal to accept such sums, the plaintiff shall deposit such funds with the Clerk of this Court who shall forthwith deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. Section 2041.

It is further ORDERED, that the costs of this action be, and the same hereby are, taxed against the party incurring the same.

Dated this 27th day of August, 1980.

James O. Quinn
UNITED STATES DISTRICT JUDGE

Defendants waive
their defenses to
plaintiff's complaint
and consent to the
entry of this judgment:

R. Michael Lang
R. MICHAEL LANG
Attorney for Defendants

Plaintiff moves for entry of
this judgment:

CARIN A. CLAUSS
Solicitor of Labor

JAMES E. WHITE
Regional Solicitor

HERIBERTO DE LEON
Counsel for Employment
Standards

By:

Barbara G. Heptig
BARBARA G. HEPTIG
Attorney

Attorneys for RAY MARSHALL,
Secretary of Labor, United
States Department of Labor,

Plaintiff.

P. O. ADDRESS:

Office of the Solicitor
U. S. Department of Labor
555 Griffin Square Bldg., Suite 501
Dallas, Texas 75202

Telephone No. 214/767-4924

SOL Case No. 10200

EXHIBIT "A"

NAME

BACKWAGES

Gary Bird	\$367.54
William Brown	746.21
Richard Burris	229.97
Joe Campos	442.77
Mike T. McNamara	494.54
Charles Bean	546.91
Chris Burkey	142.83
William W. Krafts	440.78
Barry Wickline	<u>88.45</u>

TOTAL

\$3,500.00

FILED

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

AUG 27 1980 *BT*

DALE E. MOLER,)
)
 Plaintiff,)
)
 vs.)
)
 THE SECRETARY OF HEALTH,)
 EDUCATION AND WELFARE,)
)
 Defendant.)

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

No. 79-C-457-BT ✓

J U D G M E N T

This cause having been considered by the Court on the pleadings, the entire record certified to this Court by the defendant Secretary of Health, Education and Welfare ("Secretary"), and the briefs submitted by the parties, the Court is of the opinion as reflected by its Memorandum Opinion filed herein that the final decision of the Secretary is supported by substantial evidence as required by the Social Security Act, and should be affirmed.

IT IS, THEREFORE, ORDERED that the final decision of the Secretary should be and hereby is affirmed.

ENTERED this 27th day of August, 1980.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

FILED

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

AUG 27 1980
Jack C. Silver, Clerk
U. S. DISTRICT COURT

DALE E. MOLER,)
)
 Plaintiff,)
)
 vs.)
)
 THE SECRETARY OF HEALTH,)
 EDUCATION AND WELFARE,)
)
 Defendant.)

No. 79-C-457-BT ✓

MEMORANDUM OPINION

Plaintiff, Dale E. Moler, brings this action pursuant to 42 U.S.C. §405(g), seeking judicial review of the final administrative decision of the Secretary of Health, Education and Welfare denying him disability benefits provided for in Sections 216(i) and 223, respectively, of the Social Security Act, as amended. 42 U.S.C. §§416(i) and 423. Plaintiff alleges he became unable to work on February 17, 1977. He seeks a review by this Court and reversal of the decision below and requests the Court award him the benefits he seeks. The original application of plaintiff was denied by the Bureau of Disability Insurance of the Social Security Administration. The case was considered de novo before an Administrative Law Judge, where plaintiff was represented by counsel, and on March 30, 1979, a decision was rendered denying the plaintiff benefits. This decision was affirmed by the Appeals Council and plaintiff thereafter commenced this action requesting judicial review.

An applicant for Social Security Disability Insurance Benefits has the burden of establishing that he was disabled on or before the date on which he last met the statutory earnings requirements. McMillin v. Gardner, 384 F.2d 596 (10th Cir. 1967); Stevens v. Mathews, 418 F.Supp. 881 (USDC WD Okl. 1976); Dicks v. Weinberger, 390 F.Supp. 600 (USDC WD Okl. 1974); see Johnson v. Finch, 437 F.2d 1321 (10th Cir. 1971).

The term "disability" is defined in the Social Security Act as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which....has lasted....for a continuous period of not less than 12 months." 42 U.S.C. §§416(i)(1)(A); 423 (d)(1)(A); 20 C.F.R. 404.1501(a)(i).

The scope of the Court's review authority is narrowly limited by 42 U.S.C. §405(g). The Secretary's decision must be affirmed if supported by substantial evidence. Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966); Stevens v. Mathews, supra. Substantial evidence is more than a scintilla. It is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971); Beasley v. Califano, 608 F.2d 1162 (8th Cir. 1979); Stevens v. Mathews, supra. However, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Consolo v. Federal Maritime Commission, 383 U.S. 607, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966); Stevens v. Mathews, supra.

In conducting this judicial review, it is the duty of this Court to examine the facts contained in the record, evaluate the conflicts and make a determination therefrom whether the facts support the several elements which make up the ultimate administrative decision. Heber Valley Milk Co. v Butz, 503 F.2d 96 (10th Cir. 1974); Nickol v. United States, 501 F.2d 1389 (10th Cir. 1974); Stevens v. Mathews, supra. In this case, the ultimate administrative decision is evidenced by the Findings of the Administrative Law Judge before whom plaintiff originally appeared. The Findings of the Administrative Law Judge were as follows:
(TR 15-16)

- "1. Claimant was born February 3, 1930, has attained an 8th-grade education, and has previously worked as an ironworker and construction laborer.
2. Claimant met the special earnings requirements of the Act for disability purposes on February 17, 1977, the alleged date of onset, and continues to meet said requirements as of the date of this decision.

3. The medical evidence establishes that the claimant has an impairment consisting of chronic low back pain following a lumbar laminectomy.
4. Claimant's allegation of constant severe debilitating pain is not credible and such pain as he does experience, does not restrict his ability to perform light work.
5. Claimant is unable to perform his former job of ironworker or construction laborer.
6. Claimant has the residual functional capacity to perform light work activity as defined by 20 C.F.R. 404.1510(c).
7. 20 C.F.R. 404.1513, and Rule 202.18 of Table II, of Appendix 2, of 20 C.F.R. 404.1500, directs that the claimant considering his maximum sustained work capability, age, education, and work experience, be found 'not disabled.'
8. Claimant was not under a 'disability' as defined by the Social Security Act, as amended, at any time up to the time of this decision."

The elements of proof which should be considered in determining whether plaintiff has established a disability within the meaning of the Act are: (1) objective medical facts; (2) medical opinions; (3) subjective evidence of pain and disability; and (4) the claimant's age, education and work experience. Hicks v. Gardner, 393 F.2d 299 (4th Cir. 1968); Stevens v. Mathews, supra; Morgan v. Gardner, 254 F.Supp. 977 (USDC ND Okl. 1966); Meek v. Califano, 488 F.Supp. 26 (USDC Neb. 1979).

On August 9, 1973 plaintiff filed an application for disability benefits as a result of an injury to his low back on June 4, 1972, which was denied. (TR 105-116) On December 13, 1974, plaintiff filed an application for disability benefits complaining of low back trouble, which was denied. (TR 117-127) Plaintiff filed the present application for disability benefits on September 26, 1977. (TR 173-176)

A formal hearing was had before the Administrative Law Judge on February 15, 1979, and his decision was rendered on March 30, 1979. (TR 7-16) This decision was approved by the Appeals Council on May 11, 1979. (TR3-4)

Plaintiff has been unemployed since February 17, 1977. (TR 50) He had been an iron worker since 1966. (TR 51) He was born February 3, 1930. He finished the 8th-grade in school. (TR 60) His testimony reveals he was in the Navy and has worked as an oil field carpenter, rig carpenter and iron worker. (TR 62)

Plaintiff was admitted to Oklahoma Osteopathic Hospital on February 17, 1977; underwent surgery on March 4, 1977; was discharged on March 11, 1977, with a diagnosis of herniated disc, L4, midline, and a good prognosis. (TR 213-225) On April 4, 1977, he was involved in a vehicular accident while a passenger in a car driven by his wife. (TR 232) On September 29, 1977, W. R. Slater, D.O., rendered a report to the Department of Health, Education and Welfare. (TR 232-234) He reported the following diagnosis:

"2-17-77 Acute lumbar sprain
4-6-77 Lumbar sprain aggravating a post laminectomy
convalescence period
9-13-77 Dural adhesions and epicondylitis"

A myelographic examination of plaintiff's low back was performed March 29, 1978 (TR 229) which revealed an "Asymmetric nerve sleeve on the right at the L-4-L-5 level." (TR 231)

A Disability Examiner contacted W. R. Slater, D.O. on November 2, 1977, and his Report of Contact (TR 235) reveals the following comment:

"...He stated that Mr. Moler was indeed a problem patient in that he should have progressed further by now than he has, but that apparently the car accident following the laminectomy aggravated the previous problems that he had to the point that he is not now currently doing any better."

Dr. Slater stated there was a 50 percent loss range of motion in the lumbar spine. He further stated "he had considerable back pain and some radicular symptoms but that he was able to raise his legs 140 degrees, bilaterally." At first Dr. Slater stated there were no neurological or sensory changes and no foot drop. Upon reviewing his record he noticed Mr. Moler did have a sensory defect on his right thigh and his Achilles reflexes were absent on both the right and left.

On May 22, 1978, a conversation was had between Dr. Slater and a Medical Consultant Disability Determination person, which was transcribed. Dr. Slater stated plaintiff had no actual loss of motion; that he was able to get up and ambulate and get around. He further stated plaintiff had back pain and some leg pain and

and the pain was at some times unbearable. Dr. Slater indicated he had recommended a second laminectomy but plaintiff had declined because of finances. (TR 236)

Guy D. Baldwin, D.O., submitted two written reports and appeared at the hearing before the Administrative Law Judge to testify on behalf of plaintiff. Dr. Baldwin testified plaintiff came into his office on January 9, 1978, for another opinion on his "injuries." (TR 31) Dr. Baldwin did not take x-rays during his examination. (TR 37) He stated at the first exam plaintiff could only bend forward from the waist approximately 30% and could not bend his back; his side bending was limited to 10%. (TR 39) The limitation on the movement was attributed to pain. (TR 40) In his letter of February 27, 1979, to plaintiff's counsel, (TR 238-239) Dr. Baldwin stated his diagnosis as follows:

"....1.) Old ruptured Lumbar Intervertebral Disc that was surgically removed. 2.) Chronic Lumbar Strain...."

In a letter to plaintiff's counsel dated February 15, 1979 (TR 248) Dr. Baldwin advised he saw plaintiff on February 15, 1979, and there were no changes.

James C. Walker, M.D., a neurologist, examined plaintiff on July 20, 1978. He rendered a report (TR 240-244). In his report he stated (TR 242):

"The neurological examination was entirely physiological. The low back syndrome was normal back movements were full and non painful. Therefore on the basis of a vague history and a perfectly physiological neurological examination I felt that we were dealing with a idiopathic low back pain finding no clinical evidence of neurological deficit or disfunction at this point of time."

Plaintiff and his wife testified as to his reduced physical capacity; his memory problems; his inability to drive farm vehicles or his personal vehicle more than an hour per day. Plaintiff also testified he lacked the funds to have another operation and in any event he would want additional medical opinions before he submitted to additional surgery as he had not been guaranteed his problem would be solved by surgery--in fact he indicated his condition could "worsen."

In Social Security Disability cases, the claimant bears the burden of showing the existence of disability as defined by the Act. Demandre v. Califano, 591 F.2d 1088, 1090 (5th Cir. 1979); Lewis v. Califano, 574 F.2d 452 (8th Cir. 1978); McDaniel v. Califano, 568 F.2d 1172 (5th Cir. 1978); Turner v. Califano, 563 F.2d 669 (5th Cir. 1977); Valentine v. Richardson, 468 F.2d 588 (10th Cir. 1972).

The plaintiff has the burden of proving some medically determinable impairment which prevents him from engaging in any substantial gainful activity. 42 U.S.C. §423(d)(1) and (3); Albertson v. Califano, 453 F.Supp. 610 (USDC Kan. 1978); Garrett v. Califano, 460 F.Supp. 888 (USDC Kan. 1978).

It is not the function of the Court to re-weigh the evidence. See, e.g., Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970).

The function of the Administrative Law Judge is to weigh the evidence, including the testimony of a claimant and medical and lay opinion evidence.

In the instant case it seems clear that plaintiff is afflicted with some back problems. The issue present, however, is whether the record supports plaintiff's contention that his impairment is "of such severity" that he cannot engage in gainful employment.

Plaintiff's subjective complaint and description of symptomology must also be considered by the Administrative Law Judge and the Secretary. Such "subjective evidence", however, is not binding upon the Administrative Law Judge who must subject it to critical scrutiny.

Additionally, the credibility of witnesses is a matter for the sound judgment of the Administrative Law Judge.

The Administrative Law Judge found, in his decision the following: (TR 14)

"....Claimant was observed closely during the hearing and although he complained of pain he appeared to be quite comfortable. He displayed no difficulty or discomfort in walking, standing, sitting or rising from a seated position. Claimant did not shift his hips or legs at any time during the course of a rather lengthy hearing, although he stood for approximately five-minutes after remaining in a seated position for about one and one-half hours."

The Administrative Law Judge further found plaintiff took no medication to relieve his alleged pain other than an occasional aspirin. The Administrative Law Judge concluded:

"....The Administrative Law Judge is convinced... that while claimant does experience some discomfort with his lower back, his allegation of extreme debilitating pain is overstated and self-serving;...."

The statement by a physician that an individual is or is not disabled and unable to work is a conclusion upon the ultimate issue to be decided by the Secretary, and is not determinative of the question of whether the claimant is disabled. 20 C.F.R. 404.1526. The weight to be given such a statement depends on the extent to which it is supported by scientific and complete medical findings and is consistent with other evidence as to the severity and probable duration of the individual's impairment. Albertson v. Califano, *supra*.

Plaintiff argues in his brief the fact he cannot afford to pay for an operation on his back and his refusal to have such operation may not result in denial of disability benefits, citing to Ratliff v. Celebrezze, 338 F.2d 978 (6th Cir. 1964); Hoover v. Celebrezze, 235 F.Supp. 147 (USDC WD N.Car. 1964); and McCarty v. Richardson, 459 F.2d 3 (5th Cir. 1972). The Court has considered these cases and in addition cases not cited by plaintiff relative to this proposition.

The Administrative Law Judge found: (TR 15)

"Claimant's attorney, during his closing remarks, cited authority holding that an individual's decision not to elect medical treatment or surgery where such treatment was dangerous or beyond his financial means, was not unreasonable and not a basis for denying disability benefits. The Administrative Law Judge does not disagree with these contentions and does not base his decision solely on claimant's decision to refuse further surgery. There is ample evidence that claimant has no condition remediable by surgical intervention and that further surgery could in fact be detrimental. The Administrative Law Judge is convinced that claimant has regained the ability to perform light work without further surgery, and he is not denied disability benefits because he refused further surgery."

It is fundamental a claimant under a disability need not submit to all treatment, no matter how painful, dangerous, or uncertain of success, merely because one physician believes that a remedy may be effective. Nichols v. Califano, 556 F.2d 931 (9th Cir. 1977); Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978); Blankenship v. Califano, 598 F.2d 1041 (6th Cir. 1979).

However, as is apparent from the findings of the Administrative Law Judge, his decision as to disability in the instant case was not premised on the proposition asserted by plaintiff.

Moreover, the Administrative Law Judge did not find plaintiff lacked a problem with his back--he found plaintiff lacked the degree of impairment of severe disability to entitle him to disability benefits. A person with a back ailment is not precluded from the performance of some type of work. Rhynes v. Califano, 586 F.2d 388 (5th Cir. 1978), rehrg. den., 589 F.2d 1114 (5th Cir. 1979).

The Administrative Law Judge concluded that although plaintiff was not able to perform his former "job of ironworker or construction worker", he did have the residual functional capacity to perform light work activity as defined by 20 C.F.R. 404.1510(c).

In Salas v. Califano, 612 F.2d 480 (10th Cir. 1979) the Court held once plaintiff established his claim of inability to return to his former occupation, the burden of showing the claimant could nonetheless obtain other gainful activity and that such gainful activity is available shifted to the Secretary. See also, Brenem v. Harris, 621 F.2d 688 (5th Cir. 1980).

The Court finds the Secretary has met his burden. The evidence in the case supports a finding that Dale E. Moler, though disabled from returning to his previous level of work, is still able to perform other gainful activity.

After thoroughly examining the administrative record before it, the Court is of the opinion that substantial evidence is contained therein to support the Secretary's decision that plaintiff was not disabled within the meaning of the pertinent provisions of the Social Security Act and regulations applicable thereto.

Accordingly, the Secretary's decision should be affirmed and a judgment of affirmance will be entered this date.

ENTERED this 27 day of August, 1980.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

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

CHARLOTTE GRIGGS,)
)
 Plaintiff,)
)
 vs.)
)
 ERNEST TALLEY, d/b/a)
 TALLEY INVESTMENT COMPANY,)
)
 Defendant.)

No. 79-C-692-B

1980 AUG 27 10 00 AM
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER OF DISMISSAL

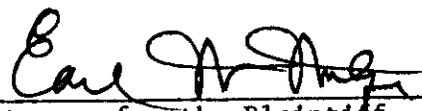
ON This 27 day of Aug, 1980, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

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

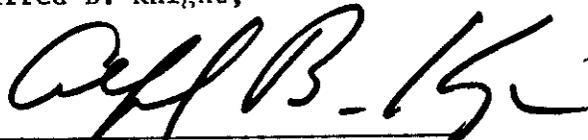

JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

Earl Wolfe,


Attorney for the Plaintiff,

Alfred B. Knight,


Attorney for the Defendant.

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

UNITED STATES OF AMERICA and)
HOMER C. WALKER, Special)
Agent, Internal Revenue)
Service,)
)
Petitioners,)
)
vs.)
)
MELBOURN GOSS,)
)
Respondent.)

No. 80-C-411-B

FILED
AUG 27 1980
U. S. DISTRICT COURT

ORDER DISCHARGING RESPONDENT
AND DISMISSAL

On this 27th day of Aug, 1980,
Petitioners' Motion to Discharge Respondent and for Dismissal
came for hearing and the Court finds that Respondent has now
complied with the Internal Revenue Service Summons served upon
him April 16, 1980, that further proceedings herein are un-
necessary, and that the Respondent, Melbourn Goss, should be
discharged and this action dismissed upon payment of \$38.40
costs by Respondent.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY
THE COURT that the Respondent, Melbourn Goss, be and he is
hereby discharged from any further proceedings herein and this
action is hereby dismissed upon payment of \$38.40 costs by
said Respondent.


U. S. DISTRICT JUDGE

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

WILLIS K. JOHNSON,)
)
 Plaintiff,)
)
 -vs-)
)
 BOB HOWE, d/b/a Bob Howe)
 Fine Car Center, et al.,)
)
 Defendants.) No. 77-C-120-C

AUG 27 1980
Jack G. Silver, Clerk
U. S. DISTRICT COURT

ORDER and
JUDGMENT FOR ATTORNEYS' FEES AND COSTS

Now on this 15th day of August, 1980, the Court has for consideration Garnishees' Motion for New Trial, Defendant Howe's Objection to Jurisdiction, and Plaintiff's Application for Costs and Attorneys' Fees. Plaintiff appears in person and is represented through his counsel, Bill V. Wilkinson, of Chapel, Wilkinson, Riggs, Abney, Keefer & Henson, the Defendant Bob Howe appears in person and is represented through his attorney, Frank R. Hickman, and the Garnishees appear by and through their counsel of record, Frank R. Hickman.

The Court recalls the evidence and testimony during the trial which transpired between April 14 and April 17, 1980, with regard to the allegations of the Garnishees and the proof produced by the Plaintiff that the transfers of assets and the assets in question were fraudulent and in violation of Oklahoma law. In reviewing the Motion for New Trial of Garnishees and Defendant Howe's Objection to Jurisdiction, the Court is not convinced that the prior Judgment should be vacated and, accordingly, the Garnishees' Motion for New Trial and Defendant Howe's Objection to Jurisdiction should be overruled.

It is the contention of the Plaintiff in its Application for Costs and Attorneys' Fees that attorney Bill V. Wilkinson has spent 41 hours in prosecuting the garnishment matter with four of the said hours being involved directly in the trial of the garnishment issue, and that attorney Donald M. Bingham has spent 75.25 hours in prosecuting the matter. Garnishees do not deny either that an attorneys' fee award is proper under the circumstances or that the hours shown on Exhibits "A" and "B" were, in fact, incurred, but rather contend that the Plaintiff should not be awarded attorneys' fees for any time incurred prior to the filing of the Answers by the Garnishees herein. It is also the contention of Garnishees that some of the hours itemized in Exhibits "A" and "B" are duplicitous in that both attorneys Wilkinson and Bingham spent some time simultaneously, and that, accordingly, Plaintiff should not recover for such duplications in time and effort. Garnishees do not challenge the validity of the expenses itemized in Exhibit "C". Garnishees do not object to the admissibility of Exhibits "A", "B" and "C", except for the reservations hereinabove stated, and such Exhibits are introduced into evidence.

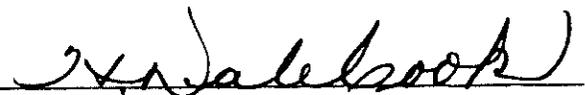
The Court finds that attorneys' fees and costs should be awarded to the Plaintiff, but that the hourly rate awarded for the time spent by Plaintiff's two attorneys, Bill V. Wilkinson and Donald M. Bingham, should be different because of the experience of the two attorneys. Accordingly, the Court notes that attorney Wilkinson spent four hours in trial time for which he is entitled to an hourly rate of \$150.00 and he spent 37 hours in other matters pertaining to litigation for which he should be entitled to an hourly rate of \$75.00, for a total combined attorney's fee award of \$4,375.00. Plaintiff's attorney Donald M.

Bingham spent 75.25 hours for which he is entitled to receive an hourly rate of \$50.00 for a total combined attorney's fee award of \$3,762.50. The total combined attorneys' fee award granted to Plaintiff is \$8,137.50. In addition, Exhibit "C" introduced into evidence indicates that the total court costs and expenses incurred amounted to \$1,273.99 and such amount should be awarded to the Plaintiff. The total combined attorneys' fees and costs to be awarded to the Plaintiff are \$9,411.49.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Garnishees' Motion for New Trial and the Objection to Jurisdiction on behalf of Bob Howe are hereby overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff's Application for Attorneys' Fees and Costs is sustained and that the Plaintiff is awarded the sum of \$8,137.50 for attorneys' fees and the sum of \$1,273.99 for costs and expenses incurred in prosecuting these garnishments actions, for a total combined Judgment in favor of the Plaintiff and against the Garnishees, Ruth B. Howe and R.B.H. Limited, jointly and severally, in the amount of \$9,411.49.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the said Garnishees are granted the time period of ten days or until August 25, 1980, in which time to file their Supersedeas Bond or undertaking to stay execution herein. For purposes of determining and ascertaining the amount of the Supersedeas Bond necessary to stay the proceedings herein in accordance with Okla. Stat. tit. 12 § 968, the Court hereby sets the amount of this final order to be \$25,000.00.


H. Dale Cook, Chief Judge
United States District Court
For the Northern District of
Oklahoma

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

FILED
AUG 27 1980
U. S. DISTRICT COURT

GEARHART INDUSTRIES, INC., a)
Texas corporation,)
)
Plaintiff,)
)
vs.) No. 80-C-404-B
)
PRODUCTION OIL CORPORATION; et al.,)
)
Defendants.)

ORDER OF DISMISSAL

NOW on this 27 day of August, 1980, comes on for presentation to this Honorable Court a Notice of Dismissal by the plaintiff, above named. The Court being fully advised that this defendant, Benson Mineral Group, is no longer a necessary and indispensable party to this action because their lien has expired.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Complaint, together with all allegations therein contained against said defendant, Benson Mineral Group, be and it is hereby dismissed as a party defendant in and to the above entitled cause.


UNITED STATES DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order of Dismissal was mailed to Rebecca L. Adams, Attorney for Defendant, Bensons Mineral Group, 117 E. Frank Phillips Boulevard, Bartlesville, Oklahoma, 74003, by placing it in the United States Mail, postage prepaid, on this _____ day of _____, 1980.

J. REX SPURR

MAILED
AUG 27 1980
U. S. DISTRICT COURT

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

CHARLOTTE HAYES,)
)
Plaintiff,)
)
vs.)
)
BOISE CASCADE COMPANY (a)
corporation), WILLIAM KREI,)
MIKE CROWL and ROBERT)
MARGASON,)
)
Defendants.)

No. 78-C-514-E

FILED

AUG 27 1980

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

O R D E R

The Court has before it motion for summary judgment by the three individual defendants. Defendants allege the Court lacks subject matter jurisdiction and in addition request attorney fees. Defendants argue that a Title VII Defendant must be named as a respondent in the EEOC charge in order for the district court to have jurisdiction. Plaintiff admits the general rule that Title VII suits are permitted only against the respondent named in the charge but states that this case falls within one of the exceptions to that rule. The Court has carefully reviewed the briefs submitted by the parties and the authorities under Title VII.

42 U.S.C. § 2000e-5(F)(1) contains a jurisdictional prerequisite which serves two important functions: first it notifies the charged party of the asserted violation and secondly, it brings the charged party before the EEOC and permits effectuation of the Act's primary goal which is securing voluntary compliance with the law. Jackson v. University of Pittsburg, 405 F.Supp. 607 (W.D. Pa. 1975); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (Seventh Cir. 1969); Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (Third Cir. 1975).

Plaintiff is not allowed to maintain this action under the Act against persons not named in her EEOC complaint. Harbert v. Rapp, 415 F.Supp. 83 (W.D. Okla. 1976); Travers v. Corning Glass Works, 76 F.R.D. 431 (S.D. New York 1977).

The individual defendants in this case received no notice

that a charge had been filed with EEOC, nor did they receive a copy of the right to sue letter. The individual defendants did not participate in the proceedings or investigation conducted by the Human Rights Commission or EEOC. The individual defendants were not named in the complaint of the EEOC.

Although the Defendants have moved for summary judgment, it is the opinion of this Court that dismissal of the three parties would be more appropriate. The defect in this case is a jurisdictional one and although some courts enter summary judgment on jurisdictional grounds, the general rule is it is improper for a district court to enter a judgment under Rule 56 because of lack of jurisdiction. 10 Wright & Miller Civil: § 2713; Jones v. Brush, 143 F.2d 733 (Ninth Cir. 1944).

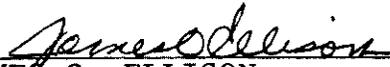
Generally when this issue has been presented to the courts, the parties not named in the charge were dismissed. Harbert v. Rapp, 415 F.Supp. 83 (W.D. Okla. 1976); Silver v. Mohasco Corp., 19 F.E.P. Cases 677 (N.D. N.Y. 1978); Batis v. Great American Federal Savings and Loan Association, 452 F.Supp. 588 (W.D. Pa. 1978); White v. North Louisiana Legal Assistance Corp., 468 F.Supp. 1347 (D.C. La. 1979). Based upon the authorities, it is the Court's position that the individual Defendants Krei, Crowl and Margason be dismissed.

In considering the question of attorneys' fees requested by Defendants, the Court cites Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694 (1978) which held that a district court may in its discretion award attorneys' fees upon a finding that the action was frivolous, unreasonable or without foundation. This Court after reviewing the pleadings and briefs finds that the test in Christiansburg Garment, supra, has not been met and attorneys' fees would not properly be awarded.

IT IS THEREFORE ORDERED that the individual defendants: Krei, Crowl and Margason be dismissed from this action.

IT IS FURTHER ORDERED that the request for attorneys' fees by the individual defendants be denied.

It is so Ordered this 27th day of August, 1980.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED
AUG 27 1980 K

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

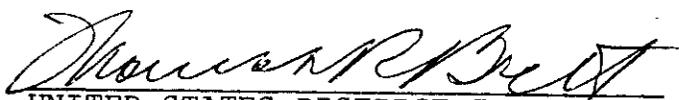
GEARHART INDUSTRIES, INC., a)
Texas corporation,)
)
Plaintiff,)
)
vs.)
)
WAGON WHEEL ENERGY CORPORATION;)
et al.,)
)
Defendants.)

No. 80-C-215-B ✓

ORDER OF DISMISSAL

NOW on this 27 day of August, 1980, comes on for presentation to this Honorable Court a Notice of Dismissal by the plaintiff, above named. The Court being fully advised that this defendant, Donald A. Carlson, has no right, title, or interest in the property involved in this action, and is no longer a necessary and indispensable party to this action.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Complaint, together with all allegations therein contained against said defendant, Donald A. Carlson, be and it is hereby dismissed as a party defendant in and to the above entitled cause.


UNITED STATES DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order of Dismissal was mailed to Ronald G. Raynolds, Attorney for Defendant, Donald A. Carlson, 320 South Boston Building, Suite 920, Tulsa, Oklahoma, 74103, by placing it in the United States Mail, postage prepaid, on this _____ day of _____, 1980.

J. REX SPURR

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

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

SOUTHPORT EXPLORATION, INC.,
a Delaware corporation,

Plaintiff,

v.

HCW DRILLING PARTNERSHIP 1978-1,
a limited partnership,
JOHN M. PLUKAS, an individual,
and ROBERT A. GLASSMAN, an
individual,

Defendants and
Third Party
Plaintiffs,

v.

QUANAH COMPANY,

Third Party
Defendant.

) NOTE: Case is stricken
) from disposition docket
) set on September 30, 1980
) at 9:30 a.m.

) No. 79-C-467-E

) **FILED**

) AUG 26 1980

) U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

NOW on this 8th day of July, 1980, the Motion to Dismiss Complaint or for Summary Judgment of the third party defendant, Quanah Company, and the Motion to Vacate Order Granting Leave to Add Third Party Defendant or in the Alternative to Sever the Third Party Claim filed by Southport Exploration, Inc. comes on for hearing. The plaintiff, Southport Exploration, Inc., appears by its attorney, James L. Kincaid of Conner, Winters, Ballaine, Barry and McGeown, the defendants appear by their attorney, Alan R. Carlson of Garrison, Brown and Carlson and third party defendant Quanah Company, appears by its attorney, Nash Lamb of Lawrence, Scott & Lamb. The Court, having reviewed the motions and the briefs filed by the parties, having heard statements of counsel, and being fully advised in the premises, finds that:

1. The Motion to Vacate Order Granting Leave to Add Third Party Defendant or in the Alternative to Sever the Third Party Claim filed by Southport Exploration, Inc. should be granted, and the Third Party Complaint naming Quanah Company as a third party defendant should be stricken in that there is an improper impleader

under Rule 14 of the Federal Rules of Civil Procedure.

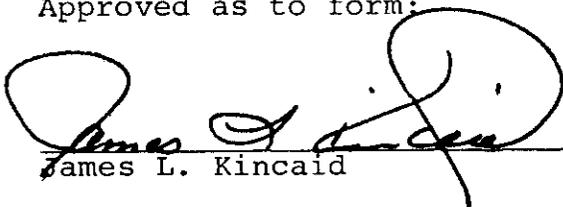
2. The Motion to Dismiss Complaint or for Summary Judgment filed by Quanah Company should be considered a Motion for Summary Judgment pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because of the affidavit attached thereto and considered by the Court, and, as such, it should be denied.

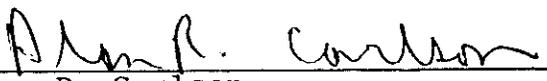
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT the Motion to Vacate Order Granting Leave to Add Third Party Defendant or in the Alternative to Sever the Third Party Claim of Southport Exploration, Inc. is granted, and the Third Party Complaint naming Quanah Company as a third party defendant is stricken in that there is an improper impleader under Rule 14 of the Federal Rules of Civil Procedure.

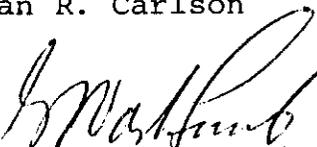
IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT the Motion to Dismiss Complaint or for Summary Judgment is a Motion for Summary Judgment filed by Quanah Company pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure, because of the affidavit attached thereto and considered by the Court, and as such, the Motion is denied.


United States District Judge

Approved as to form:


James L. Kincaid


Alan R. Carlson


Nash Lamb

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

DON A. JENKINS,

Plaintiff,

-vs-

FRED ASTAIRE NATIONAL DANCE
ASSOCIATION, INC., a Florida
Corporation, and RAYMOND SONNIER,
d/b/a FRED ASTAIRE DANCE STUDIO
(Tulsa), d/b/a H and H STUDIOS,
INC., d/b/a SONNIER & SONS, INC.,
RICHARD FELIX, MICHAEL HENDERSON,
LE ROY WANT, jointly and severally,

Defendants.

NO. 78-C-189-~~AE~~

F. L. ...
AUG 27 1980
U.S. DISTRICT COURT
TULSA, OKLAHOMA

PARTIAL JUDGMENT

This action came on for hearing before the Court, Honorable *James O. Ellison*
~~H. DALE COOK~~, District Judge, presiding, and the limited issues
of Plaintiff's Second Count, as amended, having been duly heard
and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that DON A. JENKINS, Plaintiff,
recover of the Defendant, RAYMOND SONNIER d/b/a FRED ASTAIRE
DANCE STUDIO (Tulsa), d/b/a H and H STUDIOS, INC., d/b/a SONNIER
& SONS, INC., the sum of \$11,500.00, with interest thereon at the
rate of 10% as contracted, and his costs of action.

Dated at Tulsa, Oklahoma, this 26th day of August,
1980.

S/ JAMES O. ELLISON

JAMES O. ELLISON
U.S. District Judge

APPROVED:

Thomas S. Vandivort

THOMAS S. VANDIVORT
Attorney for Plaintiff

Theodore P. Gibson

THEODORE P. GIBSON
Attorney for Defendants, FRED ASTAIRE
NATIONAL DANCE ASSOCIATION, INC., RICHARD
FELIX, MICHAEL HENDERSON and LEROY WANT

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

The Travelers Insurance Company,
Plaintiff,

CIVIL ACTION FILE NO. 79-C-499-E

vs.

Norma L. Morrow,

Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable James O. Ellison
, United States District Judge, presiding, and the issues having been duly tried and
the jury having duly rendered its verdict, in favor of the Plaintiff.

It is Ordered and Adjudged having found in favor of the Plaintiff and
against the Defendant, the Plaintiff is awarded his cost of action.

FILED
AUG 26 1980
Jack B. Silver, Clerk
U. S. DISTRICT COURT

Dated at Tulsa, Oklahoma, this 26th day
of August, 1980.


Clerk of Court

FILED

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

AUG 26 1980

Jack J. Stone, Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ALBERT PETTY, et. al.,)
)
 Defendants.)

CIVIL ACTION NO. 79-C-635-~~2~~^E

ORDER

NOW, on this 26th day of August, 1980, there came on for consideration the Stipulation of Dismissal filed herein by the Plaintiff, United States of America, and Defendant, Guy G. Henson. This Court finds this action, based on such Stipulation, should be dismissed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this action be and the same is hereby dismissed, without prejudice.

James O. Allison
UNITED STATES DISTRICT JUDGE

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

FILED

AUG 25 1980

N.P.S.T. Corporation,)
an Oklahoma corporation,)
formerly)
Norman Plumbing & Supply Co.)
of Tulsa, Inc.,)
Plaintiff,)
V.)
William H. Boyd & John C.)
Gilbert,)
d/b/a Continental Electric)
Co., a co-partnership,)
Defendants.)

U. S. DISTRICT COURT

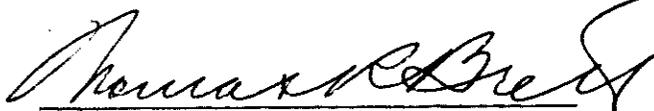
Civil Case Number 80-C-21-BT

O R D E R

Default Judgment heretofore entered on August 20, 1980, and this case having been called for hearing on Plaintiff's application for attorney's fees and the Court having heard testimony and evidence reflecting actual court time of two (2) hours at \$85.00 per hour, and ten (10) hours of research time at \$75.00 per hour, making a total and reasonable attorney's fee of \$920.00,

IT IS ORDERED BY THE COURT that Plaintiff have judgment against the Defendant for attorney's fees in the amount of \$920.00 for the use and benefit of its attorney of record.

DATED this 25th day of August, 1980.



Thomas R. Brett
United States District Judge

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

LELAND EQUIPMENT COMPANY,)
)
 Plaintiff,)
)
 V.)
)
 MIDWEST COAL & ENERGY CORP.,)
)
 Defendant.)

Case Number 80-C-67-BT ✓

AUG 21 1980

Bs

U. S. DISTRICT COURT

O R D E R

This matter was called for hearing on Plaintiff's application for attorney's fees pursuant to the provisions of the note involved and pursuant to Title 12, Oklahoma Statutes, Section 936.

After hearing statements of counsel and receiving evidence in this regard, the Court allows attorney fees of 10% of the balance due of the note in the amount of \$3,726.80, and 20% of the open account balance due in the amount of \$4,929.56, making a total and reasonable attorney's fee of \$8,656.36.

IT IS THEREFORE ORDERED by the Court that Plaintiff is granted judgment against the Defendant for attorney fees in the amount of \$8,656.36, for the use and benefit of its attorney of record, Mack Muratet Braly.

DATED this 21 day of August, 1980.


Thomas R. Brett
United States District Judge

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

GAS COMPRESSOR SERVICES, INC.,
An Oklahoma Corporation,

Plaintiff,

vs.

R & R OIL COMPANY,
a Kansas corporation, and
E. W. ROBERTS and MONITA I.
ROBERTS, d/b/a R & R Oil
Company,

Defendants.

No. 79-C-661-BT ✓

F I L E D

AUG 26 1980

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

J U D G M E N T

This case having been called for non-jury trial on this date, August 25, 1980, and the Parties announcing the case had been settled by confession of judgment as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THIS COURT that Plaintiff, Gas Compressor Services, Inc.,, have and recover from the defendants, R & R Oil Company, a Kansas partnership whose partners are E. W. Roberts and Monita I. Roberts, and each of them, a judgment in the sum of \$25,000.00 with interest thereon at the rate of 12% per annum from date of judgment, until paid, together with an attorney fee to be set by the Court unless Parties can enter into a stipulation as to a just and reasonable award on or before September 2, 1980, and all costs of action.

DATED this 25th day of August, 1980.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

United States District Court

AUG 25 1980

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

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

Hubert Dowdy, and Lender Service, Inc.	Plaintiffs,	CIVIL ACTION FILE NO. 80-C-83-BT ✓
vs.		}
Summit Home Insurance Company,	Defendant.	

JUDGMENT

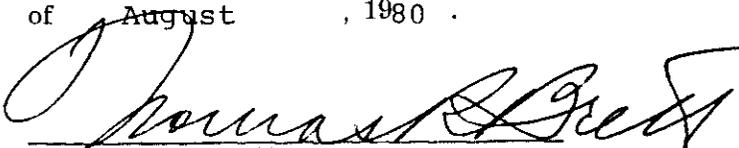
This action came on for trial before the Court and a jury, Honorable Thomas R. Brett, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, for the Plaintiffs.

It is Ordered and Adjudged that upon the finding of the jury in favor of Hubert Dowdy and Lender Service, Incorporated, Plaintiffs, and against the Defendant, Summit Home Insurance Company, damages are assessed as follows:

Mobile home actual cash value as of May 31, 1979	\$ 9,590.92
Two appurtenant structures actual cash value as of May 31, 1979	\$ 1,536.00
Personal effects actual cash value as of May 31, 1979	\$ 3,238.69
<u>TOTAL.....</u>	<u>\$14,365.61,</u>

plus interest at the rate of 12% from the date of judgment. (The issue of pre-judgment interest and attorneys fees remains to be decided).

Dated at 2 Tulsa, Oklahoma, this 21st day of August, 1980.

 THOMAS R. BRETT UNITED STATES DISTRICT JUDGE	 Clerk of Court JACK C. SILVER
--	--

AUG 25 1980

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

United States District Court

FOR THE

Northern District of Oklahoma

CIVIL ACTION FILE NO. 79-C-563-BT ✓

John Underwood,

Plaintiff,

vs.

Darrell Fell,

Defendant and

Third Party Plaintiff,

vs.

Kenneth Frost,

Third Party Defendant
and Cross-Complainant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Thomas R. Brett

, United States District Judge, presiding, and the issues having been duly tried and

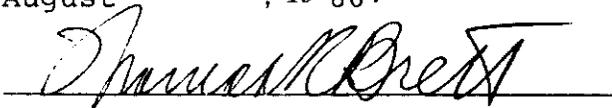
the jury having duly rendered its verdict, for the Defendant, Darrell Fell and Third-Party Defendant, Kenneth Frost, and against the plaintiff, John Underwood.

It is Ordered and Adjudged judgment is hereby granted the defendants, Darrell Fell and Kenneth Frost, against the plaintiff, John Underwood, and the costs of this action.

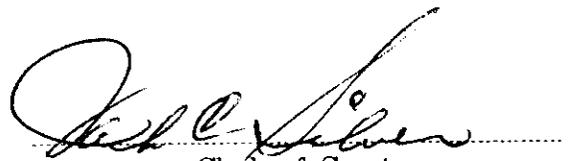
Dated at Tulsa, Oklahoma

, this 20th day

of August, 19 80.



Thomas R. Brett
United States District Judge



Clerk of Court

United States District Court

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

AUG 25 1980

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

CIVIL ACTION FILE NO. 79-C-563-BT

John Underwood,

Plaintiff,

vs.

Darrell Fell,

Defendant and
Third Party Plaintiff,

vs.

Kenneth Frost,

Third Party Defendant
and Cross-Complainant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Thomas R. Brett

, United States District Judge, presiding, and the issues having been duly tried and

the jury having duly rendered its verdict, for the defendant, Darrell Fell, and against the Cross-Complainant, Kenneth Frost.

It is Ordered and Adjudged judgment is hereby granted the defendant, Darrell Fell, against the Cross-Complainant, Kenneth Frost, plus the costs of this action.

Dated at Tulsa, Oklahoma

, this 20th day

of August, 1980.

Thomas R. Brett

Thomas R. Brett
United States District Judge

Jack C. Silver

Clerk of Court

United States District Court

AUG 25 1980

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

FOR THE

NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION FILE NO. 79-C-361-BT

Earl Wayne Comstock,

Plaintiff,

vs.

Square D Company,

Defendant.

JUDGMENT

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

It is Ordered and Adjudged upon the finding of the jury in favor of the Plaintiff and against the Defendant, damages are assessed in the sum of \$52,257.00, interest at the rate of 10% from the date of filing on the 9th day of May, 1979, interest at the rate of 12% from August 19, 1980, and Plaintiff is awarded costs of the action.

Dated at Tulsa, Oklahoma, this 19th day of August, 1980.

Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Jack C. Silver

Clerk of Court

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America,)
)
 Plaintiff,)
)
 vs.)
)
 8.80 Acres of Land, More or)
 Less, Situate in Osage County,)
 State of Oklahoma, and C. B.)
 Lambert, et al., and Unknown)
 Owners,)
)
 Defendants.)

CIVIL ACTION NO. 78-C-93-Bt ✓
Tract No. 130E

FILED

AUG 25 1980

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

J U D G M E N T
(AS TO 5/18 INTEREST)

1.

NOW, on this 25 day of Aug., 1980, this matter comes on for disposition on application of Plaintiff, United States of America, for entry of judgment on a stipulation of the parties 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 only to a 5/18 interest in the estate condemned in Tract No. 130E, 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 has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause.

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 3, 1978, the United States of America filed its Declaration of Taking of 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 5/18 interest in a certain estate in subject tract a certain sum of money and none of this deposit has been disbursed, as set out below in paragraph 12.

7.

The defendants named in paragraph 12 below under the designation "owners," are the only defendants asserting any interest in the subject property. Certain persons, to-wit,

Catherine Clark

Marcus DeNoya

Marian Paul DeNoya

Maurice H. DeNoya

Emery Hickman and

Mary Trumbly

named as defendants in this action, were in fact deceased when this action was filed. The heirs or successors in interest of these deceased defendants are included in the list of owners set forth in such paragraph 12.

All defendants other than those named in such paragraph 12, having either disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the subject property and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

The owners of the subject property 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

a 5/18 interest in the estate condemned in subject tract is in the amount shown as compensation in paragraph 12 below, and such Stipulation should be approved.

9.

This judgment will create a deficiency between the amount deposited as estimated compensation for a 5/18 interest in the estate taken in subject tract and the amount fixed by the Stipulation As To Just Compensation, and the amount of such deficiency should be deposited for the benefit of the owners. Such deficiency is set out in paragraph 12 below.

10.

It Is, Therefore, ORDERED, ADJUDGED and DECREED that the United States of America has the right, power, and authority to condemn for public use Tract No. 130E, as such tract is particularly described in the Complaint filed herein; and such tract, to the extent of a 5/18 interest in the estate described in such Complaint, is condemned, and title thereto is vested in the United States of America, as of March 3, 1978, and all defendants herein and all other persons interested in such interest are forever barred from asserting any claim to such estate.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of a 5/18 interest in the estate condemned herein in subject tract were the defendants whose names appear below in paragraph 12; the interest held by each owner is set forth following his or her name; and the right to receive the just compensation for such interest in the estate taken herein in such tract is vested in the parties so named.

12.

It is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation mentioned in paragraph 8 above hereby is confirmed; and the sum thereby fixed is adopted as the award of just compensation for a 5/18 interest in the estate condemned in subject tract, as follows:

TRACT NO. 130E
(5/18 Interest)

OWNERS:

1. Wallace Doolin ----- 1/18
2. Alfred Hall ----- 1/18
3. Colorado Springs National Bank,
Trustee of the Estate of
Marian Paul DeNoya ----- 1/72
4. Virgil Harry DeNoya ----- 1/72
5. Lillian DeNoya Davies ----- 1/72
6. Maurice J. Moseley ----- 1/144
7. Marsha Brooks ----- 1/288
8. Michael Moseley Keith ----- 1/1152
9. Patricia Ann Keith ----- 1/1152
10. Kevin Patrick Keith ----- 1/1152
11. Timothy Ward Keith ----- 1/1152
12. Teresa Ann Rogers ----- 1/216
13. Mary Christine Rogers ----- 1/216
14. Donald Anthony Rogers ----- 1/216
15. Richard Lee Rogers ----- 1/216
16. Virgil Tinker ----- 1/162
17. Joe Trumbly ----- 1/162
18. Elizabeth Bartnek ----- 1/162
19. Helen G. DeNoya ----- 1/162
20. Charles Franklin DeNoya ----- 1/162
21. Joseph Daniel DeNoya ----- 1/162
22. Frances C. Oldfield ----- 1/180
23. May Pyle ----- 1/90
24. Esther C. Hickman ----- 1/90
25. Ethel L. Hickman Nessen ----- 1/90
26. Roy Scott Hickman ----- 1/90
27. Robert L. Donelson, Jr. ----- 1/180

Award of just compensation for all interests pursuant to Stipulation -----	\$1,923.09	\$1,923.09
Deposited as estimated compensation -----	\$1,727.78	
Disbursed to owners -----		<u>None</u>
Balance due to owners -----		\$1,923.09
Deposit deficiency -----	\$ 195.31	

13.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall deposit in the Registry of this Court in this civil action, to the credit of subject tract, the deposit deficiency in the sum of \$195.31 and the Clerk of this Court then shall disburse the deposit for such tract as follows:

1. Wallace Doolin -----	\$384.62
2. Alfred Hall -----	\$384.62
3. Colorado Springs National Bank, Trustee of the Estate of Marian Paul DeNoya -----	\$96.15
4. Virgil Harry DeNoya -----	\$96.15
5. Lillian DeNoya Davies -----	\$96.15
6. Maurice J. Moseley -----	\$48.08
7. Marsha Brooks -----	\$24.04
8. Michael Moseley Keith -----	\$ 6.01
9. Patricia Ann Keith -----	\$ 6.01
10. Kevin Patrick Keith -----	\$ 6.01
11. Timothy Ward Keith -----	\$ 6.01
12. Teresa Ann Rogers -----	\$32.05
13. Mary Christine Rogers -----	\$32.05
14. Donald Anthony Rogers -----	\$32.05
15. Richard Lee Rogers -----	\$32.05
16. Virgil Tinker -----	\$42.74
17. Joe Trumbly -----	\$42.74
18. Elizabeth Bartnek -----	\$42.74
19. Helen G. DeNoya -----	\$42.74

20.	Charles Franklin DeNoya -----	\$42.74
21.	Joseph Daniel DeNoya -----	\$42.74
22.	Frances C. Oldfield -----	\$38.46
23.	May Pyle -----	\$76.92
24.	Esther C. Hickman -----	\$76.92
25.	Ethel L. Hickman Nessen -----	\$76.92
26.	Roy Scott Hickman -----	\$76.92
27.	Robert L. Donelson, Jr. -----	\$38.46

Donald A. Bell
 UNITED STATES DISTRICT JUDGE

APPROVED:

Hubert A. Marlow
 HUBERT A. MARLOW
 Assistant U. S. Attorney

Robert P. Kelly
 ROBERT P. KELLY, Attorney
 for owner no. 27 above

W. N. Palmer
 W. N. PALMER, of Gray & Palmer
 Attorneys for owners numbered 1
 through 21 inclusive, above

Robert Wilson
 W. ROBERT WILSON, Attorney
 for owners numbered 22 through
 26, inclusive, above

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America,)
)
 Plaintiff,)
)
 vs.)
)
 4.10 Acres of Land, More or)
 Less, Situate in Osage County,)
 State of Oklahoma, and Forrest)
 L. Richardson, et al., and)
 Unknown Owners,)
)
 Defendants.)

CIVIL ACTION NO. 78-C-301-Bt ✓
Tract No. 330E

FILED
AUG 25 1980

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

J U D G M E N T
AS TO 5/18 INTEREST

1.

NOW, on this 25 day of Aug., 1980, this matter comes on for disposition on application of Plaintiff, United States of America, for entry of judgment on a stipulation of the parties 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 only to a 5/18 interest in the estate condemned in Tract No. 330E, 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 has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause.

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 June 29, 1978, the United States of America filed its Declaration of Taking of 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 5/18 interest in a certain estate in subject tract a certain sum of money and none of this deposit has been disbursed, as set out below in paragraph 12.

7.

The defendants named in paragraph 12 below, under the designation "owners," are the only defendants asserting any interest in the subject property. Certain persons, to-wit,

Catherine Clark

Marcus DeNoya

Marian Paul DeNoya

Maurice H. DeNoya

Emery Hickman and

Mary Trumbly

named as defendants in this action, were in fact deceased when this action was filed. The heirs or successors in interest of these deceased defendants are included in the list of owners set forth in such paragraph 12.

All defendants other than those named in such paragraph 12, having either disclaimed or defaulted, the named defendants were, as of the date of taking, the owners of the subject property and, as such, are entitled to receive the just compensation awarded by this judgment.

8.

The owners of the subject property 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 a 5/18 interest in the estate condemned in subject tract is in the

amount shown as compensation in paragraph 12 below, and such Stipulation should be approved.

9.

This judgment will create a deficiency between the amount deposited as estimated compensation for a 5/18 interest in the estate taken in subject tract and the amount fixed by the Stipulation As To Just Compensation, and the amount of such deficiency should be deposited for the benefit of the owners. Such deficiency is set out in paragraph 12 below.

10.

It Is, Therefore, ORDERED ADJUDGED and DECREED that the United States of America has the right, power and authority to condemn for public use Tract No. 330E, as such tract is particularly described in the Complaint filed herein; and such tract, to the extent of a 5/18 interest in the estate described in such Complaint, is condemned, and title thereto is vested in the United States of America, as of June 29, 1978, and all defendants herein and all other persons interested in such interest are forever barred from asserting any claim to such estate.

11.

It Is Further ORDERED, ADJUDGED and DECREED that on the date of taking, the owners of a 5/18 interest in the estate condemned herein in subject tract were the defendants whose names appear below in paragraph 12; the interest held by each owner is set forth following his or her name; and the right to receive the just compensation for such interest in the estate taken herein in such tract is vested in the parties so named.

12.

It Is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation mentioned in paragraph 8 above hereby is confirmed; and the sum thereby fixed is adopted as the award of just compensation for a 5/18 interest in the estate condemned in subject tract, as follows:

TRACT NO. 330E

(5/18 INTEREST)

OWNERS:

1. Wallace Doolin ----- 1/18
2. Alfred Hall ----- 1/18
3. Colorado Springs National Bank,
Trustee of the Estate of
Marian Paul DeNoya ----- 1/72
4. Virgil Harry DeNoya ----- 1/72
5. Lillian DeNoya Davies ----- 1/72
6. Maurice J. Moseley ----- 1/144
7. Marsha Brooks ----- 1/288
8. Michael Moseley Keith ----- 1/1152
9. Patricia Ann Keith ----- 1/1152
10. Kevin Patrick Keith ----- 1/1152
11. Timothy Ward Keith ----- 1/1152
12. Teresa Ann Rogers ----- 1/216
13. Mary Christine Rogers ----- 1/216
14. Donald Anthony Rogers ----- 1/216
15. Richard Lee Rogers ----- 1/216
16. Virgil Tinker ----- 1/162
17. Joe Trumbly ----- 1/162
18. Elizabeth Bartnek ----- 1/162
19. Helen G. DeNoya ----- 1/162
20. Charles Franklin DeNoya ----- 1/162
21. Joseph Daniel DeNoya ----- 1/162
22. Frances C. Oldfield ----- 1/180
23. May Pyle ----- 1/90
24. Esther C. Hickman ----- 1/90
25. Ethel L. Hickman Nessen ----- 1/90
26. Roy Scott Hickman ----- 1/90
27. Robert L. Donelson, Jr. ----- 1/180

Award of just compensation for all interests pursuant to stipulation -----	\$961.56	\$961.56
Deposited as estimated compensation -----	\$840.28	
Disbursed to owners -----		<u>None</u>
Balance due to owners -----		\$961.56
Deposit deficiency -----	\$121.28	

13.

It Is Further ORDERED, ADJUDGED and DECREED that the United States of America shall deposit in the Registry of this Court in this civil action, to the credit of subject tract, the deposit deficiency in the sum of \$121.28 and the Clerk of this Court then shall disburse the deposit for such tract as follows:

1. Wallace Doolin -----	\$192.31
2. Alfred Hall -----	\$192.31
3. Colorado Springs National Bank, Trustee of the Estate of Marian Paul DeNoya -----	\$48.08
4. Virgil Harry DeNoya -----	\$48.08
5. Lillian DeNoya Davies -----	\$48.08
6. Maurice J. Moseley -----	\$24.04
7. Marsha Brooks -----	\$12.02
8. Michael Moseley Keith -----	\$ 3.00
9. Patricia Ann Keith -----	\$ 3.00
10. Kevin Patrick Keith -----	\$ 3.00
11. Timothy Ward Keith -----	\$ 3.00
12. Teresa Ann Rogers -----	\$16.03
13. Mary Christine Rogers -----	\$16.03
14. Donald Anthony Rogers -----	\$16.03
15. Richard Lee Rogers -----	\$16.03
16. Virgil Tinker -----	\$21.37
17. Joe Trumbly -----	\$21.37
18. Elizabeth Bartnek -----	\$21.37
19. Helen G. DeNoya -----	\$21.37

- 20. Charles Franklin DeNoya ----- \$21.37
- 21. Joseph Daniel DeNoya ----- \$21.37
- 22. Frances C. Oldfield ----- \$19.23
- 23. May Pyle ----- \$38.46
- 24. Esther C. Hickman ----- \$38.46
- 25. Ethel L. Hickman Nessen ----- \$38.46
- 26. Roy Scott Hickman ----- \$38.46
- 27. Robert L. Donelson, Jr. ----- \$19.23

James R. Brett
 UNITED STATES DISTRICT JUDGE

APPROVED:

Hubert A. Marlow
 HUBERT A. MARLOW
 Assistant United States Attorney

Robert P. Kelly
 ROBERT P. KELLY, Attorney
 for owner no. 27 above

W. N. Palmer
 W. N. PALMER, of Gray & Palmer
 Attorneys for owners numbered 1
 through 21, inclusive, above

W. Robert Wilson
 W. ROBERT WILSON, Attorney for
 owners numbered 22 through 26,
 inclusive, above

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

LINDA K. GOBBLE, Adminis-)
tratrix of the Estate of)
LARRY CLAYTON GOBBLE, De-)
ceased, and in her own)
behalf,)
)
Plaintiff,)
)
vs.)
)
ST. LOUIS-SAN FRANCISCO)
RAILWAY COMPANY and LARRY)
JACOBSON,)
)
Defendant.)

No. 80-C-71-E

FILED

AUG 22 1980

Jack C. Silver
U. S. DISTRICT COURT

O R D E R

The Court has before it for consideration Plaintiff's Motion to Remand this case to the District Court of Creek County, State of Oklahoma, Drumright Division.

Defendant filed a petition for removal on February 7, 1980 where Defendant St. Louis-San Francisco Railway stated that the resident Defendant, Larry Jacobson did not violate any of the duties alleged against him in Plaintiff's petition. Both Defendants joined in the removal.

Defendant Larry Jacobson filed a motion to dismiss the action against him for failure of the Plaintiff to state a claim upon which relief could be granted and cited Fuqua v. Gulf, Colorado & Sante Fe Railway Co., 206 F.Supp. 814 (E.D. Okla. 1962).

The Plaintiff filed a Motion to Remand on February 21, 1980. alleging that the petition for removal does not meet the requirements of either 28 U.S.C.A. § 1441(c) or § 1446(b).

Fuqua v. Gulf, Colorado & Sante Fe Railway Co., supra, and Scott v. Huffman, 237 F.2d 396 (Tenth Cir. 1956) both involved similar situations. However in Scott v. Huffman, the railway company removed the action on the ground of the improper and fraudulent joinder of the conductor. There was no such allegation in the instant case. McLeod v. Cities Service Gas Co., 233 F.2d 242 (Tenth Cir. 1956) provided in part at page 246:

"Of course if there is bad faith or collusion in joining a resident Defendant for the sole purpose of preventing removal, that may be shown by any means available. But, fraudulent joinder, like any other allegation of fraud, must be pleaded with particularity and proven with certainty. It cannot be inferred from a mere misjoinder of parties or causes of action." See also Updike v. West, 172 F.2d 663 (Tenth Cir. 1949); Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 52 S.Ct. 84, 76 Ed. 233.

As Plaintiff's Motion to Remand is presently before the Court, the burden of proof is on the Defendants, as the removing parties, to show that this action was properly removed. P. P. Farmer's Elevator Co. v. Farmers Elevator Mutual Insurance Co., 395 F.2d 546 (Seventh Cir. 1968); Williams v. Tri-County Community Center, 323 F.Supp. 286 (S.D. Miss. 1971), aff'd, 452 F.2d 221 (Fifth Cir. 1971); Heymann v. Louisiana, 269 F.Supp. 36 (E.D. La. 1967). Where there is any substantial doubt concerning jurisdiction of the federal court on removal, the case should be remanded and jurisdiction should be retained only where it is clear. See Shamrock Oil & Gas Co. v. Sheets, 313 U.S. 100 (1941); Morrison v. Jack Richards Aircraft Co., 328 F.Supp. 580 (W.D. Okla. 1971); Williams v. Tri-County Community Center, supra; see Jerro v. Home Lines, Inc., 377 F.Supp. 670 (S.D. N.Y. 1974). The provisions of the statutes authorizing removal, in that they represent congressionally authorized encroachments into state sovereignty, are to be strictly construed. Town of Freedom v. Muskogee Bridge Co., 466 F.Supp. 75 (W.D. Okla. 1978); Lee v. Volkswagon of America, Inc., 429 F.Supp. 5 (W.D. Okla. 1976).

When fraudulent joinder is alleged however, the Defendant's task is even more exacting. Fraudulent joinder must be alleged with particularity and proven with such complete certainty as to make the issue capable of summary determination. Smoot v. Chicago, Rock Island & Pac. R.R. Co., 378 F.2d 879 (Tenth Cir. 1967); Dodd v. Fawcett Publications, Inc., 329 F.2d 82 (Tenth Cir. 1964). Failure to meet this burden requires that the case be remanded to state court, e.g., Sparks v. St. Louis & San Francisco R.R.

Corp., 366 F.Supp. 957 (W.D. Okla. 1973); Thomas v. Archer, 300 F.Supp. 1181 (W.D. Okla. 1971); Fine v. Braniff Airways, Inc., 302 F.Supp. 496 (W.D. Okla. 1969). The possibility that a right to relief exists is sufficient to avoid the conclusion that joinder is fraudulent. Town of Freedom v. Muskogee Bridge Co., supra; 1A Moore's Federal Practice ¶ 0.161[2] at 212-213; 14 Wright & Miller § 3723 at 617-618.

In order to find that Defendant Jacobson has been fraudulently joined, therefore, the Court must be able to say that the complaint fails to state a claim against him upon which relief could be granted. It is the rule, of course, that dismissal is appropriate only when it appears beyond doubt that the claimant can prove no set of facts in support of the claim which would entitle him to relief. Cruz v. Beto, 405 U.S. 319 (1972); Jenkins v. McKeithen, 395 U.S. 411 (1969); Bryan v. Stillwater Bd. of Realtors, 578 F.2d 1319 (Tenth Cir. 1977); American Home Assur. Co. v. Cessna Aircraft Co., 551 F.2d 804 (Tenth Cir. 1977); Dewell v. Lawson, 489 F.2d 877 (Tenth Cir. 1974); Gas-A-Car, Inc. v. America Petrofina, Inc., 484 F.2d 1103 (Tenth Cir. 1973).

Fraudulent joinder was not alleged in this case but rather the Defendants allege that there is no cause of action against Defendant Jacobson. Plaintiff's motion to remand the case to state court must be granted when, upon reading the complaint, the court could not say that no possible liability existed against the individual Defendants who were residents of the state. Harris Diamond Co. v. Army Times Pub. Co., 280 F.Supp. 273 (D.C. N.Y. 1968).

The party who brings a suit is master to decide which law to rely upon. WECA Programs, Inc. v. Economy Company, 402 F.Supp. 462 (W.D. Okla. 1978); The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 33 S.Ct. 410, 57 L.Ed. 716 (1913).

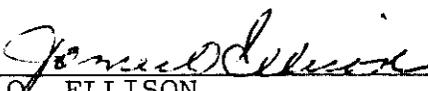
The Plaintiff is a citizen and resident of the state of Oklahoma, Defendant St. Louis Railway is a Missouri corporation

with its principle place of business in Missouri and the Defendant Larry Jacobson is a citizen and resident of Oklahoma. Since the required diversity between parties does not exist, removal of this case on the grounds of diversity is not proper. Accordingly, this Court cannot conclude that Defendant Jacobson is fraudulently joined, and this case must be remanded as there is lack of complete diversity of citizenship between the parties herein. The Court finds that removal of this action was improvident, and that this case should be remanded to the state court from which it was removed. 28 U.S.C. § 1447(c). As this Court lacks jurisdiction regarding this case, and has no authority other than to remand, the pending motions are referred to the state court.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Remand be and hereby is sustained, and the Court remands this case to the District Court of Creek County, State of Oklahoma, Drumright Division.

The Clerk of the Court is hereby directed to take the necessary action to remand this case without delay.

It is so Ordered this 22nd day of August, 1980.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

DERRIL W. AULT,)
)
 Plaintiff,)
)
 vs.)
)
 FORREST "BUDDY" PITEZEL, d/b/a)
 PITEZEL'S AUTO SERVICE,)
)
 Defendant.)
 _____)

AUG 22 1980
JUL 22 1980
U. S. DISTRICT COURT

No. 80-C-376-B ✓

ORDER OF DISMISSAL

Now on this 21 day of August, 1980, this matter coming on before me pursuant to plaintiff's written Motion for Order of Dismissal and the Court being fully advised in the premises does hereby order the above-styled action dismissed without prejudice.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the above-styled action should be dismissed without prejudice.



JUDGE

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

PUBLIC SERVICE COMPANY OF OKLAHOMA,
an Oklahoma corporation,

Plaintiff,

vs.

PATRICIA ROBERTS HARRIS, Secretary
of Housing and Urban Development,
United States Department of Housing
and Urban Development,

AND

BROCK ADAMS, Secretary of the Depart-
ment of Transportation, United States
Department of Transportation,

Defendants.

AUG 22 1980
Jack A. [unclear]
U. S. DISTRICT COURT

No. 79-C-37-BT

O R D E R

Plaintiff, Public Service Company of Oklahoma, brings this action seeking declaratory and injunctive relief based on the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §4601 et seq. ("URA"). In their answer, the defendant government agencies have moved to dismiss the complaint on a number of grounds. The legal issues have been briefed, and based upon the applicable law, the Court finds that this action should be dismissed.

In considering a motion to dismiss, the Court is to construe the complaint in the light most favorable to plaintiff, and the material allegations of the complaint must be taken as true. Jenkins v. McKeithen, 395 U.S. 411, 421-422; 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). The test for determining the sufficiency of a complaint is that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

The complaint alleges that plaintiff is a public utility under the laws of the State of Oklahoma; that plaintiff has been granted franchises in various cities and towns in the State which entitle it to use public streets, alleys and public places for the placement

of its equipment; and that it has been required to relocate its facilities at its own expense because of various street construction or improvement projects funded in part by defendant agencies.

It is plaintiff's position that federal agencies may not make grants or approve projects involving the use of federal funds unless the state first gives assurance that plaintiff's relocation costs will be reimbursed. In support of its position, plaintiff relies on the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq. ("URA"), and alleges that the URA abrogates the common law rule that a public utility required to relocate must do so at its own expense.

Defendant's grounds for its motion to dismiss are (1) that there has been no acquisition of a property interest and, therefore, plaintiff is not a displaced person under the URA and not eligible for relocation payments; (2) failure of Public Service Company to exhaust its administrative remedies; (3) defendant Secretary of Transportation is precluded from authorizing the expenditure of funds for this utility relocation by 23 U.S.C. §123 and 69 O.S. §1403(c); (4) plaintiff's claim as it relates to future occurrences is premature; and (5) plaintiff has failed to plead violations of the URA by defendants. Because of the disposition of this case on the first two grounds enumerated above, it is unnecessary to discuss the others.

WHO ARE DISPLACED PERSONS UNDER THE ACT?

The Uniform Relocation Assistance Act, 42 U.S.C. §§4601 et seq., provides that before a federal agency may approve a grant for federal assistance it must have received satisfactory assurances from the State that fair and reasonable relocation payments and assistance will be provided to "displaced persons." 42 U.S.C. §4630(1). A "displaced person" is defined in 42 U.S.C. §4601(6) as:

"any person who, on or after January 2, 1971, moves from real property, or moves his personal property from real property, as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of the acquiring agency to vacate real property, for a program or project undertaken by a Federal agency, or with Federal financial assistance; and solely for the purposes of sections 4622(a) and (b) and 4625 of this title, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project."

A corporation may be a displaced person by virtue of 42 U.S.C. §4601(5).

It is clear from the language of the URA that the URA applies only when there has been an acquisition of real property as a result of governmental action for a federal or federally aided project. Alexander v. HUD, _____ U.S. _____, 99 S.Ct. 1572 (1979); Moorer v. HUD, 561 F2d 175 (8th Cir. 1977). Therefore, in order for Public Service Company to prevail, it must show that its franchise is a property right and that there has been an acquisition. Neither is present here.

A franchise is a right or privilege conferred by law. It is a "right granted by the state or a municipality to an existing corporation or individual to do certain things which a corporation or individual otherwise cannot do." Oklahoma Gas and Electric Co. v. Total Energy, Inc., 499 P2d 917 (Okla. 1972). A franchise has also been defined as a "privilege of doing that which does not belong to the citizens of the country generally by common right." State ex rel Williamson v. Garrison, 348 P2d 859. A franchise therefore grants the franchisee the privilege of using public property for private purposes, but does not grant an interest in the land itself.

It is plaintiff's contention that a franchise, once exercised, becomes a vested property right in the particular location which has been utilized. However, plaintiff cites no applicable case in support of its contention. Empire Natural Gas Co. v. Southwest Pipe Line Co., 25 F2d 742 (N.D. Okla. 1928), cited by plaintiff involved a contractual right to lay pipeline on leased

property and not a franchise. Parlane Sportswear Company, Inc. v. Weinberger, 381 F.Supp. 410 (D.Mass.1974) involved a tenant at sufferance who was forced to move from privately owned property. Plaintiff's attempt to apply that situation by analogy to a franchisee is unpersuasive.

On the other hand, there is ample support for the Court's determination that a franchise is not a property interest. The Oklahoma Constitution, Article 18 §7 provides that a franchise grant shall not divest the State or its subdivisions of their control and regulation over the use and enjoyment of public property. Further, Title 69, O.S. §1403 specifically provides that whenever a utility company is required to relocate its facilities, such relocation is to be at the expense of the utility company. Thus, there is no property right involved. Further, there is no acquisition. Plaintiff has not been divested of its franchise, but has only been told that it must relocate certain of its facilities. Plaintiff still has the right to use public property, even though it must shift its equipment to accommodate the State's use of its property.

Plaintiff contends that the URA abrogates the common law rule that a utility required to relocate must do so at its own expense. That argument must fall because, first, in Oklahoma the rule is statutory, and secondly because the URA, by its own terms, does not create any new property interests. 42 U.S.C. §4602. Unless Public Service Company has a property interest under State law, which is lost because of the acquisition, it can claim no benefits under the URA. This is supported as well by the provisions of 23 U.S.C. §123, part of the Federal Aid Highway Act, which provides that federal funds may be used to pay the cost of utility reimbursement only when the cost is first paid by the State and only when the payment does not violate State law. Given the provisions of Title 69 O.S. §1403, such a reimbursement would obviously violate Oklahoma law. Nothing in the URA either expressly or impliedly overrules Title 23 O.S. §123. Artesian Water Company v. State Department of Highways & Transportation, 330 A2d 432 (Del.1974).

EXHAUSTION OF ADMINISTRATIVE REMEDIES.

Defendants assert that the complaint should be dismissed because plaintiff has failed to exhaust its administrative remedies. Plaintiff on the other hand argues that an administrative appeal would be futile. The Court agrees with defendants. Title 42 U.S.C. §4633 of the Act authorizes heads of federal agencies to establish regulations and procedures to assure

"(3) that any person aggrieved by a determination as to eligibility for a payment authorized by this chapter, or the amount of a payment, may have his application reviewed by the head of the Federal agency having authority over the applicable program or project, or in the case of a program or project receiving Federal financial assistance, by the head of the State agency."

Such regulations and procedures have been established, at least by HUD. 24 C.F.R. §§ 42.220-42.290. These regulations provide for review by the appropriate State agency or by HUD or both.

Under the URA, the land acquisition policy of 42 U.S.C. §4651 is not subject to judicial review by virtue of 42 U.S.C. §4602(a). Other administrative action is reviewable under the Administrative Procedures Act, 5 U.S.C. §§701 et seq. United States v. 249.12 Acres of Land, 414 F.Supp. 933 (W.D. Okl. 1976). The APA, 5 U.S.C. §704 provides:

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.
* * *

Nowhere in the URA is there a statute making agency action reviewable. Therefore, before judicial review of an action may be had, administrative remedies must first be exhausted. When agency action is subject to appeal to higher administrative authority, that appeal must be pursued before judicial review is available. St. Regis Paper Co. v. Marshall, 591 F2d 612 (10th Cir. 1979); United States v. Carroll, 203 F.Supp. 423 (WD Ark.1962); United States v. 249.12 Acres of Land, supra.

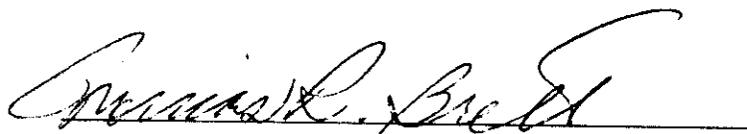
While it is true that there may be circumstances where exhaustion of administrative remedies is not required, none of those

circumstances has been shown to be present here. McKart v. United States, 395 U.S. 185 (1969); Martinez v. Richardson, 472 F2d 1121 (10th Cir. 1973); United States v. 249.12 Acres of Land, supra; St. Regis Paper Co. v. Marshall, supra.

For the foregoing reasons, the Court finds that this action should be dismissed for failure to state a claim upon which relief may be granted and for failure of plaintiff to exhaust its administrative remedies.

IT IS SO ORDERED.

DATED THIS 22nd day of August, 1980.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

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

LOUIS HOPKINS,

Plaintiff,

-vs-

SAFELITE INDUSTRIES, INC., a
Delaware Corporation, d/b/a
ROCK BROTHERS AUTO GLASS
COMPANY,

Defendant.

No. 79-C-625-E ✓

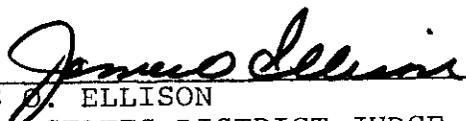
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Jack H. [unclear]
U. S. DISTRICT COURT

ORDER OF DISMISSAL

The above entitled cause comes on for hearing on this 21st
day of August, 1980, upon the Motion to Dismiss of the Plaintiff,
praying that the above entitled cause be dismissed, with prejudice,
upon stipulation between the parties hereto.

IT IS THEREFORE ORDERED that the above entitled cause be,
and is hereby dismissed, with prejudice, and that each party shall
pay his own respective costs.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

L & H LAND DEVELOPMENT COMPANY,)
an Oklahoma corporation;)
BILL LADUSAU and JACK HOLLAND,)
)
Plaintiffs,)
)
vs.)
)
THE KISSELL COMPANY, a foreign)
corporation,)
)
Defendant.)

No. 80-C-114-C ✓

FILED
AUG 21 1980 *mm*

DOCK 150
U. S. DISTRICT COURT

O R D E R

The Court has before it for consideration the defendant's motion to dismiss pursuant to Rule 12(b)(2), F.R.Civ.P. The defendant claims that he has had insufficient contacts with the State of Oklahoma to vest this Court with in personam jurisdiction over him, and that certain prior Oklahoma State Court judgments are res judicata as to this action.

This action was instituted in the Northern District of Oklahoma on March 7, 1980 by the plaintiffs, L & H Land Development Company, an Oklahoma corporation, and Bill Ladusau and Jack Holland, to recover damages from the defendant, The Kissell Company, an Ohio corporation (Kissell), resulting from the refusal of the defendant to fund a loan to the plaintiffs. The plaintiffs allege that, in reliance on a letter of commitment for a loan of \$1,650,000 from Kissell, they incurred numerous short-term debts and paid a substantial commitment fee to the defendant. The plaintiffs claim that they are entitled to recover the commitment fee, as well as damages for lost profits and damages resulting from the foreclosure on short-term debts. The defendant asks for dismissal of this action based on the res judicata of two previous Oklahoma State Court decisions on virtually identical actions filed by the plaintiffs in the District

Courts of Creek and Grady Counties. On April 17, 1979, the District Court of Creek County sustained the defendants' Motion to Quash Summons for lack of personal jurisdiction and improper venue over Kissell on the grounds of lack of personal jurisdiction under Oklahoma's long-arm statutes and improper venue over the defendants. On August 31, 1979, the District Court of Grady County dismissed the plaintiffs' Complaint on the same grounds and on the additional ground of res judicata from the Creek County, Oklahoma decision. An appeal by the plaintiffs to the Oklahoma Supreme Court, challenging the validity of the Grady County dismissal, was dismissed on August 16, 1980 for failure to complete the record in a timely fashion.

In the present action, the plaintiffs allege that the Creek County claim, as well as the same claim in Grady County District Court, were dismissed other than on the merits and that the present cause of action has been filed within one year of the earlier dismissals. The defendant's motion for dismissal presently before this Court argues that the Creek County and Grady County dismissals are res judicata as to the issue of personal jurisdiction over the defendant.

Rule 41(b), F.R.Civ.P. provides that issues of jurisdiction are among exceptions to the general rule that, unless the Court indicates otherwise, a dismissal operates as an adjudication on the merits:

Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

This exception was discussed in Costello v. U.S., 365 U.S. 265, 285, 81 S.Ct. 534, 5 L.Ed.2 551 (1961) where it was said that the exception encompassed "those dismissals which are based on a plaintiff's failure to comply with a pre-condition requisite to the Court's going forward to determine

the merits of his substantive claims." The Court went on to note that "at common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." The Costello court referred to Haldeman v. U.S., 91 U.S. 584, 585-586, where the Court said:

. . .[T]here must be at least one decision on a right between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. . . . There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively. (Costello, supra, at 285).

Thus the Court interprets the exceptions in Rule 41(b) to refer to situations in which the plaintiff fails to satisfy a precondition so that a point in controversy or a right was never litigated. The policy behind Rule 41(b), according to the Supreme Court, relates the necessity of the defendant preparing a defense because there was no initial bar to the Court's reaching the merits. (Costello, supra, 287).

The issue as to whether the "merits" of the jurisdiction had been reached was addressed in Baldwin v. Travelling Men's Ass'n, 283 U.S. 522, 524-7, (1931). Here the Supreme Court, under the res judicata doctrine, upheld the final judgment of an Iowa district court in which the question of personal jurisdiction was fully litigated. The court said:

Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause. (Baldwin, supra, 525-6)

Similarly, in Amer. Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932), the Court held that principles of res judicata apply to jurisdiction as well as to other issues: "The full faith and credit clause . . . applies to judicial proceedings of a

state court drawn into question in an independent proceeding in the federal courts The principles of res judicata apply to questions of jurisdiction as well as to other issues."

In Oklahoma courts the issue of whether a case has been decided "on the merits", has been separated from the issue of whether the jurisdictional issue has been fully litigated. In Hines v. Superior Court of Okmulgee County, 435 P.2d 149, 151, (1967), the Oklahoma Supreme Court held that "[a] dismissal of an action on the sole ground that the court is without jurisdiction of the subject matter of the suit is regarded as a conclusive determination only of the fact that the Court lacks jurisdiction. It does not operate as an adjudication of the merits and will not bar relitigation in a proper forum of the same cause or claim or of any question material to its merits." It is well-established in Oklahoma that an adjudication of the jurisdictional facts is conclusive in a collateral proceeding attacking such judgment by attempting to again put such facts in issue. See Foshee v. Craig, et al., 237 P. 78, 81-82 (1924); Bruno et al. v. Getzelman, 173 P. 850 (1918); Blackwell et al. v. McCall, 153 P. 815 (1915). Not only are final adjudications conclusive as to facts and issues actually litigated, but also as to those facts and issues which could have been litigated in the original proceeding. Oklahoma courts have repeatedly held that all questions existing in the record and necessarily involved in the decision by implication cannot be raised again in subsequent litigation. Jones v. Medlock, 202 P.2d 212 (1948); Reed v. Roberson, 219 P. 296 (1923); Moreland v. State ex rel. Hatfield, 51 P.2d 945 (1935); Wolfe v. State ex rel. Presson, 21 P.2d 1067 (1933); Bd of Educ. of Indep. Sch. Dist. No. 11 Osage Co. v. Philadelphia Fire & Marine Ins. Co., 9 P.2d 737 (1932); Midland Valley R. Co. v. Clark, 221 P. 1025 (1924).

This application of the principle of res judicata has

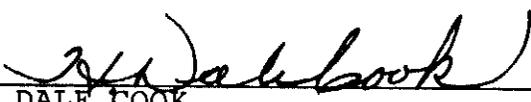
been repeatedly upheld by both state and federal courts, as well as the Supreme Court of the United States. Thus in Grubb v. Public Utilities Commission, 281 U.S. 470, 50 S.Ct. 374, 74 L.Ed. 972 (1930), the Supreme Court upheld the rule that "one suit is res judicata in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end." Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 377, 60 S.Ct. 317, 84 L.Ed. 329 (1939); Jackson v. Irving Trust Co., 311 U.S. 494, 61 S.Ct. 326, 85 L.Ed. 297 (1941). In Rippelberger v. A. C. Allyn Co., 113 F.2d 332-334 (1940), the Second Circuit upheld as res judicata an earlier decision based on a complaint identical as to subject matter and parties, but where an additional fact relevant to venue was raised in the second complaint. The court said that res judicata applied since the fact could have been raised in the earlier proceeding, and there was no change of facts on which venue depended. Similar conclusions were drawn in Spence v. Latting, 512 F.2d 93, 97 (1975), where the Tenth Circuit upheld a judgment based on freely stipulated facts which went to the heart of the plaintiff's right to relief. The court said that "Where a second suit between the same parties or their privies is on the same cause of action, the final judgment in the prior action is conclusive as to all matters which were actually litigated as well as those which could have been litigated." See also Happy Elevator No. 2 v. Osage Constr. Co., U.S. Ct. of Appeals, Tenth Circuit, 209 F.2d 459, 461 (1954). The Oklahoma Supreme Court has concurred. In Jones v. Medlock, 202 P.2d 212 (1948) it was held that "whether a particular issue was actually litigated is immaterial on the question of the conclusiveness of a decree, where there was full opportunity to litigate it, and it was adjudicated by

the decree."

In the present case, the parties and issues raised herein are identical to those raised in the Creek and Grady County adjudications. The plaintiff has presented no evidence of new facts which cure the jurisdictional defects of the earlier claim, nor has he presented any evidence that the jurisdictional issues were not fully litigated in those proceedings. In light of the foregoing, it is unnecessary to address the defendant's contentions as to the lack of contacts with the State of Oklahoma to confer jurisdiction on this Court. The Journal Entry of the Creek County District Court shows that the court, having heard arguments from all parties, considered all motions, briefs and memoranda, sustained the defendant's motion to quash for want of personal jurisdiction under the Oklahoma long-arm statutes (12 O.S. §187 and 12 O.S. 1701.03). The Journal Entry of the District Court of Grady County concurred with the decision of the Creek County Court, also specifically citing the lack of personal jurisdiction under the Oklahoma long-arm statutes. The dismissal of the plaintiff's appeal from the Grady County decision by the Oklahoma Supreme Court renders the Creek County decision final, and as such it is res judicata as to the issue of personal jurisdiction over the defendants.

The motion of the defendant to dismiss is sustained on the ground that prior Oklahoma State Court judgments are res judicata on the issue of jurisdiction over the defendant The Kissell Company.

It is so Ordered this 21st day of August, 1980.


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

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

FILED
AUG 21 1980

GEORGE W. SIBLEY,)
)
 Plaintiff,)
)
 -vs-)
)
 DR. LAWRENCE K. JOHNSON;)
 AFTON MEMORIAL HOSPITAL,)
 INC., an Oklahoma corpora-)
 tion; and L.M.&M. CO.,)
 INCORPORATED, an Oklahoma)
 corporation,)
)
 Defendants.)

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

No. 79-C-172-E

ORDER OF DISMISSAL

Based upon the Stipulation filed herewith by the parties,
it is hereby ordered as follows:

1. Plaintiff's claims against Defendants are hereby dismissed, with prejudice to the refiling thereof.
2. Defendants' claims against Plaintiff are hereby dismissed, with prejudice to the refiling thereof.

DATED this 21st day of August, 1980.



JUDGE JAMES O. ELLISON

FILED

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

AUG 20 1980

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

W. CREEKMORE WALLACE, II,)	
)	
Plaintiff,)	
)	
vs.)	No. 80-C-76-B
)	
THE STATE OF OKLAHOMA,)	
)	
Defendant.)	

O R D E R

On the 6th day of June, 1980, this case came on for hearing on defendant's motion to dismiss. Defendant asserts a number of grounds for dismissal. When considering a motion to dismiss, the Court considers the facts alleged in the complaint as being true and the complaint is construed in the light most favorable to the plaintiff. Jenkins v. McKeithen, 395 U.S. 411 (1969).

After consideration of the applicable law, the record, and the arguments of counsel, the Court finds that this case must be dismissed due to the lack of subject matter jurisdiction and the immunity of the State of Oklahoma from suit without its consent.

Plaintiff is an attorney practicing in the State of Oklahoma. In 1974, plaintiff was appointed by the District Court of Creek County to represent an indigent defendant in a murder trial. The defendant was convicted and plaintiff was then appointed to represent the defendant in the prosecution of an appeal. At the conclusion of the appeal, plaintiff was awarded attorney's fees and costs in the amount of \$8,514.48. This amount was to be paid to plaintiff out of the Creek County court fund. However, due to an insufficient balance in the fund, plaintiff experienced several delays in obtaining his money.

On September 19, 1977, even though plaintiff had not filed an application for attorney's fees, the Oklahoma Supreme Court entered an order approving a fee of \$250.00, plus reimbursement for out-of-pocket expenses of \$598.45. This order was in direct

contradiction to the Journal Entry of Judgment from the Creek County Court granting fees and expenses of over \$8,000.00.

In January 1978, plaintiff served demand upon the members of the Creek County Fund Board for payment of the claim submitted pursuant to the Journal Entry of Judgment. When the claim had still not been paid by February of 1978, plaintiff filed a civil action in the Supreme Court of the State of Oklahoma seeking a writ of mandamus directing the Creek County Fund Board members to discharge their function of paying the claim. Plaintiff hired counsel to handle this matter.

In July 1979, the Supreme Court, "in its administrative capacity," entered an order to the effect that plaintiff was entitled to the fees and expenses requested. The order indicated that upon the court fund paying the claim, the mandamus proceeding would be moot and subject to dismissal. The claim was still not paid in August, and plaintiff submitted a written request to the Supreme Court for the issuance of the writ of mandamus originally sought. A corrected order was given in which the Chief Justice authorized the Creek County Fund Board to exceed their lump-sum budget in order to pay the claim. The fee was paid shortly thereafter and plaintiff filed a Motion to Tax Costs. In September 1979, the Oklahoma Supreme Court denied the Motion to Tax Costs and denied the request for issuance of the writ of mandamus.

Plaintiff contends that this denial of reasonable attorney's fees for prosecution of the writ of mandamus has denied him equal protection of the law by denying him proper recovery under 12 O.S. 1971, §936 which provides:

"In 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 or sale of goods, wares, or merchandise, or for labor or services, unless otherwise provided by law or the contract which is the subject to the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs."

Plaintiff also contends that the order of the Supreme Court in September of 1977 was rendered without notice or hearing and thus denied him proper due process. Plaintiff prays judgment

against the State in the amount of \$3,050.00 to cover attorney's fees and court costs for instituting the mandamus proceeding, plus legal fees for the prosecution of this action. Jurisdiction is alleged solely under 28 U.S.C. §1343(3). Plaintiff's claim is based solely on violations of the equal protection and due process clauses of the United States Constitution.

The first major problem in the disposition of this case is the lack of subject matter jurisdiction. Plaintiff alleges jurisdiction under 28 U.S.C. §1343(3), but pleads a Fourteenth Amendment violation as a basis for his claim. Although §1343(e) does vest this Court with jurisdiction to redress deprivations of civil rights under color of State law, Fourteenth Amendment claims are properly brought pursuant to 28 U.S.C. §1331. This statute provides for jurisdiction in cases involving federal questions and a minimum of \$10,000.00 in controversy. Ball v. Brown, 450 F.Supp. 4, 8 (ND Ohio 1977); Amen v. City of Dearborn, 532 F2d 554 (6th Cir. 1976). In order for jurisdiction to exist under 28 U.S.C. §1343(3), courts have generally agreed that the "authorized by law" wording of the statute requires that the constitutional cause of action be embodied in a statute such as 42 U.S.C. §1983. Nouse v. Nouse, 450 F.Supp. 97, 99 (DC Md. 1978); Gay Lib v. University of Missouri, 416 F. Supp. 1350, 1363 (WD Mo. 1976) rev'd on other grounds, 558 F2d 848 (8th Cir. 1977). However, in this case, a §1983 action cannot be brought against the State of Oklahoma because the State is not a "person" within the meaning of 42 U.S.C. §1983. Meredith v. State of Arizona, 523 F2d 481, 484 (9th Cir. 1975); Williford v. People of the State of California, 352 F2d 474, 476 (9th Cir. 1965); Heath Redbud Hospital District, 436 F.Supp. 766, 767 (ND Calif. 1977). Plaintiff concedes this point on page 2 of his brief in opposition to the motion to dismiss and stated at the hearing on this motion that this was not a §1983 action.

With jurisdiction precluded under §1343(3), the Court must turn its attention to 28 U.S.C. §1331 as a basis for jurisdiction. Since the minimum amount in controversy requirement under this statute is \$10,000.00, and the plaintiff's total prayer will not realistically

reach this amount, the minimum amount requirement would preclude this court from exercising jurisdiction.

A second impediment to the adjudication of this case is the immunity from suit without their consent granted to the states by the Eleventh Amendment. Under this amendment, a State is immune from federal court suits brought by its own citizens as well as citizens from other states. Hans v. State of Louisiana, 134 U.S.1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); Peel v. Florida Department of Transportation, 600 F2d 1070, 1074 (5th Cir. 1979). In addition, where, as in this case, the liability against the State must be paid out of public funds in the State treasury, the Eleventh Amendment may also serve as a bar. Edelman v. Jordan, 415 U.S. 651, 663, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974); Jagnandan v. Giles, 538 F2d 1166,1176 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977). Furthermore, this immunity is not effected by the fact that the case may be one arising under the Constitution or laws of the United States. Clark v. State of Washington, 366 F2d 678, 680 (9th Cir. 1966); Riggle v. State of California, 577 F2d 579, 582 (9th Cir. 1978).

In his brief in opposition to defendant's Motion to Dismiss, plaintiff argues that recent Supreme Court rulings which allow federal jurisdiction over cities and counties in civil rights actions should be used by analogy to imply jurisdiction over states in such matters. See Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978); Owen v. City of Independence, Missouri, et al., ___ U.S. ___, 48 L.W. 4389 (1980). But plaintiff fails to consider the recent case of Quern v. Jordan, ___ U.S. ___, 99 S.Ct. 1139 (1979). In Quern, the Supreme Court affirmed the State's right to immunity from suit by stating at page 1144 of 99 S.Ct.

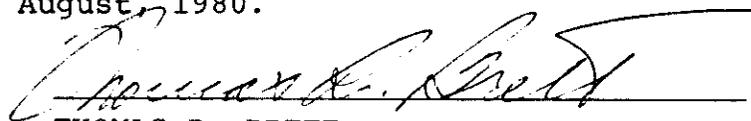
"This Court's holding in Monell was 'limited to local government units which are not considered part of the State for Eleventh Amendment purposes.' "

While it is true that a State may waive this immunity if it chooses, State of Missouri, et al v. Fiske, et al., 290 U.S. 18 (1933), there is nothing in the record before this Court to indicate that the State of Oklahoma has waived its immunity in this suit.

With these considerations in mind, the Court finds that either of these grounds standing alone would be sufficient to grant this motion.

IT IS THEREFORE ORDERED that the defendant's Motion to Dismiss is sustained and this case is dismissed.

DATED this 20th day of August, 1980.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", is written over a horizontal line.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF OKLAHOMA

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

N.P.S.T. CORPORATION, an)
 Oklahoma Corporation, formerly,)
 Norman Plumbing Supply Company of)
 Tulsa,)
)
 Plaintiff,)
)
 vs.)
)
 WILLIAM H. BOYD and JOHN C. GILBERT,)
 d/b/a CONTINENTAL ELECTRIC COMPANY,)
 a co-partnership,)
)
 Defendants.)

AUG 20 1980
 Jack C. Silver, Clerk
 U. S. DISTRICT COURT

No. 80-C-21-B

JOURNAL ENTRY OF JUDGMENT

Now on this 20th day of August, 1980, this matter coming on before me pursuant to the Plaintiff's Request To Clerk to Enter Default Judgment and the Entry of Default Judgment by this Clerk on the 24th day of June, 1980.

After being fully advised in the premises, the clerk of this court does hereby find that judgment should be rendered for the plaintiff as set forth in the Entry of Default by Clerk, for the sum of \$4,300.81; plus interest at the rate of 18% per annum since July 31, 1979 until paid in full and the costs of this action.

IT IS HEREBY ORDERED ADJUDGED AND DECREED by the Clerk of this Court that judgment be entered for the plaintiff herein for the sum of \$4,300.81 plus interest at the rate of 18% per annum since July 31, 1979 until paid in full and the costs of this action.

JACK SILVER, CLERK OF THE
 UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF
 OKLAHOMA

BY 

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

FILED

AUG 18 1980

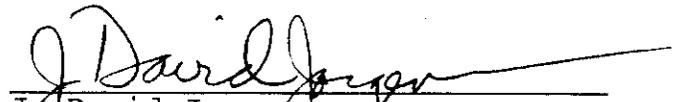
FIRST CITIZENS BANK, a State)
Bank incorporated under the)
laws of the State of Texas,)
)
Plaintiff,)
)
vs.)
)
FOX HENDERSON,)
)
Defendant.)

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

No. 79-C-559-BT

STIPULATION OF DISMISSAL

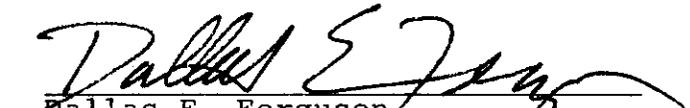
Pursuant to Rule 41 of the Federal Rules of Civil Procedure, Plaintiff First Citizens Bank hereby dismisses Plaintiff's action, with prejudice, and Defendant Fox Henderson hereby stipulates to such dismissal.



J. David Jorgenson
Attorney for Plaintiff,
First Citizens Bank

OF COUNSEL:

CONNER, WINTERS, BALLAINE,
BARRY & MCGOWEN
2400 First National Tower
Tulsa, Oklahoma 74103
(918) 586-5711



Dallas E. Ferguson
Attorney for Defendant,
Fox Henderson

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON
1200 Atlas Life Building
Tulsa, Oklahoma 74103

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

LAVETA SPENCER and the SECURITY)
BANK AND TRUST COMPANY, Co-)
Guardians of the Estate of)
Aaron DeWayne Spencer, and,)
LAVETA SPENCER, Individually,)
)
Plaintiffs,)
)
v.)
)
THE EMPIRE DISTRICT ELECTRIC)
COMPANY,)
)
Defendant.)

NO. 80-C-25-BT ✓

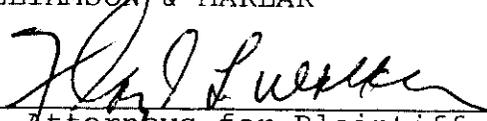
FILED
AUG 13 1980
Jack C. Silver, Clerk
U. S. DISTRICT COURT

STIPULATION OF DISMISSAL

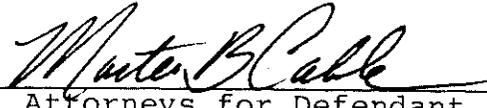
The parties, by and through their respective counsel of record, stipulate and agree:

1. Pursuant to Rule 41 (a) (1) La Veta Spencer's individual claim for damages is hereby dismissed, with prejudice, pursuant to her written authorization, which is attached.
2. The claims of Aaron Spencer made by and through his Co-Guardians remain for adjudication.
3. The cut-off date for completion of discovery is extended to September 15, 1980, because it will not be possible to complete all necessary discovery by August 31, 1980.

H. G. E. BEAUCHAMP, ESQ.
FLOYD L. WALKER, ESQ.
PRAY, WALKER, JACKMAN,
WILLIAMSON & MARLAR

By 
Attorneys for Plaintiffs

MONTE CABLE, ESQ.
SPENCER, SCOTT & DWYER
JOSEPH M. BEST, ESQ.
BEST, SHARP, THOMAS & GLASS

By 
Attorneys for Defendant

The above stipulation approved this 15TH day of
August, 1980.


THOMAS R. BRETT
U. S. District Judge

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

LaVETA SPENCER and the SECURITY)
BANK AND TRUST COMPANY, Co- ()
Guardians of the Estate of)
Aaron DeWayne Spencer, and ()
LaVETA SPENCER, Individually,)
Plaintiffs, ()
-vs-) No. 80-C-25-BT
()
THE EMPIRE DISTRICT ELECTRIC)
COMPANY, ()
Defendant.)

AUTHORIZATION

I, LaVeta Spencer, have read Mr. Walker's letter of the 3rd of July and discussed it with Mr. Beauchamp and understand it might be of some cause for confusion on Aaron's case.

I am agreeable to the withdrawal or dismissal of my personal claim and authorize Mr. Walker to do so.

July 11th, 1980

LaVeta Spencer
LaVeta Spencer

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

United States of America,)
)
 Plaintiff,)
)
 vs.) CIVIL ACTION NO. 77-C-436-Bt
)
 60.00 Acres of Land, More or) Master File #400-9
 Less, Situate in Washington)
 County, State of Oklahoma,) Tract No. 330
 and Perry Hill, et al., and)
 Unknown Owners,)
)
 Defendants.)

J U D G M E N T

1.

Now, on this 18 day of Aug, 1980, 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 parties, finds:

2.

This judgment applies to the entire estate condemned in Tract No. 330, 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 has been perfected either personally or by publication notice, as provided by Rule 71A of the Federal Rules of Civil Procedure, on all parties defendant in this cause.

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 October 20, 1977,

FILED
AUG 17 1980
Jack C. Silver, Clerk
U. S. DISTRICT COURT

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 action, the owner of the estate taken in subject property was the defendant whose name is 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 subject property 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 property 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 October 20, 1977, 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 property was the defendant whose name appears below in paragraph 11 and the right to receive the just compensation for the estate taken herein in this property is vested in the party so named.

11.

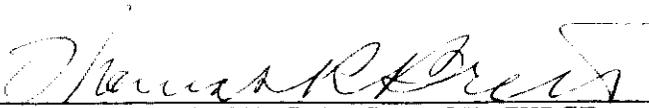
It Is Further ORDERED, ADJUDGED and DECREED that the Stipulation As To Just Compensation, described in paragraph 8 above, hereby is confirmed; and the sum therein fixed is adopted as the award of just compensation for the estate condemned in subject property, as follows:

TRACT NO. 330

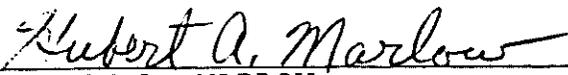
OWNER:

Marty J. Hill, Executor of the Estate of
Perry Hill, Deceased

<u>AWARD</u> of just compensation pursuant to Stipulation -----	\$42,000.00	\$42,000.00
<u>DEPOSITED</u> as estimated compensation ----	<u>42,000.00</u>	
<u>DISBURSED</u> to owner -----		<u>42,000.00</u>
<u>BALANCE DUE</u> to owner -----		None


UNITED STATES DISTRICT JUDGE

APPROVED:


HUBERT A. MARLOW
Assistant United States Attorney


JERRY T. PIERCE
Attorney for Owner

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

ABRAHAMS, TRUDEL; ABRAHAMS, WILLIE; ADAIR,)
CLARA; ADAIR, ROOSEVELT; ANDERSON, COR-)
ENE; ANDERSON, DALE; ANDERSON, CORENE and)
DALE, for and on behalf of ANDERSON,)
DWAYNE; ANDERSON, JEFFREY; ANDERSON,)
LORI; ANDERSON, MICHAEL, and ANDERSON,)
SCOTT; AUSTIN, LaDONNA; AUSTIN, MYRTLE;)
AUSTIN, MYRTLE, for and on behalf of)
AUSTIN, JANET; BALDWIN, LLOYD EVERETT;)
BALDWIN, ETHEL DARLENE; BALDWIN, LLOYD)
EVERETT and ETHEL DARLENE, for and on behalf)
of BALDWIN, CHRISTOPHER LEE; BALDWIN,)
LLOYD RAY, and BALDWIN, TERRI LYNN; BANKS,)
RAY; BANKS, MARIE; BANKS, WILLIAM TER-)
RELL; CARR, EVELYN, for and on behalf of)
BREWSTER, TINA; BENEAR, BERT; BROWN,)
CONNIE M.; BRUNER, ANNIE MAY; BRUNER,)
VIVIAN L., for and on behalf of BRUNER,)
LEOTIS, and BRUNER, LYCHELL; BRUNER,)
ANNIE MAY, for and on behalf of BRUNER,)
WINDELL, JR.; BRUNER, VIVIAN L.;)
BURKHALTER, PEGGY; BURRUSS, TRUMAN O.;)
CARR, EVELYN; CARR, EVELYN, for and on)
behalf of CLARK, DEBORAH; CLARK, SONDRRA)
and CLARK, TERESA; COLVIN, ED; COLVIN,)
MRS. ED; CORBIN, ELNORA; COVERT, JAMES;)
CRAWFORD, IRENE; CRAWFORD, JOHN;)
CUNNINGHAM, GAYLA and LARRY E., for and)
on behalf of CUNNINGHAM, ALAN; CUNNINGHAM,)
FELICIA, and CUNNINGHAM, LISA; DUNNINGHAM,)
GAYLA; CUNNINGHAM, LARRY E.; OWENS, PAM,)
for and on behalf of DAILEY, DEMARCO;)
DAILEY, RICHARD; DAILEY, IDA; DAILEY,)
RICHARD and IDA, for and on behalf of)
DAILEY, TONY; DAVIS, BILLY; DAVIS, KATIE;)
DAVIS, FRANCIS; DAVIS, JOSEPH P.; DAVIS,)
PHYLLIS A.; DAVIS, JOSEPH P. and)
PHYLLIS A., for and on behalf of DAVIS,)
CONNIE; DAVIS, KEVIN; DAVIS, MILISSA,)
and DAVIS, TINA; DEDMAN, HENRY; DERRICK,)
JOHN WESLEY; DERRICK, MABEL L.; GRAY,)
ANNE, for and on behalf of DIAZ, KATE;)
DOHERTY, ARTHUR; DOHERTY, EMMA BELL;)
EGAN, MARIE; ENGHAM, MARJORIE; ENGHAM,)
WILLIAM E; ETTER, FORRIST S.; FEELER,)
ROBERT E.; FEELER, WANDA LEE; FEELER,)
ROBERT E. and WANDA LEE, for and on behalf)
of FEELER, ROBIN E.; GRAY, ANNE, for and)
on behalf of FIDDLER, JOEY; GARDNER,)
BARBARA; GILKEY, JULIA; GILMORE, CLARENCE;)
GRAY, ANNE; WINSBY, FRED MAE, for and on)
behalf of GRAY, JOHNEY, and GRAY, SUSIE;)
AUSTIN, LaDONNA, for and on behalf of)
GRAYSON, TRUMAN; GULLETT, ALMA F.;)
GULLETT, HARRY E.; GULLETT, ALMA F. and)
HARRY E., for and on behalf of GULLETT,)
HARRY L.; HAILEY, KAY; HAILEY, KAY, for)
and on behalf of HAILEY, MICHAEL, and)
HAILEY, WILLIS; HARDING, ALICE; HARDING,)
JUANITA; HARDING, THOMAS; HATTER, PHINES;)
HATTER, VIVIAN; HAYES, D. D.; HAYES)
HELEN; HEFNER, JOANNE; HEMPHILL, MURAL)
DEAN; HERRING, ALICE M.; HERRING, HANK;)

No.78-C-295-B

ORDER

FILED

AUG 15 1980

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

HILL, LEONARD; SMITH, JOHN W. and DORATHA,)
for and on behalf of HUDSON, ANGIE;)
HUDSON, CORNELIA, and HUDSON, STEVEN;)
HUNGATE, F. H.; HUNGATE, F. H. for and on)
behalf of HUNGATE, MINNIE (Deceased);)
HUGHES, ODESSA; HYPHE, NORMA; HYPHE,)
NORMA, for and on behalf of HYPHE, RANDY,)
and HYPHE, RODNEY; ICHUIM, ALBERTA;)
JACKSON, ALBERT; JACKSON, BETTYE; JACKSON,)
IRENE; JACKSON, DAVID; JACKSON, DORIS)
JUNE; JACKSON, SUZANNE; JACKSON, ALBERT)
and IRENE, for and on behalf of JACKSON,)
BRENDA LEE and JACKSON, JERRY; JACKSON,)
LENA; JEFFERSON, HENRY; JEFFERSON, IRENE;)
JEFFERSON, JOHN H.; JEFFERSON, LEROY;)
JOHNSON, ERMA; JONES, BRENDA; JONES,)
LINDA; JONES, MICHIGAN; KITCHEN, DAVID L.;)
LARMORE, LENORA; LARMORE, SAMUEL;)
LEDMAN, WILLIE MAE; LONG, MAUDIE; MACK,)
GUNTHER R.; MAY, ELMER LEROY; McCARTY,)
BETTY JO; McCARTY, LESTER; MOLES, CECIL;)
MOLES, EDITH; MOLES, CECIL and EDITH, for)
and on behalf of MOLES, BERNICE; MOLES, CECIL,)
JR.; MOLES, LESLIE, and MOLES, THOMAS;)
MORGAN, LEE; NASH, RUTH; NASH, RUDOLPH;)
NASH, RUTH and RUDOLPH, for and on behalf)
of NASH, DANA; NASH, DAVID; NASH, DRENA;)
NASH, LIDDLE; NASH, LOWELL; NASH, MARK;)
NASH, MITCHELL, and NASH, RUDA; NEAL,)
FRANK A.; NEAL, LENA; NEWCOMB, CLAUD;)
NICHOLS, BRYAN; OGANS, TONY R.; OGANS,)
ZANFORD L.; OWENS, PAM; PETTIS, ALICE;)
PIPHER, DONNA; PHILLIPS, JOE C.;)
PHILLIPS, BETTY C.; REED, ERNESTINE; REED,)
M. R.; RENFRO, ELLEN; RIPPY, SHIRLEY B.;)
ROGERS, BERTZELLA; ROGERS, BERTZELLA, for)
and on behalf of ROGERS, CHARMINE; ROGERS,)
CYNTHIS, and ROGERS, KELLY; ROOMS, HULDAH;)
ROWE, HARVEY; ROWE, MARY; SAYLES, CRAIG)
ALLISON; SAYLES, LORENZO; SAYLES, HARVEY;)
SCOTT, ELIZABETH G.; SCOTT, TERRY L.;)
SCULBOWL, VICKEY; SHOATE, ALLICE; SMITH,)
DORATHA and JOHN W., for an on behalf of)
SMITH, ANGELIA, and SMITH, STEVEN; SMITH,)
DORATHA; SMITH, CARMELIA; SMITH, EMMA)
JEAN; SMITH, JOE and NORMA J., for and on)
behalf of SMITH, JILL D.; SMITH, JOE;)
SMITH, JOHN W.; SMITH, NANCY; SMITH,)
NORMA J.; SMITH, VIRGIL; SPEARS, R.E.;)
SPRAGUE, CARL; TAYLOR, IDA; TAYLOR,)
LOEATTA JUNE; JOHNSON, ERMA, for and on)
behalf of THURMAN, JACKY; TOWERS, WENDY,)
for and on behalf of TOWERS, CLIFFORD,)
and TOWERS, VERNON; TOWERS, JOAN; TOWERS,)
KATTIE; TOWERS, LEE A.; TOWERS, OTIS;)
TOWERS, JOAN and OTIS, for and on behalf)
of TOWERS, OTIS, III; TOWERS, WENDY;)
TURNER, ESTER and EVERETT, for and on)
behalf of TURNER, ALBERTHA; TURNER, ESTER;)
TURNER, EVERETT; WALKER, MICHAEL P.;)
WINSBY, FRED MAE; BROWN, CONNIE, for and)
on behalf of WILLIAMS, ILLIAYA; WOOD,)
SHIRLEY; WOOTEN, ELZADOR; WOOTEN, JOHN H.;)

WOOTEN, KING S.; WOOTEN, MARION D.;
WOOTEN, MILDRED; YORK, SHERMAN L. and
SUSAN, for and on behalf of YORK,
SHAYEDRA; YORK, SHERMAN L.; YORK, SUSAN;
ZACHERY, BERT; ZACHERY, ERNESTINE;
ZACHERY, BERT and ERNESTINE, for and on
behalf of ZACHERY, DARREN; ZACHERY,
JACQULIN; ZACHERY, PAUL, and ZACHERY,
SIDNEY,

Plaintiffs,

vs.

NATIONAL ZINC COMPANY, INC., a
corporation

Defendant.

No. 78-C-295-B

ORDER

The Court has reviewed the Findings and Recommendations of Magistrate filed herein on July __, 1980. Having duly considered the same, together with the case file, evidentiary materials, and briefs heretofore submitted by the parties, the Court finds that the Magistrate's Findings and Recommendations are clearly supported by the record, are based on a correct interpretation of applicable legal principles, and should be and hereby are approved. (The Findings and Recommendations of the Magistrate were not objected to by either the plaintiffs or the defendant.)

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

1. That the Motion for Summary Judgment of defendant National Zinc Company ("National") on all federal question issues presented in this action, and particularly, but without limitation, the federal question issues presented in Count V of the Third Amended Complaint, is well taken and is hereby granted. On all such federal question issues presented in this action, there is no genuine issue of material fact, and on the undisputed facts, National should be and hereby is granted summary judgment in its favor;

2. That plaintiffs' voluntary dismissal at the time of filing the Third Amended Complaint of their claims under the Federal Water Pollution Control Act is with prejudice to re-filing of any claims under said statute;

3. That the non-federal claims set forth in the Third Amended Complaint, particularly, but without limitation, in Counts I, II, III, IV and VI thereof, should be and hereby are dismissed without prejudice to re-filing; and

4. That defendant National is hereby allowed its costs of suit.

SO ORDERED this 15 day of August, 1980.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

HOPKINS, WARNER & KING, INC.
DALE WARNER

W. L. STEGER

WILLIAM O. SELLERS

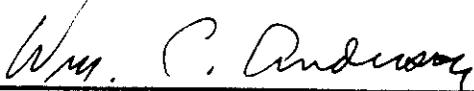
By



Attorneys for Plaintiffs

DOERNER, STUART, SAUNDERS,
DANIEL & ANDERSON
WILLIAM C. ANDERSON
RICHARD P. HIX

By



Attorneys for Defendant
National Zinc Company

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 15 1980

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ROMAN HULBUTTA and)
 ERIA C. HULBUTTA,)
)
 Defendants.)

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

CIVIL ACTION NO. 80-C-205-E

JUDGMENT OF FORECLOSURE

THIS MATTER COMES on for consideration this 15TH
day of August, 1980, the Plaintiff appearing by Robert P.
Santee, Assistant United States Attorney; and the Defendants,
Roman Hulbutta and Eria C. Hulbutta, appearing not.

The Court being fully advised and having examined
the file herein finds that Defendants, Roman Hulbutta and Eria C.
Hulbutta, were served by publication as shown on Proof of
Publication filed herein.

It appearing that the Defendants, Roman Hulbutta and
Eria C. Hulbutta, 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 Two (2), Block Three (3), APPALOOSA
ACRES SECOND, an Addition to the Town
of Glenpool, Tulsa County, State of
Oklahoma, according to the Recorded Plat
thereof;

THAT the Defendants, Roman Hulbutta and Eria C. Hulbutta,
did, on the 27th day of September, 1977, execute and deliver
to the Farmers Home Administration, their mortgage and mortgage
note in the sum of \$25,500.00 with eight (8) percent interest per

annum, and further providing for the payment of monthly installments of principal and interest.

The Court further finds that Defendants, Roman Hulbutta and Eria C. Hulbutta, 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 \$26,488.36 as unpaid principal with interest thereon at the rate of eight (8) percent per annum from June 10, 1980, 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, Roman Hulbutta and Eria C. Hulbutta, ^{in rem,} for the sum of \$26,488.36 with interest thereon at the rate of eight (8) percent per annum from June 10, 1980, plus the cost of this action accrued and accruing, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

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

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that from and after the sale of said property, under and by virtue of this judgment and decree, all of the Defendants and each of them and all persons claiming under them since the filing of the Complaint herein be and they are forever barred and

foreclosed of any right, title, interest or claim in or to
the real property or any part thereof.


UNITED STATES DISTRICT JUDGE

APPROVED

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney


ROBERT P. SANTEE
Assistant United States Attorney

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

MENACHEM MEL ROSEN,)
)
Plaintiff and)
Counterdefendant,)
)
vs.)
)
HERBERT GILL,)
)
Defendant and)
Counterplaintiff.)

Civil Action No. 79-C-360-E

FILED

AUG 12 1980

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

ORDER ALLOWING DISMISSAL UPON STIPULATION

This matter having come on before the Court and the Court having considered the memoranda and being fully advised in the premises, it is thereupon,

Ordered and Adjudged this cause and the counterclaim thereto are dismissed without any adjudication by this Court of the issues involved and without prejudice to the rights of either party.

Done this 12th day of August, 1980.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

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

THE NEOGARD CORPORATION,
a corporation,

Plaintiff,

-vs-

FRONTIER ROOFING & MATERIAL CO.,
INC., a corporation,

Defendant.

Civil Action

No. 80-C-282-B

FILED

AUG 13 1980

BS
Jack C. Smith
U. S. DISTRICT COURT

J U D G M E N T

The Defendant, Frontier Roofing & Material Co., Inc., a corporation, having been regularly served with process and having failed to appear and answer the Plaintiff's Complaint filed herein, and the default of the said Defendant having been duly entered, and it appearing that the said Defendant is not an infant, incompetent, nor a member of any military service, and it appearing by the Affidavit of Irvine E. Ungerman that the Plaintiff is entitled to a judgment herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THIS COURT that the Plaintiff have and recover from the Defendant, Frontier Roofing & Material Co., Inc, a corporation, a judgment in the sum of \$66,000.00 with interest thereon at the rate of 12% per annum from the 10th day of November, 1979, until paid, together with an attorney fee in the sum of \$9,000.00, and all the costs of the action on the First Cause of Action of Plaintiff's Complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THIS COURT that the Plaintiff have and recover a judgment from the Defendant, Frontier Roofing & Material Co., Inc., a corporation, on its Second Cause of Action as pled in its Complaint in the amount of \$34,153.69 with interest thereon at 12% per annum from the 29th day of January, 1980, until paid, together with an attorney fee in the sum of \$4,500.00

Dated this 12th day of August, 1980.


UNITED STATES DISTRICT JUDGE

UNGERMAN, CONNER, LITTLE,
UNGERMAN & GOODMAN
1710 Fourth National Bank Bldg.
Tulsa, OK 74119

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

WESLEY S. WALKER, JR.,)

Plaintiff,)

vs.)

No. 77-C-311-E)

ORKIN EXTERMINATING COMPANY,)
INC.,)

Defendant.)

FILED

AUG 13 1980

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

O R D E R

This case was tried to a jury, commencing on June 9, 1980, and ending on June 18, 1980, when the jury returned a verdict in favor of Defendant and against Plaintiff.

Now before the Court for consideration is Plaintiff's Motion for New Trial.

Plaintiff argues that the Court erred in failing to give Plaintiff's requested instruction No. 11. The requested instruction dealt with the application of negligence per se, based upon Plaintiff's allegations that Defendant's use of the pesticides in question violated 7 U.S.C. §136j (a)(2)(G).

Upon its review of the arguments advanced by counsel, and the relevant authorities, the Court is of the opinion that its refusal to give Plaintiff's requested instruction No. 11 was correct. Plaintiff's motion for new trial should, therefore, be denied.

It is so Ordered this 17th day of August, 1980.



JAMES B. ELLISON
UNITED STATES DISTRICT JUDGE

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

ELMER CHANDLER, citizen of)
Missouri, and ROADWAY EXPRESS,)
INC., an Ohio corporation,)
)
Plaintiffs)

vs.)

ARLES FERGUSON and TOMMY REHEARD,)
both citizens of Oklahoma)
)
Defendants)

No. 79-C-134-E

FILED
AUG 13 1980

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

AMENDED JUDGMENT

This action came on for trial before the Court and a jury, the undersigned Honorable James O. Ellison, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that Judgment be entered in favor of Plaintiff Elmer Chandler and against Defendant Arles Ferguson in the sum of \$20,000 and against Defendant Tommy Reheard in the sum of \$10,000.

IT IS FURTHER ORDERED AND ADJUDGED that Judgment be entered in favor of Plaintiff Roadway Express, Incorporated and against Defendant Arles Ferguson in the sum of \$4,251.67 and against Defendant Tommy Reheard in the sum of \$2,125.83.

IT IS FURTHER ORDERED AND ADJUDGED that Judgment on the Cross-Claim be entered in favor of Defendant Arles Ferguson and against Defendant Tommy Reheard.

Dated this 13th day of August, 1980.


JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

ELMER CHANDLER, citizen of
Missouri, and ROADWAY EXPRESS,
INC., an Ohio corporation,

Plaintiffs

vs.

ARLES FERGUSON and TOMMY REHEARD,
both citizens of Oklahoma

Defendants

No. 79-C-134+E

FILED

AUG 13 1980

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

O R D E R

This is a negligence action based upon the Defendants' failure to properly inspect and maintain fences, arising out of a collision which occurred between a truck, owned by Plaintiff Roadway and operated by Plaintiff Chandler, and cattle, owned by Defendant Reheard and pastured upon land owned by Defendant Ferguson. This action was tried to a jury on May 28, 29, and 30, 1980, and a verdict was returned in favor of Plaintiffs and against Defendants.

Now before the Court for consideration are Plaintiff Roadway's Motion to Amend Judgment, and alternative Motion for New Trial, Defendant Reheard's Motion for Judgment Notwithstanding the Verdict, and Plaintiff Roadway's Motion for Judgment Notwithstanding the Verdict, made orally, and taken under advisement by the Court. The facts relevant to these motions will be developed in the discussion to follow.

Roadway's Motions

It was stipulated between the parties that the property damage claim of Roadway was in the amount of \$10,629.17. The jury was instructed as to this stipulation and its effect. No evidence was presented as to the amount of Roadway's damage, aside from the stipulated figure, and photographs of the damaged tractor-trailer. The jury returned a verdict fixing Roadway's damages, disregarding any percentage of negligence, in the sum of \$6,000.00.

It is Roadway's position that once the amount of damage was stipulated to, it was removed from the consideration of the jury as a question of fact, leaving only liability to be determined. Since the jury found in favor of Roadway on the issue of liability, the argument goes, it could do nothing but fix damages in the amount stipulated to, there being no evidence whatsoever to support the finding of a lesser amount.

Roadway also contends that the uncontroverted evidence before the jury showed that it had paid to Elmer Chandler, as benefits due him for his injuries sustained in the accident, the total sum of \$9,797.15. Roadway argues that it is entitled to a recovery in this amount as well.

Defendants respond to Roadway's claim as to its property damage by arguing that the jury is not absolutely bound by stipulations, but is free to weigh them as it would were a witness to testify to the stipulated facts. Defendants also contend that Roadway's failure to object to the verdict at the time it was returned waives all objections thereto, and that Roadway's motion to amend is improperly brought under Rule 59(e), Fed. R. Civ. Pro.

Roadway's motion for new trial is based upon the same arguments and seeks a new trial as to the issue of damages only, pursuant to Rule 59(a), Fed.R.Civ. Pro., if its motion to amend judgment is not sustained.

Defendants' responses to the motion are based upon essentially the same arguments as their responses to Roadway's motion to amend judgment.

Procedural failures which might have been fatal to Roadway's motion had this diversity-based action proceeded in state court are of no moment. This matter is governed by federal procedure, see, e.g., Oldenburg v. Clark, 489 F.2d 839 (Tenth Cir. 1974); Holmes V. Wack, 464 F.2d 86 (Tenth Cir. 1972).

What Roadway seeks with its motion to amend judgment and motion for new trial is akin to additur.

Were this case to involve an excessive verdict, remittitur would unquestionably be available. When a verdict is inadequate, however, problems arise. Additur has been held to be unconstitutional, as an invasion of the right to trial by jury, guaranteed by the Seventh Amendment. Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296 (1935). In almost all cases of an inadequate verdict, the Court's only recourse is to grant a new trial (although this may, of course, be limited to the issue of damages if the Court is convinced that the finding of liability is correct), see generally 6A Moore's Federal Practice ¶¶59.05[3], 59.05[4]; 11 Wright & Miller §§2815, 2816.

However, where the issue of damages is not in dispute, the Seventh Amendment problems raised by Dimick, supra, do not arise. Were it to be otherwise, the results would be an absurd exercise in formality and a waste of judicial resources. If the parties to a dispute agree as to damages, leaving only liability in dispute, nothing prevents the Court from entering judgment for the agreed upon amount after a jury finding of liability. Similarly, if there is no dispute as to any material facts, a Court may enter summary judgment as to liability and damages.

In the instant case, the amount of Roadway's property damage was stipulated to by the parties. If a new trial were ordered as to the issue of damages alone, the Court could enter summary judgment in favor of Roadway for the amount. This is not an invasion of the province of the jury, a substitution of the Court's judgment for that of the jurors. In Decato v. Travelers Insurance Co., 379 F.2d 796 (First Cir. 1967), the Court said:

Although there is a paucity of authority on the subject, we think the constitutional rule against additur, see Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct.296, 79 L.Ed.603 (1934), is not violated in a case where the jury has properly determined liability and there is no valid dispute as to the amount of damages. In such a case the court is in effect simply granting summary judgment on the question of damages.

379 F.2d at 798 (footnote omitted). And in Rocky Mountain Tool & Machine Co. v. Tecon Corp., 371 F.2d 589 (Tenth Cir. 1966), an action under the Miller Act, our own Circuit said;

Finally, Hartford asserts that the trial court unlawfully increased the jury verdict by means of an unlawful additur. The verdict of the jury against Rocky Mountain was \$225,000, reduced by the court in final judgment to \$177,116, for reasons we have discussed. Notwithstanding a specific instruction that Hartford, if liable at all, would be jointly liable in amount with its obligee, the jury found such amount to be \$150,000. The trial court entered final judgment against Hartford for \$177,116. This was not error. Once the jury determined Hartford's liability its function was exhausted for the amount of liability was established by law. The action of the District Court in adjusting the judgment to conform with the net verdict against Rocky Mountain was both necessary and proper... This is not the situation of Dimick v. Schiedt, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603, as suggested by Hartford, where the trial court, being dissatisfied with the jury's verdict on an unliquidated claim, threatened to grant plaintiff's motion for new trial unless defendant consented to an additur.

371 F.2d at 598. In 6A Moore's Federal Practice ¶59.05 [3], at 59-62, it is said:

Although additur is an unconstitutional condition, where the damages are at large, and the court is there limited to granting a new trial when the verdict is inadequate, where the court is satisfied that the issue of liability has been properly determined in favor of the plaintiff and it could, therefore, limit the new trial to the issue of damages, but there is no genuine factual issue as to recoverable damages, the court has the power to order judgment for the amount of recoverable damages. (Footnotes omitted)

The treatise goes on to state, at ¶59.08[4] n.67:

If the trial court is satisfied that the jury has properly determined liability in favor of plaintiff, but the amount awarded is less than plaintiff is entitled to and the amount is not factually in dispute the court should render judgment in favor of the plaintiff for that amount. This does not violate the rule against additur...for by hypothesis there is no issue of damage to be tried by the jury, and the court is in effect granting summary judgment on its own motion as to damages, which it may properly do.

In the instant case, the Court is convinced that the jury's verdict in favor of Plaintiffs is proper and supported by the evidence. The Court is of the opinion that the proper course of action in this case is to increase Roadway's award of damages to properly reflect the amount of property damage stipulated to, that is, \$10,629.17.

Roadway's request, insofar as it pertains to the recovery of Missouri Workmen's Compensation benefits paid by it to Elmer Chandler, is in a somewhat different posture.

Under the law of the State of Missouri, the employee, the employer, or both may bring an action against a third-party tortfeasor. The tortfeasor will only be required to pay once, however, for the damage he has caused. In Schumacher v. Luten, 360 Mo. 1238, 232 S.W. 2d 913 (1950), the court, in construing Mo. Ann. Stat. §287.150 (Vernon), said:

Under the Missouri Act and the decisions construing it there is no double recovery, an evil to be avoided, because whoever, the employer or the employee, recovers against a third person tortfeasor holds so much of such recovery as in truth and in fact belongs to the other as an express trustee - the employee to see that the employer's right of subrogation is protected, and the employer to see that the employee receives any surplus after his indemnification.

232 S.W. 2d at 919. See also Jenkins v. Westinghouse Electric Co., 18 F.R.D. 267 (W.D. Mo. 1955); Maryland Casualty Co. v. General Electric Co., 418 S.W. 2d 115 (Mo. 1967); State ex rel. Transit Casualty Co. v. Holt, 411 S.W. 2d 249 (Mo.Ct. App. 1967); State ex rel. Royal-McBee Corp. v. Luten, 390 S.W. 2d 931 (Mo.Ct.App. 1965); Veninga v. Liberty Mutual Ins. Co., 388 S.W. 2d 535 (Mo.Ct.App. 1965); O'Hanlon Reports v. Needles, 360 S.W. 2d 382 (Mo.Ct.App.1962); State ex rel. W. J. Menefee Constr. Co. v. Curtis, 321 S.W. 2d 713 (Mo.Ct.App. 1959).

In the instant case, recovery having been had by the plaintiff-employee, he now holds, under the law of Missouri, as trustee for Roadway any sums due to Roadway for amounts received by him under the Missouri Workmen's Compensation Act. Roadway could not, even were a new trial to be granted on this point, assert its subrogation claim to amounts paid under the Missouri Workmen's Compensation Act. In State ex rel. Transit Casualty Co. v. Holt, supra, at 251, the court, citing O'Hanlon Reports, supra, noted that "the employer has no separate cause of action for the subrogation claim." Roadway cannot now seek to recover such sums of Defendants.

As to the workmen's compensation benefits, Roadway's motion should be denied.

Reheard's Motion

Defendant Tommy Reheard has moved the Court to enter judgment notwithstanding the verdict. Reheard argues that there is no evidence to support a finding that any negligence existed on his part constituting a proximate cause of the accident.

Reheard argues that it is not enough for Plaintiffs to establish that a portion of the fence was in a poor or broken condition, and that his cattle were on the highway. Reheard contends that under Oklahoma law, the plaintiff must show that the owner of the animals failed to exercise ordinary care to prevent them from running at large upon the highway, e.g. Rouk v. J. N. Halford, 475 P.2d 814 (Okla. 1970); Champlin Refining Co. v. Cooper, 184 Okla. 153, 86 P.2d 61 (1938). Reheard contends that there was no evidence that he knew of the condition of the fence or that he should have known of its condition.

Reheard is correct in his statement of the law, but errs in his recollection of the evidence. The testimony showed that Reheard had rented the pasture land in question for approximately three years; that he would go on the land about three times a week to feed the cattle and check on them; that he would inspect the fence visually during these times, and that he was familiar in general with the quality and condition of the fence.

From the evidence introduced, and especially from the evidence just recounted in detail, the Court is of the opinion that there is sufficient evidence to support the jury's finding against Reheard. His motion for judgment notwithstanding the verdict should be denied.

IT IS THEREFORE ORDERED that the Judgment as entered in this cause on June 3, 1980, be vacated, and amended to properly reflect the stipulated amount of Roadway's property damage.

Plaintiff Roadway's motion for new trial is hereby denied.

IT IS FURTHER ORDERED that Defendant Tommy Reheard's Motion for Judgment Notwithstanding the Verdict be, and the same hereby is, denied.

It is so Ordered this 1st day of August, 1980.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

ELMER DEAN MITCHELL)
Plaintiff,)
vs.)
HUGHES HELICOPTERS, A DIVISION)
OF SUMMA CORPORATION AND SUMMA)
CORPORATION,)
Defendants.)

No. 77-C-276-BT

FILED
AUG 1 1980
Jack C. Silver, Clerk
U. S. DISTRICT COURT

GARY E. CLOWER,)
Plaintiff,)
vs.)
HUGHES HELICOPTERS, A DIVISION)
OF SUMMA CORPORATION AND SUMMA)
CORPORATION,)
Defendants.)

No. 77-C-277-BT

RANDY IRWIN,)
Plaintiff,)
vs.)
HUGHES HELICOPTERS, A DIVISION)
OF SUMMA CORPORATION AND SUMMA)
CORPORATION,)
Defendants.)

No. 77-C-278-BT

MARVENA JO IRWIN,)
Plaintiff,)
vs.)
HUGHES HELICOPTERS, A DIVISION)
OF SUMMA CORPORATION AND SUMMA)
CORPORATION,)
Defendants.)

No. 78-C-510-BT

LETA MAY MITCHELL,)
Plaintiff,)
vs.)
HUGHES HELICOPTERS, A DIVISION)
OF SUMMA CORPORATION AND SUMMA)
CORPORATION,)
Defendants.)

No. 78-C-511-BT

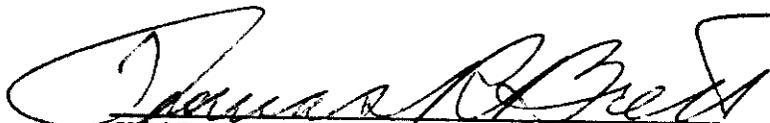
CAROLYN MADGE CLOWER,)
Plaintiff,)
vs.)
HUGHES HELICOPTERS, A DIVISION)
OF SUMMA CORPORATION AND SUMMA)
CORPORATION,)
Defendants.)

No. 78-C-512-BT

ORDER OF DISMISSAL

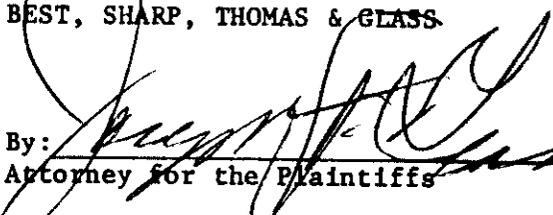
ON THIS 14th day of Aug, 1980, upon the written application of the parties for a Dismissal With Prejudice of the Complaints and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaints and have requested the Court to dismiss said Complaints with prejudice to any future actions, and the Court being fully advised in the premises, finds that said Complaints should be dismissed pursuant to said application.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Complaints and all causes of action of the Plaintiffs filed herein against the Defendants be and the same hereby are dismissed with prejudice to any future actions.

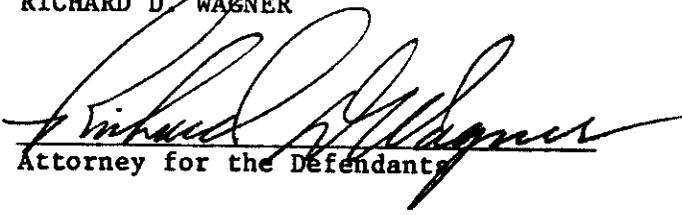

JUDGE, DISTRICT COURT OF THE UNITED
STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVAL:

BEST, SHARP, THOMAS & GLASS

By: 
Attorney for the Plaintiffs

KNIGHT, WAGNER, STUART & WILKERSON
RICHARD D. WAGNER


Attorney for the Defendants

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

KELLER BATH HOUSE, INC., a
domestic corporation

Plaintiff

vs.

THE WESTERN CASUALTY AND SURETY
COMPANY, a foreign insurance company

Defendants

No. 80-C-73C

ORDER

Now on this 8 day of August, 1980, upon application of
the parties the above captioned cause is dismissed with prejudice.

(Signed) H. Dale Cook

Judge

WS

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

WILLIS K. JOHNSON,)
)
 Plaintiff)
)
 v.) No. 77-C-120-C
)
 BOB HOWE, d/b/a Bob Howe Fine Car)
 Center, et al,)
)
 Defendant)

JUDGMENT

Now on this 17th day of April, 1980, this matter comes on for continuation of a combined non-jury trial upon plaintiff's garnishments filed against Ruth B. Howe, issued on the 30th day of November, 1978, and against R.B.H. Limited, also issued on the aforesaid date. Plaintiff appears in person with his attorneys, Bill V. Wilkinson and Donald M. Bingham. Garnishee Ruth B. Howe appears in person with her attorney Frank Hickman, who also appears on behalf of garnishee R.B.H. Limited. Defendant Bob Howe also appears in person, represented by Mr. Hickman.

From prior review of the record in this matter, the Court has determined that the garnishees have answered their respective garnishments by denying that they possessed or controlled any property belonging to Bob Howe on the date of service thereof.

The Court therefore has found that both garnishments are at issue, and a pretrial conference was held on the 21st day of December, 1979. This matter was regularly scheduled for non-jury trial on the 14th day of April, 1980, and trial was commenced on that date.

On April 14, 1980, both sides announced ready for trial. Opening statements were heard, and the plaintiff moved for judgment upon the pleadings and opening statement. Said motion was

overruled, exception noted. The Court heard the plaintiff's case-in-chief upon both garnishments, consisting of certain exhibits and the testimony of witnesses sworn and examined in open court. On this date, the plaintiff rests, whereupon both garnishees interpose their demurrers. Both demurrers are overruled, exceptions noted.

The garnishees present their case-in-chief, at the conclusion of which the plaintiff moves for judgment under Rule 56, Federal Rules of Civil Procedure for the United States District Courts. Said motion is overruled, exception noted.

Closing arguments are heard, whereupon the Court deliberates. Based upon consideration of all evidence adduced at trial and upon review of the entire record in this matter, the Court makes the following Findings of Fact and reaches the following Conclusions of Law:

I

On May, 26, 1978, this Court entered judgment against the defendant Bob Howe pursuant to a jury verdict, and the verdict was and the judgment was for \$750.00 actual damages and \$50,000.00 punitive damages. That judgment and verdict is final and binding.

II

On that same day, May 26, 1978, at approximately 7:30 p.m., an organizational meeting of the garnishee, RBH, Ltd., was held at the Bob Howe Fine Car Center, 2839 East 11th Street, in Tulsa, Oklahoma. Present at that meeting were the incorporators, Ruth B. Howe, garnishee and wife of the defendant, Bob Howe, and a Donna V. Schuster and James E. Crim.

III

Ruth Howe is the president of that corporation, chairman of the board and sole shareholder.

IV

On or about May 26th, 1978, the date of the verdict and judgment, Bob Howe conveyed his interest, leasehold interest, furnishings, equipment, all of his interest in fixtures and other matters that was owned by him as the Bob Howe Fine Car Center to RBH, Ltd. RBH, Ltd. paid no consideration to Bob Howe for these assets, nor did Bob Howe receive any other thing of value in exchange therefor. He personally received no consideration at all from RBH. The conveyances were not made in satisfaction of any antecedent debt. RBH, Ltd. did not assume the judgment debt to the plaintiff.

V

Since that time, the defendant Bob Howe has continued to manage and operate the used car business located at 2839 East 11th Street, formerly known as Bob Howe Fine Cars, the same as he did before the conveyance to RBH, Ltd. RBH, Ltd. pays life insurance premiums for Mr. Howe and certain of his personal expenses, such as medicine.

VI

The purpose for the creation of RBH, Ltd. and the transfer of the assets of the Bob Howe Fine Car Center was to extricate the defendant, if at all possible, from his bad financial situation. At the time of the transfer, Mr. Howe was clearly insolvent, that is, the present fair salable value of his assets was far less than the amount which he owed and which he would have been required to pay on his existing debts as they became absolute and matured. The judgment in this case would, in and of itself, have been sufficient to have proven the insolvency.

VII

The transfer by the defendant Bob Howe to RBH, Ltd. of the assets of the Bob Howe Fine Car Center was clearly made with

the actual intent to hinder, to delay and to defraud the judgment creditor, the plaintiff, Willis K. Johnson.

VIII

On the 11th of June, 1977, Mr. Howe, as trustee of Robert J. Howe Revocable Trust, invested \$1,000 in shares of The Investment Company of America. Effective May 31, 1978, those shares had a cash value of \$2,169.00.

On or about May 31, 1978, \$2,169.00 was transferred to Ruth B. Howe by Bob Howe, whereupon Ruth, as the trustee of the Ruth B. Howe Revocable Trust, invested said moneys, together with other moneys of her own, in the Petro-Lewis Oil Income Program VIII.

At the time of the transfer, the defendant, Bob Howe, was insolvent. The conveyance was made by the defendant, Bob Howe, without any exchange of fair equivalent value and was not made in satisfaction of any antecedent debt owed by Mr. Howe to the garnishee, Ruth Howe.

The conveyance was made with an actual intent to hinder, delay and defraud the judgment creditor, Willis K. Johnson.

IX

On June 11th, 1977, Bob Howe, as trustee of the Robert J. Howe Revocable Trust, invested \$2,500.00 in National Property Investors partnership. On June 7th, 1978, Mr. Howe assigned his interest to Ruth B. Howe as the trustee of the Ruth Howe Revocable Trust. Also on that date, Bob Howe assigned to Ruth Howe, as trustee under a trust, all of his interest in American Property Investors partnership.

At the time of these transfers, the defendant, Bob Howe, was insolvent. The conveyances were made by the defendant

Bob Howe, without any exchange of fair equivalent value and they were not made in satisfaction of any antecedent debts owed to the garnishee, Ruth Howe.

These conveyances, as were the others, were made with an actual intent to delay and to defraud the judgment creditor, the plaintiff, Willis K. Johnson.

X

The conveyances were made by the defendant, Bob Howe, to the garnishee, Ruth B. Howe and RBH, Ltd. Said conveyances were fraudulent as to the plaintiff, Willis K. Johnson, pursuant to Title 24 of the Oklahoma Statutes, Sections 101 and following.

XI

The plaintiff, Willis K. Johnson, has a matured claim against the defendant, Bob Howe. The garnishee, Ruth B. Howe and RBH, Ltd., were not purchasers for fair value and consideration without knowledge of the fraud at the time of the purchase, nor have they derived their title immediately or mediately from such a purchaser.

XII

Plaintiff, Willis K. Johnson, therefore, may disregard said conveyances and attach or levy execution upon said property and the assets conveyed by Bob Howe to the garnishee, Ruth Howe, and those assets held by RBH, Ltd.

The exception may be accomplished by way of garnishment, garnishment after judgment being an equitable action.

Said properties and assets are currently held or controlled by the garnishees and are not exempt from seizure or sale.

XIII

Ownership of all the aforesaid assets should be, and hereby is, awarded to and exclusive title thereto is vested in, subject to creditor rights, plaintiff, Willis K. Johnson. Plaintiff shall be entitled to all dividends, possession, income, profits, control and benefits, accrued or otherwise, pertaining to said assets, free and clear of any claims or encumbrances by either garnishees or the defendant.

Any benefits or rights arising from or connected to said assets which are not specifically set forth are nevertheless hereby awarded to the plaintiff. Within five days after written request by the plaintiff, the defendant and garnishee shall execute and return any documents necessary to transfer complete ownership of said assets to the plaintiff. In any event, this judgment shall operate and be regarded as full title and complete evidence of plaintiff's ownership of said assets, and the judgment may be recorded or published by the plaintiff as he deems necessary.

XIV

Further, the plaintiff, having recovered herein more than the garnishees admitted by answer, plaintiff is further awarded his costs, which costs shall include reasonable attorney fees.

XV

Further, garnishees and the defendant are hereby prohibited from transferring title except consistent with the judgment of this court in any properties transferred and the subject of this court's order.

XVI

The defendant, Bob Howe, shall not in any way dispose of assets in an effort to defraud or to defeat the judgment of

this court that is presently binding and final.

XVII

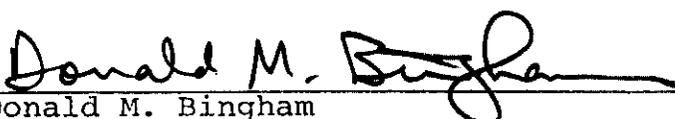
Plaintiff's counsel shall prepare a judgment in this matter and shall submit within 10 days an Application for Attorney Fees and Costs, to which the Garnishees shall have 5 days to respond.

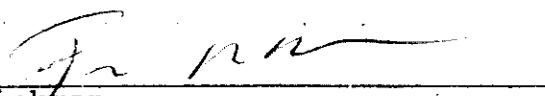
Garnishees' exceptions to this Judgment are noted.

(Signed) H. Dale Cook

H. DALE COOK
PRESIDING DISTRICT JUDGE

APPROVED AS TO FORM:


Donald M. Bingham
Attorney for plaintiff


Frank Hickman
Attorney for defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 8 - 1980

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ROGER E. BAZE,)
)
 Defendant.)

CIVIL ACTION NO. 80-C-190-C

DEFAULT JUDGMENT

This matter comes on for consideration this 8th day of August, 1980, the Plaintiff appearing by Robert P. Santee, Assistant United States Attorney for the Northern District of Oklahoma, and the Defendant, Roger E. Baze, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Roger E. Baze, was personally served with Summons and Complaint on April 11, 1980, 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, Roger E. Baze, for the principal sum of \$1,695.15, plus interest at the legal rate from the date of this Judgment until paid.

W. Salebrook
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney
Robert P. Santee
ROBERT P. SANTEE
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JAMES M. McCLAIN,)
)
 Defendant.)

CIVIL ACTION NO. 80-C-254-C

DEFAULT JUDGMENT

This matter comes on for consideration this 8th
day of August, 1980, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney for the Northern District
of Oklahoma, and the Defendant, James M. McClain, appearing
not.

The Court being fully advised and having examined
the file herein finds that Defendant, James M. McClain, was
personally served with Summons and Complaint on May 6, 1980, and
that Defendant has failed to answer herein and that default
has been entered by the Clerk of this Court.

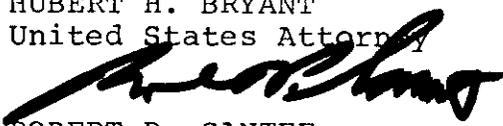
The Court further finds that the time within which
the Defendant could have answered or otherwise moved as to
the Complaint has expired, that the Defendant has not answered
or otherwise moved and that the time for the Defendant to answer
or otherwise move has not been extended, and that Plaintiff
is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

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that
the Plaintiff have and recover Judgment against Defendant, James M.
McClain, for the principal sum of \$1,552.00, plus interest
at the legal rate from the date of this Judgment until paid.


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

THE HARDESTY COMPANY,
an Oklahoma corporation,

Plaintiff,

vs.

AMERICAN BUILDING COMPONENTS, INC.,
a New Mexico corporation,

Defendant.

No. 78-C-346-E

FILED

AUG 11 1980

ORDER OF DISMISSAL

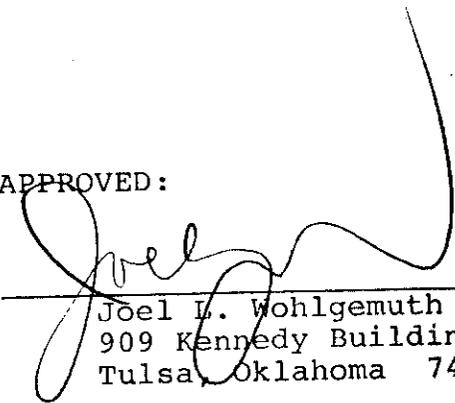
Now on this 5th day of ~~July~~ ^{August}, 1980, the Court has received a Stipulation for Dismissal submitted by the Plaintiff and the Defendant. Based upon that stipulation, it is hereby

ORDERED that the Plaintiff's Complaint and the Defendant's Counterclaim be, and the same are, hereby dismissed with prejudice.

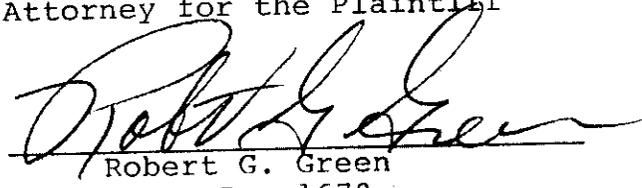
S/ JAMES O. ELLISON

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:


Joel L. Wohlgemuth
909 Kennedy Building
Tulsa, Oklahoma 74103

Attorney for the Plaintiff


Robert G. Green
P. O. Box 1679
Tulsa, Oklahoma 74101

Attorney for the Defendant

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

UNITED STATES OF AMERICA FOR THE
USE OF CHAMPLIN PETROLEUM COMPANY,
a corporation,

Plaintiff,

-vs-

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

Defendants.

FILED

AUG 11 1980

U. S. DISTRICT COURT

No. 79-C-179-5

ORDER OF DISMISSAL

On this 5TH day of ~~July~~ ^{August}, 1980, the above styled case came on for consideration before the Honorable James O. Ellison, United States District Judge upon the stipulation for dismissal of Champlin Petroleum Company and Federal Insurance Company and Utility Contractors, Inc., and having considered the same the Court finds that the Stipulation for Dismissal should be, and same is hereby, accepted by the Court.

IT IS, THEREFORE, ORDERED that the above styled action be, and same is hereby dismissed with prejudice.


United States District Judge

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

FILED
AUG 11 1980

BONNIE COLLINS, d/b/a)
WANDA'S DINER,)
)
Plaintiff,)
)
-vs-)
)
GREAT ATLANTIC INSURANCE)
COMPANY, a foreign)
corporation,)
)
Defendant.)

NO. 79-C-378-E

ORDER OF DISMISSAL

On this 5th day of August, 1980, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint and have requested the Court to dismiss said Complaint with prejudice to any future action, and the Court being fully advised in the premises, finds that said Complaint should be dismissed pursuant to said application.

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

S/ JAMES O. ELLISON

JUDGE OF THE UNITED STATES DISTRICT
COURT, NORTHERN DISTRICT

APPROVED AS TO FORM:

JOHN HARLAN
Attorney for Plaintiff

RAY H. WILBURN
Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 6 - 1980

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 TERRI L. PHELAN, a/k/a TERRI)
 L. RAINWATER,)
)
 Defendant.)

U. S. DISTRICT COURT

CIVIL ACTION NO. 80-C-63-E

DEFAULT JUDGMENT

This matter comes on for consideration this 5TH
August day of ~~July~~, 1980, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney for the Northern District
of Oklahoma, and the Defendant, Terri L. Phelan, a/k/a Terri L.
Rainwater, appearing not.

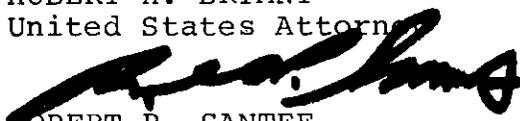
The Court being fully advised and having examined the
file herein finds that Defendant, Terri L. Phelan, a/k/a Terri L.
Rainwater, was personally served with Summons and Complaint on
February 14, 1980, and that Defendant has failed to answer herein
and that default has been entered by the Clerk of this 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, Terri L.
Phelan, a/k/a Terri L. Rainwater, for the principal sum of \$1,713.30,
plus the accrued interest of \$331.37, as of December 5, 1979, plus
interest at 7% from December 5, 1979, until the date of Judgment,
plus interest at the legal rate on the principal sum of \$1,713.30
from the date of Judgment until paid.


UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 6 - 1980

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 JERRY D. CLARK,)
)
 Defendant.)

U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CIVIL ACTION NO. 80-C-270-E

DEFAULT JUDGMENT

This matter comes on for consideration this 5TH
day of ~~July~~ ^{August}, 1980, the Plaintiff appearing by Robert P. Santee,
Assistant United States Attorney for the Northern District of
Oklahoma, and the Defendant, Jerry D. Clark, appearing not.

The Court being fully advised and having examined
the file herein finds that Defendant, Jerry D. Clark, was personally
served with Summons and Complaint on May 16, 1980, 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, Jerry D.
Clark, for the principal sum of \$1,003.82, plus the accrued
interest of \$414.17, as of March 15, 1980, plus interest at 7%
from March 15, 1980, until the date of Judgment, plus interest
at the legal rate on the principal sum of \$1,003.82, from the
date of Judgment until paid.


UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney

ROBERT P. SANTEE
Assistant U. S. Attorney

George S. Lambert, the sum of Thirty Thousand, Eleven Dollars and Seventy Eight Cents (\$30,011.78), with interest thereon at the rate of fifteen percent (15%) per annum from July 18, 1980, until paid, and any further accruing costs as provided by law, for all of which let execution issue.

S/, JAMES O. ELLISON

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED:



ATTORNEY FOR PLAINTIFF.



ATTORNEY FOR DEFENDANT.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 5 1980
U. S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
BILLIE D. KELLER and CONNIE)
J. KELLER, husband and wife,)
)
Defendants.)

Civil Action No. 79-C-446-*QE*

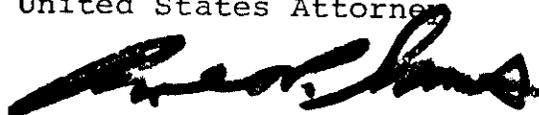
NOTICE OF DISMISSAL

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 5th day of August, 1980.

UNITED STATES OF AMERICA

HUBERT H. BRYANT
United States Attorney



ROBERT P. SANTEE
Assistant United States Attorney