

RDW/dfs

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

FILED

TRUCK INSURANCE EXCHANGE, a)
reciprocal or interinsurance exchange,)

Plaintiff,)

vs.)

POLYGUARD PRODUCTS, INC., W.S.W.)
ROOFING, INC., and CARROLL CALD-)
WELL d/b/a COMMERCIAL ROOF)
COATINGS,)

Defendants.)

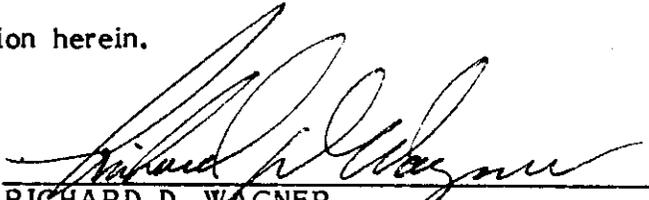
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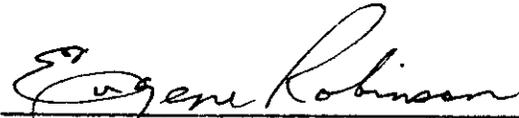
Jack C. Silver, Clerk
U.S. DISTRICT COURT

Case No.: 84-C-239-E

JOINT APPLICATION FOR DISMISSAL

COMES NOW the above named parties, and move this Court for dismissal of this action for the reason that the claim and cross-claims herein arised out of damages claimed by W.S.W. Roofing, the subject of a suit filed in the State Court, Kay County, which has now been settled by the parties herein. Due to said settlement, the parties request this Court to dismiss this action herein.


RICHARD D. WAGNER
Attorney for Defendant,
Polyguard Products, Inc.


PAUL V. MCGIVERN, JR.
Attorney for Plaintiff,
Truck Insurance Exchange

SCOTT KNOWLES
Attorney for Defendant,
Carroll Caldwell d/b/a Commerical Roof Coatings


KENT C. PHILIPS
Attorney for Defendant,
W.S.W. Roofing, Inc.

attached

Entered

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

FILED

DEC 31 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

UNITED SERVICES AUTOMOBILE)
ASSOCIATION,)
)
Plaintiff,)
)
v.)
)
JEFFERY SANDHOLM, FRANK A.)
SANDHOLM, and BETTY L. DOWLAND,)
now DOUGLAS,)
)
Defendants.)

No. 85-C-112-B ✓

O R D E R

This matter comes before the Court on motion for summary judgment of plaintiff United Services Automobile Association ("United Services"). For the reasons set forth below, plaintiff's motion is sustained.

Plaintiff seeks a declaratory judgment herein that a policy of insurance issued by plaintiff to Frank A. Sandholm covering a 1976 Dodge pickup truck does not provide coverage for a certain loss complained of in an action currently pending in the District Court in and for Creek County, Drumright Division, State of Oklahoma. The state court action, styled Betty L. Dowland, now Douglas v. Jeffery Sandholm and Frank Sandholm, Case No. C-84-73-D, concerns an accident which occurred in the early morning hours of March 12, 1983 near Mannford, Oklahoma. On March 11, 1983, Jeffery Sandholm drove the 1976 Dodge pickup owned by his father, Frank Sandholm, from Tulsa, Oklahoma to some property owned by friends in the Mannford, Oklahoma area for the

purpose of dumping some materials on the property. After he dumped the trash, he went three miles out of the way from a direct route back to Tulsa to stop at a bar west of Mannford. Later, after leaving the bar at some point in the early morning hours of March 12, 1983, Jeffery Sandholm was involved in an accident with Betty L. Dowland.

Plaintiff contends that the deposition testimony of both Jeffery and Frank Sandholm shows that Jeffery did not have his father's permission to drive the truck at the time of the accident. Because the policy specifies that it does not provide liability coverage for any person "[u]sing a vehicle without a reasonable belief that that person is entitled to do so," plaintiff argues that no coverage existed when the accident occurred. Plaintiff's Exhibit "A", p. 3, Exclusion A8.

Jeffery Sandholm did not live at his father's residence at the time of the accident. Jeffrey's car was not running at the time, as he was rebuilding the front end. November 14, 1985 Deposition of Jeffery Sandholm, p. 3. Because Jeffery needed a vehicle, his father gave him permission to use the truck:

"Q. Do I understand that at the time you were to be gone, your son was in the process of working on his vehicle?

A. Yes, that was the reason -- his vehicle was not fully operationable [sic]. That was the reason he was allowed to use this vehicle to commute to school during this period we were gone."

November 14, 1985 Deposition of Frank Sandholm. The father had discussed the use of the pickup prior to the father leaving on a trip:

"Q. And had you given him [Jeffery] permission to drive the pickup while you were gone?

A. Yes, Sir.

Q. Would you tell again the Court the parameters of the permission that you gave him insofar as the use of your pickup was concerned?

A. The use of the pickup was for the sole purpose of commuting to Tulsa Junior College and to get the needed groceries he needed for himself and he was not -- he was specifically not to come to Mannford, to our home or anywhere else in Mannford. We were out of the country at the time and my wife had a 97 year old aunt living with us and we had to have a house sitter to monitor and take care of the old aunt. The house sitter specified she didn't want Jeff or anyone else coming to the house. Jeff was told, 'Do not come to Mannford,' and the sole purpose of the use of that vehicle during this period was for him to commute to Tulsa Junior College, and I repeat again, he was not to come to Mannford. I was paying the tuition for him to go to school and I wanted to make certain that he attended."

November 14, 1985 Deposition of Frank Sandholm, p. 4.

Jeffery Sandholm admits he did not have his father's permission to drive the pickup to the bar and admits he had no belief that he was entitled to do so:

"Q. Mr. Sandholm, when you drove that pickup to that bar, you did not have your father's permission to do that, did you?

A. No, sir.

Q. As a matter of fact, it was contrary to his specific instructions, was it not?

A. Yes, sir.

Q. And you had no belief that you were entitled to drive that pickup to that bar, did you?

A. No, sir."

June 19, 1985 Deposition of Jeffery Sandholm, p. 24. The testimony given in the November 14, 1985 deposition by Jeffery Sandholm indicates that he did not have his father's permission to use the pickup for hauling trash on that date:

"Q. Did you have his permission to use his pickup to haul trash?

A. No, sir.

Q. Had you used it to haul trash in the past?

A. Yes, once before.

Q. Had you obtained permission specifically each time?

A. Yes, Sir."

November 14, 1985 Deposition of Jeffery Sandholm, p. 3. Defendant Betty L. Dowland contends that the deposition testimony of November 14, 1985 indicates that Jeffery had implied permission in that, though Jeffery had not obtained specific permission, he was not planning to tell his father about having taken the trash to the dump since he did not believe his father would object. November 14, 1985 Deposition of Jeffery Sandholm, p. 21. It remains uncontested, however, that Jeffery did not have permission to use the truck for that purpose, that he had obtained specific permission on previous occasions, and that he did not have permission to take the truck to the bar.

On November 5, 1985, the Court held a hearing on the motion for summary judgment and directed the parties to supplement the record with regard to the route taken by Jeffery Sandholm to the trash dump and the route taken to the bar, facts which are

relevant to the question of a deviation from a permitted route. Another matter of concern at the hearing involved the following testimony of Frank Sandholm:

"Q. Is it your testimony that the only time he had ever driven it or the only occasion, I should say, he had ever driven that vehicle was on business?

A. That was what he -- he was not authorized to use that vehicle at any time except for business, either my business or for his, to commute to school or to take care of business."

June 19, 1985 Deposition of Frank Sandholm. The Court noted that the statement "either my business or for his" is sufficiently broad as to possibly include hauling trash. However, in the November 14, 1985 deposition, Frank Sandholm made the following statement:

"Q. You previously have indicated that he was not authorized to use your vehicle at any time except for business, either your business or his or to commute to school. Did the authorization to use your vehicle for his business include that period of time that you were gone in March of 1983?

A. During the period when we were gone, the use of the vehicle was limited for the sole purpose of commuting to Tulsa Junior College and to get groceries. He had no business, so he had no reason to be using it for any purpose."

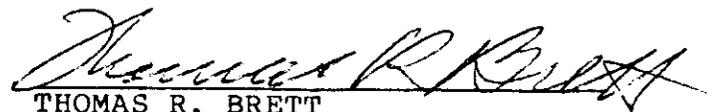
As for the route to the trash dump and the route taken to the bar, the November 14, 1985 deposition of Jeffrey Sandholm indicates that he drove to the dump by heading west on State Highway 51 from Tulsa, then south on State Highway 48 at Mannford, Oklahoma, then six miles south to the dumpsite. Instead of traveling the same route back to Tulsa, Oklahoma, Jeffery Sandholm traveled north on State Highway 48 past Highway

51, for a distance of approximately three miles, to Flo and Bo's Bar. November 14, 1985 Deposition of Jeffery Sandholm.

The evidence presented indicates that Jeffery Sandholm lacked permission, express or implied, to use the pickup truck for hauling trash or for any purpose other than commuting to school or getting groceries. Alternatively, even if it could be said that he had implied permission to haul trash, his trip to the bar constituted a substantial deviation which would violate the permissive use clause. In Aetna Life and Casualty Company v. Lumbermen's Mutual Casualty Company, 446 F.2d 217 (10th Cir. 1971), the Tenth Circuit Court of Appeals noted that Oklahoma law permits a slight deviation from the scope of permission without excluding a third party from coverage under the permissive use clause. In Aetna, the court found a substantial deviation where the third party driver had deviated from a route authorized by the owner from Los Angeles to Tulsa, Oklahoma by taking a passenger to Hot Springs, Arkansas. Jeffery Sandholm's six-mile round trip detour from the route back to Tulsa from the dump was a substantial deviation and would violate any implied permission to use the truck for hauling trash, assuming such implied permission existed.

Plaintiff's motion for summary judgment is granted.

IT IS SO ORDERED, this 21 day of dec, 1985.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Entered

FILED

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

DEC 31 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

UNITED SERVICES AUTOMOBILE)
ASSOCIATION,)
)
Plaintiff,)
)
v.)
)
JEFFERY SANDHOLM, FRANK A.)
SANDHOLM, and BETTY L. DOWLAND,)
now DOUGLAS,)
)
Defendants.)

No. 85-C-112-B ✓

J U D G M E N T

In keeping with the Order entered herein this date, IT IS ADJUDGED the plaintiff is granted judgment against the defendants and each of them, AND IT IS HEREBY DECLARED the plaintiff, United Services Automobile Association, and its insurance policy No. 013 25 044 7101 2 to Frank A. Sandholm, effective March 11, 1983 to September 11, 1983, covering a 1976 Dodge pickup owned by Frank A. Sandholm, extends no liability coverage to pay a judgment for damages rendered as a result of the accident of March 11, 1983 in Creek County, Oklahoma, when said pickup truck was being driven by Jeffery Sandholm. IT IS ADJUDGED the plaintiff is to provide a defense and pay costs of defense for and on behalf of the named insured defendant, Frank A. Sandholm, in accordance with the terms of the policy in the case of Betty L. Dowland, now Douglas, Plaintiff, v. Jeffery Sandholm and Frank Sandholm, No. C-84-73-D, filed in the District Court in and for Creek County, Drumright Division, State of Oklahoma. The costs

M

herein are assessed against the defendant, Jeffery Sandholm.

DATED this 31st day of Dec., 1985.

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

THOMAS R. BRET
UNITED STATES DISTRICT JUDGE

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

INDEPENDENT PRODUCERS, INC.,)
and MVA EXPLORATIONS, LIMITED,)
Plaintiffs,)
vs.)
KOCH INDUSTRIES, INC.,)
Defendant.)

No. 85-C-616-E

DEC 31 1985

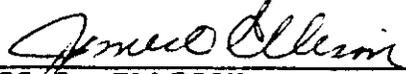
JACK C. SMITH, JR.
U. S. DISTRICT COURT

O R D E R

NOW on this 30th day of December, 1985 comes on for hearing the above styled case and the Court, being fully advised in the premises finds:

Defendant filed motion to transfer this case to the United States District Court for the Western District of Texas, San Antonio Division. The Court concludes Defendant has met its burden of showing that this action could have originally been brought in that district and that the Western District of Texas has the most significant contacts with the parties and the claim filed herein. The question of whether Gat-Man is a necessary party must be addressed by appropriate motion to dismiss which is not now before this Court.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that this case be and is hereby transferred to the Western District of Texas, San Antonio Division. The Clerk of the Court is hereby directed to take whatever administrative steps are necessary to carry out this order.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

WILBUR C. CUNNINGHAM and EARLENE)
CUNNINGHAM,)
)
Plaintiffs,)
)
vs.)
)
OWENS-CORNING FIBERGLAS)
CORPORATION, et al.,)
)
Defendants.)

No. 84-C-471-E

ORDER OF DISMISSAL

NOW on this 30th day of December, 1985, the above styled and numbered cause coming on for hearing before the undersigned Judge of the United States District Court in and for the Northern District of Oklahoma, upon the Stipulation for Dismissal of the plaintiffs and defendant, Standard Insulations, Inc. herein; and the Court being fully advised in the premises, is of the opinion that said cause should be dismissed.

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

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

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

FILED

DEC 21 1985

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

WILBUR C. CUNNINGHAM and)
EARLENE CUNNINGHAM,)
)
Plaintiffs,)

vs.)

No. 84-C-471-E

OWENS-CORNING FIBERGLAS CORPORA-)
TION; THE CELOTEX CORPORATION;)
EAGLE-PICHER INDUSTRIES, INC.;)
ARMSTRONG WORLD INDUSTRIES, INC.;)
GAF CORPORATION; KEENE CORPORATION;)
STANDARD INSULATIONS, INC.;)
PITTSBURGH-CORNING CORPORATION;)
NICOLET INDUSTRIES, INC.;)
RAYMARK INDUSTRIES, INC.;)
OWENS-ILLINOIS, INC.; FORTY-EIGHT)
INSULATIONS, INC.; H. K. PORTER)
COMPANY, INC.; FIBREBOARD CORPORA-)
TION; CROWN CORK AND SEAL COMPANY,)
INC.; COMBUSTION ENGINEERING, INC.,)
)
Defendants.)

ORDER OF DISMISSAL

Now on this 30th day of Dec., 1985, the Court being advised that a compromise settlement having been reached between the plaintiffs and the named defendants, and those parties stipulating to a dismissal with prejudice, the Court orders that the captioned case be dismissed with prejudice as to OWENS-ILLINOIS, INC., OWENS-CORNING FIBERGLAS CORPORATION, FIBREBOARD CORPORATION, EAGLE-PICHER INDUSTRIES, INC., CELOTEX CORPORATION, GAF CORPORATION, PITTSBURGH-CORNING CORPORATION, NICOLET INDUSTRIES, INC., RAYMARK INDUSTRIES, INC. and KEENE CORPORATION.

SL JAMES O. ELISON

UNITED STATES DISTRICT JUDGE

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

FILED

SAUTNER CONSULTING, INC., an)
Oklahoma corporation,)

Plaintiff,)

v.)

OFI OIL CO., a Delaware)
corporation,)

Defendant.)

Case No. 85-C-868-E

DEC 31 1985

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

JOURNAL ENTRY OF JUDGMENT

NOW on this 17th day of December, 1985, there comes on for hearing before the undersigned Judge of the above entitled Court the Plaintiff's Motion for Default Judgment, Plaintiff appearing by and through its attorneys of record, Levinson & Smith, by Jeffrey G. Levinson, and the Defendant appearing not.

The Court finds as follows:

1. The Defendant OFI Oil Co., is a Delaware corporation with its principal place of business in a state other than Oklahoma and the Plaintiff, Sautner Consulting, Inc., is an Oklahoma corporation with its principal place of business in Tulsa County, Oklahoma. Accordingly this Court has jurisdiction of this action pursuant to Title 28 of the United States Code, §1331.

2. The Defendant OFI Oil Co., was properly served with summons and notice pursuant to FRCP 4 (c)(i), and 12 O. S. §2004 (C)(2), at its principal place of business at 31 West 47th Street, Suite 202, New York, New York 10036, and at the office of its registered service agent, The Company Corp., 725 Market Street, Wilmington, Delaware 19801, all as shown by the returns of

service herein, and, accordingly, this Court has jurisdiction over said Defendant.

3. The Defendant OFI Oil Co., though it has been duly and lawfully served with summons herein, has wholly failed and refused to plead or answer as required by law, and that Plaintiff is accordingly entitled to entry of default judgment pursuant to FRCP 55 in accordance with the allegations and prayer of Plaintiff's Complaint.

4. That according to the terms and conditions of the agreement by and between the Plaintiff and the Defendant OFI Oil Co., dated January 19, 1984 as set forth in Plaintiff's Complaint the Defendant, OFI Oil Co. is indebted to the Plaintiff in the sum of \$32,947.47.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Paragraphs 1 through 4 of this Journal Entry be made the order of this Court as if fully set forth; and that judgment be entered against the Defendant, OFI Oil Co., in favor of the Plaintiff, in the total sum of \$32,947.47, and further that the Plaintiff be awarded its costs of prosecuting this action, ~~and a reasonable attorney's fee in the amount of \$_____.~~

S/ JAMES O. ELLISON
JUDGE OF THE DISTRICT COURT

Entered

FILED

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

DEC 30 1985 *af*

HEATHER YEOMAN,)
)
 Plaintiff,)
)
 v.)
)
 INDEPENDENT SCHOOL DISTRICT)
 NO. 23 OF MIAMI, OTTAWA COUNTY,)
 OKLAHOMA; OKLAHOMA DEPARTMENT)
 OF EDUCATION,)
)
 Defendants.)

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

No. 85-C-329-B ✓

ORDER

This case is an appeal from administrative action taken by the Oklahoma State Department of Education in proceedings to determine defendants' responsibility to provide plaintiff a free, appropriate education under the Education For All Handicapped Children Act ("EHA"), 20 U.S.C. §§1401 et seq. (1982). The parties have submitted the matter to the Court upon a joint stipulation of facts and after oral argument was held September 4, 1985. After considering the evidence presented, arguments of counsel, and the applicable legal authority, the Court enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The plaintiff, Heather Yeoman, is now and was at all relevant times herein a resident of Oklahoma and for school purposes, resided within the boundaries of defendant Independent School District No. 23 of Miami, Ottawa County, Oklahoma ("Miami School District").

2. Plaintiff is a multiply handicapped girl, who was eight years old at the time of the events at issue here. Plaintiff suffers from cerebral palsy and is considered to be legally blind.

3. Defendant Miami School District is the school district with the responsibility for providing plaintiff a free, appropriate public education to meet her needs.

4. Defendant State Department of Education ("SDE") is and was at all relevant times herein, responsible through its Special Education Section for administration and monitoring of all public special education programs in the State of Oklahoma. Defendant SDE was responsible, through its Special Education Section, for the final administrative decision regarding the plaintiff's educational program.

5. The child was first enrolled in the Miami Public Schools in the fall of 1981 and was continuously enrolled in the special education program of the district until the start of the 1984-85 school year.

6. On April 30, 1984, an Individualized Education Program for Heather for the 1984-85 school year was prepared by Heather's mother, her special education teacher, her physical therapist, her speech pathologist, two teachers for the visually impaired and Ms. Linda Brooks, director of special education for Miami Public Schools.

7. The IEP developed for Heather established annual educational and developmental goals. The plan was designed to

improve Heather's mobility skills, survival skills, gross and fine motor skills and receptive language skills. The plan outlined specific programs to accomplish these goals.

8. The Special Education program provided by the Miami Public School District complies with standards established by the Oklahoma State Department of Education.

9. Ms. Chris Brooks, the teacher proposed by the Miami School District to teach Heather during the 1984-85 school year, is certified by the State of Oklahoma to teach visually impaired and learning disabled children. At the time in question, Ms. Brooks had not asked for and did not hold certification from the State of Oklahoma to teach multi-handicapped children.

10. On or about August 27, 1984, the child's mother, Mrs. Iris Yeoman, removed her child from the Miami School District and placed her in the Parkview School for the Blind in Muskogee, Oklahoma.

11. The Parkview School for the Blind is approximately 100 miles from the plaintiff's home in Miami.

12. On or about October 19, 1984, the child's mother requested defendant Miami School District to convene a due process hearing to consider the defendant's responsibility to provide either transportation or reimbursement for transportation of Heather to the Parkview School for the Blind.

13. Defendant Miami School District honored the request for a due process hearing and a hearing was held on December 7, 1984.

14. On January 3, 1985, Hearing Officer Euel Pitman issued his decision, holding that the Miami School District must either (i) provide transportation for Heather from Miami to Parkview for two round trips per week, or, (ii) reimburse Mrs. Yeoman for actual mileage for two round trips per week. Reimbursement was to be agreed upon by the parties. If no agreement was reached, the Miami School District was to reimburse Mrs. Yeoman at the rate of twenty-two and one-half cents (22 1/2 cents) per mile.

15. The school district appealed the January 3, 1985, decision and an appeal hearing was conducted on February 15, 1985.

16. On March 9, 1985, Appeal Officer Charles R. Davis issued his decision, holding that the Miami School District had made available to Heather a free, appropriate public education, but that Mrs. Yeoman chose to place her child in another program outside the school district. Therefore, the appeal officer concluded, the school district was not responsible for the transportation of Heather to the out-of-district special education program.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and subject matter herein under Title 20 U.S.C. §1415(e).

2. Any Finding of Fact that might appropriately be characterized as a Conclusion of Law is incorporated herein.

3. Heather Yeoman qualifies as a handicapped child under the EHA, Title 20 U.S.C. §1401(1).

4. The Education of the Handicapped Act requires all states receiving federal financial assistance under the Act to provide a "free, appropriate public education." Board of Educ. of Hendrick Hudson Central School District Bd. of Education, Westchester Co. v. Rowley, 458 U.S. 176, 179-84 (1982); Cain v. Yukon Public Schools, District I-27, 775 F.2d 15 (10th Cir. 1985).

5. The EHA authorizes a reviewing court to order school authorities to reimburse parents for the cost of a private special education for their handicapped child if the court ultimately determines that such placement, rather than the program proposed by the local school district, is proper under the Act. Burlington School Committee v. Department of Education, _____ U.S. _____, 105 S.Ct. 1996, 2002-03 (1985); Cain, supra, at 18-19.

6. Unilateral action by a parent in changing the current placement of the child does not constitute a waiver of the right to reimbursement. Cain, supra, at 19.

7. In determining whether a local school district has offered a free, appropriate public education under the EHA, a court must consider two questions: first, whether the state has complied with the procedures set forth in the Act; and second, whether the Individualized Education Program developed through these procedures is reasonably calculated to enable the child to receive educational benefits. Id.

8. Plaintiff makes no complaint regarding the State of Oklahoma's compliance with the procedures set forth in the EHA. The Court finds no violations of the procedures required by the Act.

9. Title 70 Okl.St. Ann. §13-101 requires all school districts in Oklahoma to provide special education for all exceptional children. "Exceptional children" includes multiple-handicapped children. Id. Heather Yeoman is an exceptional child as defined by Oklahoma law.

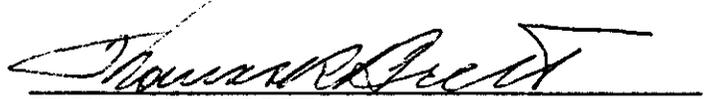
10. School districts in Oklahoma may satisfy their obligations under 70 Okl.St. Ann. §13-101 by "directly providing special education" for exceptional children.

11. The Miami School District met its obligation of providing special education for Heather Yeoman as an exceptional child under 70 Okl.St. Ann. §13-101 and met its obligation to provide a free, appropriate public education under the EHA. The Individualized Education Program prepared by Miami School District personnel was reasonably calculated to enable Heather to receive educational benefits. While the program at the Parkview School for the Blind may have offered a better opportunity to maximize Heather's potential, such an educational program is not required by the law. See, Rowley, supra, at 197, n.21, 199.

12. Therefore, since a free, appropriate public education was available in Miami, the Court finds the defendant Independent School District No. 23 of Miami, Ottawa County, Oklahoma, is not responsible for transporting Heather Yeoman to the Parkview

School for the Blind in Muskogee and is not liable for the cost of transporting Heather Yeoman to the Parkview School.

DATED this 30th day of Dec., 1985.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

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

FILED
1985
COURT

BETTY MEIXNER, ET AL.

PLAINTIFF

VS.

NO. 84-C-911-E

AC & S, INC., ET AL.

DEFENDANTS

O R D E R

Upon motion of the Plaintiff, the Complaint filed herein against Defendant Industrial Insulation should be, and it is, hereby dismissed without prejudice.

IT IS SO ORDERED.

S/ THOMAS R. BRETT
for S/ JAMES O. ELLISON

U.S. DISTRICT JUDGE

DATE: 12-27-85

APPROVED BY:



EDWARD O. MOODY P.A.
506 First Federal Plaza
Little Rock, Arkansas 72201
(501) 376-0000

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

FILED

DEC 26 1995

JACOB D. SILVER, CLERK
U.S. DISTRICT COURT

KENNETH BLEYTHING, SR., &
JEANETTE L. BLEYTHING,

Plaintiffs,

vs.

Case No. 85-C-878-E

CROWN LEASING CORPORATION,
a Texas corporation, d/b/a
CROWN HOME CENTER, and CROWN
STORES OF AMERICA, INC., a
Texas corporation,

Defendants.

STIPULATION OF DISMISSAL WITH PREJUDICE

COME NOW the parties in the above styled and numbered cause and stipulate to the dismissal of all actions asserted herein with prejudice to any future action.

FRASIER & FRASIER

By: 

Steven R. Hickman OBA#4172
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LOGAN, LOWRY, JOHNSTON, SWITZER,
WEST & MCGEADY

By: 

Donald K. Switzer
P. O. Box 558
Vinita, OK 74301
(918)256-7511
Attorneys for Defendants

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

M-1252-E

CIVIL ACTION FILE NO. 85 Civil 5275 JES

SOLCOOR INCORPORATED,
Plaintiff

vs.

PMP COMMUNICATIONS, INC.,
Defendant

DEFAULT
JUDGMENT
#85,2245

JACK O. SILVERSTEIN
U.S. DISTRICT COURT

DEC 26 1985

FILED

CERTIFICATION OF JUDGMENT FOR REGISTRATION IN ANOTHER DISTRICT

I, RAYMOND F. BURGHARDT, Clerk of the United States District Court for
the SOUTHERN District of NEW YORK,

do hereby certify the annexed to be a true and correct copy of the original judgment entered in the
above entitled action on December 9, 1985, as it appears of record in my office,
and that

- Said judgment having been entered on default of the
defendant(☞) in appearing herein and no application having
been made to vacate said judgment.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said
Court this 20th day of December, 19 85.

RAYMOND F. BURGHARDT, Clerk

By Gregory J. Light Deputy Clerk

* When no notice of appeal from the judgment has been filed, insert "no notice of appeal from the said judgment has been filed in my office and the time for appeal commenced to run on [insert date] upon the entry of [If no motion of the character described in Rule 73(a) F.R.C.P. was filed, here insert 'the judgment', otherwise describe the nature of the order from the entry of which time for appeal is computed under that rule.] If an appeal was taken, insert "a notice of appeal from the said judgment was filed in my office on [insert date] and the judgment was affirmed by mandate of the Court of Appeals issued [insert date]" or "a notice of appeal from the said judgment was filed in my office on [insert date] and the appeal was dismissed by the [insert 'Court of Appeals' or 'District Court'] on [insert date]", as the case may be.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEC # 4

-----x
SOLCOOR INCORPORATED,

Plaintiff

DEFAULT JUDGMENT

- against -

85CIV5275 (JES)

PMP COMMUNICATIONS INC.,

Defendant

U.S. DISTRICT COURT
FILED
DEC 5 1985

85-2145

This action having been commenced on July 11, 1985 by the filing of the Summons and Complaint, and a copy of the Summons and Complaint having been personally served on the defendant, PMP Communications Inc. on September 13, 1985 by personal service of a copy of the Summons and Complaint on Tom Gutman, Resident Agent of the defendant, by Deputy Sheriff Pat Owens, and a proof of service having been filed on September 24, 1985 and the defendant not having answered the Complaint, and the time for answering the Complaint having expired, it is

ORDERED, ADJUDGED AND DECREED: that the plaintiff have judgment against defendant in the liquidated amount of \$25,687.89 with interest at 9% from July 11, 1985 amounting to \$227.00 plus costs and disbursements of this action in the amount of \$170.00 amounting in all to \$26,679.89.

\$25,842.70 JES

Dated: New York, New York
November , 1985

Dec 4

[Signature]
U.S.D.J.

A TRUE COPY
RAYMOND F. BURGHARDT., Clerk

By Diana Ciampa
Deputy Clerk

DEC 9 1985

MICROFILM
DEC 06 1985

CM

United States District Court

FOR THE

NORTHERN DISTRICT OF TEXAS - DALLAS

M-1253-CV ✓

CIVIL ACTION FILE NO. CA3-84-0257G

MOBILE OIL CORPORATION

vs.

HERNDON OIL AND GAS COMPANY

FILED JUDGMENT

DEC 26 1985 *apt*

CERTIFICATION OF JUDGMENT FOR REGISTRATION IN ANOTHER DISTRICT

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

I, Nancy Hall Doherty, Clerk of the United States District Court for
the Northern District of Texas,

do hereby certify the annexed to be a true and correct copy of the original judgment entered in the
above entitled action on February 25, 1985, as it appears of record in my office,
and that

- No notice of appeal from the said judgment has been filed in my office and
the time for appeal commenced to run on February 25, 1985 upon the entry of
the judgment.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said
Court this 20th day of December, 19 85.

NANCY HALL DOHERTY, Clerk
By Maureen Ruprecht *M. Ruprecht* Deputy Clerk

* When no notice of appeal from the judgment has been filed, insert "no notice of appeal from the said judgment has been filed in my office and the time for appeal commenced to run on [insert date] upon the entry of [If no motion of the character described in Rule 73(a) F.R.C.P. was filed, here insert 'the judgment', otherwise describe the nature of the order from the entry of which time for appeal is computed under that rule.] If an appeal was taken, insert "a notice of appeal from the said judgment was filed in my office on [insert date] and the judgment was affirmed by mandate of the Court of Appeals issued [insert date]" or "a notice of appeal from the said judgment was filed in my office on [insert date] and the appeal was dismissed by the [insert 'Court of Appeals' or 'District Court'] on [insert date]", as the case may be.

Plaintiff's complaint; and is indebted to Plaintiff in the sum of ONE MILLION TWO HUNDRED FORTY-SIX THOUSAND FORTY-FIVE AND 92/100 DOLLARS (\$1,246,045.92), plus reasonable attorneys' fees of TWELVE THOUSAND SIX HUNDRED SIXTY-NINE AND 80/100 DOLLARS (\$12,669.80), with pre-judgment interest at the rate of 10 % from August 1, 1981 until the date of this Judgment, with post-judgment interest to accrue at 9.09% from the date of Judgment until paid, together with costs of court, for all of which let execution issue.

SIGNED this 25 day of February, 1985.

A. Joe Fish
JUDGE PRESIDING

Certified a true copy of an instrument on file in my office on 12-20-85
NANCY HALL DOHERTY, Clerk, U.S. District Court, Northern District of Texas
By M. Ruprecht Deputy

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

JAMES D. NAYLOR and PAULA)
NAYLOR, husband and wife,)
)
Plaintiffs,)
)
-vs-)
)
PUBLIC SERVICE COMPANY OF)
OKLAHOMA, an Oklahoma)
corporation; DR. EDGAR)
CLEAVER; DR. JERRY CLEVELAND;)
M F. REECE; JOHN WICKERSHAM;)
TOM DRAKE; JOHN DOE; and)
RICHARD ROE,)
)
Defendants.)

CIV 85-C-391-R

F I L E D

DEC 23 1985

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

O R D E R

This civil suit arises from an incident of environmental contamination which occurred at the Page Belcher Federal Building (Building) in Tulsa, Oklahoma. The contamination occurred on April 16, 1982, when an electrical transformer malfunctioned causing smoke containing polychlorinated biphenyls (PCBs), polychlorinated dibenzodioxins (dioxins) and polychlorinated dibenzofurans (furans) to enter the Building through the ventilation system. Plaintiffs allege that the contamination was only superficially cleaned up and that a continuing health hazard exists for those working in or frequenting the Building.

Defendant-Public Service Company of Oklahoma (PSO) owned and operated the electrical transformer which malfunctioned. Defendant-PSO was also responsible for cleaning up the contamination. Plaintiff-Paula Naylor was a federal employee whose office was in the Building at the

time of the transformer malfunction. Plaintiffs allege that Plaintiff-Paula's subsequent cancer was the result of the Building contamination.

There is no diversity between the parties. While the Complaint states that "every issue of law and fact herein involves federal questions of law," the only federal claim alleged against Defendant-PSO is based on the federal common law of nuisance. Defendant-PSO filed a Motion to Dismiss for lack of subject matter jurisdiction. Defendant-PSO's position is that the Complaint fails to state a cause of action under the federal common law of nuisance for any of the following reasons:

- 1) there are no allegations of interstate effect from the contamination, or
- 2) governmental units are the proper parties for federal common law, rather than private individuals such as Plaintiffs, or
- 3) the federal common law of nuisance regarding hazardous substances has been preempted by federal legislation.

Federal Common Law

Unlike state courts, federal courts do not have the power to develop general common law. Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188, 1194 (1938); City of Milwaukee v. Illinois, 451 U.S. 304, 312, 101 S.Ct. 1784, 68 L.Ed.2d 114, 123 (1981). However, in limited areas where there is a need, the Court has

formulated what is referred to as "federal common law."
United States v. Standard Oil Co., 332 U.S. 301, 308, 67
S.Ct. 1604, 91 L.Ed. 2067, 2072 (1947).

[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Texas Industries v. Radcliff Materials, 451 U.S. 630, 640,
101 S.Ct. 2061, 68 L.Ed.2d 500, 509 (1981) (footnotes
omitted).

The federal common law of nuisance was first recognized in Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971). In that case, the State of Texas sought to enjoin residents of New Mexico from using certain pesticides which would be washed into an interstate river and would eventually pollute the water supply of several Texas municipalities. The use of federal common law was necessary to protect Texas from interstate pollution without subjecting Texas to the laws of New Mexico.

Interstate Effect

The Motion to Dismiss of Defendant-PSO is granted. Plaintiffs failed to state a claim under the federal common law of nuisance because there is no allegation that the contamination involved the rights of another state.

The contamination was confined to the Building and its immediate area. Plaintiffs allege in their Brief in Response that the contamination of a federal employee, i.e. Plaintiff-Paula, who was conducting the business of the government based in Washington, D. C., affects interstate commerce. The Plaintiffs cite no authority where interstate commerce has been the basis for application of the federal common law of nuisance.¹ The Court can find no reason in this case to extend the basis for federal common law to include interstate commerce interests.

Intrastate pollution is not a proper area for the development of federal common law because it requires neither "a uniform federal rule of decision nor implicates important federalism concern." United States v. Price, 523 F.Supp. 1055, 1069 (D.N.J. 1981), aff'd 688 F.2d 204 (3d

1.

But courts asked to fashion a federal common law to adjudicate interstate disputes have usually done so only in contexts where the "interstate" nature of the dispute concerned states or state interests, rather than matters within interstate commerce in the constitutional sense.

Parsell v. Shell Oil Co., 421 F.Supp. 1275, 1281 N.15 (D. Conn. 1976), aff'd without opinion sub nom. East End Yacht Club, Inc. v. Shell Oil Co., 573 F.2d 1289 (2nd Cir. 1977).

Cir. 1982). Federal common law of nuisance, as formulated in Illinois v. City of Milwaukee, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972), vacated on other grounds 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981), and Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971), requires at a minimum that there be an interstate effect. Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 520 (8th Cir. 1975). "Where there is no claim of vindication of the rights of another state and where there is allegation of any interstate effect," there is no underlying reason to apply federal common law. Committee for the Consideration of the Jones Falls Sewage System v. Train, 539 F.2d 1006, 1010 (4th Cir. 1976); Ancarrow v. City of Richmond, 600 F.2d 443, 445 (4th Cir. 1979), cert. denied 444 U.S. 992, 100 S.Ct. 523, 62 L.Ed.2d 421 (1979).

"If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." City of Milwaukee v. Illinois, 451 U.S. 304, 313 n.7, 101 S.Ct. 1784, 68 L.Ed.2d 114, 124 n.7 (1981). The fact that Plaintiffs request pendent jurisdiction for a number of claims against PSO which are based on state law is evidence that there is no need to impose federal common law.

While there exists a line of authority holding that the federal common law of nuisance can be applied to intrastate pollution, it is a minority position that this Court does not adopt. Unlike this case, those decisions

turned primarily on the determination that navigable waters are a federal concern. Illinois v. Outboard Marine Corp., 619 F.2d 623, 629 (7th Cir. 1980), vacated 453 U.S. 917, 101 S.Ct. 3152, 69 L.Ed.2d 1000 (1981), on remand 680 F.2d 473 (7th Cir. 1982) (intrastate pollution of navigable waters; on remand, the court did not address the issue of the intrastate nature of the pollution); Commonwealth of Puerto Rico v. Muskie, 507 F.Supp. 1035, 1061-62 (D.P.R. 1981), vacated sub nom. Marquez-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981) (intrastate pollution of coastal waters); United States v. Solvents Recovery Service of New England, 496 F.Supp. 1127, 1139 (D. Conn. 1980) (intrastate pollution of groundwaters); Stream Pollution Control Board v. United States Steel Corp., 512 F.2d 1036, 1039-41 (7th Cir. 1975) (intrastate pollution of navigable waters); United States v. Ira S. Bushey & Sons, 363 F.Supp. 110, 119-122 (D. Vt. 1973), aff'd without opinion 487 F.2d 1393 (2nd Cir. 1973), cert. denied Ira S. Bushey & Sons v. United States, 417 U.S. 976, 94 S.Ct. 3182, 41 L.Ed.2d 1146 (1974) (intrastate oil spills on navigable waters).

Having determined that an interstate effect (as opposed to interstate commerce) is both necessary and lacking, the Court does not need to address Plaintiffs' alternative reasons for dismissing the federal common law claim: that private individuals are not proper parties under the federal common law of nuisance and that federal legislation has preempted the federal common law of nuisance.

Plaintiffs' § 1983 civil rights claim has been dismissed in a separate order. Order of December 20, 1985. There being no remaining basis for federal jurisdiction, all pendent state claims are also dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218, 228 (1966).

Accordingly, the Motion to Dismiss of Defendant-PSO is granted.

IT IS SO ORDERED this 20th day of December, 1985.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

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

ALFRED N. ABDO, et al.,)
)
Plaintiff,)
)
-vs-)
)
PUBLIC SERVICE COMPANY OF)
OKLAHOMA, an Oklahoma)
corporation; DR. EDGAR)
CLEAVER; DR. JERRY CLEVELAND;)
M. F. REECE; JOHN WICKERSHAM;)
TOM DRAKE; JOHN DOE; and)
RICHARD ROE,)
)
Defendants.)

85-C-390-R

F I L E D

DEC 23 1985

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

O R D E R

This civil suit arises from an incident of environmental contamination which occurred at the Page Belcher Federal Building (Building) in Tulsa, Oklahoma. The contamination occurred on April 16, 1982, when an electrical transformer malfunctioned causing smoke containing polychlorinated biphenyls (PCBs), polychlorinated dibenzodioxins (dioxins) and polychlorinated dibenzofurans (furans) to enter the Building through the ventilation system.

The individual Defendants-Dr. Jerry Cleveland, Dr. Edgar Cleaver, M. F. Reece, John Wickersham and Tom Drake (Health Officials), acting as agents of the Tulsa City-County Health Department, investigated the Building for possible contamination. Plaintiffs, who are the class of individuals employed in or frequenting the Building and their families, allege that Defendant-Health Officials

performed that investigation superficially and failed to disclose possible health risks to the Plaintiffs.

Defendant-Health officials are named only in Count Four of the Amended Complaint. That count is for violation of Plaintiffs' civil rights under 42 U.S.C. § 1983. Defendant-Health Officials filed a Motion to Dismiss on the basis that Plaintiffs' allegations are insufficient to warrant jurisdiction under § 1983. The Motion to Dismiss is granted for failure to state a claim upon which relief can be granted.

The first inquiry in any § 1983 suit is whether the plaintiff has been deprived of a right "secured by the Constitution and laws."¹ Baker v. McCollan, 443 U.S. 137, 140, 99 S.Ct. 2689, 61 L.Ed.2d 433, 439 (1979). Plaintiffs' allege in their Amended Complaint, at paragraph 6.11, that they were deprived of "their constitutional rights to a complete, full life and their individual liberty interests." The Court can find no support for the rights Plaintiffs claim.

1. 42 U.S.C. § 1983 (in part):

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

Right to a Full and Complete Life

Under both the Fifth and Fourteenth Amendments, individuals have a right not to be deprived of life, liberty, or property, without due process of law. The concern of that right is with the use of state-created power to kill rather than with the state's failure to prevent death. Jackson v. City of Joliet, 715 F.2d 1200, 1204 (7th Cir. 1983).

There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. Brazier v. Cherry, 293 F.2d 401, 404-05 (5th Cir. 1961). But there is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (where state officers' alleged negligent release from custody of a dangerous lunatic who then killed that plaintiff's decedent did not raise a constitutional claim under § 1983). See Major v. Benton, 647 F.2d 110, 113 (10th Cir. 1981) (where an inmate's death in a sewer ditch cave-in caused by alleged negligence of prison officials in failing to formulate and implement safety measures for digging the ditch did not

raise a constitutional claim required for § 1983); Heard v. Lafourche Parish School Board, 480 F. Supp. 231, 232 (E.D. La. 1979) (where student's death from a fight with another student on school grounds allegedly contributed to by school principal's failure to protect students from attack by other students did not raise a constitutional claim under § 1983); Dollar v. Haralson, 704 F.2d 1540, 1543 (11th Cir. 1983), cert. denied 464 U.S. 963, 104 S.Ct. 399, 78 L.Ed.2d 341 (1983) (where the drowning of two children who were attempting to ford a creek allegedly caused by the negligent failure of county officials to construct a bridge at that spot did not raise a constitutional claim under § 1983).

The right not to be deprived of life without due process is not the same as Plaintiffs' claimed right to live a full and complete life. A right to a full life necessarily implies a duty to protect against all life-threatening dangers. Plaintiffs' cite no authority for such a duty being constitutionally imposed.

Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles.

Baker v. McCollan, 443 U.S. 137, 146, 99 S.Ct. 2689, 61 L.Ed.2d 433, 443 (1979).

Right to Individual Liberty Interests

Plaintiffs fail to elaborate on how the alleged contamination of the Building infringes on their right to

liberty. To the extent that Plaintiffs' claim is that the Building contamination deprives them of their freedom from an unhealthy environment, there is no such constitutionally protected right. Gasper v. Louisiana Stadium & Exposition District, 418 F.Supp. 716, 720-21 (E.D. La. 1976), aff'd 577 F.2d 897 (5th Cir. 1978), cert. denied 439 U.S. 1073, 99 S.Ct. 846, 59 L.Ed.2d 40 (1979) (action brought by nonsmokers against operators of Louisiana Superdome to enjoin tobacco smoking during events); Tanner v. Armco Steel Corp., 340 F.Supp. 532, 537 (S.D.Tex. 1972) (action brought by residents to recover for personal injuries sustained from exposure to air pollutants emitted by petroleum refineries); Federal Employees For Non-Smokers' Rights v. United States, 446 F.Supp. 181, 184-85 (D.D.C. 1978), aff'd without opinion 598 F.2d 310 (D.C. Cir. 1979), cert. denied 444 U.S. 926, 100 S.Ct. 265, 62 L.Ed.2d 182 (1979) (action brought by federal employees to restrict smoking in federal buildings to designated areas); In re Motor Vehicle Air Pollution Control Equipment, 52 F.R.D. 398, 402 (C.D. Calif. 1970) (antitrust litigation alleging conspiracy to delay development of effective motor vehicle air pollution control equipment).

To the extent that Plaintiffs' claim is that exposure to the contamination amounts to a violation of their bodily integrity, the claim is without merit. "Cases recognizing a § 1983 claim for the violation of one's bodily integrity involve direct, active and intentional action" by the one acting under color of state law. Ayers v. Township

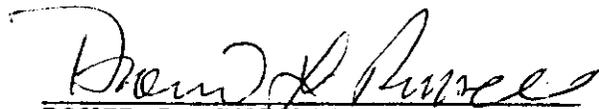
of Jackson, 189 N.J. Super. 561, 461 A.2d 184, 191 (1983) (action brought by residents alleging that toxic waste leached through municipal landfill, contaminating their well water and invading their bodily integrity).

Pendent Claims

Since there is no constitutional right to either a full and complete life or a clean and safe environment, and there are no facts alleged to support any other claim of infringement of Plaintiffs' liberty interests, the § 1983 claim must be dismissed. Plaintiffs' claim under the federal common law of nuisance, which is the only other basis for federal jurisdiction, has been dismissed in a separate order. Order of December 20, 1985. Therefore, all pendent state claims are also dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218, 228 (1966).

Accordingly, the Motion to Dismiss of the individual Defendants-Cleaver, Cleveland, Reece, Wickersham, and Drake is granted.

IT IS SO ORDERED this 20th day of December, 1985.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

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

ALFRED N. ABDO, et al.,)
)
Plaintiffs,)
)
-vs-)
)
PUBLIC SERVICE COMPANY OF)
OKLAHOMA, an Oklahoma)
corporation; DR. EDGAR)
CLEAVER; DR. JERRY CLEVELAND;)
M. F. REECE; JOHN WICKERSHAM;)
TOM DRAKE; JOHN DOE; and)
RICHARD ROE,)
)
Defendants.)

85-C-390-R

FILED

DEC 23 1985

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

ORDER

This civil suit arises from an incident of environmental contamination which occurred at the Page Belcher Federal Building (Building) in Tulsa, Oklahoma. The contamination occurred on April 16, 1982, when an electrical transformer malfunctioned causing smoke containing polychlorinated biphenyls (PCBs), polychlorinated dibenzodioxins (dioxins) and polychlorinated dibenzofurans (furans) to enter the Building through the ventilation system. Plaintiffs allege that the contamination from these toxic agents was only superficially cleaned up and that a continuing health hazard exists for those working in or frequenting the Building.

Plaintiffs are the class of individuals working in or frequenting the Building and their families. Defendant-Public Service Company of Oklahoma (PSO) owned and operated the electrical transformer which malfunctioned.

Defendant-PSO was also responsible for cleaning up the contamination.

Defendant-PSO filed a Motion to Dismiss for lack of subject matter jurisdiction. There being no diversity between the parties, Plaintiffs' only basis for federal jurisdiction over this Defendant is the federal common law of nuisance. Defendant-PSO's position is that the Amended Complaint fails to state a cause of action under the federal common law of nuisance for any one of the following reasons:

- 1) there are no allegations of interstate effect from the contamination, or
- 2) governmental units are the proper parties for federal common law claims, rather than private individuals such as Plaintiffs, or
- 3) the federal common law of nuisance regarding hazardous substances has been preempted by federal legislation.

Federal Common Law

Unlike state courts, federal courts do not have the power to develop general common law. Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188, 1194 (1938); City of Milwaukee v. Illinois, 451 U.S. 304, 312, 101 S.Ct. 1784, 68 L.Ed.2d 114, 123 (1981). However, in limited areas where there is a need, the Court has formulated what is referred to as "federal common law." United States v. Standard Oil Co., 332 U.S. 301, 308, 67 S.Ct. 1604, 91 L.Ed. 2067, 2072 (1947).

[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Texas Industries v. Radcliff Materials, 451 U.S. 630, 640, 101 S.Ct. 2061, 68 L.Ed.2d 500, 509 (1981) (footnotes omitted).

The federal common law of nuisance was first recognized in Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971). In that case, the State of Texas sought to enjoin residents of New Mexico from using certain pesticides which would be washed into an interstate river and would eventually pollute the water supply of several Texas municipalities. The use of federal common law was necessary to protect Texas from interstate pollution without subjecting Texas to the laws of New Mexico.

Interstate Effect

The Motion to Dismiss of Defendant-PSO is granted. Plaintiffs failed to state a claim under the federal common law of nuisance because there is no allegation that the contamination involved the rights of another state.

The contamination was confined to the Building and its immediate area. Plaintiffs allege in their Brief in Opposition that because the post office is located in the Building, interstate commerce interests are involved which require the application of federal common law. The Amended Complaint, however, merely states that the postal authorities relied on Defendant-PSO's representations that the building contamination had been cleaned up. A complaint cannot be amended by briefs filed in opposition to a motion to dismiss. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984), cert. denied 53 U.S.L.W. 3669, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1985). As the Amended Complaint now reads, the environmental rights of no other state except Oklahoma are involved. Furthermore, the Plaintiffs cite no authority where interstate commerce has been the basis for application of the federal common law of nuisance.¹ The Court can find no reason in this case to extend the basis for federal common law to include interstate commerce interests.

Intrastate pollution is not a proper area for the

1.

But courts asked to fashion a federal common law to adjudicate interstate disputes have usually done so only in contexts where the "interstate" nature of the dispute concerned states or state interests, rather than matters within interstate commerce in the constitutional sense.

Parsell v. Shell Oil Co., 421 F.Supp. 1275, 1281 n.15 (D. Conn. 1976), aff'd without opinion sub nom. East End Yacht Club, Inc. v. Shell Oil Co., 573 F.2d 1289 (2nd Cir. 1977).

development of federal common law because it requires neither "a uniform federal rule of decision nor implicates important federalism concerns." United States v. Price, 523 F.Supp. 1055, 1069 (D.N.J. 1981), aff'd 688 F.2d 204 (3rd Cir. 1982). Federal common law of nuisance, as formulated in Illinois v. City of Milwaukee, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972), vacated on other grounds 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981), and Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971), requires at a minimum that there be an interstate effect. Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 520 (8th Cir. 1975). "Where there is no claim of vindication of the rights of another state and where there is no allegation of any interstate effect," there is no underlying reason to apply federal common law. Committee for the Consideration of the Jones Falls Sewage System v. Train, 539 F.2d 1006, 1010 (4th Cir. 1976); Ancarrow v. City of Richmond, 600 F.2d 443, 445 (4th Cir. 1979), cert. denied 444 U.S. 992, 100 S.Ct. 523, 62 L.Ed.2d 421 (1979).

"If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." City of Milwaukee v. Illinois, 451 U.S. 304, 313 n.7, 101 S.Ct. 1784, 68 L.Ed.2d 114, 124 n.7 (1981). The fact that Plaintiffs request pendent jurisdiction for a number of claims against PSO which are based on state law (statutory nuisance, deceit, battery, assault, negligence and strict liability) is

evidence that there is no need to resort to federal common law.

While there exists a line of authority holding that the federal common law of nuisance can be applied to intrastate pollution, it is a minority position that this Court does not adopt. Unlike this case, those decisions turned primarily on the determination that navigable waters are a federal concern. Illinois v. Outboard Marine Corp., 619 F.2d 623, 629 (7th Cir. 1980), vacated 453 U.S. 917, 101 S.Ct. 3152, 69 L.Ed.2d 1000 (1981), on remand 680 F.2d 473 (7th Cir. 1982) (intrastate pollution of navigable waters; on remand, the court did not address the issue of the intrastate nature of the pollution); Commonwealth of Puerto Rico v. Muskie, 507 F.Supp. 1035, 1061-62 (D.P.R. 1981), vacated sub nom. Marquez-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981) (intrastate pollution of coastal waters); United States v. Solvents Recovery Service of New England, 496 F.Supp. 1127, 1139 (D.Conn. 1980) (intrastate pollution of groundwaters); Stream Pollution Control Board v. United States Steel Corp., 512 F.2d 1036, 1039-41 (7th Cir. 1975) (intrastate pollution of navigable waters); United States v. Ira S. Bushey & Sons, 363 F.Supp. 110, 119-122 (D.Vt. 1973), aff'd without opinion 487 F.2d 1393 (2nd Cir. 1973), cert. denied Ira S. Bushey & Sons v. United States, 417 U.S. 976, 94 S.Ct. 3182, 41 L.Ed.2d 1146 (1974) (intrastate oil spills on navigable waters).

Having determined that an interstate effect (as opposed to interstate commerce) is both necessary and lacking, the Court does not need to address Plaintiffs' alternative reasons for dismissing the federal common law claim: that private individuals are not proper parties under the federal common law of nuisance and that federal legislation has preempted the federal common law of nuisance.

Plaintiffs' § 1983 civil rights claim has been dismissed in a separate order. Order of December 20, 1985. There being no remaining basis for federal jurisdiction, all pendent state claims are also dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218, 228 (1966).

Accordingly, the Motion to Dismiss of Defendant-PSO is granted.

IT IS SO ORDERED this 20th day of December, 1985.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

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

FILED

DEC 23 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

CHARLES FREDERICK FISHER and)	
BILLIE JEAN FISHER,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
FIBREBOARD CORPORATION,)	
et al.,)	
)	
Defendants.)	No. 85-C-379-C

STIPULATION FOR DISMISSAL WITH PREJUDICE

Come now the plaintiffs, Charles Frederick Fisher and Billie Jean Fisher, and the defendant Combustion Engineering, Inc., and jointly stipulate and agree that plaintiffs' cause should be dismissed with prejudice.

There are no cross claims filed by or against said defendant, Combustion Engineering, Inc.

Said parties attach hereto proposed Order.

DONE and dated this 20 day of December, 1985.

UNGERMAN, CONNER & LITTLE
By 
Mark H. Iola
P. O. Box 2099
Tulsa, OK 74101
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ATTORNEYS FOR DEFENDANT
COMBUSTION ENGINEERING, INC.

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

JAMES D. NAYLOR and)
PAULA NAYLOR, husband and)
wife,)
)
Plaintiff,)
)
-vs-)
)
PUBLIC SERVICE COMPANY OF)
OKLAHOMA, an Oklahoma)
corporation; DR. EDGAR)
CLEAVER; DR. JERRY CLEVELAND;)
M. F. REECE; JOHN WICKERSHAM;)
TOM DRAKE; JOHN DOE; and)
RICHARD ROE,)
)
Defendants.)

85C-391-R ✓

F I L E D

DEC 23 1985 *AS*

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

O R D E R

This civil suit arises from an incident of environmental contamination which occurred at the Page Belcher Federal Building (Building) in Tulsa, Oklahoma. The contamination occurred on April 16, 1982, when an electrical transformer malfunctioned causing smoke containing polychlorinated biphenyls (PCBs), polychlorinated dibenzodioxins (dioxins) and polychlorinated dibenzofurans (furans) to enter the Building through the ventilation system.

The individual Defendants-Dr. Jerry Cleveland, Dr. Edgar Cleaver, M. F. Reece, John Wickersham and Tom Drake (Health Officials), acting as agents of the Tulsa City-County Health Department, were responsible for investigating the Building for possible contamination. Plaintiff-Paula Naylor was a federal employee whose office

was in the Building at the time of the transformer malfunction. Plaintiffs allege that Plaintiff-Paula's subsequent cancer was the result of Defendant-Health Officials' superficial investigation and failure to disclose possible health risks to Plaintiff-Paula.

While the Complaint states that "every issue of law and fact herein involves federal questions of law," the only federal claim alleged against the Defendant-Health Officials is for violation of the Plaintiffs' civil rights pursuant to 42 U.S.C. § 1983. Defendant-Dr. Edgar Cleaver filed a Motion to Dismiss for failure to state a claim. The Defendant-Health Officials, including Dr. Cleaver, filed another Motion to Dismiss on the basis that Plaintiffs' allegations were insufficient to warrant jurisdiction under § 1983. The Motion to Dismiss of Defendant-Health Officials is granted for failure to state a claim upon which relief can be granted.

The first inquiry in any § 1983 suit is whether the plaintiff has been deprived of a right "secured by the

1. 42 U.S.C. § 1983 (in part):

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

Constitution and laws."¹ Baker v. McCollan, 443 U.S. 137, 140, 99 S.Ct. 2689, 61 L.Ed.2d 433, 439 (1979). Plaintiffs allege, at paragraph 10(J) of the Complaint, that Defendant-Health Officials "violated the Civil Rights of Plaintiffs by wholly failing to inspect, report and investigate in accordance with their duties as representatives of the Tulsa-City County Health Department when they knew or should have known that their failure to do so could cause the harm that Plaintiff has incurred." Plaintiffs then further allege, at paragraph 12 of the Complaint, that Defendants' negligence proximately caused Plaintiff-Paula to lose her good health, contract cancer, undergo major surgery and radiation treatments, and have a greatly diminished life expectancy. That is the extent of the Plaintiffs' § 1983 claim stated in the Complaint.

Under a § 1983 claim, the constitutional right plaintiffs are allegedly deprived of must be specifically identified; conclusory allegations are not sufficient. Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981). In their Response Brief, Plaintiffs do specify a deprivation of their rights to a full and complete life and individual liberty interests protected by the Fifth and Fourteenth Amendments. However, a complaint cannot be amended by briefs filed in opposition to a motion to dismiss. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984), cert. denied 53 U.S.L.W. 3669, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1985).

Plaintiffs fail to state a claim under § 1983 because no deprivation of a constitutional right is specifically alleged in the Complaint. Furthermore, the Complaint cannot be amended to cure this defect. From the facts stated, the Court is unable to identify any recognized constitutional right.

Under both the Fifth and Fourteenth Amendments, individuals have a right not to be deprived of life, liberty, or property, without due process of law. The concern of that right is with the use of state-created power to kill rather than with the state's failure to prevent death. Jackson v. City of Joliet, 715 F.2d 1200, 1204 (7th Cir. 1983), cert. denied 465 U.S. 1049, 104 S.Ct. 1325, 79 L.Ed.2d 720 (1984).

There is a constitutional right not to be murdered by a state officer, for the state violates the Fourteenth Amendment when its officer, acting under color of state law, deprives a person of life without due process of law. Brazier v. Cherry, 293 F.2d 401, 404-05 (5th Cir. 1961). But there is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (where state officers' alleged negligent release from custody of a

dangerous lunatic who then killed that plaintiff's decedent did not raise a constitution claim under § 1983). See Major v. Benton, 647 F.2d 110, 113 (10th Cir. 1981) (where an inmate's death in a sewer ditch cave-in caused by alleged negligence of prison officials in failing to formulate and implement safety measures for digging the ditch did not raise a constitutional claim required for § 1983); Heard v. Lafourche Parish School Board, 480 F. Supp. 231, 232 (E.D.La. 1979) (where student's death from a fight with another student on school grounds allegedly contributed to by school principal's failure to protect students from attack by other students did not raise a constitutional claim under § 1983); Dollar v. Haralson, 704 F.2d 1540, 1543 (11th Cir. 1983), cert. denied 464 U.S. 963, 104 S.Ct. 399, 78 L.Ed.2d 341 (1983) (where the drowning of two children attempting to ford a creek allegedly caused by the negligent failure of county officials to construct a bridge at that spot did not raise a constitutional claim under § 1983.)

The right not to be deprived of life without due process does not give rise to an affirmative duty to prevent death.

Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles.

Baker v. McCollan, 443 U.S. 137, 146, 99 S.Ct. 2689, 61 L.Ed.2d 433, 443 (1979).

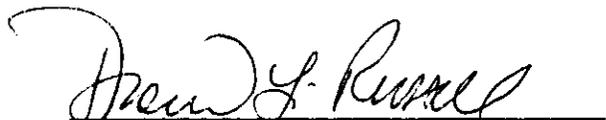
Plaintiffs fail to elaborate on how the alleged contamination of the Building infringes on their right to liberty. To the extent that Plaintiffs' claim is that the Building contamination deprives them of their freedom from an unhealthy environment, there is no such constitutionally protected right. Gaspar v. Louisiana Stadium & Exposition District, 418 F.Supp. 716, 720-21 (E.D. La. 1976), aff'd 577 F.2d 897 (5th Cir. 1978), cert. denied 439 U.S. 1073, 99 S.Ct. 846, 59 L.Ed.2d 40 (1979) (action brought by nonsmokers against operators of Louisiana Superdome to enjoin tobacco smoking during events); Tanner v. Armco Steel Corp., 340 F.Supp. 532, 537 (S.D. Tex. 1972) (action brought by residents to recover for personal injuries sustained from exposure to air pollutants emitted by petroleum refineries); Federal Employees For Non-Smokers' Rights v. United States, 446 F.Supp. 181, 184-85 (D.D.C. 1978), aff'd without opinion 598 F.2d 310 (D.C.Cir. 1979), cert. denied 444 U.S. 926, 100 S.Ct. 265, 62 L.Ed.2d 182 (1979) (action brought by federal employees to restrict smoking in federal buildings to designated areas); In re Motor Vehicle Air Pollution Control Equipment, 52 F.R.D. 398, 402 (C.D. Calif. 1970) (dismissed complaint alleging that automobiles manufactured by defendants violated plaintiffs' right to clean air and to a safe and healthy environment).

To the extent that Plaintiffs' claim is that exposure to the contamination amounts to a violation of their bodily integrity, the claim is without merit. "Cases recognizing a § 1983 claim for the violation of one's bodily integrity involve direct, active and intentional action" by the one acting under color of state law. Ayers v. Township of Jackson, 189 N.J. Super. 561, 461 A.2d 184, 191 (1983) (action brought by residents alleging that toxic waste leached through municipal landfill contaminating their well water and invading their bodily integrity).

Since there is no constitutional right to either a full and complete life or a clean and safe environment, and there are no facts alleged to support any other claim of infringement of Plaintiffs' liberty interests, the § 1983 claim must be dismissed. Plaintiffs' claim under the federal common law of nuisance, which is the only other basis for federal jurisdiction, has been dismissed in a separate order. Order of December 20, 1985. Therefore, all pendent state claims are also dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218, 228 (1966).

Accordingly, the Motion to Dismiss of the individual Defendants-Cleaver, Cleveland, Reece, Wickersham, and Drake is granted. The separate Motion to Dismiss of Defendant-Cleaver is, therefore, rendered moot.

IT IS SO ORDERED this 20th day of December, 1985.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

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

ALFRED N. ABDO, et al.,)
)
 Plaintiffs,)
)
 -vs-)
)
 PUBLIC SERVICE COMPANY OF)
 OKLAHOMA, an Oklahoma)
 corporation; DR. EDGAR)
 CLEAVER; DR. JERRY CLEVELAND;)
 M. F. REECE; JOHN WICKERSHAM;)
 TOM DRAKE; JOHN DOE; and)
 RICHARD ROE,)
)
 Defendants.)

85-C-390-R ✓

FILED

DEC 23 1985 A

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

ORDER

This civil suit arises from an incident of environmental contamination which occurred at the Page Belcher Federal Building (Building) in Tulsa, Oklahoma. The contamination occurred on April 16, 1982, when an electrical transformer malfunctioned causing smoke containing polychlorinated biphenyls (PCBs), polychlorinated dibenzodioxins (dioxins) and polychlorinated dibenzofurans (furans) to enter the Building through the ventilation system. Plaintiffs allege that the contamination from these toxic agents was only superficially cleaned up and that a continuing health hazard exists for those working in or frequenting the Building.

Plaintiffs are the class of individuals working in or frequenting the Building and their families. Defendant-Public Service Company of Oklahoma (PSO) owned and operated the electrical transformer which malfunctioned.

Defendant-PSO was also responsible for cleaning up the contamination.

Defendant-PSO filed a Motion to Dismiss for lack of subject matter jurisdiction. There being no diversity between the parties, Plaintiffs' only basis for federal jurisdiction over this Defendant is the federal common law of nuisance. Defendant-PSO's position is that the Amended Complaint fails to state a cause of action under the federal common law of nuisance for any one of the following reasons:

- 1) there are no allegations of interstate effect from the contamination, or
- 2) governmental units are the proper parties for federal common law claims, rather than private individuals such as Plaintiffs, or
- 3) the federal common law of nuisance regarding hazardous substances has been preempted by federal legislation.

Federal Common Law

Unlike state courts, federal courts do not have the power to develop general common law. Erie R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188, 1194 (1938); City of Milwaukee v. Illinois, 451 U.S. 304, 312, 101 S.Ct. 1784, 68 L.Ed.2d 114, 123 (1981). However, in limited areas where there is a need, the Court has formulated what is referred to as "federal common law." United States v. Standard Oil Co., 332 U.S. 301, 308, 67 S.Ct. 1604, 91 L.Ed. 2067, 2072 (1947).

[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.

Texas Industries v. Radcliff Materials, 451 U.S. 630, 640, 101 S.Ct. 2061, 68 L.Ed.2d 500, 509 (1981) (footnotes omitted).

The federal common law of nuisance was first recognized in Texas v. Pankey, 441 F.2d 236, 241 (10th Cir. 1971). In that case, the State of Texas sought to enjoin residents of New Mexico from using certain pesticides which would be washed into an interstate river and would eventually pollute the water supply of several Texas municipalities. The use of federal common law was necessary to protect Texas from interstate pollution without subjecting Texas to the laws of New Mexico.

Interstate Effect

The Motion to Dismiss of Defendant-PSO is granted. Plaintiffs failed to state a claim under the federal common law of nuisance because there is no allegation that the contamination involved the rights of another state.

The contamination was confined to the Building and its immediate area. Plaintiffs allege in their Brief in Opposition that because the post office is located in the Building, interstate commerce interests are involved which require the application of federal common law. The Amended Complaint, however, merely states that the postal authorities relied on Defendant-PSO's representations that the building contamination had been cleaned up. A complaint cannot be amended by briefs filed in opposition to a motion to dismiss. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984), cert. denied 53 U.S.L.W. 3669, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1985). As the Amended Complaint now reads, the environmental rights of no other state except Oklahoma are involved. Furthermore, the Plaintiffs cite no authority where interstate commerce has been the basis for application of the federal common law of nuisance.¹ The Court can find no reason in this case to extend the basis for federal common law to include interstate commerce interests.

Intrastate pollution is not a proper area for the

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But courts asked to fashion a federal common law to adjudicate interstate disputes have usually done so only in contexts where the "interstate" nature of the dispute concerned states or state interests, rather than matters within interstate commerce in the constitutional sense.

Parsell v. Shell Oil Co., 421 F.Supp. 1275, 1281 n.15 (D. Conn. 1976), aff'd without opinion sub nom. East End Yacht Club, Inc. v. Shell Oil Co., 573 F.2d 1289 (2nd Cir. 1977).

development of federal common law because it requires neither "a uniform federal rule of decision nor implicates important federalism concerns." United States v. Price, 523 F.Supp. 1055, 1069 (D.N.J. 1981), aff'd 688 F.2d 204 (3rd Cir. 1982). Federal common law of nuisance, as formulated in Illinois v. City of Milwaukee, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972), vacated on other grounds 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981), and Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971), requires at a minimum that there be an interstate effect. Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492, 520 (8th Cir. 1975). "Where there is no claim of vindication of the rights of another state and where there is no allegation of any interstate effect," there is no underlying reason to apply federal common law. Committee for the Consideration of the Jones Falls Sewage System v. Train, 539 F.2d 1006, 1010 (4th Cir. 1976); Ancarrow v. City of Richmond, 600 F.2d 443, 445 (4th Cir. 1979), cert. denied 444 U.S. 992, 100 S.Ct. 523, 62 L.Ed.2d 421 (1979).

"If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used." City of Milwaukee v. Illinois, 451 U.S. 304, 313 n.7, 101 S.Ct. 1784, 68 L.Ed.2d 114, 124 n.7 (1981). The fact that Plaintiffs request pendent jurisdiction for a number of claims against PSO which are based on state law (statutory nuisance, deceit, battery, assault, negligence and strict liability) is

evidence that there is no need to resort to federal common law.

While there exists a line of authority holding that the federal common law of nuisance can be applied to intrastate pollution, it is a minority position that this Court does not adopt. Unlike this case, those decisions turned primarily on the determination that navigable waters are a federal concern. Illinois v. Outboard Marine Corp., 619 F.2d 623, 629 (7th Cir. 1980), vacated 453 U.S. 917, 101 S.Ct. 3152, 69 L.Ed.2d 1000 (1981), on remand 680 F.2d 473 (7th Cir. 1982) (intrastate pollution of navigable waters; on remand, the court did not address the issue of the intrastate nature of the pollution); Commonwealth of Puerto Rico v. Muskie, 507 F.Supp. 1035, 1061-62 (D.P.R. 1981), vacated sub nom. Marquez-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981) (intrastate pollution of coastal waters); United States v. Solvents Recovery Service of New England, 496 F.Supp. 1127, 1139 (D.Conn. 1980) (intrastate pollution of groundwaters); Stream Pollution Control Board v. United States Steel Corp., 512 F.2d 1036, 1039-41 (7th Cir. 1975) (intrastate pollution of navigable waters); United States v. Ira S. Bushey & Sons, 363 F.Supp. 110, 119-122 (D.Vt. 1973), aff'd without opinion 487 F.2d 1393 (2nd Cir. 1973), cert. denied Ira S. Bushey & Sons v. United States, 417 U.S. 976, 94 S.Ct. 3182, 41 L.Ed.2d 1146 (1974) (intrastate oil spills on navigable waters).

Having determined that an interstate effect (as opposed to interstate commerce) is both necessary and lacking, the Court does not need to address Plaintiffs' alternative reasons for dismissing the federal common law claim: that private individuals are not proper parties under the federal common law of nuisance and that federal legislation has preempted the federal common law of nuisance.

Plaintiffs' § 1983 civil rights claim has been dismissed in a separate order. Order of December 20, 1985. There being no remaining basis for federal jurisdiction, all pendent state claims are also dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218, 228 (1966).

Accordingly, the Motion to Dismiss of Defendant-PSO is granted.

IT IS SO ORDERED this 20th day of December, 1985.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

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

JAMES D. NAYLOR and)
PAULA NAYLOR, husband and)
wife,)
)
Plaintiff,)
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-vs-)
)
PUBLIC SERVICE COMPANY OF)
OKLAHOMA, an Oklahoma)
corporation; DR. EDGAR)
CLEAVER; DR. JERRY CLEVELAND;)
M. F. REECE; JOHN WICKERSHAM;)
TOM DRAKE; JOHN DOE; and)
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85C-391-R

F I L E D

DEC 23 1985

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

O R D E R

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The individual Defendants-Dr. Jerry Cleveland, Dr. Edgar Cleaver, M. F. Reece, John Wickersham and Tom Drake (Health Officials), acting as agents of the Tulsa City-County Health Department, were responsible for investigating the Building for possible contamination. Plaintiff-Paula Naylor was a federal employee whose office

was in the Building at the time of the transformer malfunction. Plaintiffs allege that Plaintiff-Paula's subsequent cancer was the result of Defendant-Health Officials' superficial investigation and failure to disclose possible health risks to Plaintiff-Paula.

While the Complaint states that "every issue of law and fact herein involves federal questions of law," the only federal claim alleged against the Defendant-Health Officials is for violation of the Plaintiffs' civil rights pursuant to 42 U.S.C. § 1983. Defendant-Dr. Edgar Cleaver filed a Motion to Dismiss for failure to state a claim. The Defendant-Health Officials, including Dr. Cleaver, filed another Motion to Dismiss on the basis that Plaintiffs' allegations were insufficient to warrant jurisdiction under § 1983. The Motion to Dismiss of Defendant-Health Officials is granted for failure to state a claim upon which relief can be granted.

The first inquiry in any § 1983 suit is whether the plaintiff has been deprived of a right "secured by the

1. 42 U.S.C. § 1983 (in part):

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

Constitution and laws."¹ Baker v. McCollan, 443 U.S. 137, 140, 99 S.Ct. 2689, 61 L.Ed.2d 433, 439 (1979). Plaintiffs allege, at paragraph 10(J) of the Complaint, that Defendant-Health Officials "violated the Civil Rights of Plaintiffs by wholly failing to inspect, report and investigate in accordance with their duties as representatives of the Tulsa-City County Health Department when they knew or should have known that their failure to do so could cause the harm that Plaintiff has incurred." Plaintiffs then further allege, at paragraph 12 of the Complaint, that Defendants' negligence proximately caused Plaintiff-Paula to lose her good health, contract cancer, undergo major surgery and radiation treatments, and have a greatly diminished life expectancy. That is the extent of the Plaintiffs' § 1983 claim stated in the Complaint.

Under a § 1983 claim, the constitutional right plaintiffs are allegedly deprived of must be specifically identified; conclusory allegations are not sufficient. Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981). In their Response Brief, Plaintiffs do specify a deprivation of their rights to a full and complete life and individual liberty interests protected by the Fifth and Fourteenth Amendments. However, a complaint cannot be amended by briefs filed in opposition to a motion to dismiss. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984), cert. denied 53 U.S.L.W. 3669, 105 S.Ct. 1758, 84 L.Ed.2d 821 (1985).

Plaintiffs fail to state a claim under § 1983 because no deprivation of a constitutional right is specifically alleged in the Complaint. Furthermore, the Complaint cannot be amended to cure this defect. From the facts stated, the Court is unable to identify any recognized constitutional right.

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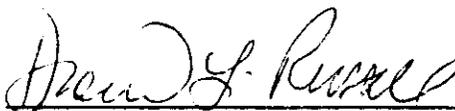
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Since there is no constitutional right to either a full and complete life or a clean and safe environment, and there are no facts alleged to support any other claim of infringement of Plaintiffs' liberty interests, the § 1983 claim must be dismissed. Plaintiffs' claim under the federal common law of nuisance, which is the only other basis for federal jurisdiction, has been dismissed in a separate order. Order of December 20, 1985. Therefore, all pendent state claims are also dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218, 228 (1966).

Accordingly, the Motion to Dismiss of the individual Defendants-Cleaver, Cleveland, Reece, Wickersham, and Drake is granted. The separate Motion to Dismiss of Defendant-Cleaver is, therefore, rendered moot.

IT IS SO ORDERED this 20th day of December, 1985.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

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

DEC 20 1985

ANADARKO LAND AND EXPLORATION)
CO., an Oklahoma corporation,)
)
Plaintiff,)
)
vs.)
)
TEMPLETON ENERGY, INC.,)
)
Defendant,)
)
AND)
)
EMC, INC.,)
)
Third party defendant.)

No. 84-C-366-E

Jack L. ...
U. S. DISTRICT COURT

C R D E R

NOW on this 20th day of December, 1985 comes on for hearing the above styled case and the Court, being fully advised in the premises finds:

Plaintiff filed second application for change of venue on September 5, 1985 to which no response has been filed. Said motion stands technically confessed pursuant to Local Rule 14, however, the Court has reviewed the application on its merits and finds same to be based on judicial economy of consolidation with another action filed in the Western District of Oklahoma.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's second application for change of venue be and is hereby granted and the above-styled case is transferred to the Western District of Oklahoma. The Clerk of the Court is directed to take such steps as are necessary to carry out this order.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

FILED

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

DEC 20 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

SCOTT MARTIN, TRUSTEE; and)
CANADIAN COMMERCIAL BANK,)
a banking corporation,)
)
Plaintiffs,)
-vs-)
)
PACIFIC INSURANCE COMPANY,)
)
Defendant.)

Case No. 85-C-977-C
(Formerly Adversary No. 85-0173)

O R D E R

NOW on this 20 day of December, 1985, comes the appli-
cation of Canadian Commercial Bank for permission to dismiss
its claim herein without prejudice to refiling and without
prejudice to its claims in Adversary Proceeding No. 85-0114
in the Bankruptcy Court for the Northern District of Oklahoma.
Good cause having been shown, and there being no objection from
the other parties to this litigation, permission is granted
and Canadian Commercial Bank is hereby dismissed from this case
without prejudice to refiling and without prejudice to its
claims in Adversary Proceeding No. 85-0114 in the Bankruptcy
Court for the Northern District of Oklahoma.

IT IS SO ORDERED.


HONORABLE H. DALE COOK
UNITED STATES DISTRICT JUDGE

FILED

IN THE UNITED STATES DISTRICT COURT FOR THE ~~DEC 20 1985~~
NORTHERN DISTRICT OF OKLAHOMA

DEC 20 1985
U.S. DISTRICT COURT

PRUDENTIAL-BACHE SECURITIES,)
INC.,)
)
Plaintiff,)
)
-vs-)
)
FRANK TAUCHER,)
)
Defendant.)

Case No. 85-C-944-E

ORDER OF DEFAULT JUDGMENT

On this 20th day of December, 1985, this matter came on for hearing before the undersigned Judge of the United States District Court upon the application of the Plaintiff, Prudential-Bache Securities, Inc. ("Pru-Bache"), for the entry of default judgment upon its First Amended Complaint to Confirm Arbitration Award filed herein on November 4, 1985; Pru-Bache being represented by its counsel, Oliver S. Howard of Gable & Gotwals, Inc., and Defendant, Frank Taucher ("Taucher"), not appearing. The Court having reviewed the pleadings and application on file, and having read the affidavit of counsel and being fully apprised in the premises, hereby finds as follows:

1. That the Court has subject matter jurisdiction over the claim of Pru-Bache and has in personam jurisdiction over the Defendant, Taucher, and that Taucher has been properly served with process herein;

2. That the time for the answer of Taucher to the First Amended Complaint of Pru-Bache has expired, that no answer has

been filed and no extension of time has been sought or granted; and that Taucher does not intend to answer or otherwise respond to the First Amended Complaint;

3. That the allegations of the Complaint and First Amended Complaint of Pru-Bache are true, to-wit:

(a) On or about November 23, 1983, Taucher entered into a Registered Representative Contract of Employment with Pru-Bache;

(b) On or about November 23, 1983, for good and valuable consideration, Taucher made and executed in favor of Pru-Bache a Promissory Note in the amount of Ninety-Nine Thousand, Seven Hundred Twenty-Four and 20/100 Dollars (\$99,724.20);

(c) On or about November 28, 1983, Taucher executed a U-4 application, Uniform Application for Securities Industry Registration, in connection with his employment by Pru-Bache whereby, in part, Taucher agreed to "arbitrate any dispute, claim or controversy that may arise between me and my firm. . .";

(d) When a dispute arose as to the repayment of the loan, both Pru-Bache and Taucher appeared before the Arbitration Board of the New York Stock Exchange to resolve the dispute;

(e) On August 23, 1985, Pru-Bache received an arbitration Award from the New York Stock Exchange against Taucher in the amount of Thirty-Two Thousand and No/100 Dollars (\$32,000.00).

3. That Pru-Bache is entitled to have judgment entered in its favor based upon the Award by the Arbitration Board of the New York Stock Exchange against Frank Taucher in the amount

of \$32,000.00 and that Pru-Bache is further entitled to the costs of this action, including a reasonable attorney's fee to be determined at a hearing set following the application by Pru-Bache, and is further entitled to post-judgment interest at the rate of 7.87% per annum until the judgment is fully paid and satisfied.

It is therefore ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of Pru-Bache against Taucher in the sum of \$32,000.00, together with the costs of the action, including a reasonable attorney's fee to be determined at a hearing subsequent to the application of Pru-Bache, and interest accruing on the judgment at the rate of ^{7.57}~~7.87~~% per annum until fully paid and satisfied; all for which let execution issue.

DATED this 20 day of December, 1985.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

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

FILED

DEC 20 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

STATE SAVINGS & LOAN
ASSOCIATION OF LUBBOCK,

Plaintiff,

-vs-

CLARENCE FOUST,

Defendant.

)
)
)
)
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)
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)
)
)
)

Case No. 85-C-782-E

DEFAULT JUDGMENT

The Defendant, Clarence Foust, having failed to plead or otherwise defend in this action, and his default having been entered, now, upon application of the Plaintiff, State Savings & Loan Association of Lubbock, and upon affidavit that Clarence Foust is indebted to Plaintiff in the sum of \$105,889.29, together with accrued interest through December 19, 1985, of \$33,003.90, that Defendant has been defaulted for failure to appear, and that Defendant is not an infant or incompetent person, and is not in the military service of the United States,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff, State Savings & Loan Association of Lubbock, recover from Defendant, Clarence Foust, the sum of \$105,889.29, together with accrued interest through December 19, 1985 of \$33,003.90, together with future interest accruing at the rate of \$41.18 per day through the date of judgment, together with other interest as allowed by law, for a reasonable attorney's fee and the costs of this action.

JACK C. SILVER, CLERK

By: Jack C. Silver, Clerk

St. Hope Williams

FILED

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

DEC 20 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

SCOTT MARTIN, TRUSTEE; and)
CANADIAN COMMERCIAL BANK,)
a banking corporation,)
)
Plaintiffs,)
-vs-)
)
PACIFIC INSURANCE COMPANY,)
)
Defendant.)

Case No. 85-C-977-C
(Formerly Adversary No. 85-0173)

O R D E R

NOW on this 20 day of December, 1985, comes the application of Canadian Commercial Bank for permission to dismiss its claim herein without prejudice to refileing and without prejudice to its claims in Adversary Proceeding No. 85-0114 in the Bankruptcy Court for the Northern District of Oklahoma. Good cause having been shown, and there being no objection from the other parties to this litigation, permission is granted and Canadian Commercial Bank is hereby dismissed from this case without prejudice to refileing and without prejudice to its claims in Adversary Proceeding No. 85-0114 in the Bankruptcy Court for the Northern District of Oklahoma.

IT IS SO ORDERED.

s/H. DALE COOK

HONORABLE H. DALE COOK
UNITED STATES DISTRICT JUDGE

Entered

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

LARRY SHUFELDT and
LORI SHUFELDT,

Plaintiffs,

vs.

GAS SERVICE COMPANY,

Defendant.

)
)
)
)
)
)
)
)
)
)

Case No. 85-C-508-B ✓

DEC 19 1985

W. G. Ellison
U. S. DISTRICT JUDGE

ORDER

As per Stipulation of Dismissal filed herein, Plaintiff's
Complaint is dismissed with prejudice with the costs of filing
assessed against the Plaintiff, and the other costs incurred in
this matter to be paid by the party which incurred such costs.

December, 1985
Date

Thomas R. Brett
James O. Ellison
United States District Judge
Thos. R. BRETT

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

FILED

DEC 19 1985

FLOYD WESLEY OWENS,

Plaintiff,

vs.

CITY OF PRYOR CREEK, OKLAHOMA;
MAYOR CARL CURRY; COUNCILMEN
LARRY RICE, FRANK VARGAS,
HAROLD WOJAHAN, BRUCE SMITH,
STANLEY LEE, WALTER HAWKINS,
RONNIE SHARP, and HAROLD RUSH;
CHIEF WILEY BACKWATER;
ASSISTANT CHIEF BILL MOON;
SERGEANT MICHAEL COATNEY; and
SERGEANT RON BATT,

Defendants.

No. 83-C-879-C

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

J U D G M E N T

This matter came on before the Court for determination of the motion of the defendants for summary judgment. There being no controverted material facts, the issues having been duly considered, and a decision having been duly rendered in accordance with the Order granting summary judgment herein,

It is ORDERED and ADJUDGED that the defendants, City of Pryor Creek; Mayor Carl Curry; Councilmen Larry Rice, Frank Vargas, Harold Wojahn, Bruce Smith, Stanley Lee, Walter Hawkins, Ronnie Sharp, and Harold Rush; Chief Wiley Backwater; Assistant Chief Bill Moon; Sergeant Michael Coatney; and Sergeant Ron Batt,

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

FILED

DEC 19 1985

JACK G. SHYEN, CLERK
U.S. DISTRICT COURT

WILLIAM A. WATERS,)
)
 PLAINTIFF,)
)
 v.)
)
 ELEPHANT TRUNK COMPANY, INC.,)
 an Oklahoma corporation,)
)
 HYMAN PRODUCTS COMPANY, INC.,)
 a Missouri corporation,)
)
 BEE KOOL, INC.,)
 a California corporation,)
)
 DYNAMIC INDUSTRIES, INC.,)
 a Chinese corporation,)
)
 and)
)
 NATIONAL LUGGAGE DEALERS)
 ASSOCIATES, an association,)
)
 DEFENDANTS.)

Civil Action No.
85-C-1063C

JUDGMENT
(Consent Decree)

Now, on this 19 day of Dec, 1985 comes on for determination so much of the above-styled cause as relates to the Plaintiff's case against the Defendant Elephant Trunk Company, Inc. The Plaintiff, William A. Waters, appears by and through his attorneys, Head, Johnson & Stevenson, of Tulsa, per Mr. Fred Gilbert. The Defendant Elephant Trunk Company, Inc., an Oklahoma corporation, having heretofore voluntarily accepted and acknowledged service and receipt of process herein pursuant to Federal Rule of Civil Procedure No. 4(c)(2)(C), appears herein pro se, by and through Mr. Joe Norton, the chairman, president, principal stockholder, and registered service agent of the Defendant, Elephant Trunk Company, Inc., and whom the Court finds is legally empowered to appear on behalf of that Defendant, and to consent to the imposition of this Judgment against that Defendant.

The Complaint herein alleges that this Defendant, Elephant Trunk Company,

Inc., along with the other named Defendants, has infringed U.S. Letters Patent Nos. 3,881,198 and 4,238,857 owned by the Plaintiff, and has committed acts of unfair competition against Dr. Waters' and his licensee's products (hereinafter the Waters devices), wherefore the Plaintiff seeks appropriate legal and equitable relief. Since the filing of this action, however, the Plaintiff and this Defendant have agreed to settle and compromise their controversy, the terms of which settlement and compromise the Court finds to be just and fair, and properly to be adopted as the basis of the Court's own decision herein. Adopting, then, the Parties' own settlement and compromise, the Court finds, orders, adjudges and decrees as follows:

1. This Court has subject-matter and personal jurisdiction and venue over this Cause, and over the Plaintiff and the Defendant Elephant Trunk Company, Inc.
2. U.S. Letters Patent Nos. 3,881,198 and 4,238,857 owned by the Plaintiff, are valid and enforceable.
3. The Defendant, Elephant Trunk Company, Inc.'s, sales of the "Bee Kool" line of air-cooled headgear constitute direct infringement of the said U.S. Patents Nos. 3,881,198 and 4,238,857 and the said Defendant's advertising of the said infringing devices constitutes inducement to infringe the said Patents; and furthermore, such acts by the Defendant Elephant Trunk Company, Inc., constitute unfair competition.
4. For its past infringement of the said patents and its unfair competition, the Defendant, Elephant Trunk Company, Inc., shall pay unto the Plaintiff, as nominal damages heretofore settled upon, the sum of one dollar, and for which let execution lie.
5. The Defendant, Elephant Trunk Company, Inc., its assigns, successors and heirs, and all directors, officers, employees and agents thereof, is and are hereby permanently enjoined from the future and further infringement of U.S. Letters Patent Nos. 3,881,198 and 4,238,857, and from further unfair competition against Dr. Waters and the Waters devices. In particular, the said Defendant, its assigns, etc.:

A) Shall cease and desist from the sale and/or advertising of the "Bee Kool" line of air-cooled headgear;

B) Shall surrender to the Plaintiff for destruction all "Bee Kool" headgear on hand, and all brochures advertising same; PROVIDED, however, by agreement of the Parties, that this portion of this Consent Decree shall be deemed complied with, with respect to the offending "Bee Kool" headgear, by its return for full credit to the supplier thereof, and with respect to any advertising already in esse, by a placard or other announcement conspicuously posted, in each of the stores of this Defendant, that the "Bee Kool" line of air-cooled has been withdrawn from sale for reason of patent infringement and fair competition, and which notice shall remain conspicuously posted at this Defendant's stores throughout the Christmas 1985 shopping season, and by a rubber-stamp announcement to the same effect imprinted over the "Bee Kool" portions of all catalogs presently on hand;

C) Shall cause its President, Mr. Joe Norton, who is also a director-elect of the Defendant National Luggage Dealers Associates, Inc., to exercise his best efforts to introduce and have adopted by that Defendant a corporate resolution or other appropriate decision whereby that Defendant will (1) cease and desist further efforts at distribution and/or promotion of the offending "Bee Kool" line of air-cooled headgear, (2) urge its members to cease and desist further commerce therein, and (3) consent to a judicial decree similar to this one; AND FURTHER, this Defendant's said President shall also exercise his best efforts to persuade the other Defendants herein to adopt similar courses of action;

D) Shall cooperate in good faith with the Plaintiff in furnishing evidence and information which might be of use to the Plaintiff in halting infringement by others of U.S. Patents 3,881,198 and 4,238,857, and preventing other acts of unfair competition against Dr. Waters and the Waters devices; and

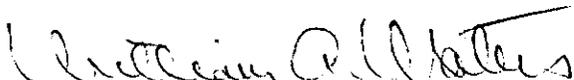
E) This Judgment (Consent Decree) shall be deemed to constitute a formal Writ

of Injunction, which by virtue of this Defendant's waiver of service, shall be effective upon issuance.

DATED at Tulsa, Oklahoma this 19th day of December, 1985.


H. DALE COOK
United States District Court

APPROVED:


William A. Waters


Fred P. Gilbert
HEAD, JOHNSON & STEVENSON

ELEPHANT TRUNK COMPANY, INC.
an Oklahoma corporation,

(seal)

by 
Joe Norton, President

Entered:

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

MARK J. EVANS,)
)
 Plaintiff,)
)
 v.)
)
 JOHN McBRIDE, doing business as)
 M D SYSTEM SOUND, and WILLIAM)
 J. ANTHONY,)
)
 Defendants.)

No. 84-C-985-B ✓
FILED

DEC 18 1985 *hg*

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

ORDER

The Court has for consideration the Findings and Recommendations of the Magistrate filed December 11, 1985 in which the Magistrate recommends that the Defendant be awarded \$2550 in attorneys fees as costs. The parties waived their right to object to the Findings and Recommendations of the Magistrate pursuant to Local Rule 31.

It is therefore Ordered that the Defendant, as the prevailing party pursuant to 12 O.S. 1981, §940 be and is hereby awarded \$2550 in attorneys fees as costs.

Dated this 18th day of December, 1985.

Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

thereafter at the rate of 4 percent per annum until judgment plus interest thereafter at the current legal rate of 7.87 percent from date of judgment until paid, plus costs of this action.



UNITED STATES DISTRICT JUDGE

Entered

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

FILED

VIRGIL TROTTER,
Plaintiff,

vs.

JAMES CRABTREE CORRECTIONAL
CENTER, et al.,

Defendant.

No. 84-C-640-B

✓ FEB 18 1985
Jack C. Silver, Clerk
U. S. DISTRICT COURT

O R D E R

On June 19, 1985, defendants Larry Van Berber and David Graham filed a motion to dismiss in the above-entitled action to which plaintiff has failed to respond. On September 5, 1985 the court clerk mailed an additional notice to plaintiff in regard to the motion to dismiss. As there has been no response to the motion to dismiss, the motion is deemed confessed. Rule 14(a) of the United States District Court for the Northern District of Oklahoma. Defendants' motion to dismiss is granted.

The sole remaining defendant, Oklahoma Corrections Institution, is not a "person" under 42 U.S.C. §1983 and is therefore not a proper defendant to this action. Bennett v. People, 406 F.2d 36, 39 (9th Cir. 1969), cert. denied 394 U.S. 966 (1969); Stanislaus Food Products v. Public Utilities Commission, 560 F.Supp. 114, 118 (N.D. Cal. 1982). Defendant Oklahoma Corrections Institution is therefore dismissed, sua sponte.

IT IS SO ORDERED this 18 day of December, 1985.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

#15

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

FILED

DEC 18 1985

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

IN RE:)
)
WAYNE DARRELL ZANG,)
)
 Debtor,)
)
BETA ENERGY CORPORATION,)
)
 Debtor,)
)
LOUIS PORTER,)
)
 Debtor,)
)
DALCO PETROLEUM COMPANY,)
)
 Debtor,)
)
 vs.)
)
U.S. DEPARTMENT OF ENERGY)

Case No. 85-C-324-C

85-C-325-C
85-C-326-C
85-C-327-C

ORDER

Upon motion to dismiss the above-referenced appeals and dissolve the stay entered herein by the United States Department of Energy, and upon the bankruptcy estates withdrawal of the notice of deposition of George B. Breznay and no objection being filed to the motion to dismiss appeals;

IT IS SO ORDERED that the above-referenced appeals are dismissed.

Dated this 17th day of December, 1985.


UNITED STATES DISTRICT COURT JUDGE

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

DEC 18 1985

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

IN RE:)
WAYNE DARRELL ZANG,)
Debtor,)
BETA ENERGY CORPORATION,)
Debtor,)
LOUIS PORTER,)
Debtor,)
DALCO PETROLEUM COMPANY,)
Debtor,)
vs.)
U.S. DEPARTMENT OF ENERGY)

Case No. 85-C-324-C

85-C-325-C

85-C-326-C

85-C-327-C

ORDER

Upon motion to dismiss the above-referenced appeals and dissolve the stay entered herein by the United States Department of Energy, and upon the bankruptcy estates withdrawal of the notice of deposition of George B. Breznay and no objection being filed to the motion to dismiss appeals;

IT IS SO ORDERED that the above-referenced appeals are dismissed.

Dated this 17th day of December, 1985.


UNITED STATES DISTRICT COURT JUDGE

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

FILED

DEC 18 1985

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

IN RE:
WAYNE DARRELL ZANG,
Debtor,
BETA ENERGY CORPORATION,
Debtor,
LOUIS PORTER,
Debtor,
DALCO PETROLEUM COMPANY,
Debtor,
vs.
U.S. DEPARTMENT OF ENERGY

Case No. ~~85-C-224-C~~
~~85-C-325-C~~
~~85-C-326-C~~
~~85-C-327-C~~

ORDER

Upon motion to dismiss the above-referenced appeals and dissolve the stay entered herein by the United States Department of Energy, and upon the bankruptcy estates withdrawal of the notice of deposition of George B. Breznay and no objection being filed to the motion to dismiss appeals;

IT IS SO ORDERED that the above-referenced appeals are dismissed.

Dated this 17th day of December, 1985.


UNITED STATES DISTRICT COURT JUDGE

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

FILED

DEC 18 1985

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

IN RE:)
 WAYNE DARRELL ZANG,)
 Debtor,)
 BETA ENERGY CORPORATION,)
 Debtor,)
 LOUIS PORTER,)
 Debtor,)
 DALCO PETROLEUM COMPANY,)
 Debtor,)
 vs.)
 U.S. DEPARTMENT OF ENERGY)

Case No. 85-C-324-C

~~85-C-325-C~~

~~85-C-326-C~~

~~85-C-327-C~~

O R D E R

Upon motion to dismiss the above-referenced appeals and dissolve the stay entered herein by the United States Department of Energy, and upon the bankruptcy estates withdrawal of the notice of deposition of George B. Breznay and no objection being filed to the motion to dismiss appeals;

IT IS SO ORDERED that the above-referenced appeals are dismissed.

Dated this 17th day of December, 1985.


UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 17 1985

MIDWESTERN PIPELINE PRODUCTS)
COMPANY, an Oklahoma)
corporation,)
)
Plaintiff,)
vs.)
)
MAYES BROTHERS, INC.,)
a Texas corporation,)
JOHN L. FITCH and DENNIS WEBB,)
)
Defendants.)

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

Case No. 85-C-319-E

DEFAULT JUDGMENT

This matter comes on for consideration this 13 day of Dec, 1985, the Plaintiff MIDWESTERN PIPELINE PRODUCTS COMPANY appearing by its attorney, Charles A. Gibbs III and the Defendant DENNIS WEBB, appearing not.

The Court being fully advised and having examined the file herein finds that the Defendant DENNIS WEBB, acknowledge receipt of Summons and Complaint on May 27, 1985. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant DENNIS WEBB has not answered or otherwise moved, and default has been entered by the Clerk of this Court. Plaintiff is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Plaintiff MIDWESTERN PIPELINE PRODUCTS COMPANY, have

and recover judgment against the Defendant DENNIS WEBB, for the principal sum of \$9,095.64 from November 1, 1981, plus interest at the current legal rate of 7.87 percent from date of judgment until paid in full, ~~attorney's fees of \$~~ and costs of this action, accrued and accruing.

S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

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

FILED

DEC 17 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

MBANK DALLAS, N.A.,)
)
Plaintiff,)
)
v.)
)
RH OPERATING COMPANY,)
an Oklahoma corporation and)
RH ENERGY DEVELOPMENT, LTD., and)
Henry P. Heister,)
)
Defendants.)

No. 85-C-762-E

NOTICE OF DISMISSAL

Pursuant to Fed. R. Civ. P. 41, Plaintiff MBANK DALLAS, N.A., hereby dismisses the above-captioned action with prejudice. This Notice of Dismissal does not constitute an adjudication upon the merits.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,
COLLINGSWORTH & NELSON

BY *Fred S. Nelson*
Fred S. Nelson
Claire V. Eagan
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of December, 1985 a true and correct copy of the above and foregoing Notice was mailed to Laurence L. Pinkerton, Conner & Winters, 2400 First National Tower, Tulsa, Oklahoma 74103.

Fred S. Nelson

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

FILED

DEC 17 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

MBANK DALLAS, N.A.,)
)
 Plaintiff,)
)
 v.)
)
 RH OPERATING COMPANY,)
 an Oklahoma corporation and)
 RH ENERGY DEVELOPMENT, LTD., and)
 Henry P. Heister,)
)
 Defendants.)

No. 85-C-857-B ✓

NOTICE OF DISMISSAL

Pursuant to Fed. R. Civ. P. 41, Plaintiff MBANK DALLAS, N.A., hereby dismisses the above-captioned action with prejudice. This Notice of Dismissal does not constitute an adjudication upon the merits.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,
COLLINGSWORTH & NELSON

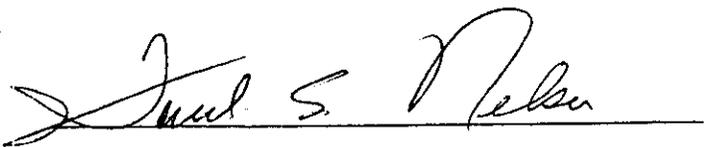
By



Fred S. Nelson
Claire V. Eagan
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 588-2700

CERTIFICATE OF MAILING

I hereby certify that on this 17th day of December, 1985 a true and correct copy of the above and foregoing Notice was mailed to Laurence L. Pinkerton, Conner & Winters, 2400 First National Tower, Tulsa, Oklahoma 74103.



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

FILED

DEC 17 1985 *ag*

JACK O. SILVER, CLERK
U.S. DISTRICT COURT

DEANNA NICHOLS, individually)
and as surviving heir and next)
of kin of CHELSEA NICHOLS,)

Plaintiff,

vs.

Case No. 85-C-1020B ✓

RICHARDSON-MERRELL, INC.,
a Delaware corporation,

Defendant.

Notice of
DISMISSAL WITHOUT PREJUDICE

COMES NOW the Plaintiff and dismisses the above styled and
numbered cause without prejudice to any future action.

Respectfully submitted,

FRASIER & FRASIER

By: *James E. Frasier*

James E. Frasier OBA#3108
1700 Southwest Boulevard, Suite 100
P. O. Box 799
Tulsa, OK 74101
(918) 584-4724

CERTIFICATE OF MAILING

I hereby certify that on this the 17th day of December, 1985,
I mailed a true and correct copy of the above and foregoing
Dismissal to Dan A. Rogers, 117 East Fifth Street, Tulsa, Oklahoma,
74103, with the correct and proper postage thereon fully prepaid.

James E. Frasier
James E. Frasier

FILED

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

DEC 16 1985

BEULAH M. WALDEN,)
)
 Plaintiff,)
)
 v.)
)
 MARGARET M. HECKLER, Secretary)
 of Health and Human Services,)
)
 Defendant.)

JACK C. SIVEL, CLERK
U. S. DISTRICT COURT

No. 84-C-522-E

MEMORANDUM OPINION AND ORDER

Plaintiff brought this action pursuant to §205(g) of the Social Security Act, 42 U.S.C. §405(g) (1976), for judicial review of a final decision of the Secretary of Health and Human Services (Secretary) denying her claim for widow's insurance benefits under 42 U.S.C. §§402(e) and 423(d)(1)(A) and for supplemental security income benefits based on disability under 42 U.S.C. § 1382c(a)(3)(A).

After the matter was referred to the Magistrate for Findings and Recommendations, the Magistrate's term ended on July 7, 1985 before the Magistrate had completed and filed written Findings and Recommendations. The Court has, therefore, considered the file, the transcript of the proceedings before the Administrative Law Judge (ALJ), and the briefs of the parties, and has concluded that the Plaintiff is not entitled to disability insurance benefits or supplementary security income benefits based on disability under the Social Security Act and that judgment should be entered for the Defendant.

Plaintiff has previously filed applications for supplemental security income benefits under the Social Security Act in March 1978, March 1980 and November 1981 which were denied administratively. Plaintiff did not pursue further review of any of those applications, and those applications are not before the Court. Plaintiff next filed applications for widow's disability benefits and supplemental security income on November 1, 1982 and May 12, 1982, respectively, in which she claims she became unable to work on February 19, 1982, because of arthritis, nervousness, bladder disease, and ulcers. Plaintiff's applications were denied administratively, both initially and on reconsideration, after a physician and a disability examiner evaluated the evidence and determined that Plaintiff was not disabled within the meaning of the Social Security Act (Tr. 2, 50-52, 54-55, 70-73). Plaintiff then requested and was granted a hearing before an Administrative Law Judge (ALJ) on June 27, 1983. The ALJ found that Plaintiff was not disabled under the Social Security Act "is not entitled to widow's insurance benefits based on disability, under 42 U.S.C. 402(e) and 423e respectively," (Tr. 15) and "is not eligible for Supplemental Security Income under 42 U.S.C. 1382c(a)(3)(A)." (Tr. 19).

Plaintiff then requested a review of the ALJ's decision by the Appeals Council, and on April 10, 1984, the Appeals Council denied Plaintiff's appeal, and the decision of the ALJ became the final decision of the Secretary. (Tr. 5-6).

At the hearing before the ALJ, Plaintiff appeared personally and with her attorney, Shirley McCarty. Plaintiff is 52 years of age, is a widow, and has an eighth grade education. Plaintiff

testified that she is able to read, write, add and subtract; that she has worked as a waitress, a grocery checker, and a cook; that she weighed 130 pounds at the time of her husband's death on February 19, 1982, but at the time of the hearing weighed 116 pounds; that she has a problem eating "whenever [she's] nervous"; that she is able to do light housework; that she has "dizzy spells" and her "hands get numb and go to sleep and [she has] a burning sensation in them" when she washes dishes sometimes; that it takes her longer to do all of the chores around the house because some days she "just can't seem to manipulate"; that she cannot stand "over an hour" without having to sit and rest for a while; that when she is on her feet for about an hour her right leg aches; that she has a bad knee; that her feet and legs swell at times even when she is not standing; that she does walk for exercise; that she can walk about six blocks; that she does have difficulty lifting anything heavy; that she "can't even hold on to the gallon of milk ... and [she] can't even cook big meals any more ... because [she] can't lift" without someone helping; that she can do her own hair but it takes her "forever to get it done" and her shoulders hurt whenever she has to reach; that she cannot do any fine manipulations such as sewing because her fingers get numb; that she sometimes wakes up during the night and early in the mornings shaking; that she does drive a car but after she has driven very far her foot cramps; that she sometimes gets dizzy when she climbs stairs; that she does do her own shopping for groceries; that sometimes she "can't stand to be around a lot of people" because it makes her nervous; that she cannot eat spicy foods because of her stomach; that she does smoke; that she does

not drink; that she does attend church; that she does have difficulty sleeping at night because of "pain in [her] shoulders"; that also sometimes her feet and legs cramp; that she does take medication for nerves; that the last time she worked was in March of 1978, at which time she was helping her husband who was chef at the Rolling Hills Country Club; that she helped prepare food for banquets and sometimes worked at the fry station; that her main health problem is arthritis and nerves; that she also has ulcers for which she takes medication consisting of "Tagamets" and Malox and Tums; that she also has occasional bladder infection which causes pain and spasms in the bladder for which she is taking medication, "Pyridiums Plus"; that cold weather and wet weather causes her to have pain in her hands and joints; that her doctor has told her to take hot showers three or four times a day; that her regular doctor is Jerry Fitzgerald; that she hasn't seen him for a while because she had no money to pay him and he would not fill her prescriptions; that she had been to a vocational rehabilitation person by the name of Mr. Anderson, who told her that they could train her for "a lab technician or something like that"; that this was in 1978; that she did not think she would be able to go to school or work on any job if she were retrained because of her nerves.

On examination by the ALJ, Plaintiff testified that she had seen a Doctor Ward in Missouri when she visited her sister; that she had also seen a Doctor Killdane (phonetic) in Joplin who had prescribed some hormone pills for her; that she had seen Dr. Killdane one time and Dr. Ward twice; that Dr. Ward treated her for arthritis, nerves, hemorrhoids and ulcers.

Appearing at Pages 62-67 is a "Medical History and Disability Report" dated October 5, 1982, in which Plaintiff states that her disability consists of "Arthritis, Bladder Problems, Bad Knee." She further states that she last saw Dr. Jerry L. Fitzgerald on October 15, 1982 for "Flu, Bladder and Nerves" for which she received medication; that her "Daily Activities consists of cleaning her house when she feels like it, washing dishes, dusting, running sweeper, and visiting her children. She further stated that she has problems with her hands going numb while she is washing dishes or running the sweeper; that her legs hurt her; that her right one is the worst; that she has a bad knee cap; that she has pain in her arms, neck and shoulders; that she has cramping of her feet and legs; that she has pain in her hand sometimes; that she has problems gripping with her hands; that she has poor circulation in her hands and feet and legs; that she has had ulcers recently; that she has difficulty eating and has lost weight since the death of her husband.

Appearing at Page 74 is a Medical Report of Jerry L. Fitzgerald, D.O., dated June 23, 1982 in which Dr. Fitzgerald states as follows:

You had asked for information regarding arthritis, bladder spasms, osteomyelitis, and poor circulation from the period of May, 1981, to the present time. Also requested were any laboratory results and X-ray.

From the period that you requested, May, 1981, until the present time, I have seen Mrs. Walden on several occasions. She does suffer from a moderate amount of osteoarthritis affecting mostly her hands, upper back, and to a moderate degree her knees. Does have some minor swelling of PIP joints bilaterally with decreased strength, especially on the right. Does have some moderate decrease in her peripheral pulses in all four extremities. She does have some spasm in the cervical and thoracic para-vertical musculature that increases considerably when she raises her arms above her head. She does state that symptoms of numbness and tingling

in her hands do increase upon raising her arms above her head. I have taken no X-rays. Laboratory results that have been gathered during this time show Streptozyme, RA latex, and sero reactive protein all to be negative, as well as ANA to be negative. She has had numerous episodes of bladder spasm and occasional urinary tract infection. I feel this is probably due to a recurring chronic urethritis rather than active infection. Her present diagnoses include osteoarthritis, thoracic outlet syndrome, chronic urethritis. Current medications include Meclanin 50 mg. QID, Pyridium prn bladder spasm, Adapin 50 mg. at hs, Norgestic Forte QID.

At Pages 75-79 of the transcript is a Medical Report of Jackie Neel, D.O., dated July 19, 1982, covering an examination of Plaintiff on July 15, 1982. Dr. Neel states, inter alia, that Plaintiff "has been extremely nervous and depressed since her husband's death in February"; that "[s]he has had no motor deficits"; that "[s]he does have loss of sensation in her arms, which is recurrent and related to the position of her arms"; that "[t]he joints of the upper extremities are unremarkable"; that "[t]he right ankle is swollen and tender to touch, especially on the lateral malleolus"; that "[p]ositive straight leg raising is noted on the right." Dr. Neel further states:

FINAL IMPRESSION: 1. Thoracic outlet syndrome. 2. Osteoarthritis. See Range of Motion Chart. 3. Anxiety and depressive reaction - situational. 4. Chronic cystitis by history. 5. Past medical history of peptic ulcer disease. 6. Decreased peripheral circulation and poor vasculature probably secondary to atherosclerosis. 7. Possible L5-S1 compressive neuropathy on the right.

Appearing at Pages 80-84 is a medical report of James S. Millar, M.D., dated February 2, 1983 covering an examination of Plaintiff on February 2, 1983. In his report Dr. Millar states that Plaintiff's "[p]rimary complaint is painful joints"; that examination of Plaintiff's "extremities" revealed that "[t]here is trace edema to the mid calf bilaterally"; that "[t]here is no

clubbing, cyanosis or edema"; that "[t]here is no evidence of muscle wasting, although the grip strength bilaterally was diminished"; that "[t]he patient ambulated normally."

Dr. Millar stated his "impression" as follows: "1. History of osteoarthritis with moderate limitation in the wrist motions. 2. Decreased peripheral pulses consistent with atherosclerotic disease. 3. Situational depression, secondary to recent bereavement."

Appearing at Page 100 of the Transcript is a Report of Dr. Jerry L. Fitzgerald, D.O. dated September 27, 1983 in which Dr. Ftizgerald states that "Beulah Walden was in [his] office today and was treated for arthritis and UTI."

There are no other medical reports in the transcript. However, appearing at Pages 90 through 96 is a decision of Administrative Law Judge John M. Slater dated October 28, 1981 as a result of a hearing before ALJ Slater on October 14, 1981 in connection with Plaintiff's applications for Social Security benefits filed on March 3, 1980, and January 27, 1981. In his decision, ALJ Slater states that Plaintiff "has been seen for many years by Terrill H. Simmons, M.D., an orthopedic surgeon, for complaints of neck and left arm pain, headaches, and intermittent numbness of her left arm"; that Dr. Simmons physical examination of Plaintiff on October 22, 1979, "revealed full range of motion of the shoulders, elbows, wrists and hands, normal reflexes, and slightly decreased grip"; that "X-rays demonstrated minimal degenerative changes in the cervical spine"; that "[n]erve conduction studies were completed at the St. John

Medical Center on November 5, 1979, and were normal"; that "Dr. Simmons started claimant on a neck exercise program"; and that plaintiff "failed to keep further appointments with Dr. Simmons."

ALJ Slater further refers to a "consultative examination [which] was performed on May 8, 1980, by Sumner Y. Andelman, a rheumatologist, [for] complaints of pain and stiffness in the back of [plaintiff's] neck and shoulders, numbness in her hands, and pain in the low back"; that "[p]hysical examination was essentially negative or normal." ALJ Slater further refers to an examination of plaintiff "by Jerry L. Fitzgerald, D.O., a general practitioner, for multiple complaints involving her entire body"; that Dr. Fitzgerald "prescribed medication, saw claimant again on January 13, 1981, and changed a prescription for her on January 23, 1981, with the notation that if she did not improve she should call him"; that on September 22, 1981, Dr. Fitzgerald stated he had not heard from the claimant again and had nothing to offer with regard to her physical condition."

ALJ Slater further states that "[a] consultative examination was performed on March 5, 1981, by Ambrose A. Solano, M.D., an internist"; that "X-rays of the hands were negative"; that "[r]heumatoid arthritis latex examination was negative and claimant demonstrated a full range of motion, extension, and flexion of weight bearing joints"; that "[p]hysical examination was essentially normal and it was specifically noted that pulses were strong and equal bilaterally with no evidence of claudication and no edema of the lower extremities."

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo, Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1954); Hobby v. Hodges, 215 F.2d 754 (10th Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C. § 405(g); Bradley v. Califano, 593 F.2d 28 (10th Cir. 1978); Atteberry v. Finch, 424 F.2d at 38. Substantial evidence has been defined as: "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), the Court, interpreting what constitutes substantial evidence, stated:

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

Cited in Atteberry v. Finch, 424 F.2d at 39; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Cellebreeze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957).

A person is considered to be "disabled" if such person is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment ...

which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §§ 416(i)(1)(A), 423(d)(1)(A). "[A]n individual ... shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. ..." 42 U.S.C. §§ 423(d)(2)(A). Heckler v. Campbell, 461 U.S. 458, 103 S.Ct. 1952 (1983).

20 CFR §§404.1572 and 416.972 define "substantial gainful activity" as "work activity that is both substantial and gainful:

(a) Substantial work activity. Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.

(b) Gainful work activity. Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized."

In Broadbent v. Harris, 698 F.2d 407, 412 (10th Cir. 1983), the Court stated:

The major tenets of law that have been distilled from the cases decided on this issue are best summarized in Allen v. Califano, 613 F.2d 139 6th Cir., 1980.

1. The burden of proof in a claim for Social Security benefits is upon the claimant to show disability which prevents (him) from performing any substantial gainful employment for the statutory period. Once, however, a prima facie case that claimant cannot perform

(his) usual work is made, the burden shifts to the Secretary to show that there is work in the national economy which (he) can perform. (Citations omitted.)

2. Convincing proof, consisting of lay testimony supported by clinical studies and medical evidence, that pain occasions a claimant's inability to perform his or her usual work is sufficient to make a prima facie case. (Citations omitted.)

3. In determining the question of substantiality of evidence, the reports of physicians who have treated a patient over a period of time or who are consulted for purposes of treatment are given greater weight than are reports of physicians employed and paid by the government for the purpose of defending against a disability claim. (Citations omitted.)

4. Substantiality of evidence must be based upon the record taken as a whole. (Citations omitted)

The grid regulations of the Social Security Administration, 20 CFR §§ 404.1501, et seq. (1982), provide for the sequential evaluation of disability. The first step in evaluating disability concerns whether the claimant is working and whether the work he is doing is "substantial gainful activity." 20 CFR § 404.1520(b) (1982). If it is found that claimant is engaged in substantial gainful employment, the claim is denied without reference to the subsequent steps in the sequence. If claimant is not so employed, the second inquiry is whether claimant has "any impairment(s) which significantly limits [claimant's] physical or mental ability to do basic work activities." 20 CFR § 404.1520(c) (1982). If claimant is found to have no "severe impairment", the claim is denied. If the ALJ finds a claimant has a "severe impairment", the third step must be followed, which is whether such impairment meets or equals one of the "Listing of

Impairments" set forth in the tables in Appendix 1 of the regulations. If the impairment meets or equals any of those listed in the table(s), the claim is approved. 20 CFR § 404.1520(d) (1982) If the impairment does not, the fourth step is considered, which requires the ALJ to "then review [claimant's] residual functional capacity and the physical and mental demands of the work [claimant has] done in the past," and if claimant "can still do this kind of work" the claim is denied. 20 CFR § 404.1520(e) (1982). If claimant is found not capable of returning to his past work, the fifth step must be followed, which requires the ALJ to "consider [claimant's] residual functional capacity and [his] age, education, and past work experience to see if [he] can do other work." 20 CFR § 404.1520(f) (1982). If claimant is not able to perform "other work", the claim is approved.

20 CFR § 404.1521 states that "[a]n impairment is not severe if it does not significantly limit [claimant's] physical or mental abilities to do basic work activities. ... Basic work activities ... mean(s) the abilities and aptitudes necessary to do most jobs. Examples of these include ... (1) [p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling; . . . (2) Capacities for seeing, hearing, and speaking; (3) Understanding, carrying out, and remembering simple instructions; (4) Use of judgment; (5) Responding appropriately to supervision, co-workers and usual work situations; and (6) Dealing with changes in a routine work setting."

In Plaintiff's "Trial Brief" filed April 17, 1985, Plaintiff contends that her claim should be remanded for further testimony, including possible testimony from a vocational witness. Plaintiff complains that the ALJ improperly stopped the sequential evaluation test at the second step, finding Plaintiff's impairment(s) as not "severe." Plaintiff contends that "[s]everal reviewing Courts have expressed displeasure with the severity cutoff by the Secretary"; that such "Courts have been concerned because a denial based on severity does not take into account vocational issues which are expressly outlined in the Social Security Act." (Plaintiff's Brief at 2) (citing Scruggs v. Schweiker, 559 F.Supp. 100 (M.D. Tenn. 1982); Chico v. Schweiker, 710 F. 2d 947 (2nd Cir. 1983); and McCoy v. Schweiker, 683 F.2d 1138 (8th Cir. 1982)).

The Court in Chico held that "it is not necessary for [it] ... to resolve what [it] considers to be close question of the validity of the 'severity' regulation, involving as it does a seeming conflict between the letter of §423(d)(2)(A), on the one hand, and, on the other, the Secretary's understandable desire to supply ... some threshold that a claimant must pass before the Social Security Administration is required either to apply the Appendix to the guidelines or to call vocational experts, and the Supreme Court's recognition, reaffirmed in its recent decision in [Heckler v. Campbell, ____ U.S. ____, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983)], that Congress has 'conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the [Social Security] Act'" 710 F.2d at 953. The Court in Chico went on to say that "assuming the

'severity' regulation to be valid, it may not have been properly applied in [Chico's] case, as a detailed review of the administrative record will show." Id. In Chico, the Court remanded the matter to the Secretary for the reason that the District Court on review of "the Secretary's determination that Chico was not disabled ... did not deal with Chico's contention that the ALJ had erroneously incorporated the requirements of §404.1525 and the Listing of Impairments into the threshold severity determination of §404.1520(c)." Id. at 955.

Plaintiff contends that "in this case, it does not appear that ALJ Evans considered whether or not Plaintiff could perform basic work activities, and thus, this case should be remanded for further testimony"; that "the evidence fails to show that any vocational testimony was taken"; that "[t]he Plaintiff has alleged that she suffers from a nervous condition (depression) and from pain (associated with arthritis)"; and that "[b]oth of these impairments are non-exertional impairments and ... a vocational expert should be used at the second hearing of this application." (Plaintiff's Brief at 4).

In the instant case, with respect to Plaintiff's Application for Widow's Insurance Benefits based on disability under 42 USC 402(e), the ALJ found that "[t]he medical evidence shown by preponderance of the medical evidence of record establishes the existence of osteoarthritis and situational depression"; that "[t]he medical evidence of record fails to establish that at any time prior to the date of [his] decision [August 25, 1983] that the claimant's impairments were of a level of severity which under regulations described by the Secretary are deemed suf-

ficient to preclude an individual from engaging in gainful activity"; that "[t]he claimant was not under a 'disability' as defined in [the Act]," and therefore, "claimant is not entitled to widow's insurance benefits based on disability." (Tr. 14-15).

With respect to Plaintiff's Application for Supplemental Security Income Benefits, ALJ Evans found that "[t]he medical evidence of record fails to establish a diagnosis of any severe impairment which would prevent substantial gainful work activity"; that "[c]onsidering the claimant's physical and mental ability, her age, education, and work history, she would be able to perform work such as waitress, grocery store checker, or cook, which she has, in fact, performed in the past"; and that "[t]he claimant was not under a 'disability' as defined in [the Act]," and that "the claimant is not eligible for Supplemental Security Income under [the Act]." (Tr. 19)

It is the view of the Court that the findings of the ALJ are supported by substantial evidence. As trier of facts, it is the Secretary's responsibility to consider all of the evidence, resolve any conflicts in the evidence, and decide the ultimate disability issue. Richardson v. Perales, 402 U.S. 389 (1971); Mayhue v. Gardner, 294 F.Supp. 853 (Kan. 1968), aff'd., 416 F.2d 1257 (10th Cir. 1969).

Because the findings of the Secretary are supported by substantial evidence, and because such findings are based upon the correct legal standards, the Court finds that Plaintiff is not entitled to widow's insurance benefits based on disability

under 42 U.S.C. 402(e) and 423, respectively, and that Plaintiff is not eligible for Supplemental Security Income under 42 U.S.C. 1382c(a)(3)(A).

It is therefore Ordered that Judgment be and is hereby entered for the Defendant and against the Plaintiff.

It is so Ordered this 13th day of December, 1985.



JAMES P. ELLISON
UNITED STATES DISTRICT JUDGE

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

DEC 16 1985

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

VIRGIL HOLDING, Individually)
and as Administrator of)
the Estate of Delbert)
Wayne Holding, Deceased,)
Plaintiff,)

vs.)

SPEEDWAY TRANSPORTATION, INC.,)
and GREAT WEST CASUALTY CO.,)
Defendants and)
Third party plaintiffs)

No. 84-C-550-E
and 84-C-600-E
(CONSOLIDATED)

vs.)

VIRGIL HOLDING, individually)
and as Administrator of the)
Estate of Delbert Wayne Holding)
Deceased,)
Third party defendant,)

vs.)

VIRGINIA BARNES, individually)
and as Administrator of the)
Estate of Sammy Lee Riley,)
Deceased,)
Plaintiff,)

vs.)

SPEEDWAY TRANSPORTATION, INC.)
and GREAT WEST CASUALTY CO.,)
Defendants and Third)
Party Plaintiffs,)

vs.)

VIRGINIA BARNES, Administrator)
of the Estate of Sammy Lee)
Riley, Deceased,)
Third party defendant.)

AMENDED JUDGMENT

Pursuant to the statements made by counsel in regard to Plaintiffs' motion for new trial the judgment entered in this case is amended as follows:

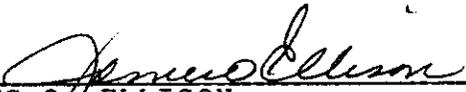
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff Virgil Holding recover of the Defendants Speedway Transportation, Inc. and Great Western Casualty Company the sum of \$7,655.82 with interest thereon at the rate of 7.91% as provided by law and his costs of action.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff Virginia Barnes recover of the Defendants Speedway Transportation, Inc. and Great Western Casualty Company the sum of \$1,250.11 with interest thereon at the rate of 7.91% as provided by law and her costs of action.

Defendant's counterclaim also came on for hearing before this Court and the issues having been duly heard and a decision having been duly rendered,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendants Speedway Transportation, Inc. and Great Western Casualty Company recover of the Plaintiff Virgil Holding, as administrator of the Estate of Delbert Wayne Holding on the counterclaim in the amount of \$4,375.32 and of Virginia Barnes, as administrator of the Estate of Sammy Lee Riley on the counterclaim in the amount of \$6,250.47 and that Defendants be awarded costs of this action.

So ordered this 13th day of December, 1985.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

Entered

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

FRANCES MOORE, JAMES COLLINS, JR.,)
and CAROL COLLINS,)
Plaintiffs,)
VS.)
SAMSON RESOURCES COMPANY,)
a corporation,)
Defendant.)

CIV. NO. 85-C-179-B

FILED

DEC 16 1985

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

J U D G M E N T

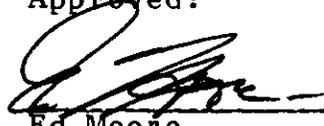
Upon offer being made and acceptance thereof by plaintiffs,
IT IS ORDERED that judgment be and it is hereby granted to plain-
tiffs and against defendant in the sum of \$17,282.64, with costs
and attorney fees to be determined by the Court upon proper
application.

DATED this 16th day of December, 1985.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

Approved:



Ed Moore
of GINDER & MOORE
120 South Grand
Cherokee, Oklahoma 73728
(405) 596-3383
Attorney for Plaintiffs



David W. Wulfers, Staff Attorney
Samson Resources Company
Samson Plaza
Two West Second Street
Tulsa, Oklahoma 74103
(918) 583-1791

FILED

DEC 16 1985

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

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

R. L. DRILLING CONTRACTOR,)
INC.,)
)
Plaintiff,)
)
vs.)
)
SCHRAMM, INC., a Pennsylvania)
corporation,)
)
Defendant and)
Third Party Plaintiff,)
)
and)
)
AEROQUIP CORPORATION,)
a Michigan corporation,)
)
Additional Defendant,)
)
vs.)
)
F. B. WRIGHT COMPANY,)
a corporation,)
)
Third Party Defendant,)
)
and)
)
PHILADELPHIA F. B. WRIGHT)
DISTRIBUTION COMPANY,)
a Pennsylvania corporation,)
)
Additional Third-Party)
Defendant.)

No. 83-C-720-C

ORDER

Now before the Court for its consideration are the objections of defendant and third-party plaintiff Schramm, Inc., to the Findings and Conclusions of the Magistrate regarding attorney

fees, said objections filed herein on October 23, 1985. Although the third-party defendants failed to timely respond to the objections pursuant to Local Rule 14(a) and further failed to respond to this Court's minute order of November 14, 1985, the Court nevertheless finds the matter ready for disposition.

Schramm prays this Court not adopt the Findings and Conclusions of the Magistrate, filed herein on October 18, 1985, without modifying said findings to reflect that the appropriate choice of law on the attorney's fees issue is the substantive law of Pennsylvania, which would exclude the third-party defendants' claim for attorney fees.

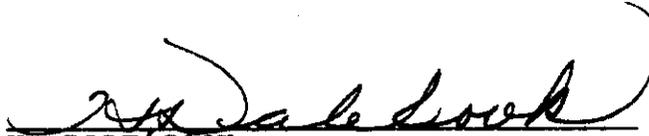
This diversity action, a claim for indemnity on a warranty action, has proceeded in all aspects of the case pursuant to Oklahoma law. The pretrial order indicates the cause of action arose in the Northern District of Oklahoma. The issues of law raised in the pretrial order were briefed by all the parties, citing Oklahoma law. Schramm relied on Oklahoma law in its motion for summary judgment; but now asks this Court to apply the law of Pennsylvania as to the issue of attorney's fees.

Schramm cites no case supporting this proposition. No justification exists for applying a state's law other than the state law the parties considered as the controlling substantive law as to the merits of the case. Thus, the attorney fee issue is properly governed by Title 12 O.S. 1981 §§936, 939.

It is therefore ordered that the objections of Schramm to the Findings and Conclusions of the Magistrate be hereby overruled. This Court hereby adopts said Findings and Con-

clusions as its own. As such, third-party defendants, as prevailing parties, are entitled to and are hereby awarded attorney fees, to be paid by Schramm, Inc., in the amount of \$13,397.25.

IT IS SO ORDERED this 13th day of December, 1985.


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

Entered

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 GARY W. LANCASTER,)
)
 Defendant.)

12/16/85
10:00 AM
CLERK'S OFFICE

CIVIL ACTION NO. 85-C-767-B

DEFAULT JUDGMENT

This matter comes on for consideration this 16th day of December, 1985, the Plaintiff appearing by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Peter Bernhardt, Assistant United States Attorney, and the Defendant, Gary W. Lancaster, appearing not.

The Court being fully advised and having examined the file herein finds that Defendant, Gary W. Lancaster, acknowledged receipt of Summons and Complaint on September 2, 1985. The time within which the Defendant could have answered or otherwise moved as to the Complaint has expired and has not been extended. The Defendant has not answered or otherwise moved, and default has been entered by the Clerk of this Court. 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 the Defendant, Gary W. Lancaster, for the principal sum of \$586.31, plus interest at the rate of 15.05 percent per annum and administrative costs of \$.61 per month from July 28, 1983, and \$.68 per month from January 1, 1984, until

Entered

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 RONALD J. FRESH,)
)
 Defendant.)

DEC 19 1985
Jack C. Siler, Clerk
U. S. DISTRICT COURT

CIVIL ACTION NO. 85-C-⁴²⁰217-B

ORDER OF DISMISSAL

Now on this 16 day of December, 1985, it appears that the Defendant in the captioned case has not been located within the Northern District of Oklahoma, and therefore attempts to serve Ronald J. Fresh have been unsuccessful.

IT IS THEREFORE ORDERED that the Complaint against Defendant, Ronald J. Fresh, be and is dismissed without prejudice.

By THOMAS R. BURT
UNITED STATES DISTRICT JUDGE

24

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LARRY W. TERRY, et al.,

Defendants.

)
)
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DEC 16 1985

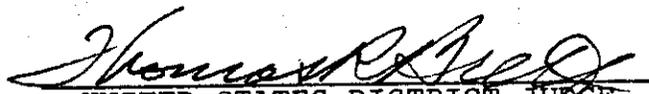
Jack C. Silver, Clerk
U. S. DISTRICT COURT

CIVIL ACTION NO. 82-C-1110-B

ORDER

Good cause having been shown, it is hereby ORDERED,
ADJUDGED AND DECREED that the above-referenced action is hereby
dismissed without prejudice.

Dated this 16 day of December, 1985.


UNITED STATES DISTRICT JUDGE

24

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

FILED

DEC 16 1985

ROBERT E. COTNER, #93780,)
)
 Plaintiff,)
)
 vs.)
)
 DON E. AUSTIN, et al,)
)
 Defendants.)

JACK D. SILVER, CLERK
U.S. DISTRICT COURT

No. 85-C-352-C

O R D E R

The Court has for consideration the Findings and Recommendations of the Magistrate filed October 15, 1985, in which recommendations were made on motions. Plaintiff has filed his objections thereto.

After careful consideration of the record, the issues presented, and the objections of the plaintiff, the Court has concluded that the objections of the plaintiff have no merit and that the Findings and Recommendations of the Magistrate should be and hereby are affirmed.

It is therefore Ordered that plaintiff's objections are overruled, plaintiff's Motion for an Extension of Time to Engage in Discovery is denied, that plaintiff's Motion to Subpoena Witnesses is denied, and that defendant's Motion for Summary Judgment is granted.

IT IS SO ORDERED this 13 day of December, 1985.


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

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

FILED

DEC 16 1985

FLOYD WESLEY OWENS,)
)
 Plaintiff,)
)
 vs.)
)
 CITY OF PRYOR CREEK, OKLAHOMA;)
 MAYOR CARL CURRY; COUNCILMEN)
 LARRY RICE, FRANK VARGAS,)
 HAROLD WOJAHN, BRUCE SMITH,)
 STANLEY LEE, WALTER HAWKINS,)
 RONNIE SHARP, and HAROLD RUSH;)
 CHIEF WILEY BACKWATER;)
 ASSISTANT CHIEF BILL MOON;)
 SERGEANT MICHAEL COATNEY; and)
 SERGEANT RON BATT,)
)
 Defendants.)

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

No. 83-C-879-C

O R D E R

Now before the Court for its consideration are the motions of the defendants to dismiss which were converted to motions for summary judgment by Court Order entered on August 29, 1984. The motions were separately filed in three groupings: The first by the City of Pryor Creek (City); the second by Chief of Police Wiley Backwater (Backwater), Assistant Chief Bill Moon, Sergeant Michael Coatney and Sergeant Ron Batt; and the third by Mayor Carl Curry and City Council members Larry Rice, Frank Vargas, Harold Wojahn, Bruce Smith, Stanley Lee, Walter Hawkins, Ronnie Sharp and Harold Rush (City Council). The defendants assert that plaintiff's claim brought under 42 U.S.C §1983 fails to state a claim upon which relief can be granted and should be dismissed pursuant to Rule 12(b)(6) F.R.Cv.P.

On October 13 the complaint, specification of charges and list of witnesses were delivered to plaintiff's attorney. A letter accompanying the complaint offered to pass the October 18 scheduled City council meeting until November 1 to allow plaintiff a ten day advance notice of the hearing. On October 18, plaintiff attended the City Council meeting to deliver a letter to the Mayor in which plaintiff refused to participate in the hearing for the proposition that such a hearing would not be fair or impartial. Plaintiff filed suit against all defendants alleging violations of his civil rights (42 U.S.C §1983) and breach of contract (implied from the City's policy manual). Plaintiff sought monetary damages, declaratory and injunctive relief. In his claim for injunctive relief plaintiff sought to have the October 18 City Council meeting enjoined for the defendants' alleged failure to comply with the requirements of procedural due process, thereby having the possible effect of irreparable damage to plaintiff.

In his claim brought pursuant to 42 U.S.C §1983 plaintiff alleges that at all times material the defendants, together and individually, were co-conspirators engaged in a common scheme or plan to deprive plaintiff of his rights to due process of law and to his constitutionally protected property right in his employment. Specifically, plaintiff asserts that the deprivation of his constitutional rights arise out of the suspension by the Chief of Policy as part of a conspiracy among the four defendants employed by the Police Department as ratified and joined in by the Mayor, City Council and the City.

policies promulgated by the City that gives rise to a cause of action. In Cowdrey v. City of Eastborough, Kansas, 730 F.2d 1376 (10th Cir. 1984), the Tenth Circuit in citing Monell held that allegations of an isolated claim of misconduct directed toward public officials was insufficient to establish an "unarticulated City policy authorizing or encouraging" an illegal act. 730 F.2d at 1379. The Court therefore finds that plaintiff's allegation that the City engaged in a "conspiratorial scheme" to deprive him of procedural due process is insufficient, standing alone, to satisfy the requisites of an official act or unarticulated custom as set forth in Monell and thereby fails to state a claim against the City in which relief can be granted.

The Court will next consider the motions of the remaining defendants for summary judgment on the basis that plaintiff has failed to state a claim for which relief may be granted under 42 U.S.C. §1983, more specifically, plaintiff's alleged denial of procedural due process.

A prerequisite to establishing a denial of procedural due process in the context of alleged deprivation of property interest, the plaintiff must prove that he possessed a protected property interest in such employment. Board of Regents v. Roth, 408 U.S. 564 (1972). A property interest is defined as an actual entitlement to continued employment rather than a mere unilateral expectation of continuing in the position. Williams v. West Jordan City, 714 F.2d 1017, 1019-1020 (10th Cir. 1983). Actual entitlement can be shown by express provisions contained in a written employment contract, state statute, or city ordinance.

city manage to remove employees "when necessary for the good of the service" or "solely for the good of the service." Supra at 198. The Court reasoned that since the city ordinance did not fix any period of employment, nor did it specify what may constitute a sufficient reason for discharge, that the ordinance clearly vested discretionary authority in the city manager to determine what was "good for the service." Supra 617 P.2d at 199. The court rejected the trial court's ruling that "solely for the good of the service" was synonymous with the term "cause." Id. The court held that such language did not create a property interest in continued employment. Id. Consistent with Oklahoma law, the Court therefore finds that the City Code of Pryor Creek did not confer upon plaintiff a protected property interest in continued employment.

Plaintiff next argues that the General Information Policy manual conferred the requisite property interest. The manual provides:

SUSPENSION OF EMPLOYEES

As provided in the City Charter, all officers and employees of the City, other than elective officers, shall hold their position during the pleasure of the Mayor and Council. Any Department Head may for just cause, suspend the service of any regular employee under his supervision, and such suspension shall separate the regular employee from pay and leave status. No regular employee however, shall be discharged without the approval of the Mayor and City Council. In the event that any regular employee is suspended or attempted to be discharged by the department head, such employee shall be entitled to appear the next regular meeting of the Mayor and Council and be heard on the question of his suspension or removal.

suspension and possible termination. However, plaintiff elected not to participate in the offered hearing. Plaintiff's bald accusation that the offered hearing would not be adequate, is insufficient to state a claim for relief; no deprivation had occurred.

Therefore premises considered, it is the Order of the Court that the motions to dismiss and for summary judgment filed by all defendants, City of Pryor Creek; Mayor Carl Curry; Councilmen Larry Rice, Frank Vargas, Harold Wojahn, Bruce Smith, Stanley Lee, Walter Hawkins, Ronnie Sharp, and Harold Rush; Chief Wiley Backwater; Assistant Chief Bill Moon; Sergeant Michael Coatney; and Sergeant Ron Batt over and against the plaintiff Floyd Wesley Owens is hereby granted.

IT IS SO ORDERED this 13th day of December, 1985.



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

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

ROGER BLAIR, as father and legal)
guardian of Cathleen Blair, a minor)
child, and ROGER BLAIR, individually,)
)
Plaintiff,))
)
v.))
)
COSCO/PETERSON, a subsidiary of Kidde,)
Inc., COSCO, INC., KIDDE, INC., foreign)
corporations, WILGAR, INC., an Indiana)
corporation, MODERN MERCHANDISING, INC.,)
d/b/a/ LABELLE'S, a Minnesota)
corporation, and BEST PRODUCTS COMPANY,)
INC., d/b/a/ BEST/LABELLE'S, a Virginia)
corporation,)
)
Defendants.)

No. 84-C-788-E

FILED

lock E. (State Clerk)
U. S. DISTRICT COURT

AGREED ORDER

Now on this 6th day of December, 1985, there came on for hearing a pretrial conference, Plaintiffs appears by and through their attorney, Michael P. Atkinson; Defendants, Kidde, Inc., Cosco and Wilgar appeared by and through their attorney, Alfred K. Morlan; and Modern Merchandising and Best Products appeared by and through their attorney, Alfred B. Knight.

Plaintiffs and Defendants stipulated that Modern Merchandising, Inc. is not a proper Defendant and should be stricken form the pleadings and proceedings. It is further stipulated and agreed that the Cosco Safe-T-Shield car seat complained of herein, was purchased at retail from Defendant Best Products Company, Inc., d/b/a LaBelle's, on or about December 30, 1982, by Cathleen's grandmother, Mariann H. Otto, for the sum of \$73.47.

It was further stipulated that the product was sold by Wilgar, Inc.

to the Best Products Company and that the discovery procedures had revealed that Best Products Company did not manufacture, assemble, change or modify the product and that the product as far as Best Products was concerned was received in a box and sold in the box.

The Court finds that there is pending a Cross Claim for indemnity by Best Products against Wilgar, Inc.

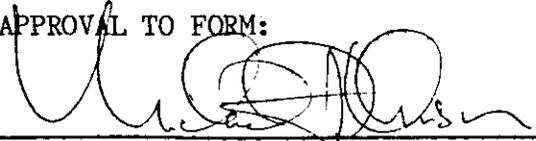
Earlier, Best Products moved for Summary Judgment based on the undisputed evidence and the pleadings. The Court finds that the Motion for Summary Judgment should be sustained and that Wilgar, Inc. should indemnify and hold harmless said Best Products from and of any and all cause of action in case number 84-C-780-E instituted by the Plaintiffs herein.

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that Modern Merchandising, Inc. should be and hereby is stricken from the pleadings and from the cause.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Wilgar, Inc. should indemnify and hold harmless said Best Products Company from any and all cause of action by the Plaintiffs in the aforesaid cause.

JUDGE JAMES E. ELLISON

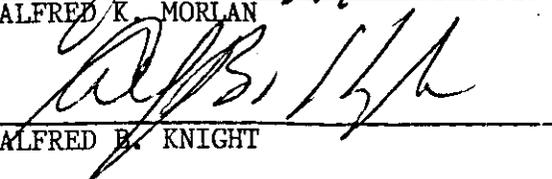
APPROVAL TO FORM:



MICHAEL ATKINSON



ALFRED K. MORLAN



ALFRED B. KNIGHT

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

FILED

MICHAEL A. PRESTON,

Plaintiff,

v.

LOWELL WILKENS TRUCKING COMPANY and
PATRICK R. MARRS,

Defendants.)

No. 85-C-772-E

DEC 17 1985

U. S. DISTRICT COURT

ORDER OF DISMISSAL

Now on this 13th day of December, 1985, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

[Signature]

United States District Judge

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

FORD MOTOR CREDIT COMPANY,)
a Delaware corporation,)
)
Plaintiff,)
)
vs.) No. 85-C-978-C
)
VANSPORTATION, INC.,)
an Oklahoma corporation;)
and SAM S. DOUGLASS,)
CLAUDIA M. DOUGLASS,)
FRANCIS L. STRAWSER;)
and TERESA B. STRAWSER,)
individuals)
)
Defendant.)

ORDER OF DISMISSAL

THIS cause came to be heard on Plaintiff's Motion for Voluntary Dismissal of said cause, and due deliberation has been had thereon, it is

ORDERED that this cause be and the same is hereby dismissed without prejudice.

Dated December 13, 1985.

s/H. DALE COOK

UNITED STATES DISTRICT JUDGE

FILED

DEC 13 1995

JACK G. SILVER, CLERK
U.S. DISTRICT COURT

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

THE NORTHERN TRUST COMPANY,
an Illinois state banking
corporation,

Plaintiff,

vs.

MILTON D. MCKENZIE,

Defendant.

No. 85-C-283-C

STIPULATION OF
DISMISSAL WITH PREJUDICE

COME NOW, The Northern Trust Company, Plaintiff in this action, and Milton D. McKenzie, Defendant and Counterclaimant in this action, and, being all parties who have appeared and claim an interest in the matters pertaining to this action, hereby stipulate as follows:

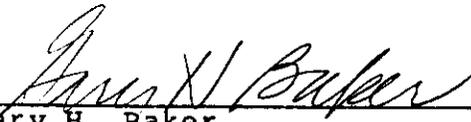
1. This action and all the claims asserted by Plaintiff against Defendant in Plaintiff's First Amended Complaint filed herein are hereby dismissed with prejudice by Plaintiff.

2. This action and all the claims asserted by Defendant against Plaintiff in Defendant's Counterclaim filed herein are hereby dismissed with prejudice by Defendant.

3. No matters remain before this Court for adjudication in this action.

4. Each party shall bear its own costs in this action.

DATED December 12, 1985.



Gary H. Baker
Baker, Hoster, McSpadden,
Clark & Rasure
13th Floor, One Boston Plaza
Tulsa, Oklahoma 74103
(918) 592-5555

Attorneys for Plaintiff
The Northern Trust Company



Jon R. Running
Running & Culver
1700 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172
(918) 585-2904

Attorneys for Defendant
Milton D. McKenzie

- Entered -

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

FILED

HELEN MILLS, ADMINISTRATRIX
OF THE ESTATE OF LOUIS L.
DEWEY and MAGGIE M. DEWEY,
DECEASED,

*
*
*
*
*
*
*
*
*
*
*

DEC 13 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

Plaintiff,

CASE NO. 85-C-678-B

VS.

MICHAEL CURTIS GEIGER, ET AL.

Defendants.

STIPULATION AND ORDER OF DISMISSAL OF MILNOT CO.

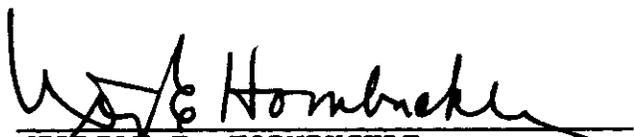
The parties below having so stipulated, and good cause appearing therefor, IT IS ORDERED

All claims of Plaintiff, HELEN MILLS, Administratrix of the Estate of Louis L. Dewey and Maggie M. Dewey, Deceased, set forth in her First Amended Complaint dated September 10, 1985, against Defendant, MILNOT CO., are hereby dismissed, pursuant to Rule 41 of the Federal Rules of Civil Procedure.

Each party shall bear its own costs and attorney's fees.

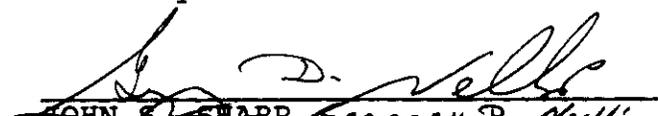
We stipulate to enter this Order:

Dated: December 10, 1985


WILLIAM E. HORNBUCKLE
Attorney for Plaintiff

FILED

Dated: _____


JOHN E. SHARP Gregory D. Null's
Attorney for Defendant,
Milnot Co.

DEC 13 1985
SO ORDERED on December 18, 1985.

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

S/ THOMAS R. BRETT

HON. THOMAS R. BRETT
United States District Judge

Copies of this instrument were sent to all other counsel of record.

FILED

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

DEC 12 1985

JACK B. OLIVER, CLERK
U.S. DISTRICT COURT

JULIE L. SAXON and
PAUL SAXON,

Plaintiffs,

vs.

RICHARD VINCENT LOUERDE,
FARMERS INSURANCE COMPANY,
INC., a foreign corporation,
and CENTRAL MUTUAL INSURANCE
COMPANY, a foreign corporation,

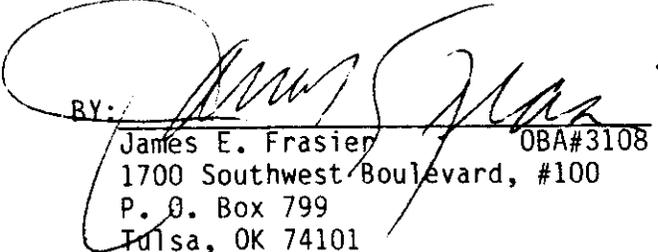
Defendants.

No. 85-C-798-E

NOTICE OF DISMISSAL

COMES NOW the Plaintiff, pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure that the Plaintiff herewith dismisses without prejudice the above-entitled action as it is against the Defendant, Central Mutual Insurance Company, a foreign corporation.

FRASIER & FRASIER

BY: 
James E. Frasier OBA#3108
1700 Southwest Boulevard, #100
P. O. Box 799
Tulsa, OK 74101
(918)584-4724

CERTIFICATE OF MAILING

I hereby certify that on this the 13 day of December, 1985, I mailed a true and correct copy of the above and foregoing Motion to Ray H. Wilburn, Attorney at Law, 2512-E E. 71st St., Tulsa, Oklahoma, 74136, Attorney for the Defendant and Cross-Petitioner, Farmers Insurance Company, with the correct and proper postage thereon fully prepaid.


James E. Frasier

Entered

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC 12 1985

IN THE MATTER OF THE TAX
INDEBTEDNESS OF DUKE'S
COUNTRY, INC.

)
)
)

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

CIVIL ACTION NO. 85-C-720-BT

NOTICE OF DISMISSAL

COMES NOW the United States of America, by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and hereby gives notice of its dismissal, pursuant to Rule 41, Federal Rules of Civil Procedure, of this action without prejudice.

Dated this 22nd day of November, 1985.

UNITED STATES OF AMERICA

LAYN R. PHILLIPS
United States Attorney

Phil Pinnell

PHIL PINNELL
Assistant United States Attorney
460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

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

FILED

DEC 11 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

ROY PARSONS,

Plaintiff,

vs.

COLOR TILE, INC.; and
ED NELSON, Agent for
Color Tile, Inc.,

Defendants.

No. 85-C-719-C

O R D E R

Now before the Court for its consideration is the motion of defendant Color Tile, Inc. to dismiss or, in the alternative, for summary judgment filed on November 12, 1985. The Court has no record of a response to this motion from plaintiff Roy Parsons. Rule 14(a) of the local Rules of the United States District Court for the Northern District of Oklahoma provides as follows:

(a) Briefs. Each motion, application and objection filed shall set out the specific point or points upon which the motion is brought and shall be accompanied by a concise brief. Memoranda in opposition to such motion and objection shall be filed within ten (10) days after the filing of the motion or objection, and any reply memoranda shall be filed within ten (10) days thereafter. Failure to comply with this paragraph will constitute waiver of objection by the party not complying, and such failure to comply will constitute a confession of the matters raised by such pleadings.

Therefore, since no response has been received to date herein, in accordance with Rule 14(a), the failure to comply

constitutes a confession of the motion to dismiss or, in the alternative, for summary judgment.

Accordingly, it is the Order of the Court that defendant Color Tile, Inc.'s motion to dismiss or, in the alternative, for summary judgment should be and hereby is granted.

IT IS SO ORDERED this 10th day of December, 1985.


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

FILED

DEC 11 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

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

KOPPERS COMPANY, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 DIAMOND ELECTRIC CO., an)
 Oklahoma corporation, and THE)
 AETNA CASUALTY AND SURETY COMPANY,)
)
 Defendants.)

Case No. 85-C-880-C

DISMISSAL

The plaintiff herein, Koppers Company, Inc., hereby dismisses its action as against The Aetna Casualty and Surety Company, without prejudice.

MOYERS, MARTIN, SANTEE,
IMEL & TETRICK

By R. Scott Savage
R. Scott Savage, OBA #7926
320 South Boston, Suite 920
Tulsa, OK 74103
(918) 582-5281

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF MAILING

I certify that on this 11th day of December, 1985, I caused a true and correct copy of the foregoing Dismissal to be mailed to the following, with sufficient postage prepaid thereon:

Donald E. Pool, Esq.
1515 S. Denver
Tulsa, OK 74119



R. Scott Savage

Entered

FILED

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

DEC 10 1985

GENE MARITAN,)
)
 Plaintiff,)
)
 v.)
)
 BIRMINGHAM PROPERTIES, an)
 Oklahoma limited partnership;)
 EDWIN KRONFELD, individually and)
 as surviving general partner of)
 BIRMINGHAM PROPERTIES, an)
 Oklahoma limited partnership;)
 et al.,)
)
 Defendants.)

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

No. 85-C-617-B

ORDER

This matter comes before the Court on defendants' motion to dismiss. For the reasons set forth below, the motion is granted.

Plaintiff, Gene Maritan ("Maritan"), brings this action under the Securities Act of 1933, 15 U.S.C. §§ 77a et seq., upon which he relies for jurisdiction in this court. Plaintiff and defendant Birmingham Properties formed a joint venture on or about July 6, 1982 for the purpose of remodeling an existing house and constructing additional houses. A copy of the joint venture agreement dated July 2, 1982, is attached as Exhibit "A" to plaintiff's complaint. As the exhibits attached to the complaint are not "matters outside the pleadings," the Court does not convert the motion to one for summary judgment.

The question presented herein is whether the joint venture interest sold to plaintiff was a "security." Plaintiff admits that the sole basis of federal jurisdiction rests upon a finding

that the joint venture constitutes an "investment contract," one of the enumerated categories qualifying as a security under 15 U.S.C. §77b(1).

In S.E.C. v. Howey Co., 328 U.S. 293, 301 (1946), the Supreme Court held that the test for distinguishing an investment contract from other commercial dealings "is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." The test has subsequently been broken down into three requirements: "(1) an investment, (2) in a common enterprise, (3) with 'a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others.'" Crawford v. Montgomery Ward & Co., 570 F.2d 877, 880 (10th Cir. 1978), quoting United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 852 (1975).¹ Defendants have conceded for the purpose of this motion that there was an investment of money by Maritan with the expectation of profits. They contest, however, that the investment was made in a common enterprise and that the expected profits were to be derived solely from the entrepreneurial or managerial efforts of others.

The courts have split as to whether "common enterprise" is to be determined by horizontal or vertical commonality.

1

Footnote 16 of United Housing mentions, without expressing a view as to the holding of S.E.C. v. Glenn W. Turner Enterprises, 474 F.2d 476, 482 (9th Cir. 1973) that "the word 'solely' should not be read as a strict or literal limitation on the definition of an investment contract, but rather must be construed realistically, so as to include within the definition those schemes which involve in substance, if not form, securities."

Horizontal commonality means that there is a number of investors who have pooled their money to fund the enterprise. Curran v. Merrill, Lynch, Pierce, Fenner & Smith, 622 F.2d 216, 221 (6th Cir. 1980). Vertical commonality means that there is a relationship between an investor and the manager of the enterprise in which the fortunes of the two are linked. SEC v. Goldfield Deep Mines Co., 758 F.2d 459, 463 (9th Cir. 1985).

Defendants contend that this Court should adopt the "horizontal commonality" standard adopted by the United States District Court for the Western District of Oklahoma. Rother v. La Renovista Estates, Inc., 603 F.Supp. 533, 537 (W.D.Okla. 1984). The Tenth Circuit has recently rejected the horizontal commonality standard, however, in favor of an evaluation of the "economic reality" of the transaction. McGill v. American Land & Exploration Company, No. 84-1932 (10th Cir. November 12, 1985).

McGill involved a joint venture in which plaintiff invested \$80,000 purported to be for the development of a real estate subdivision near Duncan, Oklahoma. Plaintiff alleged that the promoters had falsely told him that the joint venture would be completed quickly when in fact they never intended that the subdivision would actually be developed. In applying the "economic reality" standard, the Court stated:

"[I]f a transaction is purely commercial in nature (for example, a commercial loan or a sale of assets), then it does not give rise to a "common enterprise" or a "security." If, on the other hand, a transaction is in reality an investment (that is, a transaction of a type in which stock is often given), then it creates a "common enterprise" and gives rise to a "security" falling within the ambit of the 1933 and 1934 Securities Acts."

Applying the economic reality standard, the Court determined that the transaction was an investment giving rise to a "common enterprise" within the meaning of S.E.C. v. Howey, 328 U.S. 193 (1946) because the plaintiff was to recoup his original investment and half the profits that had been derived from the joint venture's operations. The transaction was not a commercial loan because plaintiff would have been promised a specified rate of return on his \$80,000. It was not a commercial purchase of assets because plaintiff purchased the right to participate in the joint venture's profits.

Here, as in McGill, application of the "economic reality" standard indicates the joint venture interest purchased was an investment giving rise to "common enterprise" because plaintiff Maritan purchased the right to a distribution of the profits. Further, both plaintiff and defendant Birmingham Properties were to pay for fifty percent of the cost of remodeling and new construction.

In regard to the third requirement of Howey, the Court concludes that the anticipated profits did not come solely from the efforts of Birmingham Properties. In reaching such a conclusion, the Court has attempted to construe the word "solely" in a realistic sense. The joint venture agreement herein therefore fails to constitute a security, as more fully discussed below.

First, joint venture interests are generally not investment contracts under the federal securities acts. Williamson v. Tucker, 645 F.2d 404, 421 (5th Cir. 1981).

"Although general partners and joint venturers may not individually have decisive control over major decisions, they do have the sort of influence which generally provides them with access to important information and protection against a dependence on others. Moreover, partnership powers are not in the nature of a nominal role in the enterprise which a seller of investment contracts would include in order to avoid the securities laws; on the contrary, one would expect such a promoter to insist on ultimate control over the investment venture. An investor who is offered an interest in a general partnership or joint venture should be on notice, therefore, that his ownership rights are significant, and that the federal securities acts will not protect him from a mere failure to exercise his rights."

645 F.2d at 422. Actual control exercised by the purchaser is irrelevant. "So long as the investor has the right to control the asset he has purchased, he is not dependent on the promoter or on a third party for 'those essential managerial efforts which affect the failure or success of the enterprise.'" Id. at 421.

Second, although the Williamson court acknowledged that a joint venture interest might be a security in those limited situations where the joint venture agreements left so little power in the alleged investor's hands that the arrangement could be considered a limited partnership, the agreement herein reveals that plaintiff Maritan retained significant power to control the construction and remodeling projects. It is clear from a review of the joint venture agreement that plaintiff implicitly retained the right to control, by mutual agreement with defendant Birmingham Properties, (a) the cost of remodeling the house on Lot 2; (b) the cost of constructing the new house on Lot 1; and (c) the cost of constructing new houses on Lots 3, 4, 5 and 6, if

plaintiff chose to participate in said construction on those particular lots within six months of the original joint venture agreement. Though the details of the remodeling and new construction were designated as "the sole responsibility of Birmingham" under the agreement, the ultimate cost of such remodeling and new construction is unspecified. Thus, plaintiff implicitly retained shared control with Birmingham Properties over the ultimate cost of remodeling and construction, which determined the size and scope of the remodeling and construction efforts, as well as the amount he was to pay under the agreement. On January 10, 1984, the joint venture agreement was amended in writing (Exhibit "B" to plaintiff's complaint) and in part specified the precise amount owed by plaintiff for construction and improvement costs incurred on Lots 1-6 between June 1, 1983 through November 30, 1983. The amendment specified that the costs were principally incurred on Lots 1 and 2. Though such costs previously incurred were specified in the amendment, plaintiff retained implicit authority to control or have input on, both before and after the amendment, the ultimate cost of construction and remodeling.

As a joint venturer, plaintiff also enjoyed the managerial authority afforded him by Oklahoma law. The law of partnership and of principal and agent controls the conduct and defines the rights and liabilities of co-adventurers. Martin v. Chapel, Wilkinson, Riggs & Abney, 637 P.2d 8, 85-6 (Okla. 1981); Roane v. U. S. Fidelity and Guaranty Co., 378 F.2d 40, 44 (10th Cir.

1967); Commercial Lmbr. Co. v. Nelson, 72 P.2d 829 (Okla. 1937). Plaintiff's rights include the right to inspect and copy the books, to have his co-adventurer render information on demand, and to have an accounting under certain circumstances. Title 54 O.S. §§ 219, 220, 222. Although the letter agreement limits plaintiff's right to sell and convey the property involved and makes details of construction and remodeling the sole responsibility of Birmingham Properties, Maritan retained the right to wield significant powers both implicit in the agreement and conferred by state law.

The agreement between the parties fails to establish plaintiff's investment was to derive profits from the entrepreneurial or managerial efforts of others. Therefore, it does not satisfy the Howey test and is not a security.

Defendants' motion to dismiss is granted, as the Court is without subject matter jurisdiction.

IT IS SO ORDERED this 9th day of December, 1985.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Entered

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

DEC 9 1985
JACK L. ...
U. S. DISTRICT COURT

RICHARD ANDERSON,
Plaintiff,
v.
ROBERT V. BLOCK, a/k/a
BOB BLOCK,
Defendant.

No. 85-C-293-B

J U D G M E N T

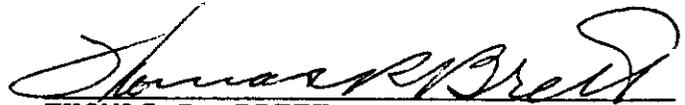
In keeping with the Findings of Fact and Conclusions of Law herein, Judgment is hereby entered for the plaintiff, Richard Anderson, and against the defendant, Robert V. Block, a/k/a Bob Block, in the amount of Twenty Thousand Dollars (\$20,000.00), prejudgment interest from June 13, 1984 at the rate of 6% per annum, postjudgment interest at the rate of 7.87% per annum, plus the costs of this action.

DATED this 9th day of December, 1985.

Thomas R. Brett
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

than reinstatement and back pay under her Title VII racial discrimination claim are hereby stricken. Plaintiff seeks to amend her complaint to allege a claim under 42 U.S.C. §1981. Plaintiff's motion is hereby granted.

IT IS SO ORDERED, this 9th day of December, 1985.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Entered

FILED

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

DEC 9 1985

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

ROBERT ALSPAUGH,)
)
 Plaintiff,)
)
 v.)
)
 DAVE FAULKNER,)
)
 Defendant.)

No. 80-C-485-B

O R D E R

This matter comes before the Court on defendant's motion for summary judgment. For the reasons set forth below, the motion is granted.

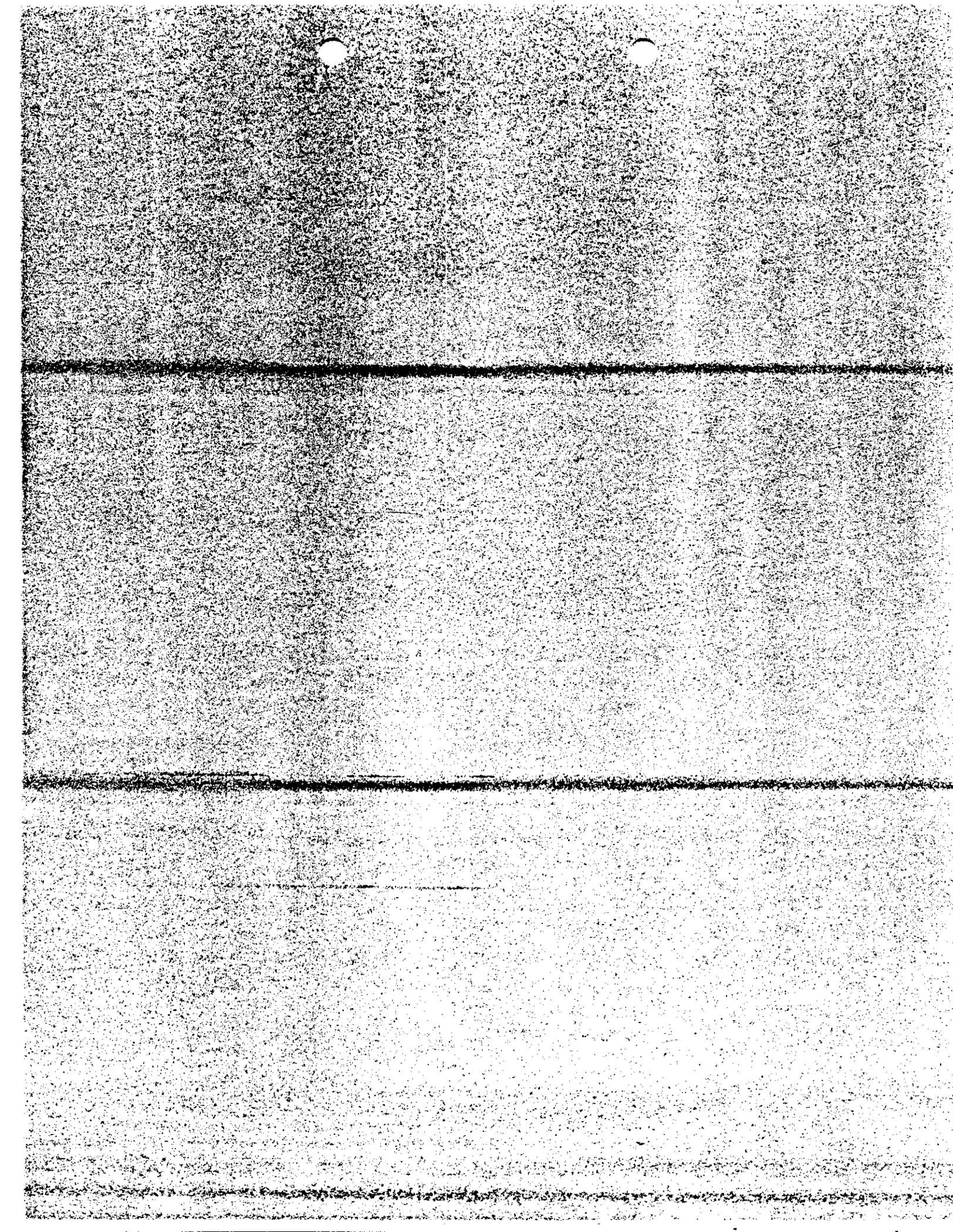
Plaintiff herein, Robert Alspaugh ("Alspaugh"), was incarcerated in the Tulsa County Jail from May, 1980 through October, 1980. Agreed Pretrial Order, p.2. On November 6, 1980, this matter was bifurcated and partially consolidated with case number 79-C-723-B, Clayton v. Thurman. The remaining unconsolidated portion of this matter regards plaintiff's claim for damages "for alleged violation of Plaintiff's right not to be housed with convicted felons and alleged violation of Plaintiff's right to religious services while an inmate of the Tulsa County Jail." Agreed Pretrial Order, p. 1.

This matter was called for jury trial on August 18, 1984. Because the agreed pretrial order filed with the Court presented two dispositive issues of law, the Court established a briefing schedule for this motion for summary judgment. The two issues of law presented in the agreed pretrial order and this motion for summary judgment are as follows:

- "1. Whether Plaintiff has a per se right to separation of pre-trial and post-trial detainees.
2. Whether Plaintiff has an unrestricted right to exercise of freedom of religion."

In addressing the motion for summary judgment, the Court considers the affidavit of Robert E. Cotner submitted by plaintiff and attached to plaintiff's supplemental brief in opposition to motion for summary judgment, filed November 26, 1984. No other evidence has been submitted by the parties.

The Court first addresses the freedom of religion issue. In that regard, plaintiff challenges the general policy toward exercise of inmates' rights to freedom of religion at the Tulsa County Jail rather than actions specifically directed against himself. This issue was addressed in the Findings and Conclusions issued by this Court en banc in Clayton, supra, on August 2, 1983. There the Court concluded that "[t]he lack of adequate facilities and security considerations preclude jail officials from allowing group religious services at the county jail facility and the city jail facility." Id., p. 37. However, the Court ordered that an opportunity for group religious services should be provided to those persons incarcerated at the medium security Adult Detention Center, since the Center had space to permit such services and since security risks were manageable. Id. at pp. 23, 39. The Court found that inmates did in fact have "free access to personal visitation by ministers, priests, or authorized representatives of any recognized religious group." Id., p. 23. Because plaintiff is a member of the prisoner class in the



Clayton case, as mentioned above, and because he challenges general jail practices in regard to inmates' freedom of religion rights, the conclusion in Clayton is res judicata to plaintiff's claim herein. The freedom of religion claim is therefore dismissed.

Plaintiff's remaining claim relates to his alleged right as a pretrial detainee to be held separate from convicted inmates. Seventy-five to eighty percent of the inmates in the Tulsa County Jail System are housed there less than 72 hours. Finding of Fact No. 8, Clayton v. Thurman, August 2, 1983, p. 7. According to jail policy, "unsentenced pretrial detainees will be separated from sentenced inmates as much as possible." Id. at p. 8, quoting Tulsa County Jail Operating Manual, JOM 007(F)(11). However, plaintiff was housed in the same cell as convicted inmates. Affidavit of Robert E. Cotner, item number 5. Analysis of plaintiff's claim requires consideration of Block v. Rutherford, _____ U.S. _____, 104 S.Ct. 3227 (1984).

In Block, pretrial detainees at the Los Angeles County Central Jail brought a class action against the county sheriff challenging on due process grounds the jail's policy of denying pretrial detainees contact visits with their spouses, relatives, children, and friends, and the Jail's practice of conducting random, irregular "shakedown" searches of cells while the detainees were away at meals or other activities. The Supreme Court held that where a pretrial detainee alleges he has been deprived of liberty without due process, the dispositive inquiry

is whether the challenged practice or policy constitutes punishment or is reasonably related to a legitimate governmental objective. See also Bell v. Wolfish, 441 U.S. 520, 535 (1979), where pretrial detainees challenged numerous conditions of confinement at the pretrial detention facility in New York City.

Plaintiff has provided no proof of an intent to punish pretrial detainees by placing them in cells with convicted prisoners. Absent evidence of intent, the Court must make a determination of "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." Block v. Rutherford, 104 S.Ct. at 3231, quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963). "Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment'." Bell v. Wolfish, 441 U.S. at 539. On the other hand, "if a restriction or condition is not reasonably related to a legitimate goal--if it is arbitrary or purposeless--a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." Id.

In setting forth the guidelines above, the Court stressed "the very limited role that courts should play in the administration of detention facilities." Block, 104 S.Ct. at 3232. Such administrative policies "are peculiarly within the

province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these [security interests], courts should ordinarily defer to their expert judgment in such matters." Bell v. Wolfish, 441 U.S. at 540-541, n. 23.

The confinement of pretrial detainees with convicted criminals may be necessary in some cases for administrative reasons. Federal courts are properly reluctant to limit the freedom of prison officials to classify prisoners as they, in their broad discretion, see fit. Marchesani v. McCune, 531 F.2d 459, 461 (10th Cir. 1976), cert. denied, 429 U.S. 846 (1976). As stated above, plaintiff has provided no proof of an intent to punish him or other pretrial detainees by holding them in cells with post-trial detainees. The defendant's action of holding plaintiff (and other pretrial detainees on occasion) with convicted prisoners is reasonable, given the administrative considerations inherent in securely confining various classes of prisoners in the same facility. Classification of inmates upon their admission to the Tulsa County jail system depends upon a number of factors, including age, the type of offense, past history of violent or hostile behavior, intoxication, and evidence of homosexuality or vulnerability to attack, as well as legal status (i.e., whether the inmate has been sentenced or unsentenced, or is a witness). Clayton Finding of Fact No. 9, pp. 7-8. Given the numerous administrative considerations

attendant to classifying prisoners for confinement, plaintiff's confinement with convicted persons did not, in and of itself, amount to "punishment".

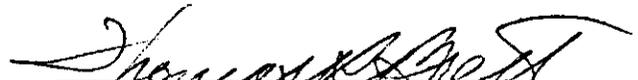
Plaintiff attempts to bolster his claim by alleging that he was assaulted while incarcerated with inmates who had previously been sentenced. He cites Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973), for the proposition that a prisoner has the constitutional right to be reasonably protected from constant threat of violence and sexual assault by fellow inmates. Affiant Robert Cotner states he "can verify [Alspaugh] was assaulted [sic] and abused." Plaintiff's implicit argument is that he would not have been assaulted had he not been incarcerated with convicted inmates.

Occasional, isolated attacks by one prisoner on another may not constitute cruel and unusual punishment. Woodhous, 487 F.2d at 890. However, confinement in a prison where violence and terror reign is actionable. Id. This Court determined in Clayton, supra, that the facilities of the Tulsa County Jail "do not rise to a level of constitutional inadequacy," but that, "in light of the obsolete design of the facilities and the understaffing of the eighth and ninth floors, inmates are exposed to a pervasive risk of harm from assaults by other inmates." Clayton, Conclusion of Law No. 27, p. 34. Thus, all inmates were exposed to such assaults. The Court ordered increases in staffing of the eighth and ninth floors and physical changes in the bulkheads to improve viewing, which have been implemented.

Clayton, Conclusion of Law No. 39, p. 38. Given the improvements ordered by this Court in Clayton, the incidence of assault to which all inmates were occasionally exposed has been ameliorated. The assault on plaintiff does not, of itself, indicate that the occasional practice of incarcerating pretrial detainees with convicts, to which plaintiff was subjected, is constitutionally impermissible. The Court has determined, above, that occasional incidents of such incarceration are not punishment and are reasonably related to a legitimate governmental objective.

Defendant's motion for summary judgment is hereby granted.

IT IS SO ORDERED, this 7th day of December, 1985.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Entered

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

LDS OF TULSA, INC., and ST.)
PAUL MERCURY INSURANCE)
COMPANY,)
)
Plaintiffs,)
)
vs.)
)
SAM P. WALLACE, INC., et al.,)
)
Defendants.)

No. 85-C-562-B

F I L E D

DEC 9 1985

U. S. DISTRICT COURT

O R D E R

At a scheduling conference before the Magistrate, the parties agreed that LDS of Tulsa, Inc. should be dismissed as a party plaintiff, and that upon dismissal of LDS of Tulsa, Inc., diversity would exist.

The plaintiff's attorney advised the Magistrate that the proper name of the entity involved is LDS-Tulsa, Inc., a Louisiana corporation. The Magistrate gave the plaintiff thirty (30) days within which to determine whether or not to amend its Complaint to name LDS-Tulsa, Inc., a Louisiana corporation, as an additional party plaintiff, and if the plaintiff so elects, the plaintiff is to recite the residence of LDS-Tulsa, Inc., and St. Paul Mercury Insurance Company, and to supply the Court and the parties with affidavits or other evidence establishing the office and principal place of business of LDS-Tulsa, Inc.

The Magistrate has scheduled another scheduling conference for January 9, 1986, at 9:30 A.M.

S/ THOMAS R. BRETT

THOMAS R. BRETT, Judge

FILED

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

DEC 6 1985

READD SUPPLY COMPANY, a Texas corporation,

Plaintiff,

vs.

MARWIL d/b/a CAL METAL, a California partnership; TECRIM CORPORATION; MILLSTEEL; DURHAM INDUSTRIES, INC., and RUTLAND, LTD.,

Defendants.

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

No. 83-C-844-E

ORDER OF DISMISSAL WITH PREJUDICE

This matter comes on for hearing on the Application of the plaintiff for a Dismissal With Prejudice. The Court being fully advised in the premises finds that the dispute between the parties has been resolved and the issues have been settled.

Accordingly, the Complaint of Readd Supply Company against the defendant is hereby ordered dismissed with prejudice to refiling.

Jack C. Silver
U. S. DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

READD SUPPLY COMPANY

By Paul C. Duncan
Paul C. Duncan
Attorney for Plaintiff

MARWIL d/b/a CAL METAL, et al

By Jack X. Goree
Jack X. Goree
Attorney for Defendants

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

FILED

DEC -5 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

DESIGN PROPERTIES, INC.,
A Corporation,

Plaintiff

vs.

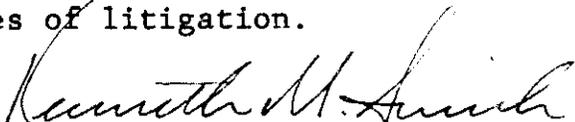
No. 84-1003-E

HARRY JAMES DAVIS and CAROL
ANN DAVIS, WESTERN NATIONAL
BANK OF TULSA, A National
Banking Association, and THE
UNITED STATES OF AMERICA, ex
rel, THE INTERNAL REVENUE
SERVICE,

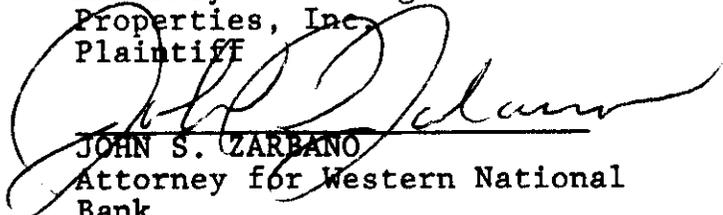
Defendants

STIPULATION ^{OF} FOR DISMISSAL

It is hereby stipulated and agreed that the complaint and crossclaim in the above-entitled case, filed against the United States of America be dismissed with prejudice as to Defendant and Cross-defendant United States of America, the parties to bear their respective costs, including any possible attorneys' fees or other expenses of litigation.


KENNETH M. SMITH

Attorney for Design
Properties, Inc.
Plaintiff


JOHN S. ZARBANO

Attorney for Western National
Bank
Cross Plaintiff


M. KENT ANDERSON

Attorney, Tax Division
Department of Justice
1100 Commerce, Room 5B31
Dallas, Texas 75242-0599
(214) 767-0293

Attorney for Defendant

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

DEC -4 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

GEORGIA A. SAUNDERS,)
)
 Plaintiff,)
)
 vs.)
)
 MARGARET M. HECKLER,)
 Secretary of Health and)
 Human Services,)
)
 Defendant.)

CIVIL ACTION NO. 85-C-536-C

ORDER

Upon Motion of the Defendant, Secretary of Health and Human Services, by Layn R. Phillips, United States Attorney for the Northern District of Oklahoma, through Phil Pinnell, Assistant United States Attorney, and for good cause shown, pursuant to the Social Security Disability Benefits Reform Act of 1984, it is hereby ORDERED that this case be remanded to the Secretary for readjudication.

Dated this 2 day of ^{Nov} November, 1985.

(Signed) H. Dale Cook

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:

LAYN R. PHILLIPS
United States Attorney

Phil Pinnell
PHIL PINNELL
Assistant United States Attorney

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

FILED

DEC -4 1985

PHYSICIANS' DIGITAL
RESOURCES, INC.

VS.

JASPER COUNTY MEDICAL
EQUIPMENT TRUST AND
JOHN L. SESSIONS

*
*
*
*
*
*
*

NO. 84-C-75-C

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

FINAL JUDGMENT

BE IT REMEMBERED that on the 25th day of July, 1985, this action came on for hearing before this honorable Court; the parties by and through their respective attorneys of record duly announced to the Court that all matters and controversy had been resolved and that judgment would be entered for Cross-Plaintiff, John Sessions, against Cross-Defendant, Physicians' Digital Resources, Inc., in the sum of SIXTEEN THOUSAND ONE HUNDRED FORTY-SEVEN AND NO/100 (\$16,147.00) DOLLARS; and that Cross-Plaintiff, John Sessions, would be required to release to Cross-Defendant, Physicians' Digital Resources, Inc., all equipment and software delivered to Cross-Plaintiff by Cross-Defendant in accordance with the agreement dated June 16, 1983.

It is therefore ORDERED, ADJUDGED AND DECREED that Cross-Plaintiff, John Sessions, have judgment against Cross-Defendant, Physicians' Digital Resources, Inc., for the sum of SIXTEEN THOUSAND ONE HUNDRED FORTY-SEVEN AND NO/100 (\$16,147.00) with interest therein at the rate of 7.87 percent.

It is further ORDERED, ADJUDGED AND DECREED that the Plaintiff, Cross-Defendant, Physicians' Digital Resources, Inc.,

recover of and from Defendant, Cross-Plaintiff, John Sessions d/b/a Jasper County Medical Equipment Trust all equipment and software delivered to Defendant, Cross-Plaintiff, pursuant to the lease agreement dated June 16, 1983.

All costs of Court are taxed against the party incurring such.

ENTERED this 4 day of September, 1985.

s/H. DALE COOK

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

APPROVED as to substance and form.

TONAHILL, HILE, LEISTER & JACOBELLIS
P. O. Box 670
Jasper, Texas 75951
409/384-2501

By: Richard C. Hile
Richard C. Hile
TBA # 09620500

ATTORNEYS FOR CROSS-PLAINTIFF,
JOHN SESSIONS

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

By: Michael J. Gibbens

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

FILED

DEC -4 1985

JERRY D. BROWN,)
)
 Plaintiff,)
)
 v.)
)
 MARGARET M. HECKLER, Secretary)
 of Health and Human Services,)

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

No. 82-C-164-C

O R D E R

Plaintiff brought this action for judicial review of a final decision of the Secretary of Health and Human Services (Secretary) denying his claim for disability insurance benefits under §§216(i) and 223 of Title II of the Act, 42 U.S.C. §§416(i) and 423 (1976 and Supp. III 1979). Plaintiff is represented by Paul McTighe and the Defendant is represented by Nancy Nesbitt Blevins.

On April 1, 1980 the United States Magistrate filed Findings and Recommendations in which it was recommended that this case be remanded to the Secretary for further administrative proceedings. On April 18, 1983 this Court entered an Order "that this case be remanded to the Secretary for the purpose of re-evaluation of Plaintiff's disability pursuant to 20 CFR §404.1520 and for the purpose of hearing additional evidence, including the testimony of a vocational expert or other specialist if the Secretary, in making the sequential evaluation of disability as required by the regulations determines that such vocational testimony should be heard, or if plaintiff desires to submit evidence on the vocational issue."

A supplemental hearing was held before an Administrative Law Judge (ALJ) on January 13, 1984, at which time Plaintiff appeared with his attorney, Paul McTighe, and a vocational expert, David Smith, testified on behalf of the Secretary.

At the hearing before the ALJ, on examination by the ALJ, Plaintiff testified that he had "[t]ried to" work since May 14, 1979 for Rogers Plumbing on some oil and gas leases at which time he "tried to run a ditch witch ... digging gas lines"; that he worked at that job for approximately three months at which time he was involved in an automobile accident and has not worked since; that prior to May 14, 1979 he worked as a furniture salesman for approximately 11 years; that prior to working as a furniture salesman he worked in sales at Van Dusen Aircraft Supply; that at the present time he does not do much of anything except "[a] little bit of housework with [his] wife"; that he does go to church and does help take care of their 4 year old child.

On examination by his attorney, Plaintiff stated that when he worked as a furniture salesman he also was required to move furniture and work in the warehouse; that while working at the furniture store he hurt his back while unloading bed frames; that he has had two back surgeries; that Dr. Lins found that he had spinal stenosis, canal stenosis; that he took Percodan for pain at one time but that he felt that he was becoming addicted to that and now takes only Tylenol and Aspirin; that he has pain at the present time "in [his] lower back and can't bend over"; that "[i]t's not too bad when [he] first wake[s] up in the morning"; that "[he] [has] muscle spasms during the night once in a while"; that "[t]he more [he] bend[s], the more it hurts ... [and] the

more [he] turn[s] the more it hurts"; that he has "lost quite a bit of [his] feeling in [his] left leg"; that "[i]t just goes down [his] leg as the day goes on and muscle spasms cause that"; that he has pain in his back "all the time ... sometime[s] a lot more than other times"; that he has a 12th grade education and some on-the-job training; that he is not able to sit for more than approximately 10 or 15 minutes at a time without moving around; that his attention span is distracted by pain; that his "legs get to throbbing."

On further examination by the ALJ, Plaintiff stated that he had never been to a "pain clinic", where they discuss pain and how you handle it; that both he and his wife have cars; that he does not drive much but that he did drive to the hearing; that he has not been on any trips of any kind since 1979; that he probably spends two to three hours a day lying down; that he usually gets up in the morning around 7 or 8 and goes to bed around 10 or 10:30; that he does some minor chores around the house.

On further examination by his attorney he stated that he has a body brace but does not wear it because after he has it on a while it hurts him; that the body brace was prescribed by Dr. Lins; that he does have a stimulator which he uses; that the minor chores he does around the house is "help[ing] a little bit with the laundry and with the dishes"; that he does not do any yard work.

David Smith, a vocational expert, testified on examination by the ALJ that he is a psychologist; that he has never treated Plaintiff or consulted with him in any way; that he heard his testimony during the hearing; that he has reviewed the relevant

documents in Plaintiff's claim file; that he is able to make an evaluation of Plaintiff's past work activity; "that the most relevant occupation job title that we've worked with here is one of manager of a retail store, in this case, furniture store ... from 1966 to 1980, apparently with graduated levels of responsibility from warehousing to sales to managerial levels"; that "[t]he exertional level as defined by the DOT is one of light and the skill level again as defined by the DOT is one of being a skilled occupation"; that

[t]he skills associated with this kind of work are a combination of an ability to plan, initiate and execute programs, sales programs whatever; and ability to understand, interpret and apply procedures, directives, and just kind of keeping the operation running according to procedure; the numerical facility to analyze and use limited statistics and to maintain inventory control records, keeping things up to date and knowing what we have; leadership qualities associated with managing and motivating people; a certain amount of verbal facility; and the ability to relate to people in order to motivate and direct employees and to maintain good relationships with both employees and customers.

The vocational expert, Mr. Smith, further stated that from listening to Plaintiff's testimony it appeared that the work Plaintiff actually did "required a lot more physical exertion than might be typically associated with the standard retail store management description as they appear throughout the national economy"; that "[his] guess is that he was much more a working manager than administrative kind of manager." The vocational expert further stated that the combined sales and management work which Plaintiff performed as a furniture salesman is classified "as at least medium type work"; that "if the claimant had been working in some major furniture chain with a lot of specialized roles where he sat ... behind a desk, and perhaps walked around and talked to customers, then the description of light or

sedentary ... might fit"; that "[i]f a person did have then some kind of significant back problem where he is restricted in bending, lifting and stooping, ... it would preclude this type of work"; that "if [plaintiff's] judged capable of sedentary work, it would appear that he'd have to narrow the scope but try to work with somewhat skilled/semi-skilled sorts of positions, and the ones that seem the most easily transferrable into would be something in the area of the clerical, timekeeping, bookkeeping arena"; that one of such jobs "is the general office clerk, perhaps in a similar kind of setting, ... Bookkeeper, limited books, kinda keeping track of inventory rather than heavy accounting or other work in those, and these are skilled area positions"; that "we're talking about some 2000 to 2200 in those kinds ... of positions in that broad category, some of which the claimant would be able to do, others of which he wouldn't be." The vocational expert further stated that "most employers would not be able to tolerate the employee moving off the job and lying down" if the employee had to rest periodically in order to be able to work.

On examination by Plaintiff's attorney, the vocational expert testified that he had not given any regard to the testimony by Plaintiff of allegations of pain; that all he, the vocational expert, is doing is responding to "the kinds of hypotheticals which the judge has offered to us"; that if Plaintiff has such pain that it would be judged to affect his attention span, he would not be able to perform the positions of "bookkeeper, inventory control, clerical, those kinds of positions which require a significant attention span and ability to organize work not only at your desk, but also to kind of keep it

organized in your head." The vocational expert stated that when he used the word "bookkeeping" he meant "to allude to ... more of a record keeping kind of function than a bookkeeping kind of function."

On further examination by the ALJ, the vocational expert stated that a person who is 41 years of age and is able to do sedentary work, should be capable of doing most sedentary jobs such as bench work and things of that nature; that those skills can be learned in a fairly short period of time and in addition to bench assembly work would include such positions as "cashiering" and "ticket sales."

At Page 265-268 of the Transcript is a report by St. John Medical Center regarding hospitalization of Plaintiff for the period August 15, 1982 through August 26, 1982. A medical report of John Vosburgh, M.D., dated August 17, 1982 states a "post operative diagnosis" of "Advanced osteoarthritis left knee." The report further states that Dr. Vosburgh performed surgery on Plaintiff described as Osteotomy proximal left tibia, fibula, closing wedge." The report further shows that after surgery "[t]he patient was taken from the operating room to recovery awake and in satisfactory condition." No further medical evidence is contained in the transcript.

In his "Recommended Decision", the ALJ found that "[t]he medical evidence establishes that the claimant has severe history of multiple knee surgeries and osteoarthritis of left knee, history herniated nucleus pulposus at L3-4, surgically corrected in March 1980 and history of spinal canal stenosis, L2 to S1, surgically corrected in November 1980"; that Plaintiff "does not require prescription medication or ongoing aggressive medical

management for his alleged pain"; that Plaintiff "is unable to perform his past relevant work as an aircraft salesman and furniture store sales manager"; that Plaintiff "has the residual functional capacity to perform the full range of sedentary work"; that Plaintiff "has acquired work skills, such as multiple clerical abilities, leadership-supervisor abilities and sales abilities which he demonstrated in past work"; that "[c]onsidering his residual functional capacity, these skills can be applied to meet the requirements of skilled work functions of other work which exists in significant numbers in the national economy"; that "[e]xamples of such jobs are timekeeper, bookkeeper, office manager and general clerical office work"; that "[t]he vocational expert stated [that] 2,000 to 2200 such jobs exist in the region in which the claimant resides." (Tr. 208-209) The ALJ then concluded that Plaintiff "was not under a 'disability' as defined in the Social Security Act at any time through the date of this decision [March 30, 1984]."

In Plaintiff's Trial Brief filed April 19, 1985, Plaintiff "contends that the A.L.J. erred in his assessment of Smith's [vocational expert] testimony particularly in the A.L.J.'s Finding that the Plaintiff could perform a full range of sedentary work." (Id at 2). Plaintiff asserts that the vocational expert's testimony was not supported by any specific hypothetical questions touching on Plaintiff's specific medical complaints of pain. Plaintiff notes that "[t]he A.L.J. asked no hypothetical questions in the medical area" of Plaintiff's alleged complaints of pain; that "[t]he vocational expert was unable to form a valid conclusion in this case and thus the testimony of the vocational expert should not be considered."

It was the finding of the ALJ with respect to Plaintiff's allegations of pain that Plaintiff's "multiple conflicting statements raised a serious question regarding credibility of [Plaintiff]"; that Plaintiff "does not require prescription medication or ongoing aggressive medical management for his alleged pain"; and that "Plaintiff's statements are self-serving and lack probative value." (Tr. 208) Although the ALJ did not include in his hypothetical questions to the vocational expert Plaintiff's alleged claim of pain, the Plaintiff's attorney did question the vocational expert with respect to his opinion as to Plaintiff's allegations of pain. (Tr. 251-252) Plaintiff's attorney asked the ALJ whether "[s]omebody, for instance, like the claimant that has severe pain, and as he [Plaintiff] stated all the time causes problems with his attention span, would they be able to do jobs, such as bookkeeping, that requires attention?" The vocational expert replied that "[i]f its judged that he is markedly distractable that he's going to be pulled away by the pain, his attention's being pulled away by the pain, then he's not going to be able to perform those tasks at a high level of performance, no. . . ." (Tr. 251-252) Plaintiff urges that because "[t]he vocational testimony elicited herein has been shown to be faulty, ... this case should be remanded for a third administrative law judge hearing." (Plaintiff's Trial Brief at 4-5).

Judicial review of the Secretary's denial of Social Security Disability Benefits is limited to a consideration of the pleadings and the transcript filed by the Secretary as required by 42 U.S.C. § 405(g), and is not a trial de novo, Atteberry v. Finch, 424 F.2d 36 (10th Cir. 1954); Hobby v. Hodges, 215 F.2d 754 (10th

Cir. 1954). The findings of the Secretary and the inferences to be drawn therefrom are not to be disturbed by the Courts if there is substantial evidence to support them. 42 U.S.C § 405(g); Bradley v. Califano, 593 F.2d 28 (10th Cir. 1978); Atteberry v. Finch, 424 F.2d at 38. Substantial evidence has been defined as: "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401, citing Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). It must be based on the record as a whole. See Glasgow v. Weinberger, 405 F.Supp. 406, 408 (E.D. Cal. 1975). In National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939), the Court, interpreting what constitutes substantial evidence, stated:

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

Cited in Atteberry v. Finch, 424 F.2d at 39; Gardner v. Bishop, 362 F.2d 917 (10th Cir. 1966). See also Haley v. Cellebrezze, 351 F.2d 516 (10th Cir. 1965); Folsom v. O'Neal, 250 F.2d 946 (10th Cir. 1957).

A person is considered to be "disabled" if such person is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment ... which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §§ 416(i)(1)(A), 423(d)(1)(A). "[A]n individual ... shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do

his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. ..." 42 U.S.C. §§ 423(d)(2)(A). Heckler v. Campbell, ____ U.S. ____, 103 S.Ct. 1952 (1983).

20 CFR §§404.1572 and 416.972 define "substantial gainful activity" as "work activity that is both substantial and gainful:

(a) Substantial work activity. Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before.

(b) Gainful work activity. Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized."

In Broadbent v. Harris, 698 F.2d 407, 412 (10th Cir. 1983), the Court stated:

The major tenets of law that have been distilled from the cases decided on this issue are best summarized in Allen v. Califano, 613 F.2d 139 6th Cir., 1980.

1. The burden of proof in a claim for Social Security benefits is upon the claimant to show disability which prevents (him) from performing any substantial gainful employment for the statutory period. Once, however, a prima facie case that claimant cannot perform (his) usual work is made, the burden shifts to the Secretary to show that there is work in the national economy which (he) can perform. (Citations omitted.)

2. Convincing proof, consisting of lay testimony supported by clinical studies and medical evidence, that pain occasions a claimant's inability to perform his or her usual work is sufficient to make a prima facie case. (Citations omitted.)

3. In determining the question of substantiality of evidence, the reports of physicians who have treated a patient over a period of time or who are consulted for purposes of treatment are given greater weight than are reports of physicians employed and paid by the government for the purpose of defending against a disability claim. (Citations omitted.)

4. Substantiality of evidence must be based upon the record taken as a whole. (Citations omitted)

The grid regulations of the Social Security Administration, 20 CFR §§ 404.1501, et seq. (1982), provide for the sequential evaluation of disability. The first step in evaluating disability concerns whether the claimant is working and whether the work he is doing is "substantial gainful activity." 20 CFR § 404.1520(b) (1982). If it is found that claimant is engaged in substantial gainful employment, the claim is denied without reference to the subsequent steps in the sequence. If claimant is not so employed, the second inquiry is whether claimant has "any impairment(s) which significantly limits [claimant's] physical or mental ability to do basic work activities." 20 CFR § 404.1520(c) (1982). If claimant is found to have no "severe impairment", the claim is denied. If the ALJ finds a claimant has a "severe impairment", the third step must be followed, which is whether such impairment meets or equals one of the "Listing of Impairments" set forth in the tables in Appendix 1 of the regulations. If the impairment meets or equals any of those listed in the table(s), the claim is approved. 20 CFR § 404.1520(d) (1982) If the impairment does not, the fourth step is considered, which requires the ALJ to "then review [claimant's] residual functional capacity and the physical and mental

demands of the work [claimant has] done in the past," and if claimant "can still do this kind of work" the claim is denied. 20 CFR § 404.1520(e) (1982). If claimant is found not capable of returning to his past work, the fifth step must be followed, which requires the ALJ to "consider [claimant's] residual functional capacity and [his] age, education, and past work experience to see if [he] can do other work." 20 CFR § 404.1520(f) (1982). If claimant is not able to perform "other work", the claim is approved.

20 CFR § 404.1521 states that "[a]n impairment is not severe if it does not significantly limit [claimant's] physical or mental abilities to do basic work activities. . . . Basic work activities . . . mean(s) the abilities and aptitudes necessary to do most jobs. Examples of these include . . . (1) [p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling; . . . (2) Capacities for seeing, hearing, and speaking; (3) Understanding, carrying out, and remembering simple instructions; (4) Use of judgment; (5) Responding appropriately to supervision, co-workers and usual work situations; and (6) Dealing with changes in a routine work setting."

In Brady v. Heckler, 724 F.2d 914 (11th Cir. 1984), the Court stated that "[i]n an action seeking disability benefits, the burden is upon the claimant to demonstrate the existence of a disability as defined by the Social Security Act." The Court further stated that "[t]he key point then becomes what is meant by a severe impairment." (Id. at 918). After discussing the regulations concerning the definition of a severe impairment, the Court stated that "[t]hough the 1968, 1978, and 1980 regulations

used different words to describe severe impairment, it is clear from an analysis of the cases that the definition of severe impairment has not changed throughout the years." (Id. at 919).

The Court further noted:

In a document entitled "Appeals Council Review and Sequential Evaluation Under Expanded Vocational Regulations," attached to a January 30, 1980, memorandum from the Appeals Council regarding its cumulative findings on appraisal of appealed cases during 1979, the Appeals Council set forth its policy regarding findings of severe or not severe:

The Appeals Council, therefore, specifically considered the issue of when an impairment(s) should be considered as 'not severe' within the meaning of these regulations. The Council concluded in a minute that the definition contained in regulations 404.1503(c) and 416.903(c) was not intended to change, but was merely a clarification of the previous regulatory terms 'slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities . . .'. In other words, an impairment can be considered as 'not severe' only if it is a slight abnormality which has such a minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience

Appeals Council Review of Sequential Evaluation Under Expanded Vocational Regulations (1980).

(Id. at 919-920). The Court then stated that "[t]he 1980 recodification stated that impairment is not considered severe if it does not significantly limit the claimant's physical or mental ability to do basic work activities"; that "[t]hough the regulation adds new language to the definition of severe impairment, the key point is that . . . the recodification in 1980 evinced no change in expression of the Secretary's intent as to the levels of severity needed for finding of not disabled on the basis of medical considerations alone" and that "[a]n impairment can be considered as not severe only if it is a slight abnormality which has such a minimal effect on the individual

that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience." (Id. at 920).

The Social Security Disability Benefits Reform Act of 1984 amended Sec. 3. (a)(1) Section 223(d)(5) of the Social Security Act with respect to "EVALUATION OF PAIN" as follows:

An individual's statement as to pain or other symptoms shall not alone be conclusive evidence of disability as defined in this section; there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment that results from anatomical, physiological, or psychological abnormalities which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all evidence required to be furnished under this paragraph (including statements of the individual or his physician as to the intensity and persistence of such pain or other symptoms which may reasonably be accepted as consistent with the medical signs and findings), would lead to a conclusion that the individual is under a disability. Objective medical evidence of pain or other symptoms established by medically acceptable clinical or laboratory techniques (for example, deteriorating nerve or muscle tissue) must be considered in reaching a conclusion as to whether the individual is under a disability.

Sec. 4. (a)(1) Section 223(b)(2) of the Social Security Act with respect to "MULTIPLE IMPAIRMENTS" was also amended as follows:

(C) In determining whether an individual's physical or mental impairment or impairments are of a sufficient medical severity that such impairment or impairments could be the basis of eligibility under this section, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of such severity. If the Secretary does find a medically severe combination of impairments, the combined impact of the impairments shall be considered throughout the disability determination process.

Step 2 of the Grid Regulations requires an inquiry as to whether claimant has "any impairment(s) which significantly limits [claimant's] physical or mental ability to do basic work activities." 20 CFR § 404.1520(c).

At pages 129-144 of the transcript are Hillcrest Medical Center records regarding Plaintiff's hospitalization from March 11, 1980 to March 29, 1980. Dr. Lins covers this period of hospitalization in her report dated November 25, 1980 at Page 147 of the transcript. In her report she states that Plaintiff underwent "lumbar laminectomy on 3/17/80, following which he had initial improvement, then gradual recurrence of pain progressive in nature." She further states that Plaintiff was readmitted to Hillcrest Medical Center on October 29, 1980 "with complaints of increasing low back and lower extremity pain." She further states that Plaintiff underwent "extensive lumbar laminectomy on 11/5/80, with the operation consisting of total decompressive laminectomy of L3, L4 and L5 with sub-total decompressive laminectomy of L2 and S1 with lysis of adhesions at L3 and L4, right L4, 5 discectomy and bilateral L3, 4 foraminotomies." Dr. Lins further states:

As a result [of] the patient's pain syndrome, he has been unable to work since May of 1979. In view of his extensive operative procedure performed on 11/5/80 with necessity for re-exploration on 11/1780, it is my opinion that his postoperative recovery period will be extensive and will be most likely require an additional 12 months for maximal improvement. It is [her] opinion that [Plaintiff] has been permanently and totally disabled for any type of employment since May of 1979 and that his inability to perform any type of gainful employment will extend for a minimum of an additional 12 months.

(Tr. 147)

At Pages 148-178 are medical records of Hillcrest Medical Center regarding Plaintiff's hospitalization from October 29, 1980 to November 26, 1980.

On Pages 179-180 of the transcript is a medical report of Dr. Robert T. Rounsaville, M.D. dated March 19, 1981. From his examination of Plaintiff, Dr. Rounsaville concludes as follows:

The patient does appear to be impaired to the point that I would not recommend him doing any job which requires bending or lifting. The most desirable way to rehabilitate this patient would be reschooling. Further operation surely would not be indicated. I think this patient is able to do sedentary type work and should reschool himself to the point that he does do sedentary work. Most of all, he should not do any type of job which requires bending or lifting.

At Pages 183-187 of the transcript are office records and medical opinion of Dr. Lins dated May 18, 1981. Dr. Lins states that in her opinion plaintiff "remains permanently and totally disabled for any type of gainful employment even of sedentary nature at this time." After describing the nature of Plaintiff's disabling condition, Dr. Lins states:

It is my opinion that Jerry Brown will never be capable of unrestricted manual labor or any type of employment requiring standing on his feet or walking a major portion of the day. As a result of his low back difficulties, Mr. Brown has been unable to work since May 15, 1979. As you will note in my last progress note of 5/8/81, he did attempt to do light carpentry work in order to help alleviate his financial situation. This, however, resulted in aggravation of his pain.

The Medical Report of Robert T. Rounsaville, M.D., dated March 19, 1981 found at Pages 179-180 of the transcript supports the conclusion of the ALJ that Plaintiff is capable of doing sedentary type work. Also, the medical opinion of Dr. Lins, Plaintiff's treating physician, dated May 18, 1981 states that in her opinion Plaintiff "will never be capable of unrestricted manual labor or any type of employment requiring standing on his

feet or walking a major portion of the day." (Tr. 183) (emphasis added). Although Dr. Lins states in her opinion that Plaintiff "remains permanently and totally disabled for any type of gainful employment even of sedentary nature at this time," her opinion would indicate that Plaintiff would be capable of doing the kind of sedentary type work described by the vocational expert at the hearing before the ALJ on January 13, 1984.

It is the view of the Court that the Findings of the ALJ are supported by substantial evidence. As trier of fact, it is the Secretary's responsibility to consider all of the evidence, resolve any conflicts in the evidence, and decide the ultimate disability issue. Richardson v. Perales, 402 U.S. 389 (1971); Mayhue v. Gardner, 294 F.Supp. 853 (Kan. 1968), aff'd., 416 F.2d 1257 (10th Cir. 1969). The regulations vest discretion in the Secretary to weigh physicians' conclusory opinions. 20 CFR §404.1527 (1982); Trujillo v. Richardson, 429 F.2d 1149 (10th Cir. 1970).

Because the Findings of the Secretary are supported by substantial evidence and because such findings are based upon the correct legal standards, the Plaintiff is not entitled to disability benefits under the Social Security Act and judgment is, therefore, entered for the Defendant.

It is so Ordered this 3 day of December, 1985.


H. DALE COOK
CHIEF JUDGE

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

FILED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ONE 1974 KINGSCRAFT HOUSEBOAT)
 SERIAL NO. 24448; OK 5741 OA,)
 AND TOOLS AND APPURTENANCES)
 LOCATED THEREON,)
)
 Respondent in Rem.)

DEC -4 1985

JACK C. SILVER, CLERK
U.S. DISTRICT COURT

Case No. 83-C-849-C

JOURNAL ENTRY OF JUDGMENT

NOW on this 3rd day of December, 1985,
the captioned matter comes on for hearing before me, the
undersigned Judge. The Plaintiff, United States of America,
appears by and through its attorney, John S. Morgan, lien
claimant Tera Miranda Marina, formerly Airport Resort, appears
by and through its attorney, William W. Bailey, and lien
claimant, Federal Deposit Insurance Corporation, Receiver for
First City Bank, N.A., appears by and through its attorney,
Lynn R. Kromminga, and all come and appear before the Court and
announce that the Judgment shall be rendered as hereinafter set
forth.

FINDINGS OF FACT/LAW

The Court having reviewed the pleadings herein and
being fully advised finds as follows:

1. The Court has jurisdiction over the parties
and the subject matter herein and venue is proper in the United
States District Court for the Northern District of Oklahoma.

2. That on July 30, 1985, an Order of Sale was
signed by H. Dale Cook, United States District Judge, ordering

the public sale of One 1974 Kingscraft Houseboat, Serial No. 24448, and tools and appurtenances located thereon.

3. That pursuant to said Order said craft was sold at public sale for the sum of \$24,000.

4. That after paying the U.S. Marshall's cost of sale and dockage fees, there remains for disbursement to the lien claimants the sum of \$19,216.61.

5. That Tera Miranda Marina, formerly Airport Resort Marina, is a valid lien holder claiming \$14,214.90.

6. That the Federal Deposit Insurance Corporation, Receiver for First City Bank, N.A., is a valid lien holder claiming \$12,750.00.

7. That said claims exceed the amount of proceeds available for disbursement.

8. That the parties hereto stipulate and agree to resolve their respective claim to the proceeds by agreement to proportionate distribution.

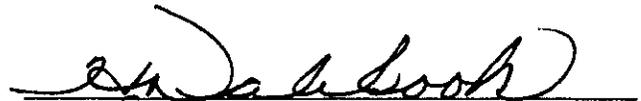
9. That accordingly Tera Miranda Marina's claim represents 52.72% of the total of the claims, that percentage of the proceeds being \$10,131.00.

10. That Federal Deposit Insurance Corporation, Receiver for First City Bank, N.A.'s, claim represents 47.28% of the claim, that percentage proceeds being \$9,085.61.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the Plaintiff, United States of America disburse and pay the sum of \$10,131.00 of the proceeds to Tera Miranda Marina.

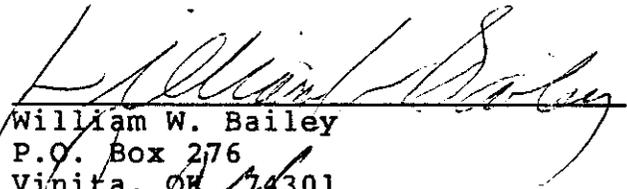
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, United States of America disburse and pay the sum of \$9,085.61 of the proceeds to Federal Deposit Insurance Corporation, Receiver for First City Bank, N.A.

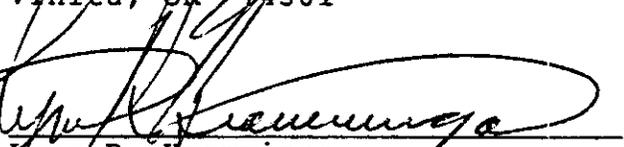
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the findings of fact herein above-stated are incorporated herein and made a part of this decree.


H. Dale Cook, Chief
U.S. District Judge

Approved As to Form:


John S. Morgan
Assistant United States Attorney
3600 U.S. Courthouse
Tulsa, OK 74103


William W. Bailey
P.O. Box 276
Vinita, OK 74301


Lynn R. Kromminga
Federal Deposit Insurance
Corporation
P.O. Box 26208
Oklahoma City, OK 73126
(405) 842-7441

3094M

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

F I L E D

DEC 3 1985

JOSEPH KLEMENTOVICZ d/b/a
BROOKSIDE HEATING AND AIR
CONDITIONING,

Plaintiff,

v.

SOUTHWESTERN BELL YELLOW
PAGES, INC., a foreign
corporation, and SOUTHWESTERN
BELL MEDIA, INC., a foreign
corporation,

Defendants.

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

No. 85-C-636-C

STIPULATION OF JOINT DISMISSAL WITH PREJUDICE

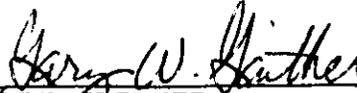
COMES NOW the parties in the above captioned action, the plaintiff, Joseph Klementovicz d/b/a Brookside Heating and Air Conditioning and the defendants, Southwestern Bell Yellow Pages, Inc. and Southwestern Bell Media, Inc., and jointly dismisses with prejudice all causes of action and claims asserted. The joint dismissal is with prejudice to the filing of any future action on said causes of action and claims.

It is stipulated by all parties subject to this dismissal that each shall bear their own costs and attorney's fees.

Dated this 22nd day of November, 1985.

Joseph Klementovicz d/b/a
Brookside Heating and Air
Conditioning, Plaintiff

BY:

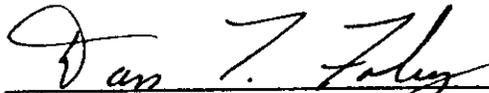


GARY GAITHER
Law Building, Suite 100
Tulsa, Oklahoma 74119
TELEPHONE: 918/587-6764

- and -

Southwestern Bell Yellow Pages, Inc.
Southwestern Bell Media, Inc.

BY:



DAN T. FOLEY
800 North Harvey, Room 310
Oklahoma City, Oklahoma 73102
Telephone: 405/236-6757

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

THE TELEX CORPORATION,)
a Delaware corporation, and)
TELEX COMMUNICATIONS, INC.,)
a Delaware corporation,)
)
Plaintiffs,)
)
vs.)
)
TELEX COMMUNICATIONS, INC.,)
a Texas corporation,)
)
Defendant.)

FILED

DEC 23 1985

JOHN C. SILVER, Clerk
U. S. District Court

No. 85-C-750-E

CONSENT DECREE

The parties, having advised the Court that they have agreed to the following terms for dismissal of this action:

1. The parties agree that this Court has jurisdiction over the subject matter of this controversy and venue is proper with this Court.

2. The defendant acknowledges that plaintiffs' registered marks as set forth in the Complaint are good, valid, and subsisting and are the exclusive property of plaintiff The Telex Corporation.

3. Defendant, Telex Communications, Inc., shall, prior to March 1, 1986, cease using the mark "TELEX" in its business, including, but not limited to, the use of the mark as a part of its corporate tradename, or as a trademark or service mark, or in

any other form in its advertising and marketing and will not use any mark or tradename phonetically equivalent or otherwise confusingly similar to the mark "TELEX".

The prohibition of this paragraph shall not preclude defendant from using the word "telex" in an uncapitalized form in describing any of its products or services.

4. Defendant shall, prior to March 1, 1986, remove all signs and destroy all printed material or other tangible items having the mark "TELEX" thereon.

5. Defendant shall, prior to March 1, 1986, change its corporate name as aforesaid and shall serve upon plaintiffs' counsel a copy of certification from the Secretary of State of Texas or any other state where domesticated showing such corporate name change.

6. Each party shall bear its own costs and attorney fees.

7. It is agreed that the Complaint in this case shall be dismissed with prejudice as to those acts of defendant occurring prior to the date of this Decree and shall be dismissed without prejudice as to acts occurring after this Decree and that plaintiffs have leave to reinstate their Complaint if there is a violation of any of the above terms.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that upon the foregoing terms the Complaint in this action is dismissed in part with prejudice and in part without prejudice and with leave to

reinstate, all as provided in paragraph 7.

DATED this _____ day of _____, 1985.

S/ JAMES O. ELLISON

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

HEAD, JOHNSON & STEVENSON

By *Paul H. Johnson*
Paul H. Johnson
228 W. 17 Pl.
Tulsa, OK 74119
(918) 584-4187

Attorneys for Plaintiffs

Craig Blackstock
CRAIG BLACKSTOCK
320 S. Boston, Suite 1605
Tulsa, OK 74103
(918) 587-1805

Attorney for Defendant

OF COUNSEL:

DAVID OSTFELD
Chamberlain, Hrdlicka, White,
Johnson & Williams
1400 Citicorp Center
1200 Smith St.
Houston, TX 77002

Attorney for Defendant

Entered

FILED

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

DEC 2 1985

MELVIN L. JONES,
Plaintiff,

vs.

SUN REFINING AND MARKETING
COMPANY,
Defendant.

No. 84-C-784-E

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

JUDGMENT DISMISSING ACTION
BY REASON OF SETTLEMENT

The Court has been advised by counsel that this action has been settled, or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS ORDERED that the action is dismissed without prejudice. The Court retains complete jurisdiction to vacate this Order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

IT IS FURTHER ORDERED that the Clerk forthwith serve copies of this judgment by United States mail upon the attorneys for the parties appearing in this action.

DATED this 3rd day of December, 1985.



JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

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

FILED

DEC 3 1985

SHARON LACEBY,)
)
 Plaintiff,)
)
 vs.)
)
 AETNA LIFE INSURANCE COMPANY,)
 a Connecticut Corporation,)
)
 Defendant.)

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

Case No.: 85-C-285 E

ORDER OF DISMISSAL

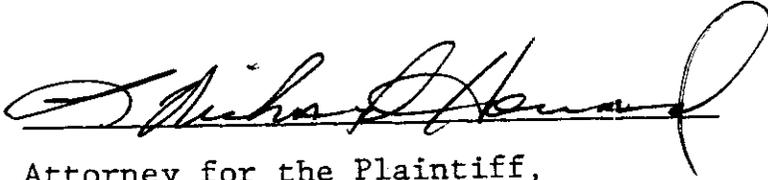
ON This 3rd day of Dec, 1985, upon the written application of the parties for a Dismissal with Prejudice of the Complaint and all causes of action, the Court having examined said application, finds that said parties have entered into a compromise settlement covering all claims involved in the Complaint 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.

Jack C. Silver
JUDGE, DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF OKLAHOMA

APPROVALS:

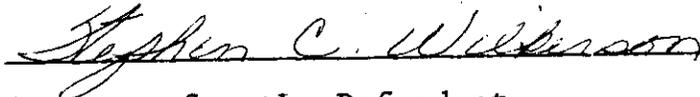
L. RICHARD HOWARD,



L. Richard Howard

Attorney for the Plaintiff,

STEPHEN C. WILKERSON,



Stephen C. Wilkerson

Attorney for the Defendant.

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

JENSEN INTERNATIONAL, INC.,)
)
 Plaintiff,)
)
 vs.)
)
 KEN WILSON and)
 SHELBY ENERGY, INC.,)
)
 Defendants.)

Case No. 85-C-227-E ✓

FILED

DEC 3 1985

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

ORDER

NOW, on this 3rd day of December 1985, upon motion of the plaintiff and for good cause shown, the plaintiff's Motion to Dismiss Party Defendant Ken Wilson, without prejudice, is hereby sustained.

Judge of the United States District Court

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

FREDERICK J. ORTH AND MARY ORTH,
EDMOND DAVIS, RAY RENDON,
FRANK NEWSOME, and M. BRIAN PAGE,

Plaintiffs,

v.

MIDWESTERN INVESTMENTS &
MARKETING, LTD., an Oklahoma
Corporation; IMPERIAL DRILLING
COMPANY, INC., a Kentucky
Corporation; BROWNWOOD INVESTMENT
CO., an Oklahoma Corporation;
ALFRED LONDON; GARY L. JONES;
DOUGLAS BRANTLEY; BRIAN RICE;
A. L. RICE; BARRY RICE; VERNON L.
GARBER; HENRY B. CHRICHLOW; JIM
WILLIAMS and CALVIN JONES,

Defendants.

No. 84-C-815E

FILED

DEC 3 1985

Jack C. Silver, Clerk
U. S. District Court

ORDER

Upon motion of the Plaintiffs, Frederick J. Orth, Mary M. Orth, Edmond David, Ray Rendon, Frank B. Newsome and M. Brian Page, filed pursuant to Rule 41(a)(2) Fed. R. Civ. P., and as a result of the parties' settlement of this action,

IT IS HEREBY ORDERED that Plaintiffs' complaint against Defendants, Midwestern Investments & Marketing, Ltd., James T. Williams, Henry B. Crichlow and Alfred London is dismissed with prejudice.

S/ JAMES O. ELLISON

James O. Ellison
United States District Judge

Entered

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

FILED

DEC 2 1985

CONNIE JEAN EMERY, and CRAIG)
 EMERY, husband and wife,)
)
 Plaintiffs,)
)
 vs.)
)
 JEPHTHA A. EVANS,)
)
 Defendant.)

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

No. 84-C-817-B ✓

ORDER

On October 30, 1985, plaintiffs filed their complaint for declaratory judgment. Defendant has failed to answer or otherwise respond to the complaint. The Court therefore declares the allegations of the complaint confessed, which allegations have heretofore been resolved in favor of the plaintiffs by Order of this Court dated March 8, 1985, granting plaintiffs summary judgment as to defendant's liability for legal malpractice.

A Declaratory Judgment consistent with this Order shall be entered contemporaneously herewith.

IT IS SO ORDERED this 2nd day of December, 1985.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

Entered

FILED

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

DEC 10 1985

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

CONNIE JEAN EMERY, and CRAIG)
EMERY, husband and wife,)
)
Plaintiffs,)
)
vs.)
)
JEPHTHA A. EVANS,)
)
Defendant.)

No. 84-C-817-B

DECLARATORY JUDGMENT

Now on this 2nd day of Dec., 1985, the Court hereby enters the following findings:

1. The Defendant, Jephtha A. Evans, an attorney licensed to practice law in the State of Arkansas, was retained by the Plaintiffs to file and prosecute a medical malpractice action against Dr. Leroy Jeske, D.O., and Dr. Keith P. Sutton, D.O., for their damages arising out of medical and surgical treatment of the Plaintiff, Connie Jean Emery.

2. Pursuant to that attorney/client contract, entered into between Plaintiffs and Defendant, Defendant filed a complaint in the Northern District of Oklahoma, alleging medical malpractice, said complaint being filed on april 30, 1982.

3. On September 16, 1983, a notice was filed by opposing counsel in the medical malpractice action to take the deposition

of one Dr. Gilbertson on September 22, 1983. Defendant failed to attend the deposition of Dr. Gilbertson, to the detriment of Plaintiff.

4. On September 16, 1983, a notice by opposing counsel in the medical malpractice action was filed to take the deposition of one June Evans, one Sharon Cresswell, and one Vicki Tressler on September 22, 1983. Defendant also failed to attend any of these depositions, to the detriment of Plaintiff.

5. On September 19, 1983, a notice by counsel for Dr. Jeske was filed to take the deposition of one Jim Wolfe, M.D., on September 23, 1983. Defendant failed to attend the deposition of Dr. Wolfe. Further, Defendant had listed Dr. Wolfe as an expert witness for the Plaintiffs' case in the medical malpractice action. Dr. Wolfe testified that he had never been contacted by the Plaintiffs or by their counsel, had never discussed the case with Plaintiffs or Plaintiffs' counsel, and had only received knowledge of the deposition after service of a subpoena upon him.

6. Based on the testimony obtained from the above depositions, which he failed to attend, on October 3, 1983, a motion and brief by counsel for Dr. Jeske was filed requesting the Court grant summary judgment. On October 13, 1983, counsel for Dr. Sutton filed a motion for summary judgment.

7. Defendant Evans did not reply to said motions for summary judgment until October 24, 1983, said response being substantially out of time.

8. On November 15, 1983, case was called for pretrial, at which Defendant, Jephtha Evans, did not appear. The docket sheet maintained by the office of the Clerk of the U. S. District Court for the Northern District of Oklahoma reflects that a telephone call from Plaintiffs' counsel to the Court indicated that Mr. Evans confessed judgment in the medical malpractice action, to the detriment of Plaintiffs. Whereupon, the Court made findings and sustained the motions for summary judgment to be entered in behalf of Drs. Jeske and Sutton.

9. On November 28, 1983, a journal entry of judgment was entered against the Plaintiffs and in favor of the Drs. Jeske and Sutton.

10. Contrary to the canons of professional responsibility and in breach of his attorney/client contract, at no time did Defendant, Jephtha Evans, consult with his clients regarding their permission or acquiescence to a confession of judgment being made, to their detriment.

11. Subsequent to the journal entry of judgment being entered, the Plaintiffs, Connie and Craig Emery, contacted the Defendant in order to ascertain the status of their medical malpractice action. The Defendant fraudulently misrepresented to the Plaintiffs that their case had been heard by the Court, that they had "lost" their lawsuit, and failed to supply them with any explanation as to the true facts and occurrences.

12. To appease his clients, on December 27, 1983, the Defendant, Jephtha Evans, filed a notice of appeal from the journal entry of judgment, knowing that said appeal was frivolous, having previously confessed judgment in the medical malpractice action.

13. That the above actions of Defendant, Jephtha Evans, were grossly negligent and in knowing violation of the Code of Professional Responsibility as promulgated by the laws of Arkansas and Oklahoma. That the Defendant willfully and recklessly disregarded the Code and his own fiduciary responsibilities to both Plaintiffs.

14. That the Defendant was never admitted to practice in the Northern District of Oklahoma wherein the medical malpractice action was filed. That the Defendant, in violation of local court rules, failed to obtain local counsel who was admitted to this forum following the withdrawal as co-counsel on July 21, 1983, of Robert Shephard, 500 West 7th Street, Tulsa, Oklahoma.

15. That the Defendant wholly failed to file suit in the medical malpractice action on behalf of the Plaintiff, Craig Emery, for damages suffered by Craig Emery, including, but not limited to: mental anguish in witnessing the suffering endured by his wife and the lack of consortium. That the failure to name Plaintiff, Craig Emery, as a plaintiff in the medical malpractice action was in willful breach of his attorney/client contract with

Plaintiffs, to whom he had falsely and fraudulently alleged that he would file a medical malpractice action on both of their behalfs, and naming both husband and wife as plaintiffs.

16. That the Defendant failed to represent the Plaintiffs zealously in that he failed (a) to conduct adequate pretrial discovery, (b) to locate and interview expert witnesses for Plaintiffs, (c) to conduct adequate fact investigation, (d) to conduct adequate legal research, (3) in that he failed to interview adequately Craig and Connie Emery themselves, (f) was professionally incompetent to handle their malpractice action properly and that he failed to refer them to an attorney who was capable of such adequate representation; or that he failed to obtain sufficient assistance from an attorney adequately skilled in representing plaintiffs in a medical malpractice action, (g) that he defrauded the Emerys by falsely representing to them that he was competent to prosecute their medical malpractice claim.

5/ THOMAS R. BRETT

Thomas R. Brett, U. S. District
Court Judge